

**THE RELEVANCE AND ADMISSIBILITY OF EXPERT EVIDENCE IN  
CRIMINAL CASES IN ZAMBIA**

**BY**

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## DECLARATION

I, **CHILUFYA BORNIFACE** of computer No **29056764** do solemnly declare that this work entirely represents my own findings and I have not in any respect used any work produced or submitted by any person to the University of Zambia or any other institution without acknowledgement.

I therefore bear the responsibility for all the contents in this research paper.

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Signature........

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**THE RELEVANCE AND ADMISSIBILITY OF EXPERT EVIDENCE IN  
CRIMINAL CASES IN ZAMBIA**

Be accepted for examination in partial fulfillment of the requirements of the award of the Bachelor of Laws Degree of the University of Zambia. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the research regulations governing directed research essays.

**MRS ANNE CHEWE CHANDA**

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Date:.....

## **ABSTRACT**

The study investigated expert evidence, its relevance in criminal cases and its admissibility in the courts of law. The research was carried out amongst the key players in the criminal justice system such as the judicial officers, lawyers and law enforcement agencies such as the Zambia Police Service using questionnaires, interviews and discussions as well as other literature such as books and articles.

The study has revealed that expert evidence is very important in criminal proceedings in matters calling for specialized knowledge which are beyond the understanding of the court for both the court and the prosecution. Expert evidence in these matters has been found to assist the courts to make proper decisions. For the prosecution, it has been revealed that expert evidence is important for them to secure convictions of accused persons thereby fighting crime. It has also been revealed that expert evidence is only used by the court if it can assist them to arrive at a proper decision, the decision which the court may not arrive at as it lacks specialized knowledge in a matter before it.

In order for law enforcement agencies to secure convictions and thereby fight crime in these cases there is need for officers to be sensitized that every time there is a technical issue or scientific issue before courts, experts specialized in such matters must be called to testify otherwise failure to do so may lead to an accused person be acquitted. Further there is need to provide adequate training to experts of these law enforcement agencies so that they can be able to investigate the cases properly. The state has been urged to provide proper and adequate equipment to assist the law enforcement agencies to fight crime. Experts have also been urged to always provide accurate examination results so that some of the unnecessary acquittals which are being recorded by these agencies can be avoided by producing accurate results.

## **ACKNOWLEDGEMENTS**

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## **DEDICATION**

This research is dedicated to all who sacrificed for me both spiritually and finally especially my family. It has not been an easy journey and without my family support, I would not have managed to complete the work. I thank God for all of you.

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2. Evidence Act, chapter 43 of the Laws of Zambia

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## CHAPTER ONE

### 1.0 INTRODUCTION

So much has been written on the law of evidence in Zambia ranging from admissibility of confessions, understanding of DNA evidence and its uses in criminal justice, admissibility of illegally obtained evidence, the contribution of forensic science to the criminal justice system and many others. Hence the law of evidence is important in criminal proceedings in Zambia.

There are various categories of evidence and these include direct evidence, real evidence, best or original evidence, circumstantial evidence and opinion evidence also known as expert evidence.<sup>1</sup>

Expert evidence is one of the most important components of the law of evidence in Zambia. There are certain issues which cannot be determined without expert evidence for example issues to do with fraud, money laundering, ballistics, engineering, medicines just to mention a few.

Experts have been very instrumental in assisting the courts settle a variety of legal disputes. An expert in the legal process needs to possess sufficient specialized knowledge, skill, training or experience to enable him to supply information and opinion not generally available to the members of the public.<sup>2</sup>

An expert has been defined as one who has specialized knowledge by education, training, experience or skill<sup>3</sup>. As a general rule, opinion evidence is inadmissible, a witness may only speak of facts which he personally perceived, not of inferences drawn from those facts.

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<sup>1</sup>Rupert Cross and Nancy Wilkins, *Outline of the law of Evidence*, 5<sup>th</sup> edition (London: Butterworth's Publishers, 1980), p.20.

