AN ANALYSIS OF THE ROLE OF, THE PERFORMANCE OF AND THE CHALLENGES FACED BY THE SUBORDINATE COURTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN ZAMBIA

BY

LAWRENCE NYELETI
COMPUTER NUMBER 21023115

A PAPER SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF A DEGREE OF BACHELOR OF LAWS OF THE UNIVERSITY OF ZAMBIA
I recommend that this Obligatory Essay under my supervision,

By Lawrence Nyeleti,

Entitled,

**AN ANALYSIS OF THE ROLE, PERFORMANCE OF, AND THE CHALLENGES FACED BY, THE SUBORDINATE COURTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN ZAMBIA**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing Obligatory Essays.

Date 21/01/2007...  
Supervisor...  
MR S.E KULUSIKA

UNZA  2006
DEDICATION

This essay is dedicated to my father, Mr. DAVID NYELETI who supported me almost single handedly albeit his physical state. Also to my late brother, Mr. SYLVESTER NYELETI whose motivation and good guidance somewhat enabled me to come this far.
PREFACE

The presentation of this Obligatory Essay shall revolve around a very important institution in the Zambian legal system: the Subordinate Court (also referred to as the Magistrate Courts)

Because the 21st Century has seen an increase in the need for the promotion of human rights, our Zambian Law and Order sector need to effectively regulate the conduct of the people, private and public institutions in society. But looking at Subordinate Court as an institution in the judiciary, its age, administration and above all, its practice with particular reference to the standards and quality of court judgment in criminal law cases, I was moved to carry out a research and subsequently write this essay entitled, An Analysis of the Role of , the Performance of and the Challenges faced by the Subordinate Courts in the Administration of Criminal Justice in Zambia. It begins by looking at the historical development of the Subordinate Court in Zambia and its current structure.

The second Chapter restates the role of the Subordinate Courts in the Zambia’s legal system as regards the administration of criminal justice at pre trial, during trial as well as after the verdict has been given.

Chapter Three discusses the general performance of the Subordinate Courts in the handling of criminal law cases.

Chapter four discusses the Challenges, also referred to as impediments, faced by the subordinate Courts in the administration of criminal justice in the country.

In the final Chapter, general conclusions are drawn from all the Chapters in this Essay. Finally, recommendations are given to improve the administration of this important court.
It is the purpose of this whole Essay to provide a clear starting point in the reorganization of the Subordinate Court of Zambia. Since this study shall bring forth the real state of affairs of things, real court judgments and reasoning therein, the scope of understanding of criminal law principles and justice by the magistrates shall be established. By the end of the whole presentation, this Essay will be a contribution to the efforts to restore the confidence of the public in our court system so that the talk of bias and raw magistrates decisions and general administration in the Subordinate courts will be a thing of the past.
ACKNOWLEDGEMENTS

Most importantly, I am heavily indebted to the Almighty, GOD.

To all those that had a hand in one-way or the other in the compilation of this work, may they be abundantly blessed for their contribution in any little way.

Sometimes I fault and bound to inadvertently make mistakes, I, alone take full responsibility of all mistakes found in this work.

To my Supervisor Mr. SIMON, E. KULUSIKA, I pour out gratitude for the encouragement and suggestions you gave me at all the preparatory stages of this paper and without whose assistance this piece of work would not have materialized. May the good Lord continue to shower you with blessings so that you help many more students.

To my family especially my father, Mr. DAVID NYELETI, I thank them for being understanding and encouraging me to go through my Degree Program and bring desired honors to the family. I thank them all because they spurred me to work even harder as they looked at me expectantly.

To Mr. CLOSBY MUTENJE, who is now more like a brother for helping me with his personal computer type the manuscript sometimes late into the night but without complaining. Be assured of many more blessings from Him.

I am also indebted to the many friends in my class and at UNZA generally.

Lastly, to my good close friends, you know yourselves: sign up on this space…
TABLE OF CASES

Muyendekwa & 2 Others v The People (2001) HPR /01/01
R v Five European Juveniles (1945-48) 4 NRLR 32
Sooli v The People (1980) SCZ Judgment No. 20
The People v Charles Kabwe (1972) HPR 170 /722
The People v Goodson Chundula & Luckson Zulu (1983) unreported
The People v Jubeke (1974) ZR 29
The People v Lt General Sande Langeni Kayumba & Another SSP / 96 04
The People v Lt General Wilford Joseph Funjika SSP / 87 04
The People v Roxburgh (1972) ZR 43 (HC)
The People v Samuel Bwalya Musonda SSP / 99 04
The People v Siamwaba (1989) ZR 61
Woolmington v Director of Public Prosecutions (1935) AC 462
TABLE OF STATUTES

Anti Corruption Commission Act No. 42, 1996 of the Laws of Zambia
Constitution Act, CAP 1 (as amended in 1996) of the Laws of Zambia
Control of Goods Act, CAP 690 of the Laws of Zambia
Criminal Procedure Code Act, CAP 88 of the Laws of Zambia
High Court Act, CAP 27 of the Laws of Zambia
Juvenile Act, CAP 217 of the Laws of Zambia
Judicature Administration Act (Commencement Order) Statutory Instrument No. 44 of 1995 of the Laws of Zambia
Legal Aid Act, CAP 34 of the Laws of Zambia
Local Court Act, CAP 29 of the Laws of Zambia
Penal Code Act, CAP 87 of the Laws of Zambia
Prisons Act, CAP 97 of the Laws of Zambia
Subordinate Courts Act, CAP 28 of the Laws of Zambia
Subordinate Courts Ordinance (Amendment) Act, CAP 52 Of the Laws of Zambia

ABBREVIATIONS

AC --------- Appeal Cases
CAP --------- Chapter
CPC --------- Criminal Procedure Code
DPP --------- Director of Public Prosecutions
JSC --------- Judicial Service Commission
LLB --------- Bachelor of Laws
LRF --------- Legal Resources Foundation
PC --------- Penal Code
PRM --------- Principal Resident Magistrate
RM --------- Resident Magistrate
SC --------- State Counsel
SCA --------- Subordinate Courts Act
SCZ --------- Supreme Court for Zambia
SRM --------- Senior Resident Magistrate
UNZA --------- University of Zambia
TABLE OF CONTENTS

Declaration ................................................................. i
Dedication ................................................................ ii
Preface .................................................................. iii
Table of Cases .............................................................. iv
Table of Statutes ............................................................. v
Abbreviations ................................................................. vi
Table of Contents ............................................................ vii
Methodology ................................................................. ix

CHAPTER ONE

Introduction ................................................................. 1
1.1 The need for the creation of the Subordinate Court ................. 1
1.2 The Current constitution of the Subordinate Court ................. 4
1.3 Appointments in the Subordinate Court ................................ 7
1.4 Officers of the Subordinate Court ..................................... 7
1.4.1 The Magistrate ......................................................... 7
1.4.2 The Clerk .............................................................. 8
1.4.3 The Director of Public Prosecutions .............................. 8
1.4.4 The Chief Justice .................................................... 9
1.4.4 Prosecutor and the Defence Counsel ............................ 8
1.5 Jurisdictions and Law in the Subordinate Court ................. 10
Conclusions ................................................................. 11
CHAPTER TWO

Introduction ................................................................................................................. 12

2.1 The Role of the Subordinate Court in the Zambia's criminal legal system ................ 12

2.1.1 General criminal proceedings ............................................................................. 12

2.1.2 Resolution of Disputes ....................................................................................... 13

2.1.3 Sentencing ........................................................................................................... 14

2.1.4 Preservation of Fundamental Rights and Freedoms ........................................... 15

2.1.5 Accountability and Governance ......................................................................... 16

2.1.6 Review and as Appellant court ............................................................................ 17

2.2 The Administration of criminal justice in Zambia .................................................... 18

2.3 The Pre trial procedure in the Subordinate Court ..................................................... 19

Conclusion .................................................................................................................... 20

CHAPTER THREE

Introduction .................................................................................................................... 21

3.1 Performance of the Subordinate Courts in the Administration of criminal justice ...

................................................................. 21

3.1.1 Bail related cases ................................................................................................. 21

3.1.2 Offences against morality .................................................................................... 24

3.1.3 Offences against property .................................................................................... 27

3.1.4 Application of the sentencing principles .............................................................. 30

3.1.5 Interpretation of the Subordinate Courts' Jurisdiction ......................................... 31

3.1.6 Other Cases ......................................................................................................... 34
Conclusion ........................................................................................................ 35

CHAPTER FOUR

Introduction ......................................................................................................... 37

4.1 In the Pre trial police procedure ................................................................. 37

4.1.1 Transport and fuel shortages ................................................................. 37

4.1.2 Delays issuing the fiat by the Director of Public Prosecution .............. 38

4.2 Inadequate manpower ................................................................................. 39

4.3 Shortage of courtrooms and courtrooms' facilities ................................. 40

4.4 Administration and Independence of the Subordinate Court .................. 42

4.5 Frequent adjournments .............................................................................. 46

4.6 Lack of proper theoretical background ..................................................... 48

4.7 Unreliable Legal Aid Department ............................................................. 49

Conclusion ........................................................................................................ 50

CHAPTER FIVE

Introduction ......................................................................................................... 52

5.1 CONCLUSIONS ......................................................................................... 52

5.1.1 Historical Development ...................................................................... 52

5.1.2 Structure and the Role of the Subordinate Courts ............................... 52

5.1.3 Performance ......................................................................................... 53

5.1.4 Challenges ........................................................................................... 54

5.2 RECOMMENDATIONS ............................................................................ 55

Budgetary constraints ....................................................................................... 55
METHODOLOGY

The primary source of information used in his research was largely the researcher's personal experience as well as desk research. The other source was by a way of personal interviews with, and visits conducted to, various relevant persons and institutions. Statutes, reported, unreported cases still undergoing trial, unpublished papers and local daily newspapers were also analyzed and appropriate applied.
CHAPTER ONE

THE HISTORICAL DEVELOPMENT OF SUBORDINATE COURTS

IN ZAMBIA

INTRODUCTION

This Chapter sets out to explore the historical development of the Subordinate Courts in the Zambian judicial structure. It begins by looking at the need for the establishment of the Subordinate Courts. The Chapter discusses the current constitution, appointments and officers of the Subordinate Courts in the Zambian judicature. This Chapter would provide clear background information to this important court in our judicature against which the court’s performance in the country may be examined.

1.1 THE NEED FOR CREATION OF THE SUBORDINATE COURTS

In 1933, the Subordinate Court Ordinance was enacted which established the basic pattern for the clarification of the Subordinate Court system in which officials called Magistrates presided. Henceforth, Subordinate Courts could alternatively be called the Magistrates’ Courts.

Between 1948 and the time of independence in 1964, there had been an increased volume of litigation handled by the Native Courts. There were relatively few cases of appeals against the decisions of these Native courts. Unlike the Native courts, that never attempted to codify customary law rules, the new Subordinate court did. During the period towards the independence, the Subordinate Courts continued to administer the laws and procedures imported from England.
However, subsequent amendments were made to the Subordinate Court Ordinance of 1933 including the Subordinate Courts Ordinance (Amendments) Act of 1965,¹ which was altered in detail. This Act provided for the creation of three classes of Subordinate Courts that can be presided over by different classes of magistrates, being:

(1) Subordinate Courts of the First Class presided over by the;

   (a) Senior Resident Magistrate,

   (b) Resident Magistrate or,

   (c) Class I Magistrate

(2) Subordinate Courts of the Second Class, presided over by the;

   (a) Class II Magistrate.

(3) Subordinate Courts of the Third Class, presided over by the;

   (a) Class III Magistrate.

The post independence era started with the removal of legal separatism. The judiciary became responsible for the whole of judicial work performed previously by officers of the Provincial Administration exercising magisterial powers.

A spate of other changes in the new Zambian judicial system was experienced.

