

**AN EVALUATION OF THE COURTS' POWERS TO AMEND AN
INDICTMENT AND ITS IMPACT ON THE DELIVERY OF JUSTICE IN
ZAMBIA**

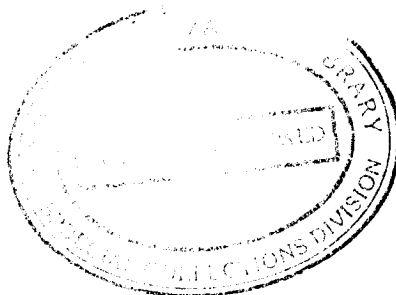
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A dissertation submitted to the University of Zambia in partial fulfillment of the requirements for
the Award of the Bachelor of Laws (LLB) Degree.

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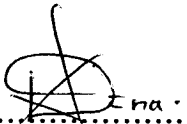


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APPROVAL PAGE

This dissertation of **DINA NUNDWE** is approved as fulfilling the requirements or partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree by the University of Zambia.

Supervisor:

Date:

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ABSTRACT

This dissertation deals with the courts' powers to amend an indictment and its impact on the delivery of justice in Zambia. In discussing the subject matter, the research sets the scene by zoning in on how prosecutors prepare an indictment in readiness for trial making sure all the information is accurate. Further, it shows how the courts exercise their powers to amend indictments pursuant to section 213 and 273 of the Criminal Procedure Code.

The dissertation through research, interviews and questionnaires found that it is fundamental for the courts to exercise their powers to amend an indictment as early as the prosecution's case to avoid any prejudice to the accused person in his defence. Conversely, the effect of not amending an indictment at an early stage results to justice not being served not only to the accused person, but in some instances to the victim and the society at large.

In this respect this paper makes recommendations for the proper training of officers in the criminal justice system, mainly targeting the prosecution because they prepare the indictment and make application for amendment to the courts. This dissertation further recommends that the law on amendment of indictments should be revised to the extent of making the effects of amending and not amending an indictment more pronounced. The judiciary moreover should be adequately funded with trained personnel that will help both the prosecution and the courts when issues of amendment arise due to the bulk of cases they deal with. The dissertation further calls for the strict compliance with the law to avoid case delays and grave financial expenses on the accused. Finally, in order for the courts' powers to amend indictments to be more operational and efficient, the dissertation recommends that there be co ordination and cooperation between the prosecution and the defence in making application to amend an indictment to the courts.

ACKNOWLEDGEMENTS

The completion of this research would not have been possible without the help of so many people. It would be selfish of me to carry all the praise without acknowledging the support of these people.

Sincere thanks goes to my supervisor, Mrs. A.C Chanda, for her supervision and guidance and pushing me beyond what I thought was my limit. I take responsibility for all errors and mistakes made and appreciate the continuous support you have rendered.

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But mostly, the biggest thanks goes to GOD for giving me the strength, the patience and the wisdom to take one day at a time and reminding me that even if I go through the deepest darkness, you are always with me.

DEDICATION

To my parents whose endless belief in me to achieve anything I set my mind to is unbelievable, you are the reason for my immeasurable commitment to my academics. You have really raised me into a strong and confident woman, pushing me to be at my best always. Thank you for everything.

To my sister, my best friend and my rock, Mable Nkhubezu Nundwe Chamunda, words are not enough to express my gratitude. This one is for you!!!!!!!!!!

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LIST OF ABBREVIATIONS

ICCPR	International Covenant on Civil and Political Rights
ACHPR	African Charter on Human and Peoples rights
CPC	Criminal Procedure Code
DIHR	Danish Institute for Human Rights

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CHAPTER ONE

1.1 Introduction

This chapter is aimed at bringing to the fore the courts' powers to amend indictments and the impact they have on the delivery of justice in Zambia. It sets the scene by showing the courts' powers to amend indictments as a rule of procedure that focuses on amending an indictment to ensure that justice is served. This is achieved by adhering to the correct form of procedure from the point an indictment is prepared up until judgement is passed. The chapter basically covers the whole aspect of the research paper, by identifying the statement of the problem, research questions, objectives, significance and justification of the study.

The power to amend indictments is pursuant to the Criminal Procedure Code¹ under sections 213 and 273 for the Subordinate Court and the High Court for Zambia respectively. The sections make mention of the indictment being amended before trial or at any stage of the trial before an accused person is put on his defence, to prevent any injustice.

An indictment is a document which is prepared by the prosecutor charging the accused person with an offence. It forms part of the criminal proceedings and it can be defined as a formal accusation of a crime which contains the particulars of the offence and the statement of the offence and it is read out at trial.² The police, prosecutors and the magistrates or judges are the key players in the criminal justice system and actively take part in proceedings to ensure that justice is delivered.

¹ Cap.88 of the Laws of Zambia

² Elizabeth Martin, *Oxford dictionary of law* (London: Oxford University Press, 2005), 271.

Criminal proceedings start from the time the suspect is apprehended by the police, and then he is formally arrested and finally taken to court by the prosecutor. The prosecutor after that prepares an indictment which contains the particulars of the offence and the statement of the offence. The reason the complainant reports a case to the police is to institute investigations. Where there is sufficient evidence that justifies bringing the charge, the complaint and the charge will be prepared and presented to the magistrates together with the summons and warrants.³

The magistrate then reads out the charge to the accused person at plea stage and if any defect is spotted in the indictment at this stage, the court will make an amendment. Another way an amendment is made is by the prosecution identifying a defect and making an application to the court to amend the indictment.

However, if the trial commences and the defect is identified at this stage, the CPC⁴ pursuant to sections 213 and 273 provides for the amendment of the indictment before the accused person makes his defence. After defence, amendment will amount to an acquittal of the accused person pursuant to s. 206 of the CPC, because it shows that a case has not been made against the accused due to the wrong information that has been identified on the indictment and he cannot make a defence based on wrong information.

Notably, the courts' powers to amend indictments are only operational at an early stage which is before judgement is passed. This is because after judgement their powers become functus officio. The whole essence of amending indictments by the courts is to ensure that justice is delivered to the accused person and he is sentenced according to what he deserves instead of creating a

³ Eric Swarbrick, *Magistrates Hand book* (Lusaka: National Institute of Public Administration, 1991), 25.

⁴ Cap. 88 of the Laws of Zambia

situation where an accused person is acquitted or given a lesser punishment than he actually deserves.

In *Gleeson v. R*⁵ a criminal trial was seen as the search for the truth, with the twin principles that the prosecution must prove its case and a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent.

1.2 The importance of indictments in the criminal justice system

An indictment is an essential document in criminal proceeding because it contains the statement of the offence and the particulars of the offence including the date of commencement⁶

According to s. 134 of the Criminal Procedure Code⁷:

Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

This is important because an indictment is a document that shows both the court and the accused person what case they are facing, what transpired and under what law they are being charged.

The indictment further gives assurance to the accused person that he has been formally charged with the offence and gives him an opportunity to answer to the charge levied against him. It is essential that the indictment is clear and precise in relation to the statement of the offence and particulars of the offence, because the information is read to the accused person and he is required to take plea.

⁵ [2003] EWCA Crim 3357

⁶ Halsbury's Laws of England, Vol.37, 4th ed, 124.