<sup>2</sup>Bill Doogue, "Expert evidence in criminal cases", volume 1 (01/09/2009), [http:// www. expert.mth](http://www.expert.mth) (accessed on 2/11/2011)

<sup>3</sup>John Hodgson, "The role of expert evidence. A paper presented to Law Enforcement Officers", 5<sup>th</sup> Commanders Annual Conference held at Kenya Defence and Security College, Nairobi, Kenya, 2004. p.12

To this general rule there is an exception, that is, an appropriately qualified expert may state his opinion on a matter calling for the expertise which he possesses.

In criminal cases there is a requirement that the evidence adduced in the courts of law must be beyond reasonable doubt. This can only be achieved when all relevant evidence is adduced including expert evidence, otherwise it would be unsafe for the court to convict an accused person without admitting all the relevant evidence as it was stated in the case of *Kalebu Banda v The People*.<sup>4</sup> In this case, Baron Deputy Chief Justice had the following to say “when we add to the misdirection and unsatisfactory features in this case the failure to obtain finger print evidence and place it before the court, we are satisfied that it would be unsafe to allow the conviction of the appellant.”

The use of experts has often been found to be very helpful and important in criminal cases which are calling for specialized knowledge, skill, training or experience. For example in cyber crimes, it is very difficult to convict a perpetrator without expert evidence because this is a sophisticated crime. It is only a person trained in computer software and hardware who can assist the court which has no knowledge of computer network system to arrive at a proper decision, otherwise a criminal may end up being acquitted on insufficient evidence.

It has been indicated that an expert can be used to show that the conclusion that the police are drawing is not right or is only one of the possible explanations for something happening. Using an expert is like using private investigations in criminal proceedings and when it is done it can have great benefit for the prosecution<sup>5</sup>.

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<sup>4</sup>(1977) ZR.169

<sup>5</sup>John Hatchard and Muna Ndulo, *Readings in Criminal Law and Criminology in Zambia* (Lusaka: Multimedia publications, 1994). p.14

The recent developments in Zambia have shown that there is need for expert evidence especially in offences termed “white-collar crimes” such as fraud, forgery, money laundering, corruption and other serious crimes such as murder and aggravated robbery. White-collar crimes have been seen to have negative effects on the economy of the country as the state loses huge sums of money. Aggravated robberies also pose a danger to the economy of the country as businessmen may be robbed of their resources by criminals and sometimes end up being killed in the process and because of this, individuals may not be free to do business for fear of being attacked.

### **1.1 STATEMENT OF THE PROBLEM**

The case of *R v Silverlock*<sup>6</sup> defined expert evidence as that evidence which is required in matters calling for special knowledge or technical skill such as questions of science and art. It was stated in this case that the court is obliged to admit such evidence as it lacks knowledge and skill to draw the proper inference from the information or data given. This case shows that expert evidence is very important in criminal proceedings.

It is for this reason that this research carries an investigation of what expert evidence is, what is its relevance or importance in criminal proceedings and the effect of its admissibility in the courts of law? The research further investigates why expert evidence is given a special status as compared to ordinary evidence.

### **1.2 OBJECTIVES OF THE STUDY**

The objectives of the study are to

- a. Investigate the relevance of expert evidence and its admissibility in the Zambian courts.
- b. Analyze the weight given to expert evidence in criminal cases.

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<sup>6</sup>[1894] 2 QB 766

- c. Investigate whether expert witnesses are different from other witnesses.
- d. Identify some of the institutions and how they operate in providing expert evidence in criminal cases in Zambia.

### **1.3 SPECIFIC RESEARCH QUESTIONS**

- a. Is expert evidence relevant in criminal cases in Zambia?
- b. What is the weight given to expert evidence in criminal cases?
- c. Is an expert witness different from other witnesses?
- d. How do the institutions involved in providing expert evidence in criminal cases in Zambia operate?

### **1.4 SIGNIFICANCE OF THE STUDY**

The study is very important and has come at the time when there are numerous cases in the courts of law which require the application of science or technical skill to resolve some legal disputes. It has been argued in the case of *R v Silverlock* that in matters calling for special knowledge or technical skill, the court is obliged to admit expert evidence as it lacks knowledge and skill to draw the proper inference from the data given and the failure to admit scientific evidence as was held in *Kalebu case* will give a suspect the benefit of doubt and may be the ground for appeal.