For instance, the 1964 Annual Report of the Judiciary and the Magistracy observed thus²

"The year 1964 saw many and far reaching changes in the judicial system of the courts. With the introduction of the new Constitution in January, there was established for the first time a Court of Appeal, the number of puisne judges were subsequently increased from four to five. The new Constitution also provided for the establishment of the Judicial Service Commission under the Chairmanship of the Chief Justice with important advisory and executive powers"

¹ CAP 52, the Subordinate Courts Act of the Revised Laws of Zambia
² Obtainable at the Government Printers in Lusaka
over judicial appointments and designed to ensure that such official appointments were made free from political influence."

The significance of the above extract is essentially to show that the judiciary in general was concerned with the laying groundwork for the actual integration of the dual judicial system that existed since the late 1920s through the courts systems. Now that Zambia had gained political independence and sovereignty, its nationals had to prepare to man all judicial institutions. This is in an attempt to adopt the law to the social as well as political change realizing that "law changes society and society changes the law so that the legal systems must provide methods of the change."

To this effect, a Law School was established at the National Institute for Public Administration (NIPA) in Lusaka where a number of Lay Magistrates underwent judicial training in Civil and Criminal Procedure, Prosecution, Contract and the law of Tort. Add to this, some students started their legal profession training at the institute and later proceeded to the British Inns of Court where many were called to the British (English) Bar before returning home to man most of the judicial institutions including the Subordinate Courts. In all, by the year 1964, the judiciary in general became responsible for the whole of the Provincial Administrator exercising magisterial powers.

By 1975, Class I Magistrates were lay Magistrates in most cases of Zambian origin. This meant that almost all expatriate magistrates were qualified magistrates with professional qualifications of, for instances, Barristers-at-Law and/or LL.B Degrees and presided over either as Resident Magistrates or Senior Resident Magistrate in Class I Subordinate Courts with more jurisdiction than Class I lay Magistrates. The Second and Third Class Subordinate Courts were usually manned by unqualified magistrates, that is to say, those with no legal qualifications apart from the initial training obtained from the Legal Training Department of the NIPA in Lusaka. The trend has continued to date.
Further, a Subordinate Court of each of the three classes is established by statute in each district in the Republic of Zambia. This is, of course not to say that there are magistrates stationed in each of the seventy-three districts of Zambia. Each of the Subordinate Courts shall have the jurisdiction and such powers only within limits of the districts for which each such court is constituted. Such Subordinate Courts may sit at different places simultaneously when it is expedient that there should be two or more divisions of that court presided over by different magistrates. Out of the fifty-two selected districts of Zambia, there are 5 districts\(^3\) in which no permanent magistrate is stationed. Since magistrates are appointed to sit in any district in the country, it may be common to see a magistrate is sent to sit in any of these five districts.\(^4\) The trend has been that most of the districts in which magistrates are posted are the ones heavily populated such as those along the line of rail. For example, Lusaka district has a total of eighteen magistrates of varying classes whilst other centers such as Zambezi have only one class II magistrate.\(^5\)

Today, the beginning point, for the Subordinate Courts, is the Constitution of the Republic of Zambia.\(^6\) In Part VI, the Constitution provides for the Judicature, which has the similar meaning as Judiciary\(^7\) as a branch of Government. This is in pursuance of Montesquieu’s writings as espoused in his doctrine of the separation of powers in which the Government is to be divided into three main separate departments. To give practical meaning to this

\(^3\) Law Directory and Legal Calendar- 2004/5, Lusaka: Government Printers
\(^4\) These are Samfya, Kaputa, Mpokosopo, Chisamba and Chadiza
\(^5\) Law Directory and Legal Calendar- 2004/5
\(^6\) CAP 1, 1991, as amended by the Constitution of Zambia (Amendment) Act 1996
\(^7\) The judges and the courts per Oxford Advanced Learners Dictionary of Current English (2000) p.645
\(^11\) Article 91 (1) CAP 1 of the Laws of Zambia
doctrine, emphasis is placed on making the courts efficient taking into account the court
decisions. Basically, the judicature is the hierarchy of levels of courts consisting of: 

(a) the Supreme Court of Zambia;
(b) the High Court for Zambia,
© the Industrial Relations Court;
(d) the Subordinate Courts;
(e) the Local Courts; and
(f) such lower Courts as may be prescribed by an Act of Parliament.

From the above Constitutional provision, suffice to say that the Subordinate Courts are constitutional institutions. Their existence cannot be questioned without touching the relevant constitutional provision.

In addition, the Subordinate Courts Act (SCA), Chapter 28 of the Laws of Zambia provides for the establishment, the constitution, the jurisdiction and the procedure in the Subordinate Courts in Zambia. This Act also provides for appeals and the procedure thereof to the High Court. To be where it is, the Subordinate Court Act has undergone several amendments, the most recent one being in 1994.\(^9\)

Part II of the SCA \(^{10}\) establishes the constitution of the Subordinate Courts. In each district of the Republic of Zambia, there shall be and thereby constituted Subordinate Courts in the following structure:

(a) a Subordinate Court of the first class to be presided over by a principal Resident magistrate (PRM), a senior resident magistrate (SRM), resident Magistrate (RM) or a magistrate of the first class,

---

\(^9\) Act No. 13  
\(^{10}\) CAP 28 of the Laws of Zambia
(b) a Subordinate Court of the second class to be presided over by a magistrate of the second class,

(c) a Subordinate Court of the third class to be presided over by a magistrate of the third class.

The table below shows the structural hierarchy of the Subordinate Courts in Zambia:

<table>
<thead>
<tr>
<th>SUBORDINATE COURTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRM</td>
</tr>
<tr>
<td>Class I</td>
</tr>
</tbody>
</table>

Clearly, the structure of the Subordinate Courts has seen an addition of one category under the Class I being: PRM, which is absent in Subordinate Court structure of 1965.

1.3 APPOINTMENTS IN THE SUBORDINATE COURTS

The Judicial Service Commission (JSC), acting on behalf of and in the name of the President, may appoint persons to act in the office of PRM, SRM RM or magistrate of any class. The Commission determines the number of magistrates required from time to time. On the request of the JSC, a two-year diploma course is conducted at the NIPA. The magistrate may be recruited upon completion of the course.
1.4. OFFICERS OF THE SUBORDINATE COURTS

1.4.1 The Magistrate

Among the general powers of the magistrates of different class include the power:

(a) to issue writs of summons for the commencement of the actions in a Subordinate Courts,

(b) to administer oaths

© to take solemn affirmations and declarations

(c) to make such degrees and orders

(d) to issue such process and exercise such powers, judicial and ministerial, in relation to the administration of justice as shall, from time to time, be prescribed by any written law or rules of court.

1.4.2 The Clerk of the Court

Has the duty to.\(^{12}\)

(a) issue summons, warrants and writs of execution,

(b) registers all orders and judgments

© have custody and keep an account of all fees and fines payable or paid into court and all moneys paid into or out of court,

(d) pays over to the government the amount of fines and fees in the custody as specially directed by the court or by any rules of court.

1.4.3 The Director of public prosecutions

This is a constitutional office empowered to institute criminal proceedings in any case.\(^{13}\)

Because the number of criminal cases has been increasing in him recent years, \(^{14}\) the work

\(^{12}\) As provided in section 35, the Subordinate Court Act

\(^{13}\) Article 56, CAP 1
of the Director of Public Prosecution (DPP) has equally increased. Therefore, the state advocates, all professionally qualified in the law, assist the DPP with work to include prosecuting criminal cases considered serious such as theft by public servant where the amount of money involved is quite substantial in the Subordinate Courts. Some criminal offences under the Zambian law require the consent and authority of the DPP to commence the prosecution.\textsuperscript{15} The fiat is a document that contains such a consent and authority.\textsuperscript{16} This does not, however, prevent the arrest of the person alleged to have committed any such criminal offence though until such a time that fiat has been issued no further steps may be taken. Additionally, the main burden of prosecuting criminal cases in the Subordinate Courts has also been delegated to the police. The DPP has appointed all police officers of the rank of sub-inspector and above as public prosecutors a practice that has been on since around 1965 the time Zambia had few lawyers. So, as a matter of necessity and to ensure continuity of business in the court system. Most of these public prosecutors have received their training from the NIPA.

\textbf{1.4.4 The Chief Justice}

The honorable office of the Chief Justice also has a part in the structure of the Subordinate Court. By Statutory Instrument, the CJ may make rules such as the forms to be used, the fees payable, the costs and charges to be allowed to legal practitioners practicing therein. He may also make regulatory rules for the court procedure and practice relating to appeals and reviews and generally for making any provisions proper and necessary for effective exercise of jurisdiction by such courts.

1.4.5 The Prosecutor and the Defense Counsel

In the structure of the Subordinate Court, the prosecutor and the defense counsel are recognized as the officers of the Courts. These officers of the Courts have a role to assist the presiding magistrate to arrive at a just conclusion within the framework of the law. So, it is appropriate that both of these officers be learned in the law profession. However, most Zambian magistrate courts are manned by unqualified police public prosecutors whose highest academic qualification is Grade Twelve plus the six months initial training acquired at Lilayi Police College in Lusaka. The training is in the skills of constable depending on one’s obedience to his superiors.¹⁷

1.5 THE JURISDICTION AND THE LAW

Part III of the Subordinate Court Act (SCA) provides that the jurisdiction vested in the Subordinate Courts shall be exercised in the manner provided by the SCA as well as the Criminal Procedure Code (CPC) or by such rules and orders of court that is in substantial conformity with the law and practice for the time being observed in England in the County court and courts of summary jurisdiction.¹⁸ The Act, and any other written law for the time being in force, gives the Subordinate Courts the jurisdiction and the powers. The jurisdiction of the courts extends only the areas within the limits of the District for which each such court is constituted. As regards the powers and the jurisdiction of the individual magistrates, the SCA and the CPC¹⁹ provide that all magistrates shall have and may exercise equal power, authority and jurisdiction depending on the class one falls in. Furthermore, a Subordinate Court may sit at different places simultaneously when it is expedient that there should be two or more divisions of that court presided over by

¹⁸ Section 12
¹⁹ Chapter 88 of the Laws of Zambia
different magistrates.\textsuperscript{20} One of the considerations for these provisions is to ensure speedy trial thereby reduce on delays and congestion of the cases. This is in that three magistrates can sit at one time, in different courtrooms; hence dispose of the cases at almost the same time.

Among other orders the Subordinate Courts can make is that to transfer proceedings civil and or criminal subject to general or special direction of the High Court for trial to any Local Court.\textsuperscript{21} This is generally done in the interest of justice and for convenience to the parties. Therefore, reasons for doing so must be proper, well documented and recorded.\textsuperscript{22}

In addition, the Subordinate Court can apply all British Acts declared by any Act to extend or apply to Zambia to be in force so far as the circumstance in Zambia may permit.\textsuperscript{23} Law and equity shall be concurrently administered.\textsuperscript{24} There is a restriction on the application of customary law in criminal law cases subject to the conditions found in the SCA.\textsuperscript{25}

Further, in the exercise of their jurisdiction the court shall have all the powers and jurisdiction conferred on them by the CPC, the SCA or any other law for the time being in force.\textsuperscript{26}

CONCLUSION

It has been shown how the Subordinate Courts has developed within the Republican judicial structure from the pre-colonial period through colonial and at independence to what it is today. Throughout the country, there are over 70 magistrates dotted in almost every district of the country manned by different magistrates above mentioned, including

\textsuperscript{20} Section instance, in Lusaka at the Chikwa courts, there is a total of eight magistrates and three courtrooms.
\textsuperscript{21} A court recognized s such under the Local Court Act, Chapter 29 of the Laws of Zambia
\textsuperscript{22} Section 13
\textsuperscript{23} Section 14
\textsuperscript{24} Section 15
\textsuperscript{25} Section 16
\textsuperscript{26} Section 19
lay magistrates. Today the subordinate court is recognized to be one court that handles the most number of criminal cases despite their limited sentencing and jurisdictional powers both in terms of matters that they may hear and the geographical coverage. It can therefore be concluded that the court has a special role through its structure to play in the Zambia judicial system especially in the administration of criminal justice.
CHAPTER TWO

THE ROLE OF THE SUBORDINATE COURT IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN ZAMBIA

INTRODUCTION

The basis of this chapter is to carefully restate the role of the Subordinate Courts (the Courts) in the Zambia’s legal system in particular and the society at large. The Courts have the responsibility to ensure that the people’s aspirations and expectations are realized within the context of the principles law. It is important that the Courts understand their role if they are to remain the mirror of society.