⁷ Cap 88 of the Laws of Zambia

1.3 Statement of the Problem

As aforesaid, the CPC provides for the amendment of indictments pursuant to s. 213 and s.273. It provides for the amendment of a defective indictment at any stage of the trial provided no injustice is caused to the accused person. The amendment of indictments should be done before judgement is passed for the courts' powers to amend are moot after judgement is passed.

*In Kambarage Mpundu Kaunda v. The People*⁸ the Supreme Court stressed that it is advisable that an amendment be made as early as possible during the course of trial as a late amendment may, in some cases, cause injustice to an accused person.

In this respect, the issue under investigation is the powers of the courts to amend an indictment and its impact on the delivery of justice in Zambia.

1.4 Research Objectives

- To find out what an indictment is and why it is relevant in the criminal justice system.
- To find out whether the courts' powers to amend indictments are effective and efficient in the criminal justice system.
- To find out the implications of not amending an indictment on the delivery of justice in Zambia.
- To bring to the fore the importance of amending indictments at an early stage.

1.5 Research Questions

- What is an indictment and how is it relevant in the criminal justice system?

⁸ (1990/1992) Z.R. 215

- Are the powers that the courts have to amend indictments effective and efficient?
- What are the implications of amending or not amending an indictment on the delivery of justice in Zambia?
- What is the importance of amending an indictment?
- If an amendment is made, what value does it add to the criminal justice system?

1.6 Significance of the study

The whole aim of the criminal law is to punish offenders who deserve punishment for the offence committed, and the harm caused should be proportionate to the punishment⁹. In relation to amendment of indictments by the courts, if the amendment is made after defence this amounts to an acquittal. What this entails is the accused person is set free and cannot be re tried based on the same offence, implying that it is possible for a guilty person to be acquitted based on these technicalities. Hence, this undermines the aim of the criminal law to punish offenders for crimes committed.

Further, after judgment has been passed, the courts' powers become *functus officio* and when the issue of amendment is brought up in the Supreme Court on appeal the court does not have jurisdiction to amend the indictment and the Supreme Court may pass a sentence lesser than the one deserved.

In this regard, this study is important because it shows the importance of the powers of the courts to amend an indictment at an early stage to avoid unnecessary acquittals and avoid giving an accused person a lesser punishment than he deserves.

⁹Simon Kulusika, *Text, Cases and Materials on Criminal law in Zambia* (Lusaka: Unza Press, 2006), 14.

1.7 Justification of the Study

The reason behind the motivation of carrying out this study is due to the occurrence of giving lesser punishments to accused persons in our criminal justice system than they deserve because an indictment was not amended as early as the prosecution's case.

In support of this submission, in the recent case of *Mulenga Katete v. the People*¹⁰ the Supreme Court sentenced the accused to 20 years imprisonment which was a lesser punishment than he deserved due to the fact that the charge was not amended in the lower courts. The Supreme Court had no jurisdiction to amend the charge to fit the evidence. Had the indictment been amended in this case, the accused person would have been given the death penalty instead of a 20 year sentence for this is what he deserved. In this regard, it can be said that due to the lack of spotting the defect at an early stage by the prosecution, the courts did not amend the charge resulting to the accused getting less than he deserved.

This study is necessary and for a good purpose because it urges law enforcement officers to adhere to the law on amendment of indictments and to make sure when drafting an indictment the information is correct and the offence tallies with the section in the penal code. Also, it urges them to make an application for amendment to the courts as early as the prosecution's case, before the accused is required to make his defence. When this is done, the criminal justice system will deliver justice accordingly and the accused person will be convicted and sentenced in accordance with the crime committed.

¹⁰ SCZ Judgment No. 10 of 2010

1.8 Methodology

The research for this paper has been a qualitative one consisting of both desk research and field investigations. Desk research has been through collection of information from law books, case law, newspaper articles, dissertations as well as the internet. Field work has been through data collection tools in form of questionnaires and interviews.

1.9 Layout of the Chapters

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In conclusion, this chapter has given the basic aspects of the research paper making reference to the problem at hand which has set the scene for this research. It has further given the significance

and justification of the study which has shown why it is important that this research is carried out and what value it will add to the criminal justice system. The methodology used in this research has also been laid down, showing both desk research and field investigations in the form of questionnaires and interviews.

In the next chapter, the research looks at the procedure for the application for amendment of indictments and how the courts exercise their powers to amend indictments pursuant to s.213 and 273 of the Criminal Procedure Code.

CHAPTER TWO

POWERS OF THE COURTS TO AMEND INDICTMENTS

2.1 Introduction

The previous chapter set the scene on the courts' powers to amend indictments and their impact on the delivery of justice in Zambia, identifying the significance, the problem and the justification of the study. This chapter deals with the procedure for application by the prosecution for the amendment of indictments to the courts. It looks at the nature of an indictment that makes it relevant in criminal proceedings and why it is important when a defect is identified that the prosecution make an application for amendment.

Thereafter, the courts that deal with the application for amendment of indictments are examined giving and explaining the law that governs their powers to amend indictments and what they put into consideration when interpreting the law in order to exercise their powers accordingly.

In a nutshell, this chapter investigates the procedure for application for amendment of indictments giving the importance of amending an indictment and showing the role of the courts in their duty to uphold the rule of law.

2.2 Procedure for the application of amendment of indictments

The general structure for the application to make amendments to an indictment, starting with how institutions of proceedings are carried out is important as a foundation for leading to the courts exercising their powers to amend indictments.

The common practice in Zambia is application to amend an indictment is made by the prosecution to the courts. The ordinary procedure is an accused person is arrested by the police based on a complaint that has been filed against him. When the accused is arrested on allegations of a crime he has committed, the essential elements must be put in a document stipulating precisely and clearly the offence, the time it was committed, where it was committed and other relevant information that will help the prosecution make a case against him.

This document is what is referred to as an indictment, prepared by the prosecutor who uses it to initiate proceedings showing the accused person the offence which he is charged with and under what law he will be tried. An indictment formally accuses the person of a crime by stating the particulars of the offence and the statement of the offence. The indictment must contain sufficient particulars of offence and statements of the offence in order to fairly inform the accused of the substance of the offence he is charged with¹¹. Section 134 of the CPC¹² provides for a charge to contain a statement of the specific offence and such particulars that are necessary.

The prosecutor has a duty to accurately lay the most serious charge which is deduced by the evidence and if he charges a lesser offence than the evidence which is in contention, this is improper¹³. The accused person is at this instant taken to court based on the information conveyed by the prosecution to plead to the indictment before a magistrate or a judge, who verifies the charge sheet to make sure that the correct person and particulars of the offence and statement of offence are on the indictment.

¹¹ Honourable Sir Francis Adams, ed., *Criminal law and practice in New Zealand* (Wellington: Sweet and Maxwell, 1964), 469.

¹² Cap 88 of the Laws of Zambia

¹³ Eric Swarbrick, *Magistrates Hand book* (Lusaka: National Institute of Public Administration, 1991), 181.

Before trial commences and a defect is found on the indictment, the defect can be cured by the court and when trial commences and a defect is found on the indictment, it is the duty of the prosecution to make an application to the court for the amendment of the indictment based on merit. It is paramount that the indictment should be defective in order for the courts to consider amending it.