The research is being carried to show that the failure to provide expert evidence in criminal cases requiring specialized knowledge, skill, training or experience is fatal to the prosecution case and a criminal may end up being acquitted. For example in *Kalebu case*, the failure by the police to

take finger prints from the window and the door of the stolen taxi was held to be a dereliction of duty and the appellant was acquitted. The court held that “when finger print evidence has not been obtained in circumstances where there was a duty to do so, then an assumption favourable to the accused must be made”. The court stated that “favourable” in this context means “in favour of”.

This research is of value to the criminal justice system players such as the Zambia Police, the Anti Corruption Commission and the Drug Enforcement Commission as it intends to help reduce a number of unnecessary acquittals recorded by these institutions in the courts of law which can be avoided more especially if the cases before the court requires evidence of an expert to secure a conviction. The courts need to be assisted in these technical matters for them to arrive at proper decisions. This research is of great help to Law Enforcement officers who are charged with the responsibility of combating crime as it will assist them fight crime, for example, “white-collar” crimes such as corruption, money laundering, fraud, cyber crimes and other serious crimes. This research emphasizes to Law Enforcement Agencies that whenever there is a technical or a scientific matter before the courts of law which require specialized knowledge, skill or training or experience it must be a requirement that an expert witness be called to give evidence in order for them to secure a conviction. Otherwise failure to call experts in these technical fields may lead to a lot of unnecessary acquittals and the perpetrators may continue robbing the country of huge sums of money and thereby having a negative effect on the economy.

## **1.5 DEFINITION OF KEY TERMS**

For purposes of this research paper the following terms are used.

- a. **Evidence:** This include all the facts, documents, materials, objects, statements and any other legal means that maybe used to establish a fact in issue.<sup>7</sup>
- b. **Facts in issue:** These are the facts the prosecutor in criminal proceedings, must prove in order to succeed, together with any further facts an accused must prove in order to establish a defence.<sup>8</sup>
- c. **Expert evidence:** This refers to evidence given by a witness having special knowledge of the subject which assist the court to arrive at a conclusion on matters which the court itself does not usually have the necessary knowledge to decide.<sup>9</sup>
- d. **Direct evidence:** This refers to the facts that are actually perceived by a witness using one or more of the witnesses' five senses such as sense of sight, smell, hearing, feeling (touch) and taste.<sup>10</sup>
- e. **Witness:** One who gives or provides evidence in a case before a court in any suit or proceedings.<sup>11</sup>
- f. **Testimony:** This refers to the statement of a witness in court offered as evidence of the truth of that which is stated.<sup>12</sup>

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<sup>7</sup>Shukla L.Salwan and Uvarsh Nurang, *Legal Dictionary*, 21<sup>st</sup> edition, (New Delhi: Academic (India) Publishers, 2011),p.131

<sup>8</sup>Shukla L.Salwan and Uvarsh Nurang, *Legal Dictionary*, p145

<sup>9</sup>Shukla L.Salwan and Uvarsh Nurang, *Legal Dictionary*, p142

<sup>10</sup>Shukla L. Salwan and Uvarsh Nurang, *Legal Dictionary*, p113

<sup>11</sup>Sukla L.Salwan and Uvarsh Nurang, *Legal Dictionary*, p380

<sup>12</sup>Sukla L.Salwan and Uvarsh Nurang, *Legal Dictionary*, p148

**g. Relevance of evidence:** This refers to the degree of connection between a fact that is given in evidence and the issue to be proved.<sup>13</sup>

**h. Admissibility of evidence:** This refers to evidence which may be received by a trial court to aid the judge in deciding the merits of controversy.<sup>14</sup>

## **1.6 METHODOLOGY**

This research is a qualitative approach. The primary data has been collected using questionnaires, interviews and discussions. Lawyers, Advocates and Magistrates have been interviewed about this topic of opinion (expert) evidence, its relevance and admissibility in criminal cases. The secondary sources are from other literature such as books and articles of legal scholars. The internet has also been used to get latest information.