2.1 THE ROLE OF THE SUBORDINATE COURTS IN THE ZAMBIA’S LEGAL SYSTEM

In the Zambia’s court system, the Subordinate Courts are courts of record, with both original and appellate jurisdiction. The extent of the powers depends on the class of the presiding magistrate though all magistrates have both civil and criminal jurisdiction. The nature and delicacy of the courts role makes it imperative to restate and critically understand some of these roles.

2.1.1 General criminal proceedings

Though the High Court has unlimited original jurisdiction, in practice it deals only with serious offences such as homicide, treason armed robbery, aggravated robbery and infanticide. Even these cases, serious as they might be, are handled by magistrates in their preliminary stages before are referred to the High Court in order to ensure a fair trial and that all rights guaranteed by the constitution to an accused.
2.1.2 Resolution of Disputes

As it has been the traditional role of the courts, the Subordinate Courts prominent role is to decide disputes in accordance with the law. In this context, the law is that recognized as an established body of principles, which in turn prescribes rights, and duties of the general citizenry, human and non-human legal persons. In doing so, the Courts must ensure the adherence to the highest degree of impartiality, that is to say, there should be no personal bias or prejudice on the part of the presiding magistrate in the dispute resolution. The magistrate must at all times exclude irrelevant considerations such as political or religious views or the social status of the subjects in his judgments. As regards this duty, professor Nwabueze aptly states,

"...At the instance of a person aggrieved to adjudicate all violations of the law, and to protect an individual against by the grant of appropriate legal remedy or relief. In a suit properly brought before it, the court has therefore a duty to determine whether the allegation is well founded, that is, it has to say authoritatively and with finality what the law is, and determine the suit by the application off the law to the facts of the case. It is not in the court's power to decline jurisdiction of such suit, it has no choice or discretion to entertain or refuse the case. Its role therefore, imports both a duty and a power, a duty to say what the law is and to apply it. In the determination of all justifiable disputes properly brought before it and a power to issue compulsory process and to bind parties by its determinations and to enforce such determination."  

Therefore, every individual litigant deserves and expects to be heard fully, fairly and in the final analysis receive justice; not necessarily acquitted in the case of defendant. By and large, the Courts are put in unique position to do well or harm according to its interpretation advances or detracts from the dictates of criminal laws and other penal sanctions. The magistrates must apply deep insight, a mature and bold outlook on the facts to balance them with the law.

2.1.3 Sentencing

Before Zambia gained its political independence, there was legislation enacted to confer power to judicial bodies (the courts) to deal with offender as an individual. For example, the Juvenile Offenders Ordinance empowered the courts (including Subordinate Courts) to deal with offenders according to the provisions of that Ordinance, that is, to order caning and to impose fines on the parents of the juvenile as a penal measure. In one case, there were five offenders who were accordingly tried in one magistrate court. The offenders were found guilty of store breaking and theft. The case was sent for the High Court to revise the sentence. A chance was also accorded to the juvenile offenders and their parents to submit why sentence should not be enhanced in the magistrate court. After due consideration, the sentences were set-aside in the High Court because the magistrate was unduly lenient.29

It is part of the role of the Subordinate Courts magistrates to ensure that juvenile offenders are not sentenced to life imprisonment without the possibility of a release. Magistrates should not be quick to imprison incarcerate juvenile offenders unless there is no response. Therefore, other forms of sentence such as restitution, community service, temporary supervision and guidance and the compensation of the victims should be opted for as first avenue. As regards trial, the hearing of any charge is assigned to a juvenile court. a

29 The case of R v Five European Juveniles (1945- 48) 4 NLR 33
Subordinate exercising a special jurisdictional role only except in cases of homicide or attempted murder which a reserve of the High Court.\(^{30}\)

Furthermore, since Zambia could be considered as having a rational penal system, there is a wide range of options to enable a court, including the Subordinate Courts, to pass appropriate sentence upon a convicted offender. Hatchard and Ndulo state that in Zambia the judiciary is generally given a considerable amount of freedom in determining the appropriate punishment for an offender.\(^{31}\) So, the magistrate has a role to impose a sentence ranging from an absolute discharge to a sentence of imprisonment.

### 2.1.4 Preservation of fundamental rights and freedoms

The Subordinate Courts should be rightly thought as defenders of the rights of individuals from attack by public authorities and private individuals. The Republican Constitution, in its enforcement of protective provisions, the magistrate and other courts are instructed to ensure proper approach and treatment of human rights cases.\(^{32}\) It is further provided that any person, who alleges that his or her rights and freedoms have been or are likely to be contravened in relation to him or her, can seek the intervention of the courts, the Subordinate Courts inclusive.\(^{33}\)

During pre trial detention and as regards the right of bail, it is the role of the magistrates to balance the value of presuming an accused innocent and that of protecting victims and national public interest at large by recognizing the danger to the public in allowing a violent criminal to remain free to threaten witnesses and other citizens.

Magistrates must offer protection from torture, cruel inhuman and degrading treatment perpetrated by the police. This could be done by excluding from evidence illegally

\(^{30}\) Sections 63 & 64, The Juvenile Act, CAP 217 of the Laws of Zambia


\(^{32}\) Article 28 (1)

\(^{33}\) Article 28 (2)
obtained evidence regardless of its relevance to the issues before the court after conducting a trial within trial. The prosecution of the police officers found wanting could be recommended by the magistrates. Also, magistrates can visit prisons more often and talk to the inmates about conditions under which they are kept.\textsuperscript{34}

Further, magistrates must not wantonly issue search warrants but should carefully consider the evidence given by the police and ascertain whether or not there are reasonable grounds for the application. The right to privacy is highly valued in any civilized society.

\textit{2.1.5 Accountability and Governance}

In order to attain the rule of law, there is an absolute need to ensure that those who govern do so in accordance with the law. For this, the Subordinate Courts, and any other courts, should ensure that governmental bodies and institutions do not seek to act beyond their designated powers. It has the responsibility to hold political power holders accountable in the event that they so act outside their legally defined powers. It entails the ability to prevent criminal act and other illegitimate use of political power. For instance, power holders could be subjected to disclose and justify their actions and by sanctioning political authorities when they overstep the boundaries for which their powers as defined in a relevant law.\textsuperscript{35} In Zambia, this could be illustrated in the on going national resources plunder cases. The judgment in which Mr. Samuel Musonda, the former Managing Director of the then state owned national commercial bank was found guilty of abuse of public office and fraud\textsuperscript{36} shows that where statute lays down procedure to follow before power could be exercised, the Courts have a critical role to ensure that there is serious insistence that these procedures are followed. The Courts may reasonably add their own

\textsuperscript{34} Part XIX, The Prisons Act, CAP 97 of the Laws of Zambia provides for magistrates visits
\textsuperscript{35} Nwabueze, B. O, \textit{Judicialism in Commonwealth Africa}. New York: St Martins press
\textsuperscript{36} The case of Samuel Musonda as reported in the Post Newspaper: Wednesday, 11/10/2006
gloss to ensure that government bodies, institutions and persons do not act dishonestly to deprive the citizenry. In the governance of the country, the Courts have a further role to act as arbiter not only between private individuals but also between the public governmental power and the private citizens. Therefore, the Courts should not only be viewed to be restricted to resolution of disputes but to safeguard the public interest too.

2.1.6 Review and as Appellant Court

<table>
<thead>
<tr>
<th>SUBORDINATE COURTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRM</td>
</tr>
<tr>
<td>Class I</td>
</tr>
</tbody>
</table>

Appeal to

LOCAL COURTS

It is the role of the Subordinate Courts to act as a general reviewing and appellant forum in which anyone not satisfied in the Local Courts of Zambia could try to rally fresh support and evidence in an attempt to get the measure reversed. The aggrieved has the statutory power to appeal to the Subordinate Courts of the first or second class within whose jurisdiction such Local Court is situate. Add to that, a case could be committed to the Subordinate Court for sentence where the court is of the opinion that a great punishment should be inflicted on the convicted person for such an offence than this court

37 Local Courts Act, CAP 29 of the Laws of Zambia
38 Section 51(1)
has power to inflict.\textsuperscript{39} In most cases, in the interpretation of statutes such as PC, CPC, ACC Act, the role of the Subordinate Courts is purely judicial and as impelled by the necessity of deciding ordinary adversary litigation between individual parties, for example in the crime of rape. The Act contains a provision to the effect that the Subordinate Courts shall have to forward to the High Court a complete list of all criminal cases decided by or brought before the Court in the preceding month.\textsuperscript{40}

\textbf{2.2 THE ADMINISTRATION OF CRIMINAL JUSTICE IN ZAMBIA}

Notwithstanding the jurisdictional restrictions, all criminal proceedings for offences triable by the High Court and the Subordinate Courts are instituted in the Subordinate Courts.\textsuperscript{41} Upon hearing the complaints before them, they must ascertain whether the offence in question falls within the boundaries of their jurisdiction. And, if the matter is beyond the jurisdictional limits of the Subordinate Courts, as in triable by the High court as a court of first instance, a preliminary inquiry into the matter maybe held\textsuperscript{42} to see if the evidence warrants trial.\textsuperscript{43} However, if it is a case that has been certified as one suitable for summary proceedings in the High Court by the Director of Public Prosecutions (DPP), then no preliminary inquiry needs to be held.\textsuperscript{44}

\textbf{2.3 PRE TRIAL PROCEDURE IN THE SUBORDINATE COURTS}

The procedure begins with the accused person being brought before a magistrate for plea and for the possible grant of statutory right of bail.\textsuperscript{45}

\textsuperscript{39} Section 40(1)
\textsuperscript{40} SCA, section 56
\textsuperscript{41} Section 11, Criminal Procedure Code, CAP 88; Statutory Notice issued by the Chief Justice
\textsuperscript{42} ibid, Section 223
\textsuperscript{43} ibid, Section 231
\textsuperscript{44} ibid, Sections 254 & 255
\textsuperscript{45} Ibid, Section 204(1) & Article123, Constitution of Zambia, as amended in 1996
Usually, the charge is read out to the accused and then ask him to take his plea, that is, asked whether he admits or denies the truth of the charge. It is the plea that determines the next stage, in the pre trial procedure. If he pleads guilty by admitting the charge, the Court shall record his plea of guilty, convict him and pass sentence provided that admission of guilty is unequivocal\textsuperscript{46}. But if he denies the charge, the court enters a plea of ‘not guilty’ after which trial should be able to follow\textsuperscript{47}.

By practice, the court adjourns the matter for a period of 14 days at the end of which the accused must appear before the court for mention. When the accused appears, the court will fix the trial date and adjourn the matter until such a date. Meanwhile, the accused person is required to appear for mention fortnightly for the whole period that he is awaiting his trial. Presumably, the purpose for these adjournments is to allow the police time to adequately prepare the case by gathering all pieces of evidence and the relevant witnesses. It is also to allow the magistrate handling the case to fix the case into his calendar or schedule of cases, whether that is true or not is another story.