The importance of amending an indictment is that any defect is remedied by the amendment whether the defect is trivial or fundamental, for example, by omitting from the particulars an essential element of the offence that is charged in the count.¹⁴

In layman language, an indictment is defective when the wrong information is placed on a charge sheet leaving out the correct information. This causes a lot of irregularities for the accused person is subjected to a charge that does not portray the correct details of his offence or particulars. The challenge on the prosecution is to identify the defect, in order to make an application to amend based on the correct information.

The case of *the People v. Edward Jack Shamwana and others*¹⁵ gave an illustration of a defective indictment and its effect. The prosecution in this case was of the view that:

The court has powers to amend information under the law and if a wrong section is referred to, reference to a wrong section does not nullify the powers so existing. The situation can be likened to charging one with an existing and known offence under the law but referring to a wrong section. The charge is not a nullity or bad, it is merely defective and the accused cannot be prejudiced by reference to a wrong section.

¹⁴ John Spark, *A Practical Approach to Criminal Procedure* (London: Oxford University Press, 2005), 255.

¹⁵ (1982) Z.R. 122 (H.C.)

Additionally, in *Joseph Nkole v. The People*¹⁶ the appellant appealed against sentence only for he was convicted in the subordinate court on two counts of forging and uttering GCE 'O' Level certificate. It was held by the High Court that the statement of offence was clear and so were the particulars of the offence but what was wrong was the inaccurate reference to the section of the enactment that created the offence. Nevertheless, this error did not make the charge bad but simply defective, and in the absence of embarrassment or prejudice to the accused the proviso to section 15 (1) of the Supreme Court of Zambia Act did not apply.

The foregoing instances are some of the situations that the prosecution is faced with when a defect is on an indictment and an application is made for the defect to be cured by the courts. Generally, a defective indictment does not make the indictment null, but it is important to amend it so that the accused person makes his defence based on the correct information and he is not prejudiced in his defence. The courts observe whether the indictment is defective for amendment to be exercised, therefore the prosecution needs to make sure that the application made is accurate and precise and a defect has indeed been identified, for the courts to take the necessary action to amend.

In the case of *The Prosecutor v. Felician Kabuga*¹⁷ it was stated that the role of the prosecutor in making an application for amendment of an indictment is to show that the presumption of the accused is liability would be better expressed by an amended indictment.

The prosecution in this regard start the criminal process by drafting the indictment and making an application to the court for the amendment of a defective indictment which the court before amending confirms. The courts are under law given the power to amend indictments, using these

¹⁶ (1977) Z.R. 351 (S.C.)

¹⁷ Case No ICTR -98-44B

powers with the utmost discretion in most instances so that justice is delivered not only to the accused person but also the victims and society at large.

2.3 The powers of the courts that facilitate for the amendment of indictments

If the Judge or magistrate considers an indictment to be defective after application to amend has been made, an order for the amendment of the indictment must be made. An amendment should always be allowed if it can be made without injustice to the other party, so that the real controversy between the parties is determined. It is crucial to amendment an indictment were it is clearly seen that there is a variance between the statement and the evidence in the charge¹⁸.

Further, the courts' powers to amend indictments are a technicality which is followed by the courts to have a fair criminal trial. In *R v Clarke and McDaid*¹⁹, Lord Bingham of Cornhill said; "Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply law, which is sometimes technical."

The law that is at the core of the powers of the courts to amend indictments is the CPC²⁰ whose preamble reads that it is an Act which makes provision for the procedure to be followed in criminal cases. The sections in relation to the amendment of indictments provide:

S. 213(1) Where at any stage of a trial before the accused is required to make his defence, it appears to the court that the charge is defective either in substance or in form, the court may, save as in section two hundred and six otherwise provided, make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

¹⁸ Alfred V. Landsdown, *Outline of the South African Criminal law and Procedure* (Cape town: Juta and Co Ltd, 1960), 288.

¹⁹ [2008] UKHL 8

²⁰ Cap 88 of the laws of Zambia

Provided that, where a charge is altered under this subsection-

- i) the court shall thereupon call upon the accused person to plead to the altered charge
- ii) The accused may demand that the witnesses, or any of them, be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

Also s. 273(2) which is used by the High Court provides:

Where, before upon information or at any stage of such trial, it appears to the courts that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice. All such amendments shall be made upon such terms as the courts shall seem just.

These two sections of the CPC govern the courts in their powers to amend indictments, and the courts ensure that they adhere to them in their pursuit to deliver justice. There are fundamentally two courts in Zambia that have jurisdiction to entertain matters of amendment namely, the Subordinate Courts and the High Court for Zambia.

The Subordinate court is presided over by magistrates and has limited jurisdiction in civil and criminal matters²¹, while the High court is presided over by judges who have original and unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law²².

²¹ The Criminal Procedure Code, Cap. 88, s. 7

²² The Constitution of Zambia, Cap. 1, Art. 94

Zambia is a democracy which is governed by a Constitution and in a constitutional democracy courts are impartial and independent playing a key role in promoting the rule of law. The courts have the duty to make sure that there is compliance with the laid down rules and procedure.²³ Therefore, when the courts are exercising their power to amend indictments they are acting impartially and independent making sure that the rule of law is promoted and they comply with the CPC that gives them the laid down procedure for amendment.

In the case of *the Prosecutor v. Felician Kabuga*²⁴ the tribunal looked at its role when an application for amendment comes to its attention. The tribunal stated that:

The diligence of the prosecution in making the amendment should be in a timely manner. The likely delay or other possible prejudice to the defence if any, caused by the amendment is seriously considered. The Judge also sees whether a prima facie case exists with respect to each of the new charges in the proposed amendment.

In connection to the above mentioned case, when the prosecution makes an application for the amendment of an indictment to the courts, it is very important that this application is made at an early stage so that the courts exercise their powers to amend the indictment without causing any injustice. The courts in Zambia, like in the *Felician Kabuga* case also take into consideration factors that may affect the parties before amending an indictment, and the most important factor is justice being delivered to the parties.

Ideally, according to the CPC, amendment of indictments by the courts is made before a trial upon information or at any stage of such trial before the accused is required to make his defence.

²³Dr Patrick Matibini, *Access to justice and the rule of law: An issue paper presented for the commission on legal empowerment of the poor* “web.undp.org/legal empowerment/.../27_3_Access_to Justice_pdf” (accessed on 11th April, 2012), 13.

²⁴Case No ICTR -98-44B

It is in this time frame that the prosecution should make an application to the courts to exercise their powers to amend an indictment. The reason is at this point justice is administered because the accused person has not made his defence, therefore he is not affected by the proceedings yet.

In the case of *Kambarage Mpundu Kaunda v. The People*²⁵ the Supreme Court stated that the courts had the power to amend indictments but stressed that it is advisable that an amendment should be made as early as possible during the course of a trial as a late amendment may, in some cases, cause injustice to an accused person. It further went on and quoted *R. v Johal and Ram*²⁶ to support its submission which stated:

The longer the interval between arraignment and amendment, the more likely it is that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.

In this case the Supreme Court found that no prejudice was caused to the appellant due to the fact that the right procedure was followed in relation to the appellant's rights.