## **1.7 CHAPTER LAYOUT**

The layout of the research paper is as indicated below:

### **Chapter 1**

1.0 Introduction

1.1 Statement of a problem

1.2 Objectives of the study

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<sup>13</sup>Shukla L.Salwan and Uvarsh. Nurang, *Legal Dictionary*, 21<sup>st</sup> edition, (New Delhi: Academic (India) Publishers, 2011).p.106

<sup>14</sup>Sukla L.Salwan and Uvarsh Nurang, *Legal Dictionary*, p143

1.3 Specific Research Questions

1.4 Significance of the study

1.5 Definition of Key terms

1.6 Methodology

1.7 Conclusion

## **Chapter 2**

2.0 Introduction

2.1 The general nature of expert (opinion) evidence

2.2 Who is an expert witness?

2.3 Forensic evidence as a form of expert evidence in criminal cases

2.4 Are expert witnesses different from other witnesses?

2.5 The basis of opinion (expert) evidence

2.6 Applicability of expert evidence in criminal cases in Zambia.

2.7 Conclusion

## **Chapter 3**

3.0 Introduction

3.1 Relevance of expert evidence in criminal cases.

3.2 Admissibility of expert evidence in criminal cases

3.3 Conclusion

## **Chapter 4**

4.0 Introduction

4.1 Findings on expert evidence, its relevance and its admissibility in the court of law.

4.2 Evaluation of expert evidence, its relevance and its admissibility in criminal cases

4.3 Conclusion

## **Chapter 5**

5.0 Conclusion on expert evidence, its relevance and its admissibility in the courts.

5.1 Recommendations

## **1.8 CONCLUSION**

In conclusion this chapter has given the general introduction of the paper. It has been observed that the general rule of opinion (expert) evidence is that it is not admissible; a witness may only speak of facts which he personally perceived, not inferences drawn from those facts. The exception to this general rule is on matters calling for expertise in which a qualified person can give his opinion.

It has been observed that expert evidence is admissible only if it passes the ordinary tests of relevance and reliability. This chapter has also given the methodology, the layout of the essay, the definition of key words, statement of the problem and the significance of the study.

The next chapter discusses the general nature of expert (opinion) evidence, who is an expert witness?, forensic evidence as part of expert evidence, the differences between expert witnesses and ordinary witnesses, the basis of opinion evidence and the applicability of expert evidence in criminal cases in Zambia.

## CHAPTER TWO

### 2.0 INTRODUCTION

This chapter discusses the general nature of expert evidence, who is an expert witness?, forensic evidence as part of expert evidence, the differences between expert witnesses and ordinary witnesses, the basis of opinion evidence, and the applicability of expert evidence in criminal cases in Zambia. The chapter finally gives a conclusion on these issues.

### 2.1 THE GENERAL NATURE OF EXPERT (OPINION) EVIDENCE

The law of evidence, as used in judicial proceedings has several meanings, but there are two main senses of the word. Firstly, it refers to all facts, documents, materials, objects, statements and any other legal means that may be used to establish a fact in issue. Secondly evidence is the foundation of proof which leads to a conclusion as to the truth or falsity of alleged facts which are subject to inquiry. The Law of evidence deals with facts in issue. “Facts in issue” are those facts which the prosecutor must prove in order to succeed, together with any further facts an accused must prove in order to establish a defence. The English Evidence Law provides that whoever desires to any court to give evidence as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist<sup>15</sup>. This is the position in the area of evidence law in Zambia.

In the law of evidence, “opinion” means any inference from observed facts, and as the general rule witnesses must speak only to that which was directly observed by them. Evidence is divisible into that of ordinary witnesses and that of expert witnesses.

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<sup>15</sup>George Nokes, *Introduction to Evidence* (London: Sweet & Maxwell, 1962) P.214-215

Ordinary witnesses' evidence is that evidence given by a witness using his five senses of sight, smell, touch, hearing and taste.