During the same time the Court may also consider the question of bail. However, whether the accused person is admitted to bail or not is dependent on two issues:

1. Whether the accused is capable of fulfilling the conditions for the grant of bail stipulated in the CPC\textsuperscript{48}.

2. The classification of the offence with which he is charged \textit{vis a vis} bail-able or non bail-able.

A bail-able offence is one for which, by law bail may be granted to an accused person so long as he meets the stipulated requirements to secure his appearance for trial\textsuperscript{49}.

\textsuperscript{46} ibid, Section 204(2)

\textsuperscript{47} ibid, Sectios204 (3) & 205

\textsuperscript{48} ibid, Sections 123 & 124: the provision of such a sum of money as may be determined by the Court or the payment of such a sum of money as appearance for trial

\textsuperscript{49} Roulston, R.D (1979) \textit{Principles of bail} p.46
A non bail-able offence, on the other hand, is one in respect of which by an express provision of the law, the grant of bail has been prohibited.\textsuperscript{50}

Therefore, it is law that accused people who cannot afford the bail bond or provide the required sureties or who is charged with a statutory non bail-able offence will not be admitted to bail. Accordingly, he shall be remanded in custody until his case is due for trial.

\textbf{CONCLUSION}

The nature and the delicacy of the Courts role in the judicature entails high expectations from the general citizenry to balance liberty and social progress by applying deep insight and bold outlook on the part of the magistrate. In all, the role of the Subordinate Court in the Zambia’s legal system is indeed crucial.

\textsuperscript{50} CPC, Amendment Act, No.35, 1993. These are: murder, treason aggravated robbery, drug related offences, misprision of treason, motor vehicle theft, etc
CHAPTER THREE

THE PERFORMANCE OF THE SUBORDINATE COURTS IN HANDLING OF CRIMINAL LAW CASES IN ZAMBIA.

INTRODUCTION

Inasmuch as it is the main objective of this chapter to show the mediocre performance of the Subordinate courts, it shall also be pointed out where the Courts have done well. Arguably, the Subordinate Courts have performed well in spite of the bad conditions of service and sometimes-adverse political atmosphere. The courts have settled many serious, high profile cases. Anyhow, there have been serious shortcomings and it shall be seen that the negative performance tend to be more highlighted thereby being easily recalled and recorded.

3.1 PERFORMANCE OF THE SUBORDINATE COURTS IN PARTICULAR CRIMINAL LAW CASES

3.1.1 Bail related cases

 Simply put, a proper bail system is a prime element in the protection of accused persons\textsuperscript{51}. It is asserted from the constitutional rule that the defendant is presumed to be innocent until he is proven guilty, flows the proposition that the defendant shall not be subject to unnecessary pre trial deprivation of his freedom. Section 123 of the Criminal Procedure Code, as amended provides that,

\textbf{"When any person is arrested or detained or appears before a Subordinate Court, the High Court or the Supreme Court he may, at any time while he is in custody, or at any stage of the proceedings before such\}}

\textsuperscript{51} Chanda, A.W (2004) \textit{Human Rights for Law Enforcement Officers} p.5, unpublished
Court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or Court, to secure his appearance, or released upon his own recognizance if such officer or court thinks fit.

It is further provided that the amount of bail shall not be excessive. An example of proper handling of bail related cases by the Subordinate Courts was displayed in the case of three Muslims who were charged with cruelty to 280 juveniles contrary to section 46(1), CAP 53, Laws of Zambia. The state objected to the bail application by the defense lawyer saying that the trio was foreigners and that if granted bail, thee three would all run away to their respective countries. In dismissing the objection, the Lusaka trial magistrate, John Njapau encouragingly and reasonably asserted the law did not discriminate on who was entitled to bail. He added,

"...Whether Zambian or not, everyone must be treated equally, we are all equal before the law."  

Accordingly, a K500, 000 bail to each was granted, one surety each and to surrender their passport. As far as the reasoning behind the ruling was concerned, the magistrate exhibited professionalism except for the conditions of the bail, which would be viewed, as rather relaxed considering the nature and national status of the accused.

In practice, many accused persons have been denied bail through the Court fixing bail at a figure that is beyond the resources available to the defendant; or on the pretext that that it is not in society’s interest to release the defendant. In the recent case of The People v Samuel Bwalya Musonda, the respondent was charged with bail able offences. In reply to the bail application by the respondent, the Task Force prosecutor, Dennis Simwinga told the Court that;

---

52 Section 126, C.P.C
53 The Post Newspaper: 05/07/2003, Saturday p.5
54 As reported in The Post Newspaper: 29/03/2004
"...my instructions were that the state was apprehensive with the attitudes of some accused persons who were granted bail."

The prosecutor then asked the Court for stiffer bail conditions. The setting of bail conditions which the prisoner and / or his sureties could not possibly meet effectively meant to frustrate the bail application. This is in that the state itself demanded that stiff conditions including the sum of K10 billion with three working sureties in their own recognizance, be imposed. The Lusaka PRM, Jones Chinyama again rejected the application for bail citing the reason that some other accused persons had jumped bail. Although the PRM did not state the reason for the rejection, he was reported to have said that Xavier Chungu and Arton Shanshonga, who had jumped bail, had taught the Court a lesson when they did so. But for the guidance of the Court, neither the Chungu nor the Shanshonga case should be the test be applied. The test, under normal legal and social circumstances, should be whether the accused would submit to the jurisdiction of the Court. It was only on appeal to the High Court that the K20 million bail was granted plus the accused to surrender his passport to the police and report to police once fortnightly.

In yet another but related case of The People v Lt General Sande Langeni Kayumba & Another the Lusaka PRM rejected an application because the matter was transferred to another magistrate, and that could not follow up bail conditions. Also, a bail able offence was charged against the accused. On the 31st May 2004, the accused made an application before the new trial magistrate, PRM at Kabwe but also denied the accused bail without reasons. On the following day, the accused appealed to the High Court. Here, Judge Kakusa also rejected the appeal without reason relevant to the accused who had been on bail facing the same charges with Anuj Kumar Rathi who jumped bail which necessitated the state to enter a nolle prosequi so that the could proceed with the accused alone.

55 SSP/87/04 (At the time still under trial)
Although the judge rightly pointed out that “denying the accused bail is a grave decision in any particular civilized nation...” he went ahead to reject the application but said the accused was at liberty to reapply. This clearly indicates the fact that the judge was convinced that the accused was entitled to bail but why bail could not be granted both in the Subordinate Court and the High Court, is something still unknown in law.

Similarly in the case of *The People v Lt General Wilford Joseph Funjika*\(^{56}\) again the Lusaka PRM on the 20th May 2004 said that he could not grant bail to the accused because bail was not a right but a privilege that was given at the discretion of the court. The accused had been on bail before another court and had not jumped bail. Clearly, this ruling lacked legal reasoning or proper criteria not to mention the analysis of personal circumstances of the accused and balancing of the accused against public interest.

### 3.1.2 OFFENCES AGAINST MORALITY

**Rape cases**

In the Penal Code of the Republic of Zambia, the criminal offence of rape is described as,

> “*Any person who has unlawful carnal knowledge of a woman or a girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman by personating her husband, is guilty of the felony termed ‘rape’.\(^{57}\)*

The statute further provides that,

---

\(^{56}\) SSP/87/04 (At the time still under trial)

\(^{57}\) Section 132, CAP 87
"Any person who commits the offence of rape is liable to imprisonment for life."^58

Like in all other criminal offences, the burden to prove the crime of rape lies on the prosecution rather than on the victim herself, though she is the most important witness to testify against the accused. The victim must convince both the police and the Court that she did not consent to what happened on the material date. Of course this includes the task of producing evidence, such as torn pants, and of having to answer rather embarrassing and tormenting questions from intimidating and aggressive defense lawyers at cross-examination during trial.

However, if technicalities and evidential requirements result into failure of prosecution or acquittals of the accused, then victim is denied justice and society loses confidence in the judicial system especially the Subordinate Courts. A clear illustrative example is the case of **Muyendekwa & 2 Others v The People**^59 in which the convict was sentenced, by a magistrate in Mumbwa District, to one day simple imprisonment for the rape of schoolgirl. Not surprisingly, this sentence sparked a lot of disquiet among; *inter alia*, women’s groups and gender activists. This situation prompted the High Court to review the sentence upwards to five years imprisonment with hard labor. The verdict of the learned trial magistrate at Mumbwa does not give reasons for the unusual sentence and does not cite any authority either. One may undoubtedly speculate that perhaps the learned trial magistrate had entertained some doubts about his judgment of guilty, after having considered all the material circumstances. However, if this was something to go by, why did he not acquit the accused in the light of such doubt? This is because in all criminal cases as in rape, the standard of proof is “ beyond reasonable doubt,” and if the slightest

---

^58 ibid, Section 133
^59 HPR/01/2001
doubt arises, it must be resolved in favor of the accused. In this instance, to sentence the prisoner to one day simple imprisonment is, *prima facie*, a miscarriage of justice.

Furthermore, the Penal Code does not set any minimum sentence for rape, it sets the maximum punishment of life imprisonment. On this law, Parliament intended to signify the gravity that society sees in this sort of crime at the same time giving the Courts, Subordinate Courts inclusive, a lot of discretion in applying the sentence in this particular crime. The judgment was absolutely deficient in law and hence needed a more detailed and realistic approach. It appears the accused was convicted on his own admission when he stated that he had normal sexual intercourse with the prosecutrix, girl. The prosecution completely failed to prove rape because the accused’s fate seemed to have been determined only by his admission that he had coitus with the girl. But, does coitus, by itself, constitute rape?

In Ndola District,60 two boys picked up two girls and together went to spend a night with them. The following morning, the girls left but made no complaints to the either the police or their parents until three later when the parents to one of the girls pressed her to tell them where she had spent the night. She finally revealed that she and her friend had spent the night with two young men. Upon receipt of this information, the angry parents sought the boys and pressed charges for rape. The Subordinate Court convicted the boys. Again, like in the Mumbwa case, no evidence to prove rape *beyond all reasonable doubt* was adduced in this particular case. It was enough that the boys slept with he girls! To prove rape, it must have been shown that the girls did not consent to the sexual intercourse that took place. However, the available facts do not support the satisfaction of this requirement of rape by the prosecution. Why, for instance, did the girls go along to the boys’ house some eight kilometers away from their home being persons who fully understand the facts

---

60 As reported in the Sunday Times of Zambia: 17/11/2002
of life and even spent the night there? Why did they not shout for help at the house in the high population density area of Lubuto Site and Service, where it was so easy to catch the attention of the neighbor or passers by? Add to that, when the girls left the following day, why did they not report the incident to the police or better still their parents. The learned trial magistrate did not address his mind to establish evidential proof of the above important issues before convicting because had he done so, it is doubtful if the decision could have been the same.

3.1.3 OFFENCES RELATING TO PROPERTY

Theft

Again, the definition for the crime of theft as provided in the Penal Code of Zambia is framed in the following g style:

“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.”

Generally speaking, since the judiciary of Zambia could be best be described as" the mirror of society", the Subordinate Courts as the institution of the judiciary must demonstrate an exceptional degree of knowledge of the law and subsequently apply it to the facts in the dispensation of criminal justice because" a crack in the mirror will not give a true reflection."

Nevertheless, since the 1970s, errors by magistrates in theft and related cases have been too much and of the type that demonstrate ignorance of the law the higher courts (the High Court and the Supreme Court) cannot cope with. The errors are a sort of errors that can even be spotted by laymen. In most cases when Subordinate Court criminal cases go

---

61 CAP 87, Section 265 (1)
to the High Court on an appeal, over half of such cases' decisions are reversed. For instance, in the old case of The People v Charles Kabwe\textsuperscript{62} went for review before the learned judge of the High Court for Zambia originally tried by magistrate class II for Kasama District. The brief facts of the case were that on the 14th February 1972, Charles Kabwe who pleaded guilty to simple theft involving property worth K7.99 was after conviction by the Subordinate Court sentenced to two years imprisonment with hard labor. The sentence was subject to confirmation by the High Court. But even after this sentence the trial magistrate made the following order:

"...The convict should be made grow his own food."