Further, to amplify the argument on when the courts can amend an indictment without causing any injustice, Stocker, J had this to say relating to the point amendment of indictments should be made in the case of *Harris v R*²⁷ :

As to the time at which amendment was made, it may very well be that in very many circumstances application to amend as late as the close of the case for the prosecution would be so likely to involve injustice to an

²⁵ (1990/1992) Z.R. 215

²⁶ (1972) 56 Cr. App. R. 3

²⁷ 62 Cr. App. Rep. 28.

accused person that such an application in many instances might be refused.

In view of this, the courts seriously consider justice being delivered before amendment can be made to the indictment. Amending an indictment at the close of the prosecutions case will most likely cause injustice to the accused person because at this point the prosecution has proved its case beyond reasonable doubt but has based its submissions on the wrong information in the indictment. In this regard, the courts are very careful when amending an indictment looking at *the stage when the application to amend has been submitted and considering the possible effects.*

2.4 Conclusion

In conclusion, this chapter has shown the procedure for application for the amendment of indictments to the courts by the prosecution who are in charge of drafting indictments. It has shown why it is relevant that this procedure is evoked, bearing in mind that the indictment is relevant in criminal proceedings.

It has further looked at the courts that deal with the amendment of indictments and how they exercise their powers accordingly for the purpose of justice delivery. In the next chapter, the impact of amending and not amending an indictment on the delivery of justice in Zambia will be discussed.

CHAPTER THREE

IMPACT OF AMENDING AND NOT AMENDING AN INDICTMENT ON THE DELIVERY OF JUSTICE IN ZAMBIA

2.5 Introduction

The previous chapter looked at the procedure for the application for amendment of indictments by prosecutors to the courts, and the courts that have jurisdiction to facilitate for amendment of indictments. However, this chapter looks at the impact of amending and not amending an indictment and the effect it has on the delivery of justice in Zambia.

2.6 Effect of amending an indictment.

The effect of amending an indictment on the delivery of justice by the courts is largely dependant on the point the amendment is made. From the wording of s.213 and s.273 of the CP C, the amendment is made at any stage of the trial before the accused is required to make his defence. What then is the end result of the courts amending an indictment at this point?

The effect of amending an indictment at an early stage before the accused makes his defence is that amendment will be made without prejudice. In a nutshell, attainment of justice will be the end product of amending an indictment at an early stage. It is fundamental that the prosecution realize how critical the concept of justice is in the criminal justice system in order for the courts to exercise their powers to amend adequately and at an early stage.

In the criminal justice system, justice delivery is primary because it portrays that the accused had a fair trial due to having the correct particulars and statements on the indictment after amendment and this upholds the integrity of the judiciary in delivering justice.

The notion that a trial should be fair has elaborated series of norms of what constitutes a fair trial under English law and these have become an essential part of the concept of justice²⁸

Lord Denning has stressed that:

The paramount importance of a fair trial is that on the road to justice, there are two important things that must be achieved, the first being that the laws must be just, and secondly, that they must be justly administered, regarding the latter as the most important. He further mentioned that a country cannot tolerate a legal system which does not give a fair trial²⁹.

What this entails is that the perception of justice is one which an accused person is entitled to for it is interrelated to having a fair trial which is an important human right. According to Du Cann³⁰ he emphasizes that nothing is more condemnatory than an unfair trial and it is converse that a fair trial is rightly regarded as necessary to justice in criminal proceedings.

Under national law, The Constitution of Zambia³¹ provides that any person whose charged with a criminal offence should be afforded a fair hearing within a reasonable time by an independent and impartial court which is established by law. It is important that the criminal justice system respects the constitutional rights of the accused persons in its day to day operations.

Zambia is among the many countries in Africa and the world that has ratified international human rights instruments, and one of them is the International Covenant on Civil and Political Rights (ICCPR) which provides for the right to a fair trial and this right is guaranteed to the accused. The ICCPR imposes obligations which are absolute on member states to respect and

²⁸ Fred Dowrick, *Justice according to the English Common Law Lawyers* (London: Butterworth, 1961), 30.

²⁹ Alfred Thompson and Denning B. Denning, *The Road to justice* (Great Britain: S. Hein Publishing, 1955), 6-7.

³⁰ Charles G. Du Cann, *Miscarriage of justice* (Otwell: Fredrick Muller Ltd, 1958), 75.

³¹ The Constitution of Zambia, Cap. 1, Art. 18

ensure the rights are guaranteed to each individual within its territory and subject to its jurisdiction³².

At a regional level, Zambia has ratified the African Charter on Human and Peoples Rights (ACHPR) which also provides for the right to a fair trial. However, despite ratification of these international instruments, there has been little domestication of these instruments.

Human rights are significant for they are rights that one has as a matter of being human and this is the only qualification that one is required to have in order to be entitled to these human rights. The purpose of human rights in society is that they protect human dignity, they are essential for individual well-being and fulfilment, and they are necessary for the preservation of peace and justice³³. Hence, the right to a fair trial results to the preservation of peace and justice in society and the courts exercising their powers to amend indictments portray this very fact.

2.6.1 Justice defined and its importance

As aforesaid, the effect of amending an indictment before defence is the delivery of justice to the accused. What then is justice and what importance does it serve to the accused when the courts exercise their powers to amend an indictment? Justice has wide range of definitions, however, it is best defined by the Oxford dictionary of law³⁴ as a moral ideal which the law will seek to protect by upholding what is right and punishing what is wrong. This relates to the accused serving what is owing to him and not punishing him for what he has not done.

³² Carlson Anyangwe, *Introduction to Human Rights and International humanitarian law* (Lusaka: UNZA Press, 2004), 36.

³³ Alfred W. Chanda, "The role of lower courts in the domestic implementation of human rights", Volume 33 (2001) under <http://www.unza.zm/zamlil/whats-new.html> (accessed on 11th April, 2012).

³⁴ Elizabeth Martin, *Oxford dictionary of Law* (London: Oxford University Press, 2005), 55.

Notably, it is important that justice is delivered to the accused person because he is sentenced based on the correct information and serves his sentence accordingly. The receiving of justice by the accused person brings about public confidence in the judiciary, and individuals in society trust that when they come before the court, their case will be afforded the correct channel of adjudication.

The importance of justice cannot be overlooked in criminal proceedings because justice upholds the principle that the punishment should be proportionate to the offence³⁵ and amending an indictment results in the appropriate particulars being added or removed from the indictment, therefore, when judgment is passed the punishment given is in compliance with the offence. Justice is also important because it covers concepts of fairness, equality, impartiality and gives the appropriate rewards for punishment.³⁶ Further, lawyers make emphasis of justice being fundamental to the accused person by imploring that it proofers the jurisprudential definition of justice being the perpetual wish to give each man his due (just desserts).³⁷

2.6.2 The core function of the Judiciary in promoting justice

The Judiciary of Zambia is an independent arm of the government. A.91 (1) of the Constitution of the Republic of Zambia provides for the composition of the Judicature of the Republic as consisting of The Supreme Court of Zambia, The High Court of Zambia, The Industrial Relations Court, The Subordinate Court and The Local Court.