Expert evidence on the other hand, is opinion evidence from an expert. For example a medical doctor may be called as a witness in the court to give his opinion on technical matter. Relevant opinions of an expert may be sought to establish, age, health, intoxication, insanity, hand writing, fraud and speed of a vehicle. A person may not give his/ her opinion on matters that the court considers call for special skill or knowledge of an expert unless he/ she is an expert in such matters. In the case of *Kasungani v The People*<sup>16</sup>, the court held that “the medical doctor was competent to classify the injuries sustained by a victim as grievous harm as he was specifically trained”. He was therefore able to assess the gravity of the injury sustained.

The law on expert (opinion) evidence in Zambia is adopted from English Common Law and is based on the presumption that it is possible for the court to draw a sharp distinction between opinions and the facts. It has been observed that there is a difference between legitimate expression of opinion and its application to a given set of facts. In the Ugandan case of *Uganda v. Sulaiman*<sup>17</sup>, Justice Allen stated that “the role of the court as laid down by the law of evidence is to evaluate the opinion evidence with reference to and in context of the totality of evidence and record its verdict”.

It is trite law that the law of evidence recognizes that, in so far as matters calling for special knowledge or skill are concerned, the court is not necessarily equipped to draw the right inferences from the facts stated by the witnesses.

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<sup>16</sup>(1978) Z.R. 260

<sup>17</sup>(1986) UGLR 865

In such cases a witness will be allowed to state his opinion with regard to these matters provided he is an expert in them, but where the matter is one which does not require specialized knowledge, expert evidence should not be admitted.

## 2.2 WHO IS AN EXPERT WITNESS?

In the case *Wakeford v Lincoln (Bishop)*<sup>18</sup> an expert was defined as one who has specialized knowledge by education, training, experience or skill. An expert witness therefore is a person who is a specialist in a subject, often technical, who may present his/her expert opinion without having been a witness to any occurrence relating to the lawsuit or criminal case.

Expert evidence is an exception to the rule against giving an opinion in trial, provided that the expert is qualified by evidence of his/ her expertise, training and special knowledge. If the expertise is challenged, the prosecution or the party calling the "expert" must make a showing of the necessary background through questions in court, and the trial judge has discretion to qualify the witness or rule that he/she is not an expert, or is an expert on limited subjects.

In criminal cases when the prosecution is calling an expert to testify they will indicate to the court the name of such an expert they intend to call and the court will put it on record.

Lord Russell in the case of *R v Silverlock*<sup>19</sup> defined an expert as one who by reason of his study or experience of a particular subject is especially skilled in that subject.

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<sup>18</sup>(1921) CJPC 174

<sup>19</sup>[1894] QB 766

Therefore an expert in the legal sense needs to possess sufficient specialized knowledge, skill, training or experience to enable him to supply information and opinions not generally available to members of the public.

Salwan and Narang in Academic's legal dictionary<sup>20</sup>, defines expert evidence as evidence given by a witness having special knowledge of the subject which assists the court to arrive at a conclusion on matters which the court itself does not usually have the necessary knowledge to decide. The dictionary definition of the term "expert" therefore demonstrates that the adjective has two relevant descriptions of expert that is (i) experienced; (ii) trained by study or practice, skilled or skilful.

In practice there is a broad discretion vested in the court to decide whether or not a person is capable of giving expert evidence. The two most important qualities are the possession of knowledge of specialization, and an ability to use that knowledge by virtue of training and/or experience in that field. In short an expert must be qualified and must satisfy the court that he possesses sufficient skill, training or experience to assist it.

The concept of what constitutes adequate qualification of an expert is elastic. It is not generally concluded that an expert must have had theoretical training or practical experience to give an opinion on a matter. The competence of the expert is a preliminary question for the judge and is one upon which, in practice, considerable laxity prevails<sup>21</sup>. The judge must decide in each case whether the witness is sufficiently qualified to assist the court.

Though the expert must be "skilled" by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

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<sup>20</sup>Shukla L.Salwan and Uvarsh Nurang, *Legal Dictionary*, 21<sup>st</sup> edition (New Delhi: Academic (India) Publishers, 2011) p139.