After being questioned by the reviewing judge, the magistrate confessed that he had no authority under which he made the order. The order was set aside by the judge. Clearly, here, the magistrate failed to even refer to the powers of the criminal courts relating to the punishment of adult offenders set out in the Penal Code Act\textsuperscript{63}, which must be adhered to.

The inefficiency in the handling of criminal law cases is unbearable. During a review of another case\textsuperscript{64} in which the accused was acquitted by magistrate for lack of evidence, the High Court judge had cause when he stated,

"...The investigations are virtually non-existent. A few statements appear to have been put through together and the Subordinate Court is expected to do something about them, but did not...I just do not understand how the authorities could have tolerated such inefficient and ineffective investigations which are often in the hands of the people who simply are not properly trained for the job..."

\textsuperscript{62} HPR/170/1972
\textsuperscript{63} Section 24
\textsuperscript{64} The People v Jubeke (1974) ZR 29
Here, after weighing the evidence adduced, the magistrate should not have committed the accused to the High Court, as there was not enough evidence. He must have ensured that the prosecutor had seen to it that all circumstantial or material evidence was available before presenting the case to the court for preliminary inquiry. This case could be contrasted from the good performance exhibited in another case in Kabwe involving the murder of a six years old girl by her eleven-year-old nephew over an egg that the deceased was allegedly to have eaten. A preliminary inquiry was ordered into the death of a three years old who was murdered by an 11 years old school boy after the deceased allegedly ate his eggs by the Kabwe PRM, Egympso Mwansa. The preliminary inquiry was to determine whether the boy was old enough to understand that he was committing a crime for the Court to form an informed opinion whether this matter should proceed for summary trial.

In what circumstances may a person be convicted of theft where the particulars of offence aver a general deficiency of either cash or goods? This was the question under consideration in another case of Sooli v The People in which the appellant had been convicted of two counts of theft by public servant. With regards to the second count, the accused had been responsible for large sums of money of which over k1, 500 were unaccounted for. The appellant claimed that he knew of the shortage but did not have the courage to report it to his superiors. His explanation was that the shortage could have been as a result of over payment by him as he was dealing with the payment of over K150, 000 to more than 2000 persons. The trial magistrate rejected this application; the appellant was convicted of theft. But the magistrate could have first addressed his mind on the following legal issues;

---

65 According to section 223, CAP 88
66 (1980) SCZ Judgment No. 29
1. if the accused makes no explanation, he is liable to be convicted upon proof of general deficiency.

2. if the accused makes an explanation which might reasonably be true and which the tribunal of fact recognizes as such although they do not believe, he is entitled to be acquitted.

3. if the accused makes an explanation which is disbelieved and which could not reasonably be true, he may be convicted.

In this instant case, the magistrate did not ensure to prove beyond reasonable doubt that the shortage was by inefficiency on the part of the accused and that his explanation could not reasonably have been true.

3.1.4 ON THE APPLICATION OF THE PRINCIPLES OF SENTENCING

When an offence is prevalent, the Courts have a duty to impose deterrent sentences so that would be offenders could fear committing them. However, in trying to apply or impose this sentencing principle, Subordinate Courts end up developing a marked tendency to, for example, impose indiscriminately custodial sentences for offences in which they should normally fine. For instance, if assaults are prevalent in a particular area, the Court is reasonably expected to stop giving or passing suspended sentences, but impose custodial sentences. In the years 1988-89, the Lusaka Civic Centre Subordinate Court which hears cases under the Control of Goods Act, CAP 690, and Laws of Zambia departed radically from exercising the principles of sentencing in that on the 19th May, 1988, all the eleven accused persons convicted were sentenced to a similar sentence of six months imprisonment with hard labor. 67 On the 11th May 1988 four people were convicted and sentenced to a similar sentence of six months imprisonment with hard labor plus four

67 Monthly returns for the criminal cases disposed of at Lusaka Civic Center Subordinate Court for the months April, May, November
strokes of the cane each. On 17th May 1988, six people were convicted and sentenced to yet another uniform sentence of six months imprisonment with hard labor for selling controlled goods in excess of the minimum stipulated price. As can be seen, here, this mode of sentencing is bad because it does not take into account the mitigating factors of each accused person. There is absolutely nothing wrong to impose deterrent sentences where the offences have become rampant if circumstances do allow. However, where all the eleven different people convicted on the 11th May, 1988 with different sociological and economical backgrounds, different family needs, different antecedents and first or subsequent offenders was bad enough to receive a uniform sentence. Besides, when sentences are unreasonably too severe, the magistrate may fail to send out a message but instead be in danger of being looked at with contempt. This can in turn have very serious consequences for the law itself and the society in general.

3.5 INTERPRETATION OF JURISDICTION OF THE SUBORDINATE COURTS

The Subordinate Courts in Zambia are a matter and creation of the constitution68. As regards criminal jurisdiction of these courts, section 19 of the Subordinate Courts Act provides as follows.

"In the exercise of their criminal jurisdiction, Subordinate Courts shall have all the powers and jurisdiction conferred on them by the Criminal procedure Code, this Act or any other law for the time being in force".

Since the Penal Code is the prime source of Criminal Law in Zambia69, the jurisdiction of the Courts in Zambia for the purpose of this Code extends to every place in Zambia. In the same token, the Code clearly provides the extent of liability for such offences that have been committed outside the jurisdiction or partly within and partly beyond the

---

68 CAP I, Article 91(1), as amended in 1996

31
jurisdiction. The case of *The People v. Roxburgh* is a clear manifestation of how badly the Subordinate Courts have handled criminal law cases even where the law has no technical difficulty. The law is that no person shall be rendered liable and punished under the Penal Code for any act done-outside which, if wholly was done within Zambia, would be an offence against this Code. The brief facts of the case in the Roxburgh case were that a bigamous marriage, an offence under the Penal Code, was entered into in the United States of America. It was undisputed that the defendant was not a citizen of Zambia. In the Subordinate Court, a question of the jurisdiction of the Court to try a man for crime allegedly committed in some other country arose to be legally answered by the trial magistrate. But, alas, in his own words, the magistrate ruled,

"... At this stage my ruling is that this Court has jurisdiction to try crime any in the world provided the accused is within the court's jurisdiction..."

Such a ruling is not only startling but also absurd to be supported by any right thinking officer of the Court, worse, a learned trial magistrate. There is not such an extensive jurisdiction in Zambia. If at all it did exist, then any person could come and complain to the Zambian Police Service about crimes having been committed in other countries by residents of Zambia even if such an act is not a crime in that country and possibly the "trigger happy" policemen would pursue the accused and shoot dead.  

As if that was not enough, the trial magistrate did not bother to ensure whether he had the power to preside over the type of crime brought before him, which is bigamy. Under the CPC, it is provided that,

"(I) The Chief Justice may, by notice in the Gazette order that any class of offence specified in such notices be tried by the High or be tried or committed to

---

70 CAP 87, section 6(1) – (3)
71 (1972) ZR 43 (43)
72 Police shooting of suspects reported in N'gombe, Misisi, and Matero Townships in Lusaka in the months: August, September and October on ZNBC 19:00 hours news
the High Court for trial by a Subordinate Court for trial presided over by a Senior Resident Magistrate ONLY.

(2) No case of treason or murder or of any offence of a class specified in a notice issued under the provisions of sub section (1) of the this section shall be tried by a Subordinate Court unless special authority has been given by the High Court for such trial.\textsuperscript{73}

Under the above section, the Chief Justice has made a number of notices, bigamy being one of the crimes of which trial has been reserved to the High Court alone to consider. However, the learned magistrate chose to disregard such an important order even if he was fully informed and aware that such an order had been made. At this particular point, it is perfectly clear from the outset that the magistrate had not a slightest jurisdiction. The magistrate had adopted a very wrong approach to the question of his jurisdiction. On review of this case in the High Court, Doyle, C.J (as he then was) had cause when he said in the strongest terms that,

“...The learned magistrate having wasted a great deal of time on this case when delivered a homily on sentence which comprised two closely typed foolscap pages. He chose to adopt the status of amateur psychiatrist: he gave his judgment in language which would be better attributed to a Victorian penny novelette”

The Chief Justice went further to castigate the magistrate as he said,

“...I do not know from where in the evidence he found the basis for such flights of fancy as, “The most dangerous game in the world – women”, and “The hunter who would face a charging rhinoceros without, “The lion who become a mouse when confronted by a human female.”

\textsuperscript{73} Section 10
The last part of the Chief Justice judgment was an appeal to the magistrate when he said that that sort of rubbish should not grace the record. If the magistrate was at all going to deliver judgment in any in case in any court in future, he should do so concisely and in the language more fitting to the Courts. The proceedings were quashed in toto, which saw the discharge of the defendant.\textsuperscript{74}

\section*{3.1.6 OTHER CASES}

The process of committal should be straightforward exercise in which the Subordinate Court transfers a case over which it has no jurisdiction to try, to the High Court for trial. However, the length of time that it takes for the accused’s to first appearance to his committal is a shocking statistic. It has been revealed that in some cases, it has taken as long as five years to do so.\textsuperscript{75} In one case,\textsuperscript{76} a Kabwe High Court Judge Mr. Justice Muntali was angered by the fact that a murder suspect had been remanded in Mumbwa Prison for close to four years. In most cases, this has led to justice delayed justice denied whereby an accused person charged with a non bail able offence had to remain in custody for such a long time only to be found not guilty of the charge. In another case,\textsuperscript{77} five accused persons were charged with murder arising from a hunting expedition. The five first appeared before the Subordinate court on 15\textsuperscript{th} August 1990. They appeared before the same Court eleven more times before committal to the High Court for trial while remaining in custody. At the end of the trial, all were acquitted that is after remaining in custody for two years.

In yet another similar case in Lusaka,\textsuperscript{78} two suspects charged with aggravated robbery had appealed to the Legal Resources Foundation, LRF, to intervene in a matter in which they

\textsuperscript{74} Hatchard, J & Muna Ndulo (1983) A Case Book on Criminal Law. P. 7
\textsuperscript{75} Afronet Human Rights Report, 1997
\textsuperscript{76} Reported in The Times of Zambia Newspaper, 5/01/2000
\textsuperscript{77} Afronet Human Rights Report, 1997
\textsuperscript{78} The LRF News, No. 67, February 2005 P.1
allege to have appeared in court 50 times for mention in the magistrate court. The suspects complained that ever since they were arrested in May 2002 they have appeared in court 50 times for mention. They alleged that each time they went to court they were told they were appearing for mention adding that the situation was scarifying them and wondered if their charge would proceed further than mention from the time they were arrested. Since June 2002 to 2005, they had been detained at Kamwala remand prison; and appeared for mention 30 times before the first magistrate and under the ten current one, 20 more times. The duo has since been released by the High court because the complainant no longer seems to be interested in the matter.

The performance of the Subordinate Courts in the handling of criminal law case in Zambia's legal system leaves much to be desired considering the adverse results produced which are clear for all to see. In most of the Subordinate court, the standard and quality of arguments are pathetic, the trend that has persisted since independence to date. In those cases defended by counsel, there is usually confusion in court. Generally, defense counsel dominates proceedings of the court to the extent of embarrassing the presiding magistrates. What is also remarkable is that most magistrates especially away from the line of rail are presided over by non-professional magistrates whose highest professional qualification is a one-year diploma obtainable at the NIPA in Lusaka. This is, however, not to suggest that professional magistrates, holding LL.B degrees from the University of Zambia are any better in all aspects.