The judiciary plays an important role in promoting justice. The judiciary respects the fact that the accused is entitled to justice whether or not he committed the crime. It is the role of the judiciary to administer effective justice administration through amending of indictments for it shows that

³⁵ The American Heritage, ed., *Dictionary of English Language* (Boston: Houghton Mifflin Company, 2000), 75.

³⁶ James Pollock, *Ethics in crime and justice* (Wadsworth: Thompson learning Inc, 2004), 78.

³⁷ Carlson Anyangwe, *Introduction to Human Rights and International humanitarian law* (Lusaka: UNZA Press, 2004), 3.

the courts have upheld their noble duty and have discharged it. The role or core functions of the Judiciary include the following:

- Administration of justice through resolving disputes between individual and individual, and between state and individual
- Safeguard the constitution and uphold democratic principles
- Protect human rights of individuals and groups³⁸.

The Judiciary is an autonomous body which acts independently and the independence of the judiciary goes only as far as the proper administration of justice is concerned.

The judiciary plays a major role in administration of justice that is granted to the accused when the indictment is amended. It is crucial in all regards that the judiciary plays its role for the courts hold the custodianship of justice and once the accused is given justice, the reputation of the judiciary especially in the administering of justice and protection of human rights portrays an operative judiciary.

2.7 Effect of not amending an indictment

The law on amendment of indictments has a huge influence on the delivery of justice in Zambia. In a nutshell, the effect of not amending an indictment is that the accused person is tried based on information that does not tally with the particulars or the offence.

The accused in this instance has been treated unjust and unfairly, showing that he was not afforded a fair trial. The accused person does not enjoy his right to a fair trial and in this regard is

³⁸ <http://www.judiciary.gov.zm/index.php> (about judiciary/introduction) accessed on 11th April, 2012

still surrounded with a defective indictment that does not portray the actual particulars or actual statement of the crime committed.

The argument, however, is that a criminal proceeding which ends prematurely due to error, mistake, or misconduct has an effect on an accused person for the purposes of punishment and is equivalent to a finding of not guilty and he cannot be retried³⁹. The justification for this is that a re trial cannot be conducted because the injustice has already been served at the finish of the trial and so the accused person is considered as not guilty by the courts due to the defect on the indictment. The accused person in this regard is acquitted and cannot be tried again on the same offence. Section 206 of the CPC⁴⁰ provides:

If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case, and shall forthwith acquit him.

The reason the accused is acquitted is because the prosecution has failed to prove its case beyond reasonable doubt, and at defence when the defect is spotted the accused is acquitted because the information that the prosecution has on him is wrong and they have failed to discharge the case.

The law is clear on acquittal pursuant to s.206 of the CPC, however, if it is strictly applied the operation of the criminal justice system to punish offenders who deserve punishment for the offence committed, and the harm caused being proportionate to the punishment⁴¹ will be undermined and justice will not be delivered. Nonetheless, under s.213 and s. 273 of the CPC, the courts look at the circumstances of the case when amending the indictment. In this regard, it

³⁹ File:///E:/prejudice.(legal procedure) html _Civil _Law (accessed on 11th April, 2012).

⁴⁰ Cap 88 of the laws of Zambia

⁴¹ Simon Kulusika, *Text, Cases and Materials on Criminal law in Zambia* (Lusaka: Unza Press, 2006), 14.

is not always that the court will amend an indictment when an application for amendment is made. In *Gleeson v. R*⁴² Lord Justice Auld went on to cite paragraph 154 of chapter 10 of the Report of the Criminal Courts Review. In the passage cited he observed that:

A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent.

In addition, there is an effect on the delivery of justice when the indictment is not amended up until judgment is passed. The consequence is the courts' powers to amend an indictment become *functus officio* and the defect on the indictment remains. On appeal to the Supreme Court the accused person may be given a lesser punishment than he deserves undermining the whole concept of justice delivery in our criminal justice system.

The Supreme Court recently gave audience to such a case in *Mulenga Katete v. the People*⁴³ where the appellant was convicted of one count of aggravated robbery contrary to section 294(1) of the Penal code but sentenced to death contrary to section 294(2) of the Penal code. In this case the evidence showed that a firearm was used but this was not included in the charge and it was not amended. On appeal to the Supreme Court the appellant was sentenced to 20 years, which was a lesser punishment than he deserved had amendment been done in the lower courts.

Notably, the Supreme Court has no jurisdiction to amend indictments meaning the defect on the indictment remains. However, the Court of Appeal can quash the conviction due to the

⁴² [2003] EWCA Crim 3357

⁴³ SCZ Judgement No 10 of 2010

indictment being defective, but not every defect amounts to quashing the conviction⁴⁴. There is an exception to this rule which is, if the defect does not render the proceedings on the indictment or the charges a nullity, the court of appeal will focus its attention to whether the defect complained of renders the conviction unsafe⁴⁵.

The reasoning behind this is the mere fact that a defective indictment is an imperfect indictment and what the courts consider is whether the proceedings and the charge were untrue, prejudicing the accused person and if not was the conviction that was passed unsafe due to the defect.

Lord Bingham of Cornhill in the case of *Rv. Marsh and others*⁴⁶ said a conviction would not be granted as unsafe due to the fact that there was some drafting or clerical error, or omission or some discrepancy or departure from good practice. The case of *R. v Thompson*⁴⁷ made reference to the reasoning in the proviso to section 4 of the criminal appeal Act, which is a piece of section 15 (1) of the Supreme Court of Zambia Act as replaced, that the main objective of the proviso was to prevent a situation where the courts quash a conviction which has not prejudiced an accused person because of technicalities. The intention of the legislature was that justice should be done either way notwithstanding the wrong decision, as long as there was no miscarriage of justice.

The decision in this case shows how the Supreme Court deals with issues of quashing a conviction which is brought on appeal from an accused who claims he was convicted based on

⁴⁴ John Fredrick Archbold, ed., *Archbold Criminal pleading Evidence and Practice* (London: Sweet and Maxwell, 1992), Paragraph 1-195.

⁴⁵ J. Archbold, *Criminal Pleading, Evidence and Practice*, Paragraph 1-195.

⁴⁶ [1997] 1 Cr. App. R.302

⁴⁷ [1914] 2 K.B. 99.

wrong information. The Supreme Court will not quash the conviction if no prejudice was suffered by the accused in the lower courts.

2.8 Conclusion

In conclusion, this chapter has shown the impact on the delivery of justice if an indictment is or is not amended. It has shown the importance of justice delivery to the accused person whose indictment is amended and has also shown how lack of amendment of an indictment affects the delivery of justice and how the courts using their powers to amend indictments have tried to balance the interests of the prejudiced person with the interests of justice by looking at the circumstances of each case. The next chapter will give analysis from the field work conducted on the courts powers to amend indictments and the impact on the delivery of justice in Zambia.

CHAPTER FOUR

ANALYSIS OF FINDINGS FROM QUESTIONNAIRES AND INTERVIEWS

2.9 Introduction

This chapter presents the results from the field research that was conducted. The findings are based on the data collected through questionnaires, interviews and other literature that has dealt with the courts' powers to amend indictments and their impact on the delivery of justice in Zambia.

The information given was obtained from magistrates, prosecutors and lawyers who are conversant with the law on amendment of indictments. During this research a lots of issues were raised concerning the courts' powers to amend indictment and the impact they have on the delivery of justice in Zambia.