<sup>21</sup>Thomas Hodgson, *Expert Evidence: Law and Practice* (London: Sweet & Maxwell, 1990) p 312.

The common law position regarding expert evidence has been adopted in most jurisdictions and Zambia is not an exception. Uganda and Zambia share most of the principles on expert evidence. In the Ugandan case known as *Gatheru's case*,<sup>22</sup> the appellant was convicted by the Ugandan Supreme Court on two counts of being in unlawful possession of a fire arm and of unlawful possession of ammunition and was sentenced to death on each of these two counts.

A witness, whose competence as an expert in fire arms was not established gave evidence that the article in question was a "home-made rifle" Justice Law opined that; " The court has on several occasions said that when a trial court has to form an opinion upon the question whether a home-made gun or part thereof, is a lethal barreled weapon, it must have the assistance of expert opinion that we think that such special skill is not confined to knowledge acquired academically, but would also include skill acquired by practical experience, that in the present circumstances, even though a police officer employed an operational or investigation work, acquires a sufficient practical knowledge to qualify him as an expert, his competence as an expert should in all cases, be shown before his testimony is properly admitted. "

It has been shown that it is the function of the court to decide whether the witness has sufficient skill, training, qualification or experience to be able to give assistance.

According to Msebenzi Dumani<sup>23</sup>, the use of experts in criminal cases has been found to be very useful as they furnish the court with factual data, explain scientific principles to lawyers and the court in the course of trial.

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<sup>22</sup>(2001) UGLR 125

<sup>23</sup>Msebenzi Dumani, Aspects of Expert Evidence in Criminal Justice System with an emphasis on DNA. An Obligatory Essay submitted to the Faculty of Law, Nelson Mandela Metropolitan University, South Africa for the award of a Bachelor of Laws Degree , 2005, p 3- 4

## **2.3 FORENSIC EVIDENCE**

Forensic evidence is the common form of expert evidence in criminal cases in Zambia. According to Jason Woodland<sup>24</sup>, forensic evidence is the application of science to law. In Latin the forum was the parliament or court and the word has derived from that, meaning scientific matters relevant to the law. The fundamental principle upon which forensic science is based is known as Locard's principle of Exchange.

When talking about forensic evidence we are looking at the application of forensic science in the investigation of crime, particularly in relation to looking for physical evidence. The aims of forensic evidence according to Jason Wood are to provide a link in the chain of evidence i.e. suspect to victim and the suspect to scene of crime, to corroborate or refute a person's story and to provide answers to questions, such as "Is it a suicide or murder?"

Forensic evidence in Zambia is provided by forensic experts from the Zambia Police Service Forensic Department, the Food and Drug Laboratory Department under University Teaching Hospital, Pathologists and generally medical doctors. The Zambia Police Forensic Department is divided into ballistics section, scenes of crime, handwriting, pathology and toxicology.

### **(a) Handwriting Expert**

A Forensic handwriting expert examines documents presented to him and investigates who is the author of such documents. The documents for investigations usually are forged cheques and other disputed documents such as pay slips, bank withdraws slips, pay schedules just to mention a few.

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<sup>24</sup>Jason Woodland, Expert Witness Institute Newsletter: The use of experts in fraud cases (London: Warwick Court publications, 2012) p. 1

A handwriting expert examines a document and point out only similarities between the suspect's handwriting and the handwriting on the disputed or forged document.

In the case of *Chuba v The People*<sup>25</sup> the Supreme Court held that “an expert called for the prosecution to give expert evidence in handwritings is only to point out the similarities and draw conclusions from them”. This is the manner in which experts' evidence in matters of this kind ought to be presented to the court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of such matters, whether a particular writing is to be assigned to a particular person. The evidence of a handwriting expert (as of all other expert witnesses) is an opinion only and the matter is one on which the court has to make a finding. It was also held in this case that in addition to his opinion, the expert should place before the court all the materials used by him in arriving at his opinion so that the court may weigh their relative significance.