CONCLUSION

The general sum up to be gathered from Chapter Three is something close to the fact that going by the magistrates' performance, irrespective of class, during the time from

---

79 For example the case of Kitwe Magistrate Mr. Musona and lawyer, J.P Sangwa in July-August, 2005
independence, Zambia and her Subordinate Courts have a long way to go insofar as handling of criminal law cases is concerned. The period from independence has witnessed a number of high profile cases with national importance economically, socially and above all, legally. However due to the lack of the appreciation of the cardinal principles of criminal law on the part of magistrates has thrown most us in the legal fraternity into a frenzy of astonishment, left in believing that perhaps the level of legal training and sometimes experience acquired by most magistrates across the country is not satisfactory too meet the current pressing and high expectations and aspirations of the Zambians. A quick look at the cases illustrated in this Chapter, it is absolutely clear that the Subordinate Courts in some cases exhibited among others, the lack of independence from those wielding political power and the public at large especially on the cases plunder of national resources, corrupt practices and abuse of authority. The interpretation and application of the Penal Code, Criminal Procedure Code and the Constitution must ensure criminal justice now and continue to be relevant for the future.
CHAPTER FOUR

THE CHALLENGES IN THE SUBORDINATE COURTS IN HANDLING CRIMINAL LAW CASES IN ZAMBIA

INTRODUCTION

In my Chapter Two, I looked at the role of the Subordinate Courts in handling criminal law cases in Zambia. In Chapter Three, I evaluated the performance of the Subordinate Courts in furtherance of the courts' role in the handling of criminal law cases. It has been shown therein that the Subordinate Courts have a critical role to play in the dispensation of criminal justice and ultimately meet the high-level expectations and aspirations of the general Zambian citizenry. Add to that, as regards performance of these courts, it has been shown that there is need for a more detailed, intelligent and realistic approach in the handling of criminal law cases on the part of the magistrates in order to win the confidence of the people both in the Courts and Judiciary as an independent branch of government. 80

However, the role and the performance of the Subordinate courts in the administration and handling of the criminal law cases to ensure criminal justice system in the country has been beset by various impediments, also referred to as challenges, which have in the final analysis effectively caused them to be less efficient. The following and the others have been identified as the main challenges under which these Courts operate.

80 Appendix II
4.1 IN PRE-TRIAL POLICE PROCEDURES

The administration of criminal justice faces a stumbling block in the Subordinate court at the pre trial police criminal procedure. Research has pointed out that challenges are faced in the following areas:

4.1.1 Transport and Fuel Shortage

The problem of transport is the one that cuts across the bulk of criminal law cases involving very serious cases and non-bail able offences such as aggravated robbery and motor vehicle theft.

On several occasions, criminal suspects fail to appear in Subordinate courts as required because there is literally no transport and/or fuel to ferry them to the respective courts for trial. Currently, most police stations have at most one vehicle to be used in the 24 hours of the day. Perhaps this is why it is not uncommon to see police vehicles constantly breaking down due to over use. This problem has a negative implication on the final outcome in the criminal matter before the magistrate. This is in that it makes it almost impossible for investigations officers to travel to various places to carry out thorough and necessary investigations of cases and sufficiently locate the relevant witnesses for the magistrate to arrive at a just decision. Further, delays on completing investigations affect the entire process of criminal justice, as it takes longer to gather required pieces of evidence to enable the prosecutor to take the case before the magistrate. The Prosecutors end up applying for adjournments of the matter to a latter date meanwhile the remanded suspect has to wait until the next appointed date that his case shall come up for hearing.

The Judiciary & Magistracy Annual Report 2004/5 obtainable at the Government Printers in Lusaka
4.1.2 Delays in issuing the fiat by the Director of Public Prosecutions

Some criminal offences under the Zambian law require the consent and authority of the Director of Public Prosecutions (DPP) to commence the prosecution. The fiat is a document that contains such a consent and authority. This does not, however, prevent the arrest of the person alleged to have committed any such criminal offence though until such a time that fiat has been issued no further steps may be taken.

Because the DPP has unlimited time period in which to exercise his judgment to issue his authorization to prosecute, it leads to the DPP to take just too long in issuing the fiat. The consequence of this that obviously evidence will be so that there be high chances of miscarriage of criminal justice. With regard to the legal principle that unless and until evidence is produced in court to prove that offence was committed by the accused person, the accused person must not be convicted and imprisoned. For all this, the standard of proof is very high as conviction may result in the curtailment of the right to liberty and even life.

4.2 INADEQUATE MANPOWER

When measured against the rapid population growth and consequently crime and the very fact the Subordinate courts handle the most bulk of criminal law cases than any other courting Zambia, the problem of manpower has considerably reduced the strength of these courts. Research reveals that the number of magistrates has generally not matched the acute increase in the country’s population, especially along the line of rail, and therefore increased incidences of crime and criminal law cases. A check at the Magistrates’ complex building in Lusaka revealed that there are currently total of 14 magistrates to

---

82 Section 99(1) Criminal Procedure Code Act, CAP 88 of Laws of Zambia
84 Woolmington v DPP (1935) AC 462
cater for the whole Lusaka District which a population slightly above 3 million\textsuperscript{85}. With this increase in population and therefore crime, it is only right to observe that there has been an upward explosion I the number of cases being brought before the Subordinate court. For this, the volume of caseloads shouldered on the each magistrate continues to be on the upswing so that they have abnormal workloads that they should efficiently handle. There has been repeated reports on how some provinces in Zambia have been constantly hit by no or inadequate manpower in the Subordinate Courts. For instance, Luapula Province faces a critical shortage of magistrates, which resulted in remandees being held in custody for about two years without their case being heard.\textsuperscript{86} In another case in Lusaka, two suspects charged with aggravated robbery appealed to the Legal Resources Foundation (LRF) to intervene in a matter in which they allege to have appeared 50 times for mention in the magistrate court since 2002, June to February, 2005. The suspects had appeared for mention 30 times before the first magistrate and under the then current one, 20 times. One of the reasons forwarded for this trend was that of inadequate manpower magistrates would be moved from one place to another. When this happens, the newly allocated magistrate normally would want to hear the case allover again to know exactly what happened meaning that the suspect would have to appear for mention more than once.\textsuperscript{87}

Clearly, the idea of keeping suspects for a long period on grounds of inadequate manpower, is unfair and a denial of justice on the part of the state. The Government of the sovereign republic of Zambia should consider employing more qualified magistrates that could be sent to all parts of the Zambia including far-flung areas such as Lukulu, Kaputa Chama and Shan’gombo.

\textsuperscript{85} Central Statistics Office Total Population projection, 2004/5
\textsuperscript{86} The Post Newspaper, 20/08/2005 p.4
\textsuperscript{87} Interview with magistrate class 1 at Magistrate complex building who responded on condition of anonymity
4.3 SHORTAGE OF COURTROOMS AND COURTROOMS’ FACILITIES

For Lusaka Urban District, the problem of shortage courtrooms at Subordinate court level has somewhat been sorted by the opening of the Magistrate Complex Building in the year 2005 in addition to the already existing three courtrooms at the Chikwa magistrate courts. However, it is in those areas far away from the line of rail that are badly hit by the serious repercussions resulting from the unavailability of courtrooms. Take for instance, Isoka District in Northern Province of Zambia, research reveals that there is only one courtroom as against two magistrates. This simply means that the available courtroom has to be shared between the two magistrates because it is not possible for each magistrate to have lined a good number of cases to come up for use of the courtroom. In this situation, the magistrate is forced to adjourn the matters left of his time limit to another date that his diary will accommodate so as to allow the other magistrate make use of the available court space. Here, we see a situation, again where criminal trials not being commenced because the relevant case has fallen out of time.

Even with the few available courtrooms around the country, court buildings of the Subordinate Courts have not been properly maintained. It has been argued that due to lack of funds, the situation is that many of the buildings are dilapidated state and erratic water supplies. The security of some of these buildings where case records are kept also needs to be looked into. Thos is in the light of the current levels of crime in Zambia, some of the doors and windows must be at least burglar barred as a matter of urgency. The security of our Subordinate courts is highly compromised. This could be illustrated from the recent case of the drama at the Magistrate complex building where suspects who were being

---

88 Survey conducted during a visit on 17/09/2006 during the vacation
89 Appendix I
taken to the court for trial managed to escape from lawful custody the time between trial and when disembarking from the vehicle that brought them from prison.\textsuperscript{90}

It is also not uncommon to see court sessions disrupted due to missing documents and lack of stationery. Partly because of lack of security and proper courtroom storage facilities, a case of missing plunder cases documents was reported at the PRM in Lusaka and the hearing could not take off.\textsuperscript{91} This was a high profile case involving cases of abuses of authority and corrupt practices in the former president Chiluba administration.

Even with the current advancement of technology development, it is dismaying to talk of lack of modern in our Subordinate courts. At the Isoka District Subordinate court, one could not see any modern technology such as computers that are now acceptable essential element of any efficient operation. Some writers have bemoaned the lack of printers and other courtrooms’ facilities and that it is common to see lawyers and other parties to the case instituting legal proceedings using their own stationery because there is none at the court when such parties have already paid court fees. Such is uncalled for.\textsuperscript{92} It has further been suggested that it is better to hike fees to reasonable levels than leave them at levels that cannot provide adequate stationery to the Subordinate court criminal justice system.\textsuperscript{93}

To enhance their performance, it is important that Subordinate courts magistrates and other personnel are computer literate and be provided with the other modern facilities\textsuperscript{94} for an efficient dispensation of criminal justice.

\textsuperscript{90} The Post Newspaper, October 2006
\textsuperscript{91} The Post Newspaper, Wednesday 12/01/2005 p.1
\textsuperscript{93} ibid, p.46
\textsuperscript{94} Such as phones, fax facilities, photocopiers, printers, electronic type writers, etc
4.4 ADMINISTRATION AND THE INDEPENDENCE OF THE SUBORDINATE COURTS

The Judicature Administration Act\textsuperscript{95}, Laws of Zambia came into force to provide for the administration of courts and to confer upon the judicial Service Commission, the power to appoint certain members of staff of the judicature including magistrates.

In order to make the day to day of the Subordinate Courts autonomous, the funds from which it is to be administered consists of such moneys as court fees, grants, that money appropriated to it through Parliamentary other moneys accruing thereto. From such funds, the salaries, allowances, loans and the others are to be paid to the magistrates and other staff of the Subordinate court. So, capital infrastructure to equip and maintain respective courtrooms and facilities officers and buildings remains the sole responsibility of the Republic of Zambia. However, the general administration aspect of the Subordinate courts has been adversely affected by the problem of the availability of insufficient funds to meet conditions of service of magistrates and the staff. This has a direct bearing on the morale and ultimate performance of the Subordinate Courts in handling of criminal law cases. For instance, the conditions of service for magistrates and other staff are pathetic. In Zambia, a stage has been attained where magistrates or judiciary workers in general even go on strike year in, year out something that seems to be tolerated. For example, on the 2\textsuperscript{nd} July 2004, the unionized judiciary workers had given the government 48 hours to pay them their housing allowances failure to which they would strike. They actually went on strike on the 9\textsuperscript{th} July 2004 that lasted for close to one month\textsuperscript{96}. Again in April 2005 Subordinate court business came to a stand when magistrates went on strike for close to a month.\textsuperscript{97} Yet again, in 2006, the magistrates gave the government an ultimatum to have

\textsuperscript{95} Commencement Order, Statutory Instrument No. 44 of 1995
\textsuperscript{96} The Post Newspaper,
\textsuperscript{97} ibid, April- May, 2005
their conditions of service including salaries to be improved. They went on strike that lasted for over 3 weeks through the tripartite elections of 28th September 2006.\textsuperscript{98}

Clearly, this state of affairs does not at all augur well for the maintenance of law and order, criminal justice as well as prevention of anarchy in the country. In this scenario, the magistrates and other judicial officers are not expected to perform an indispensable service to be appreciated. The idea of subjecting magistrates to heavy dependence on the government for their survival, on one hand, and the reduction on their entitlements and conditions of service in the name of cost saving, on the other hand, breeds a cadre of demotivated and disgruntled magistrates. It was complained that some magistrates earned as little as K800, 000 per month. That such was too little to sustain them, hence being forced to use other means of making money.\textsuperscript{99} Some magistrates are reported to indulge in bribery and other corrupt practices. A magistrate Nkhoma in Kabwe was arrested by the Anti- Corruption Commission for allegedly soliciting K300, 000 as a bribe from a suspect\textsuperscript{100} in 2002 who was appearing before his court facing an assault charge. The matter went before another magistrate (coincidentally one of the magistrates who appeared on the Radio program) who replaced him in the same court in 2004 who not strangely found him with no case to answer.\textsuperscript{101}

In all, magistrates and other personnel in the Subordinate Courts must be properly remunerated.