3.0 Findings on the courts' powers to amend indictments

The courts' powers to amend indictments are an important rule of procedure pursuant to section 213 of the CPC and section 273 for the Subordinate Courts and High Court respectively. These powers provide for the determination of fairness and promotion of justice.

A majority of the respondent lawyers revealed in the research that an indictment is a formal written statement charging a person with the commission of a crime or an offence and it is drawn up by a prosecutor. They also pointed out that an indictment is basically a charge that an accused person is tried for, containing the offence he has committed.

Further, the respondent prosecutors submitted that an indictment is a charge sheet at the Subordinate court while at the High court it is called information. They further conceded that an indictment is a charge levelled against an accused person upon his arrest.

In support of these views, Dhirajlal and Rantanlal in their book **The Criminal Procedure Code**⁴⁸ noted that a charge simply tells the accused as precisely and concisely as possible as to the matter which has been brought against him and to convey with the most certainty and clearness what the prosecution intends to prove against him of which he will be given the opportunity to clear himself.

Further, the respondent prosecutors pointed out that an indictment is relevant in criminal proceeding merely because it is framed in such a way as to outline the statement of the offence and the particulars of the offence the accused is charged with. According to Dhirajlal and Rantanlal⁴⁹, the framing of a proper charge is vital to a criminal trial and it is on this matter that judges should bestow the utmost careful attention.

The respondents in their knowledge of the importance of indictments in criminal proceedings went on to state that indictments are relevant in criminal proceedings to inform an accused person of the charge that has been laid against him or her so that the person will be able to prepare for his defence. This was described as one way of not breaking the law of natural justice. Moreover, they indicated that indictments are important because basically they show the accused and the courts presiding over the matter, what the accused person brought before them is being tried with and under what law. An indictment was also considered as relevant in criminal

⁴⁸ Dhirajlal Keshavlal and Rantanlal Ranchhoddas, *The Criminal Procedure Code: Act No V of 1898* (Bombay : The Bombay Law reporter private limited, 1969), 242.

⁴⁹ Keshavlal and Ranchhoddas, *The Criminal Procedure Code: Act No V of 1898*, 242.

proceeding because it outlined the statement of the offence and the particulars of the offence the accused is charged with.

From these findings it is clear that indictments serve a huge importance in the criminal justice system and in a situation where they are found to be defective, it is paramount that the courts exercise their powers to amend indictments so that the accused person is tried based on all the correct particulars. The focus now shifts to whether the courts' powers to amend indictments are effective and efficient in the delivery of justice in Zambia.

With regards to whether the respondents considered the courts' powers to amend indictments as efficient and effective, the majority of the respondents answered in the affirmative, giving solid reasons to support their submissions.

It is argued that the court on its own has no power to raise a motion for the amendment of indictments, the responsibility lays with the prosecution to make an application to move the court to amend the indictment. The courts can only be moved when the prosecution moves it, hence when an application to amend the indictment comes to the courts attention in most instances the courts have acted accordingly taking into consideration the relevant law of s.213 and s.273 of the CPC⁵⁰.

Consequently, the courts' powers to amend indictments are effective and efficient, because the CPC clearly provides under section 213 for the courts' powers to amend indictments and these powers are only labelled as inefficient and ineffective when the magistrate or the judge is not conversant with the law and has not applied it effectively in a given case⁵¹.

⁵⁰ Interview with Mr Ngona, a Lusaka based prosecutor at central police on 30th March, 2012 in Lusaka.

⁵¹ Interview with Miss Kapelembe, a Lusaka based lawyer on 23rd March, 2012 at Lusaka.

Further, Honourable Humphrey Chitalu a magistrate pointed out that the courts have the powers to amend indictments pursuant to s.213 for the Subordinate court and s.273 for the High court which is referred to as information. He specified that the courts' powers to amend indictments are effective and efficient because the powers are discretionary due to the fact that the courts when amending an indictment look at the circumstances of the case and makes amendments as it deems just. The courts use these powers to balance the interests of the accused with the interests of the state and the victims. He submitted that by the mere fact that these powers are discretionary, amendment of indictments focuses on delivering justice.

He further supported his submission by giving an example that the courts do not follow the law strictly for it is common palace that a good law is one which is flexible, as a result situations arise where an indictment is not amended and upon defence the issue is brought up.

It is not always that the courts will acquit an accused person, the courts may look at the seriousness of the offence and choose not to acquit based on a mere technicality. In this regard the courts try to balance interests and make sure justice is delivered to all the key players in the proceedings⁵².

Lord Justice Auld in the case of *Gleeson v. R*⁵³ supports this submission by observing that:

A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent.

⁵² Interview with Honourable Humphrey Chitalu, a magistrate on 13th April, 2012 at Lusaka.

⁵³ [2003] EWCA Crim 3357

Further, Dhirajlal and Rantanlal⁵⁴ also support this submission at p. 248, by stating that the courts should continue with the trial, if the charge is not likely to prejudice the accused in his defence or the prosecution in the conduct of the case.

In this view, the majority of the respondents submitted that the courts use their powers to amend indictments effectively and efficiently so that justice is delivered at all times to everyone affected by the proceedings. According to Honourable Humphrey Chitalu:

Courts are conceived as the empires of justice and criminals should be punished for the wrongs they have done. The courts look at the victims turmoil and how they have suffered, therefore the courts cannot just acquit based on technicalities. The inefficiencies of the courts powers to amend indictments are to be expected but the discretion makes the law less rigid, and in turn the courts deal with situations on a case to case basis.

Kulusika in his book **Criminal law in Zambia** also makes mention that one of the functions of the criminal law is to punish offenders who deserve punishment for the offence committed, and the harm caused should be proportionate to the punishment⁵⁵.

However, the notion of the courts' powers to amend indictments as being effective and efficient was denied by one of the respondents. He submitted that since most of the amendments are not done by the courts on their own motion, the courts rarely amend indictments and in most cases the accused person ends up being acquitted or getting away with a minor punishment than he ought to have originally gotten.

⁵⁴ Dhirajlal Keshavlal and Rantanlal Ranchhoddas, *The Criminal Procedure Code: Act No V of 1898* (Bombay: The Bombay Law reporter private limited, 1969), 248.

⁵⁵ Simon Kulusika, *Text, Cases and Materials on criminal law in Zambia* (Lusaka: Unza Press, 2006), 14.

The authority in support of this submission is the case of *Mulenga Katete v. the people*⁵⁶ where the appellant, Mulenga Katete was given a lesser punishment than he actually deserved when the issue of amendment of the indictment was brought on appeal to the Supreme Court. In this case, the evidence showed the use of a firearm which was not included in the particulars of the offence and not argued in the lower court. Due to this error which was not brought up until appeal to the Supreme Court which looked at the point of law not the facts, the appellant was sentenced to 20 years imprisonment.

3.1 Findings on the impact of delivery of justice in Zambia with regards to amendment of indictments

One of the respondent prosecutors submitted that the impact on the delivery of justice in Zambia if an amendment is made to the indictment is that the accused person will be tried on the correct charge instead of a defective charge. Spark in his book, **A Practical Approach to Criminal Procedure** observes that the importance of amending an indictment is that any defect is remedied by the amendment whether the defect is trivial (e.g. where there is a misspelling of the accused name on the indictment) or whether the defect is fundamental for example, by omitting from the particulars an essential element of the offence that is charged in the count⁵⁷.