However the Supreme Court in *Chuba v The People* cited above condemned situations where experts make peremptory observations which amount to giving “a direction by the expert to the court”. For example the following statement by the expert was held to be improper: “These similarities (in handwriting) indicate with a strong degree of certainty that the writer of the specimen writing in column (b) is one and the same person who wrote the disputed cheque”. The Supreme Court went further and said that it would be wrong to assume otherwise. In addition Lord Hewart in *Wakeford v Lincoln (Bishop)* case already cited above said: “A handwriting expert is not a person who tells you, this is the handwriting of such and such a man.

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<sup>25</sup>(1986) ZR-123

But he is a person who, habituated to the examination of handwriting, practiced in the task of making minute of handwriting, directs attentions of others to things which he suggests are similar.”

Handwriting expert evidence is very important to the courts because an expert will use his specialized knowledge, training, skill or experience in handwriting and corroborate this with prosecution evidence to assist the court draw a conclusion as to whether a disputed or forged document was authored by the accused person. A handwriting expert is a key witness in fraud cases such as forgery and uttering a false document. A document forged may be a cheque, or a pay slip. A handwriting expert as he/she is giving evidence is expected to place before the court all the materials used by him in arriving at his opinion so that the court may weigh their relative significance. This is so because “white-collar crimes” are sophisticated and difficult to prove. The failure by the prosecution to call a handwriting expert in forgery case is fatal.

#### **(b) Ballistic Evidence**

A forensic ballistic expert was defined in the case of *James Mabuluku and Another v The People*<sup>26</sup>, as an expert who testify or give his opinion to the court, for example that the empty cartridge or live ammunitions were fired from the gun which fall within the definition of a gun capable of firing live ammunitions. Further in *Chansa v The People*<sup>27</sup>, the Supreme Court held that “A ballistic expert give evidence that the used round of ammunition was in his opinion fired from that very gun which is a barreled weapon and this opinion must be supported by any test material or photographs.”

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<sup>26</sup>SCZ Judgment No. 15 of 2010

<sup>27</sup>(1975) Z.R. 136

A ballistic expert is a very important witness in criminal cases of aggravated robberies falling under *section 294(2)* of the penal code<sup>28</sup>. This section provides for a maximum penalty of life imprisonment when it is proved that an accused person stole property using a lethal barreled weapon called a fire arm. A ballistic expert after examining a fire arm will give a report that will be able to assist the court to arrive at a conclusion, for example that the gun which was used in the robbery was a lethal barreled weapon from which some live ammunitions could be discharged, otherwise a lay person would think that the gun that was used in robbery is a toy gun when in fact it is a lethal gun. The failure to call ballistic experts by the prosecution to testify in these cases is fatal as the accused person may end up being acquitted by the court.

### **c) Medical Evidence**

Medical evidence is the evidence obtained from a medical doctor or a pathologist. A pathologist is a very important witness in homicide cases such as murder. In suspected murder cases a pathologist need to conduct a postmortem and then give his findings of the cause of death. A Pathologist will assist the court establish whether the accused person is guilty of murder or not. Otherwise it can be argued that a person died of a heart problem or from other natural cases.

The failure to produce a postmortem report in a murder case is fatal and an accused person may end up being acquitted despite him having caused the death of the deceased as we have seen in the case of *Kasumu v The People*<sup>29</sup>. Sometimes though in very rare cases, the accused person may be convicted even if there is no postmortem report to corroborate the prosecution evidence. This is so only where there is overwhelming evidence against the accused.

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<sup>28</sup>Chapter 87 of the Laws of Zambia

<sup>29</sup>(1978) Z.R. 252

In the case of *Chisampala v The People*<sup>30</sup>, Gardner DCJ said that “the impact which medical evidence can have on the trial makes it essential that it is as full and detailed as possible”. He further stated that a medical officer making a medical report in all such cases is requested to report on the extent of the injuries and whether they are consistent with the circumstances alleged. He indicated that it is very important that medical officers as busy as they may be should complete medical forms, which are to be used to assist courts, with the outmost care, bearing in mind that the duty of medical officers is to assist the courts in arriving at proper judgments.