Generally speaking, the independence of the Subordinate Courts in the dispensation of criminal justice entails that the magistrates must enjoy protection against attack on their conduct in court both from the public and the executive branch or legislative branch of government. The law of contempt of the court is properly designed to strengthen the

\textsuperscript{98} ibid, September-October, 2006
Magistrates Richard Choonge and Egypso Mwansa on Radio Phoenix, \textit{Let the People Talk} program, 17/ 04/2005

\textsuperscript{99} Contrary to section 29(1) Anti – Corruption Act, No. 42, Laws of Zambia

\textsuperscript{100} The Post Newspaper, 4/08/2004
required independence of the magistrates and ultimately ensure that the court orders are obeyed and that court proceedings are not unnecessarily disrupted. Provided it falls of scurrilous abuse, criticism of judicial decision is lawful. However, the due process of criminal justice should not be impeded by improper comment upon litigation in process or simply criticism of particular magistrate by anyone. The Lusaka PRM, Jones Chinyama is on record\textsuperscript{102} of having censured His Excellency, the President of the republic of Zambia, Mr. Levy Mwanawasa, S.C, to desist from mocking the courts by passing pre trial comments on corruption and abuse of authority cases against the second republican president, Dr Frederick Chiluba and the others. The PRM rightly stated that it does augur well that the executive branch of government should make statements on the proceedings before courts. He added that the independence of the Subordinate courts in the administration of criminal justice would be boosted only if the executive reduced commenting political aspirations on the cases before the court or else the public lose its confidence in the outcome of the decision as well as the judiciary at large.

In all, magistrates should perform their responsibilities with courage and without bias. The must resist any external pressures and bribes.\textsuperscript{103} The pressure may come from the state or powerful individuals in society. If the magistrate has an interest in the matter or knows one or both of the parties he or she must recuse him or herself from the case as it is important that justice should not only be done but also seen to be done. Magistrates should not be influenced by media reports or sentiments expressed by politicians and the public but should decide cases before them on the basis of evidence presented and the law applicable to the facts. For instance, on 3\textsuperscript{rd} April, 2002, the then Registrar of the High Court issued a Circular directing all PRMs, SRMs, RMs and magistrates in charge to decongest the overflowing prisons as there had been several articles in the local

\textsuperscript{102} The Post Newspaper, 20/08/2005
\textsuperscript{103} As guaranteed by Article 91(2) Constitution Act, CAP 1, Laws of Zambia (as amended in 1996)
newspapers on the plight of prisoners and those on remand. In the Circular, the Registrar directed the addressees to ensure that magistrates in their respective provinces visit prisons and where possible for those in remand and that the issue of bail should be seriously considered. It further stated,

"... Please also bear in mind the presumption of innocence. Everyone has a right to be presumed innocent, and treated as innocent, until or unless convicted according to the law."

Here, what was propounded was and is sound law as it is in conformity with the provision of the Republican Constitution. However, the question may be raised as to whether the Registrar had to wait for newspaper articles and reports about the plight of the remandees when every month each court throughout the country does submit criminal cases returns which is also supposed to indicate which accused persons are on bail or in custody pending trial. Clearly the Registrar must have been reacting to external pressure. Before the newspaper reports, the information regarding the remandees pending trial allover the country was available. The situation could have been dealt with administratively as and when criminal cases returns were received.

4.5 FREQUENT ADJOURNMENTS

The problem of frequent repeated adjournments is attributable to both defense counsel and the prosecution. It is one problem that is well known in giving rise to cases of delay to the process of commence of criminal trials.

Firstly, because lawyers are essentially of the courts, they are called upon to be supportive to the Courts, including the Subordinate courts to promote criminal justice. However, the their tendency of seeking too many adjournments on flimsy or

104 Ministry of Justice, Circular No. 2 of 2002
105 Article 18
106 Appendix III
unmeritorious grounds has contributed a great deal to the issue of delayed criminal justice in the country. Criminal proceedings have to be recalendarred several times. Magistrate Edward Musona was angered by the apparent disregard of the court by lawyers defending former Finance permanent secretary, Stella Chibanda and the six others facing corruption charges. This was after prosecutor Mutembo Nchito made an application for adjournment after having observed that some defense lawyers were not present in court. One of the lawyers Vincent Malambo was reported to having been attending some matters in the High Court. The defense lawyers not present were Prof. Patrick Mvunga, Mwelwa Kaona and Nicholas Chanda. Later after the matter was adjourned, Chanda and Prof Mvunga were seen at the court.\textsuperscript{107}

The prosecution can also not escape blame. The prosecution has on several occasions cited reasons such as the unavailability of witness. For example, in the above case Prosecutor Mutembo Nchito made an application for adjournment saying that their witness Gideon Lintini had had to travel to attend a special course for 10 days adding that the course could not be repeated.\textsuperscript{108} Sometimes, lawyers give excuses that some important documents missing.\textsuperscript{109}

A very good illustration of how the issue of frequent adjournments may cause embarrassment to the administration of criminal justice system could be found in one unreported case,\textsuperscript{110} in which the accused persons were arrested on 2\textsuperscript{nd} June 1983 for theft of a motor vehicle.\textsuperscript{111} The accused persons were brought to court the following day and trial was set for 6\textsuperscript{th} July 1983. Their application for bail was declined on the grounds of the severity of the penalty attached to the offence. On the trial day, defense counsel asked for an adjournment because he was handling another case in the High Court. On the next

\textsuperscript{107} The Post Newspaper, Tuesday, 14/11 / 06
\textsuperscript{108} Ibid
\textsuperscript{109} Some plunder cases documents were missing so the case could not take off, The Post Newspaper12/01/05
\textsuperscript{110} The People v Goodson Chundula & Luckson Zulu(1983)
\textsuperscript{111} Contrary to section 271, Penal Code, Cap 87, Laws of Zambia
appointed date of hearing, defense counsel did not show up and so trial could not be commenced because defense counsel was attending to some other 'prior arrangement'. The court set a fresh date but trial could not proceed because both the accused and the defense counsel did not attend court. Trial was, yet again, set for another date but this time both the public prosecutor and the defense counsel were not present. The case was adjourned to yet another date but by then the complainant got fed and withdrew from the case. Since he was the only witness, the accused persons were acquitted. This state of affairs is a clear indication of lack of commitment on the part of both defense lawyers and the prosecution.

Sometimes adjournments are jointly necessitated by the absence of either both the magistrate due to illness or the lack of the witnesses. In one case, involving one Ben Mutumwa who was co-charged with another, Joseph Mwila for breaking into the Kenneth Kaunda Building along Cairo Road in Lusaka. However, Mwila was given a two years suspended sentence because he pleaded guilty in Subordinate Court. As for Mutumwa, every time that he went to court for trial his name did not appear on the cause list. Because of this, Mutumwa always ended up in court cells because his record got lost in the Subordinate Court when the magistrate had fallen ill. Also, due to lack of witnesses, suspects would not always be tried when they went to court. This results in the suspects to appear so many times for mention.

4.5 LACK OF PROPER THEORETICAL BACKGROUND

This is yet another problem that has dogged the proper operation and performance of the Subordinate Courts in the dispensation of criminal justice in Zambia mainly the lay

112 The LRF News, No. 59, February, 2004
magistrate and police prosecutors in their operations for along time. It has been argued that due to budgetary constraints as well as inadequate funding, the police service department has not been able to equip its officers with the necessary capacity to provide adequate training facilities and orientation programs needed to equip its officers with the necessary capacity to prosecute criminal cases.\textsuperscript{113} As a matter of law, where the prosecution is constrained ass in where there has been poor investigations and attendance of court without the necessary statements of evidence (or exhibits), it is almost t practically impossible to commence trial\textsuperscript{114} or otherwise the performance of the magistrate in the particular case would be negatively affected.

In most of the Subordinate court, the standard and quality of arguments are pathetic, the trend that has persisted since independence to date. In those cases defended by counsel, there is usually confusion in court. Generally, defense counsel dominates proceedings of the court to the extent of embarrassing the presiding magistrates.\textsuperscript{115} What is also remarkable is that most Subordinate Courts especially those away from the line of rail are presided over by non-professional magistrates whose highest professional qualification is a one year diploma obtainable at the NIPA in Lusaka. This is, however, not to suggest that professional magistrates, holding LL.B degrees from the University of Zambia are any better in all aspects.

The good handling of criminal law cases in the Subordinate Courts largely depends on good magistrates. It is therefore important that only legally qualified magistrates, best equipped in both ability and temperament to discharge effectively the formidable responsibilities of handling these criminal law cases, are recruited on the bench.

\textsuperscript{113} Interview with Mpika police officer who answered on condition of anonymity, Wednesday 20/11/06
\textsuperscript{115} For example the case of Kitwe Magistrate Mr. Musona and lawyer, J.P Sangwa in July- August, 2005
4.6 UNRELIABILITY OF THE LEGAL AID DEPARTMENT

The Legal Aid Department plays an important role in the administration of the criminal in the Subordinate Courts especially in pursuance of a legal principle of equality before the law, which is deeply rooted, in the Zambia’s legal system.

Because the modern legal system is highly complex and consists of rules of practice and procedure that can be better understood only by professional people, the Legal Aid Act 116 makes all specified offences especially criminal law cases in the Subordinate Courts are defended by Legal Aid Counsel throughout the country. Therefore, if the accused has been provided with legal aid at the public expense, trial cannot proceed if for some reason defense counsel is not available, or the trial would be declared null and void. Because of this, the role of the Legal Aid Counsel therefore puts the Legal Aid Department in a very crucial but important position in the whole criminal justice process.

However, despite the very important position that the Legal Aid Department occupies in the criminal justice process, it is far from being reliable. A good number of magistrates have complained about the non-attendance of Legal Aid Counsel in court. It has been lamented that the Legal Aid is the worst. Counsel do not attend to cases and that attendance counsel is erratic, , that is to say Counsel change as and when the case comes.117 This state of affairs has been blamed on the Legal Aid Department being under funded and under staffed.118 This inefficiency on this Department has adversely affected the operations and performance of the Subordinate Courts in criminal law cases. In the case of the People v Siamwaba,119 for example, a Subordinate Court granted a Legal Aid certificate to the accused. However, the Legal Aid Defence Counsel could not attend so that the case was adjourned 15 times, over a period of seven months. Here again, we see a

116 Section 8(1), CAP 34, Laws of Zambia
117 Magistrate John Njapau at the Magistrate Complex Building in Lusaka.
118 Personal interview with Counsel at Legal Aid Department in Lusaka. Tuesday 7/11/ 2006
119 (1989) Z.R 61
clear manifestation of how proceedings are delayed in their commencement due to the unreliability of the Legal Aid Department.

CONCLUSION

In the foregoing Chapter, it has been observed that the predominant factor from which spring the challenges causing the poor performance in the Subordinate Courts in handling criminal law cases is that of budgetary constraints. This factor has further caused the undesirable delays in both the commencement of trials at the police pre-trial procedure level, during trial and when it comes to the actual disposing of the case. The challenges are largely attributable to inadequate government funding of the institution of the Judiciary, the Subordinate Courts.