The respondent further insisted that this will accord the accused person a fair trial and justice will not only be done but seen to be done because the court took the time to amend and see to it that the accused is tried on the correct information.

Mr Mutale, a Lusaka based lawyer conceded to the view of the respondent by pointing out that an amendment will bring about a clear charge and this in turn will give an accused person a clear

⁵⁶ SCZ. Judgement No 10 of 2010

⁵⁷ John Spark, *A Practical Approach to Criminal Procedure* (London: Oxford University Press, 2005), 255.

depiction of the offence committed and will give him an opportunity to defend himself effectively and in the process may bring about justice to both the accused, the prosecution and society at large⁵⁸.

Additionally, emphasis was made to the fact that the stage of amendment of the indictment is critical on the delivery of justice. During trial where the issue of amendment arises, the courts can amend the indictment and the accused person is called upon to make a fresh plea. The mere fact that this is done shows that the accused has been treated fairly and just and there has been no injustice because proper procedure has been followed, therefore the courts have effectively carried out their powers to amend⁵⁹.

The case of *Kambarage Mpundu Kaunda v. The People*⁶⁰ supports this submission for the Supreme Court held that there was no injustice that was caused to the appellant especially because a proper procedure as regards to the appellant's rights was observed by the learned trial judge at the time and the appellant's defence of self defence was not prejudiced by the amendment that was made.

The research further looked at the impact on the delivery of justice in a situation where the amendment to the indictment is not made.

One of the respondents, a prosecutor, noted that in an instance where the indictment is not amended this can be advantageous to the accused person who can be acquitted by the courts, and

⁵⁸ Interview with Mr Mutale, a Lusaka based lawyer on 23rd March, 2012 at Lusaka.

⁵⁹ Interview with Honourable Humphrey Chitalu, a magistrate on 13th April, 2012 at Lusaka.

⁶⁰ (1990/1992) Z.R. 215

the effects of an acquittal according to s.216 of the CPC is a bar from further proceedings for the same matter against the same accused person.

In furtherance of this, not amending an indictment would obviously cause injustice either to the accused person if he is found guilty based on the defect or the victim/state if the accused is found not guilty due to the wrong charge. It is therefore crucial that an indictment is amended at an early stage so that justice is delivered to everyone. If this is not done, the image of the courts will be tarnished.⁶¹

One of the respondent prosecutors further submitted that the lack of amendment of indictments can also cause an accused person to be convicted based on an offence which he did not do, and this will go against the criminal justice system in Zambia which aims at promoting justice to everyone in criminal proceedings.

The findings have revealed that when an indictment is amended at an early stage, the impact on the delivery of justice in Zambia will be positive, for the accused person is faced with a fair trial and he is not prejudiced in any way in his defence, adhering to the laws of natural justice.

On the other hand, the study has further revealed that the criminal justice system considers an indictment as a very relevant document, and the courts when faced with an application to amend an indictment indeed look at the best way justice can be proportioned to all the key players in the proceedings. However, when it is not amended there is more likely to be injustice than not, although the courts decide not to amend on a cases to case basis.

⁶¹ Interview with Miss Kapelembe, a Lusaka based lawyer on 23rd March, 2012 at Lusaka.

3.2 Conclusion

This chapter has discussed through the findings, the courts' powers to amend indictments and their impact on the delivery of justice in Zambia. It has achieved this by defining what an indictment is and why it is relevant in criminal proceedings. It has further shown how the courts have been portrayed as using their powers to amend indictments efficiently and effectively. The impact of amending and not amending indictments has also been discussed to portray their impact on the delivery of justice in Zambia.

The next chapter concludes the study on the courts' powers to amend indictments and their impact on the delivery of justice in Zambia. It further gives recommendations on what can be done to improve the powers bestowed by law on the courts to amend indictments for the sake of justice delivery in Zambia.

CHAPTER 5

CONCLUSION AND RECOMENDATIONS

3.3 Introduction

This chapter looks at what has been discussed in the previous chapters and the conclusions that have been drawn relating to the courts' powers to amend indictments and their impact on the delivery of justice in Zambia. The chapter suggests recommendations to improve the operations of the courts to amend indictments and their impact on the delivery of justice in Zambia.

3.4 General Conclusion

The focus of this study has been to bring to the fore the courts' powers to amend indictments and their impact on the delivery of justice in Zambia. The study has shown that the procedure for application for amendment of indictments is engineered by the prosecution in most instances, and they are the officers who draft the indictment clearly and precisely, giving particular attention to the particulars of the offence and the statement of the offence.

The study through literature, case law, and findings from the field has shown that indictments engineer criminal proceedings and they are very relevant especially for pleading in criminal offences. The study has shown that in order to understand how the courts' powers to amend indictments operate, it is important to give a foundation on how indictments are handled from the time an accused person is arrested and indicted.

Secondly, this dissertation has identified the importance of justice delivery when an amendment is made at an early stage, before the accused is required to make his defence. It has done this by defining what justice is and its importance in criminal proceedings. This has given recognition to

the fact that the accused person's right to a fair trial has been respected in accordance with the Constitution and other regional and international instruments.

It has further shown how the judiciary has promoted justice as one of its core functions, upholding public confidence once justice is delivered. This is important because the courts are the key custodians of justice, and they must always put into consideration their image to society, therefore streaming confidence in the courts as adjudicators on amendment of indictments.

Nonetheless, when the issue of amendment is brought up at defence stage, the accused person according to the law is to be acquitted. However, findings have revealed that the courts use their discretion on a case to case basis, and weigh the pros and cons to ensure justice is delivered; hence it is not always that the courts will acquit an accused person at this stage especially if the crime accused of is of much gravity and the evidence clearly points to the accused person.

The dissertation has further found that it is not always that the courts exercise their powers to amend indictments. The result of this is the accused person will not be afforded a fair trial and will be sentenced based on the wrong particulars. After judgment has been passed, the powers of the courts become *functus officio*, and on appeal the courts look at the point of law and not the facts, so if it is found that the accused was not prejudiced, the conviction will not be quashed.

The findings of the study have shown that the courts have at a larger extent been consistent in their use of the powers to amend indictments and regard has been given to the prosecution to make application at an early stage so that justice is delivered and the courts operate adequately.

3.5 Recommendations

Having discussed the courts' powers to amend indictments and their impact on the delivery of justice in Zambia, there is need for some degree of reform due to the underlying observation that the courts need to use their powers adequately in order for justice to be delivered. It is against this background that measures be taken in the following ways:

3.5.1. Legal education to promote efficiency

There is need for development of legal education in the criminal justice system in order to promote the efficiency of amending indictments. These legal education courses should target the justice system institutions in Zambia such as the judiciary, prosecution offices and the police. The reason for this is because these are the criminal justice institutions that have the privilege of dealing with indictments from the time an accused person is indicted up until the time the need for amendment of indictments arises if necessary, to the time judgement is passed.