Therefore, the challenges bred by the insufficient funding include; lack of adequate transport and fuel to ferry prisoners, prosecutors and magistrates to court, delays in issuing the fiat by the DPP, inadequate manpower at the Courts, improper administration of the Subordinate Courts and the lack of independence for magistrates the lack of theoretical background required to equip the officers of the court with the necessary expertise to handle criminal law cases and the general absence of incentives to motivate the magistrates to be more dedicated and diligent in carrying out their duties.

All these, and the other factors, together work against the proper dispensation of justice in the country thereby rendering the constitutional right to a speedy trial less meaningful. The old cliché that justice delayed is justice denied cannot be overemphasized. In Zambia, it has been shown in this Chapter that delays in the criminal justice delivery are almost endemic, some cases dragging on for even up to 5 years. Adjournments are granted at the slightest excuse.
CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

From what has been discussed in the paper, the basis of the whole work revolves around the performance and the challenges in the Subordinate courts since the 1970s, currently and thereafter. The Courts can hardly receive respect, loyalty and confidence from the general citizenry, without the meaningful guarantee for peoples’ rights to a fair and quick criminal trial. To win the confidence of the people, the decisions of magistrates should contain intellect and integrity. Where these are lacking, possible causes should be identified because “discovery of the defect is half the cure.”

Historical development

After the political independence of Zambia, the judiciary became responsible for the whole of judicial work performed previously by officers of the Provincial Administration exercising magisterial powers. It could be concluded from the Chapter One that the separation of the executive from judicial powers in the magistracy in 1964 could be rightly described as a bold step taken in a bid to build a new Zambian magistracy into a viable component of the judicial branch. Today, there are three main classes of Magistrates that can preside over cases in the Subordinate courts depending on the type of a particular offence.

The Structure and the Role

Generally, all criminal proceedings are commenced in the subordinate courts also known as Magistrates courts, which are courts of record. The Subordinate Courts can try any
offence under the various criminal law sources of Zambia except specified offences that are expressly reserved to be tried by the High court. However, when an accused person is charged with such an offence, he must still pass through the hands of the Subordinate courts for purposes of instituting proceedings. It is one of the roles of the Subordinate courts in the administration of criminal justice system to commit accused persons charged with specified offences to the High court for trial upon an order of committal issued by the DPP to the prosecution and presented to the courts.

The following have also been identified as some of the other roles of the Subordinate courts in the administration of criminal justice in Zambia: Resolution of disputes, Sentencing of guilty offenders, the preservation of fundamental rights and freedoms, Accountability and Governance and also the Review of, and as Appellant court to the Local courts.

**Performance**

From the discussion in Chapter Three, one is led to conclude that just as it is true with every group of people in abilities, there is also thought to be a wide variation in the abilities among the magistrates in terms of their performance in the handling of criminal law cases and other related matters. There are some magistrates who would be said to be barely able to cope with their work but there are also those who are perceived to be as good as any anywhere. In any event, the collective ability has been all that is sufficient to get the job done. As regards how good is the work done, the pattern of performance among the magistrates shows that something more must be done both by the administrators in the judiciary and the magistrates themselves in order to ensure good handling of criminal justice. There have been serious shortcomings highlighted in the essay. The theoretical background, the work attitudes and the general personal conduct of magistrates have collectively tended to tarnish the image of the magistrates' courts. Inn
cases that are politically sensitive such as those of plunder cases, abuse of authority and corrupt practices; the magistrates have received criticism from the public, the government and the opposition alike.

The Chapter bring out an important point that even though magistrates are seen to operate based o the cases reported, they do not operate with the efficiency and the justice required. Where there is defense counsel, the performance of magistrates is particularly not impressive as in most cases they come out to be les learned to the extent of sharing the reasoning power as the learned defense counsel. The result often, is that either an innocent man is convicted or the guilty fellow is acquitted.

**Challenges: the Courts inadequate performance**

In Chapter Four, the following have been identified as the major challenges faced by the Subordinate courts in the handling of criminal law cases in Zambia. ; The shortage of adequate (qualified) manpower: there is generally shortage of judicial personnel, relevant legal material, training workshops and qualified personnel in Zambia. Magistrates who handle most criminal law cases lack specialized knowledge and relevant case material. The lack of adequate and suitable financial and material resources in the Subordinate courts and the other related institutions such as the DPP Chambers. The other impediments noted above include: frequent and unnecessary adjournments, lack of dedication, institutional culture among the officers involved and the lack intellectual quality, integrity and training of magistrates.

Among the many challenges pointed out in that Chapter, the ones easiest to solve are also the most important to solve first. For instance, with regard to courtrooms and facilities, it has been observed that every time this critical prerequisite to the magistrates’ function is unavailable, the magistrate simply cannot perform his primary duty resulting in the waste
of the prosecutors time, delays in the disposing of litigation that are otherwise ready to go to trial anxiety and waste of time on the part of parties and witnesses and so on.

Essentially, despite the problems faced, mostly the persistency ones, at every hand, the Zambian magistracy has endeavored to discharge its burden and the role of handling criminal law cases (in at least acceptable way) a heavy caseload generated throughout a large area. Under normal circumstances, magistrates should be men and women of integrity and their caliber should reflect that of a person worth to hold a constitutional office of a magistrate.

RECOMMENDATIONS

Having looked at the historical development and the role of the Subordinate courts in the handling of criminal law cases in Zambia in my Chapter One and Two respectively, I went on to valuate the performance of the Subordinate Courts. In Chapter Four, some of the challenges faced by the Subordinate Courts that are, in turn, the factors that cause delay in the process of bringing the accused person for trial were identified. This part of the essay now recommends the following measures to be put in place.

Budgetary Constraints

First and foremost, the government of the Republic of Zambia should improve its budgetary allocations to the Subordinate courts through the judiciary and the other assisting institutions in the criminal justice system such as he police, the Legal Aid Department and the DPP Chambers. This should serve to arrest the problem of budgetary constraints in he Subordinate Courts that has effectively rippled their operations. Recently, the government through the Ministry of Finance and National Planning in its National
Development Plan 2002-2005\textsuperscript{120} made a commitment to increase the budgetary allocations to the Law and Order sector. It would be a good start if the government could actually implement this measure expeditiously and on time. With improved funding, reorganization of the institutions involved would result.

Furthermore, the calls for financial autonomy of the Judiciary have been sounding for some time now, yet nothing seems to be done. The Zambian government (Executive branch) seems to take pride when the Judiciary and its related institutions of Law and Order depend on them to finance their activities. To reserve it from this mess, the Subordinate courts should have budgetary autonomy, that is to say, it should be receiving directly a separate share of the money appropriated to the Judiciary by Parliament. There should not be any involvement of the Ministry of Justice. The Ministry of Finance should only be able to determine and propose what monies to be allocated to the Subordinate Courts and then seek parliament’s scrutiny and approval.

**The right to speedy trial**

The constitutional right to speedy trial should not be far fetched in Zambia. To give life to this constitutional right, the Subordinate Courts should be given power to set up arraignment courts, that is to say, they should start hearing criminal law matters right at the prisons. This will help to reduce incidences of prisoners failing to appear for trial because of transport and fuel shortages. This is possible considering that the other judicial systems have successfully done it. For instance, in California, the United States of America (USA), many arraignment courts have been composed consisting of a room that is built on the prisons.\textsuperscript{121}

\textsuperscript{120} Preliminary Report, 2005
\textsuperscript{121} The Munyama Human Rights Commission, 1995, p. CIV
To address the problem of having to keep accused persons for a longer period than is reasonable, a general statutory period within which an accused person must be put on trial could be put in place. Again, in the USA, The Speedy Trial Act requires that every criminal case must commence within 70 days of the accused’s arrest.\textsuperscript{122} An example could take from such a legislation which in the case of Zambia it could be phased in several years with the time period gradually shortening to a desired limit.

Further, a preliminary inquiry must be held within 10 days after which an accused person must appear in the High Court within 14 days and then tried within 60 days of appearance. In the long run, the adoption of such measures will inevitably cause the DPP to expeditiously provide for the required instructions and all the other officers involved to take speedy action in the whole system. For now, all that is needed is proper nurturing so that with time, such will become one of the basic principles of calendaring which can be met voluntarily without actual special planning. To curb the problem of frequent adjournments, the Subordinate Courts should tighten up the adjournment policy to check the practice of both the defense lawyers and the prosecutions. This can be done by way of written policy for acceptable excuses for allowing an adjournment. This will prevent the problem of the creation of bottlenecks in the administration of criminal justice and the slowing down of the pace at which cases are advanced.

**Legal Aid Clinic at the University of Zambia**

Under the supervision of a qualified legal practitioner or the assignment of an outside partner such as the Legal Aid Department of Zambia, the Legal Aid Clinic at the University may enable law students to give advice and assistance. Students Practice Rules could be drafted by the Zambian Parliament to enable final year students attached to the Law clinic to appear in criminal law cases or indigent accused persons in the Subordinate Courts. Today, the University produces approximately fifty law graduates annually. If

\textsuperscript{122} ibid, CIII
each final year law student were to do, say, two cases a year, mainly during the vacations, this could provide criminal representation and defenses for a hundred criminal law cases.

**Legal Education**

The good handling of criminal law cases largely depends on a good magistrate who should be a master in the art of fairness, imbued with a doctrine of reasonableness and a keen sense of what is practical and lawful in the circumstance. This calls for moral uprightness, professional honesty and intellectual sharpness, among other qualities. So, there is need to insist on magistrates who are adequately trained so that the quality of their decisions could be improved. This could be compounded by progressive programs and refresher courses preferably once in each year. This will help the magistrates to keep up with new developments and the expansion of knowledge on crime related cases. Add to that, the magistrates will enhance their perceptual skills, human sensitivity and critical abilities necessary to handle information and ably assessing results of research concerning different types of penal measures and sophistication of crime.

If possible, magistrates too, should be selected from among the most intelligent lawyers and graduates with sound educational; and training background capable of grasping legal issues arising from different criminal law cases. The graduates and / or lawyers to be selected must those who went to reputable universities such as the University of Zambia, the University of Khartoum or the Makerere University, among others should be preferred.
Research Programs

Research, such as the ones carried out at UNZA\textsuperscript{123}, should become a normal and necessary part in the administration of criminal justice. Results of such research must be made known to the magistrates themselves for their own mental consumption, the correctional agencies as well as the appointing authorities.

Conditions of Service and Salaries

There is need to improve the salaries and the general working conditions for both the magistrates and the staff of the Subordinate courts. Given the poor conditions of service, there are very few magistrates with University degrees. The salaries and the conditions of service must be sufficient to attract good candidates from University graduates and lawyers for office and also to secure a modicum of social respect and to protect them against petty bribery. Additionally, this will bring to an end persistent cases staff or the magistrates going on strike.

\textsuperscript{123} In form of Obligatory Essay, submitted in partial fulfillment to LL.B Program
BIBLIOGRAPHY


OTHER MATERIALS REFERRED TO

Afronet Human Rights Report, 1997

Law Directory & Legal Calendar, 2004/5

Magistrates Handbook, 1991

Ministry of Justice & Magistracy Annual Reports

Registrar’s Circular No. 2 of 2002 - Decongesting Prisons
The Post Newspaper

The Times of Zambia Newspaper

The Legal Resources Foundation News. 2003, 2004, 2005

APPENDIX

The table below shows the distribution of the magistrates of different classes at Lusaka’s magistrate complex:

<table>
<thead>
<tr>
<th>PRM</th>
<th>SRM</th>
<th>RM: Class I</th>
<th>Class II</th>
<th>Class III</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>11</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: Law Directory and Legal Calendar 2004/5