In particular, prosecutors should undergo these courses, because they are the officials that draft the indictment, and they move the court to amend an indictment. A Study has been carried out that prosecutors are not properly trained for their course only runs for 4 months and after the basic course, they only undergo an advanced programme for 9 months, hence showing low academic qualifications posing a serious weakness in the criminal justice system which relies on personnel who are either ill trained or untrained to conduct grave task of prosecuting⁶².

⁶²Kevin Mweemba, *An examination of the factors that prevent sexual abuse cases from being effectively prosecuted in Zambia*. An Obligatory Essay submitted to the School of Law in partial fulfilment for the award of Bachelor of Laws Degree (2011),43.

The image of the prosecution when it comes to issues of prosecuting has little to be desired by the general public. In an article in the Lusaka times by Elias Munshya wa Munshya headed **Regina Chiluba's Acquittal: Kafunda and the Prosecution's fiasco**, it was mentioned that the prosecution's failure to follow routine procedure when charging an accused person is despicable especially considering that they have been charging criminals with similar offences since independence⁶³.

Legal education courses will help educate judicial officers on the importance of indictments in the criminal justice system and the relevance of an early application to amend. They will also help the courts to appreciate the importance of amending indictments when an application to amend is made and the consequences of not amending indictments on the delivery of justice in Zambia. The launching of training programmes tends to improve the skill of the personnel involved in the delivery of criminal justice in general⁶⁴.

The Danish Institute for Human Rights (DIHR) is an example of how legal education programs help the criminal justice system and it is commended for hosting courses with the title **'Strengthening the Capacity of Access to Justice Institutions in Zambia'** for the past years. These courses deal with justice system institutions in Zambia such as the judiciary, prison services, prosecution office, police and the Legal Aid Board. The aim of this program is to inspire *Zambian* institutions in their reform programmes and also to compare and contrast the *Zambian* judicial system to the Danish one. With such programmes in place, Zambia is able to associate herself with other jurisdictions and able to learn from their developments.

⁶³ The Lusaka Times, 14th December, 2010.

⁶⁴ Kevin Mweemba, *An examination of the factors that prevent sexual abuse cases from being effectively prosecuted in Zambia*. An Obligatory Essay submitted to the School of Law in partial fulfilment for the award of Bachelor of Laws Degree (2011),43.

3.5.2. Legislature

The legislature is the branch of government which deals with the making of laws and it serves as an important organ in the delivery of justice by enacting laws that provide for justice delivery.

S. 213 and s. 273 of the CPC provides for the law on amendment of indictments, and it is conceded that the legislature has enacted this law as clearly, precise, certain and flexible as can be. It is however suggested that the sections should be revised to include the importance of amendment of indictments on the delivery of justice and the effect of not amending an indictment on the delivery of justice in detail.

The adding of this will admittedly make the section lengthy, but it will be more pronounced and will remind the courts every time they are faced with an application to amend an indictment of the significance of instituting these proceedings and the consequences that follow if the defective amendment is not cured. The legislature is important in the journey of real justice and fundamental to delivery of justice is whether laid down laws are good or bad⁶⁵.

3.5.3. Image of the judiciary

The judiciary is an autonomous body meaning it acts independently. However, this does not imply that there should not be consistent funding of the judiciary. In order for the judiciary to function and operate accordingly, it should be funded adequately to promote justice delivery. According to Chief Justice Ernest Sakala he says that poor funding of the judiciary defeats the

⁶⁵ Hakayuwa Muleya, *A critical analysis of the administration of the right to justice in Zambia since 1964*. An Obligatory Essay submitted to the School of Law in partial fulfilment for the award of Bachelor of Laws Degree (2011), 42.

very concept of an autonomous judiciary and it seriously undermines the capacity, prestige and integrity of our judiciary⁶⁶.

The judiciary should be funded adequately in order for the courts to carry out their duty to amend indictments effectively. This can be done by hiring trained personnel who can assist prosecutors draft and identify defective indictments or assist the courts in elaborating the need to amend defective indictments and the importance of their powers to amend at early stage.

The additional assistance will make a difference due to the bulk of cases that the courts deal with every day, and preferably help from trained personnel will help prosecutors in their duty to make applications to amend indictments on time. With adequate funding, the courts are able to operate as they should independent from the executive and with enough resources to help uphold its integrity.

3.5.4 Strict compliance to the law to avoid delays in trial and expenses.

When an indictment is amended by the courts the trial is started again and an accused person is required to take a fresh plea, then the trial commences based on the fresh plea that has been made. This process ensures justice is delivered to the accused person so that the punishment fits the crime that has been committed based on the correct particulars.

This is clearly the procedure, but the implication on the accused is grave financially. This is because the cost of hiring a lawyer is high and to have a re trial means paying again for the lawyer's services. In this regard, the accused is faced with grave expenses due to the late application of the indictment and the courts making an amendment when trial has far long began.

⁶⁶ The Post newspaper, 9th January, 2011.

A re trial will also mean delay in the disposition of a case, for example, a case that is supposed to take one year may end up taking longer than that , and the courts will also end up using more resources than anticipated on one case and this may in turn frustrate the courts.

For this reason, there is need to implore strict obligation on the prosecution to make sure that the drafting of the indictment is clear and precise and amendment is made at an early stage to avoid any delay and extra costs on the accused and the courts. In order for this to be operational, a penalty should be levied against the prosecution when a late application to amend an indictment is made to the court, this will trigger strict compliance with the law and adequate amendment of indictments by the courts.

3.5.5 Coordination and Cooperation in the Criminal justice system

Officers of the courts should cooperate and coordinate when it comes to indentifying a defect in the indictment. It is law that the prosecution have the duty to prove their case beyond reasonable doubt, but this should not mean that the defence aware of the defect which the prosecution has not spotted should hold back and not make an application to amend due to the intention of wanting the accused to be acquitted. It is through this effort of co operation and coordination that justice delivery can be at the core of the criminal justice system for the intention of the prosecution and the defence lawyer will be mutual, helping the courts make amendments to the indictment in good time.

It is not a hidden fact that the primary duty of lawyers is that of client representation, but it is also important to state that a lawyer has also been assigned a role of being a guardian of society's interests. These roles do sometimes conflict and a wise resolution for a lawyer is to look at the perception of the social interests involved and usually society's interests deal in minimizing

instances of injustice⁶⁷. Further, Kulusika⁶⁸ in his book, **Criminal law in Zambia**, mentioned that it is not only the judges who play an important role in realising criminal justice, the police, the prosecution and the defence lawyers also play a role.

This gives a clear picture of cooperation and coordination that is needed in order to have criminal justice, and by doing so the courts will exercise their powers to amend indictments more efficiently because a defect that has not being spotted by the prosecution will be raised by the defence for the common good of justice delivery.

3.6 Conclusion

In conclusion this chapter has shown that for the courts' powers to amend indictments to operate more effectively and efficiently, efforts should be made to control the operations. Until these recommendations are taken into consideration and dealt with by the government, the realization of their importance will not be appreciated. With these recommendation implemented, the courts' powers to amend indictments will be more functional, effective and efficient.

⁶⁷ Ted Finman and Vern Country man, *The Lawyer in modern society* (Boston: Little Brown and Co, 1966), 187.

⁶⁸ Simon Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: Unza Press, 2006), 14.

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