#### **2.4 ARE EXPERT WITNESSES DIFFERENT FROM OTHER WITNESSES?**

As described by Meint-jes-Van der Walt<sup>31</sup>, “expert evidence differs from ordinary evidence on matters of fact in that it is not based on the use of untutored senses or on the observation of the average man, but on specialized training, experience out of common and or theoretical information of reconдите kind”.

It has been indicated that in the adversarial system, expert evidence is inherently different from other types of evidence. Gross<sup>32</sup> supports this view and develops his argument by considering each of the four stages that evidence passes through, namely: (a) the location and inducement of the witness to testify; (b) witness preparation; (c) presentation of evidence, and (d) the evaluation of the testimony.

In the ordinary course of events an expert witness need not have had any previous contact with the case. Expert witnesses differ from ordinary witnesses who are usually observational witnesses, in that the experts’ entire knowledge of the case might have been obtained after they have been enlisted as witnesses.

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<sup>30</sup>(1968) Z.R 26

<sup>31</sup>Meintjes Van der Walt, *The South African Law of Evidence*, 3<sup>rd</sup> edition, (London: Butterworth’s, 1986), P.43

<sup>32</sup>Simon Gross, “Expert Testimony” (Wisconsin Law Review, 1991) p 194

This means that litigation parties may be able to select those witnesses who will serve their case best. According to Mrs Nawa, the Principal State Advocate in the office of the Director of Public Prosecution, expert witnesses cannot be compelled to testify in court and they are usually reimbursed for their services rendered to the prosecution.

It has been indicated by Wigmore in the law of evidence<sup>33</sup> that because expert witnesses are paid witnesses, they can become professional witnesses, perfecting their courtroom performance by repeated practice in order to present their testimony and achieve the maximum effect. John Wigmore has further argued that a lay witness, by contrast, usually has no incentive in shading his or her testimony in favour of one or the other side and has pointed out that an expert is usually subjected to pressure to make findings favourable to the party instructing him.

Experts, like all witnesses, have a duty to state what is, or what they believe to be the truth about matters upon which their opinion or their recollection is being sought.

## **2.5 THE BASIS OF OPINION (EXPERT) EVIDENCE**

The opinion of an expert may be given on facts within his personal knowledge or on hypothetical facts. It is essential for the court to know what facts have been relied on as the basis of the opinion. For example bold statements of opinion may have very little value if any and the weight that is to be given to them will depend on the circumstances.

An expert may refer to data gathered from the experience of others, provided that he has the necessary qualifications to evaluate the data and to know where to find reliable sources of information. Opinion evidence that is not linked to the facts is a mere abstract theory and an expert cannot base his opinion, on for instance documents that are not before the court.<sup>34</sup>

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<sup>33</sup>John H. Wigmore, *Law of Evidence*, 3<sup>rd</sup> edition (Boston: Little, Brown and Company, 1983), p. 54

<sup>34</sup>Rupert Cross and Nancy Wilkins, *Outline of the Law of Evidence* (London: Butterworth's Publishers, 1980), p. 212

The law requires that expert witnesses support their opinions with valid reasons and this will depend much on the nature of the issue before the court and the presence of an attack on the opinion of the expert. If proper reasons are advanced in support of an opinion, the probative value of such an opinion will be strengthened.

## **2.6 APPLICABILITY OF EXPERT EVIDENCE IN CRIMINAL CASES IN ZAMBIA**

The cases cited above and those below show how expert evidence has been used in criminal cases to assist the courts in Zambia to arrive at proper decisions.

In *Chuba case* cited above, the Supreme Court of Zambia stated that “expert evidence provides the court with the necessary scientific criteria for testing his accuracy so as to enable the court to form its independent judgment, that is by applying these criteria to the facts proved in evidence.”

In *Sithole v State Lotteries Board*,<sup>35</sup> the Supreme Court pointed that “where there is in fact documentary or pictorial evidence which formed the basis of the expert’s opinion it is necessary for these documents to be properly proved and for the court to see for itself the various points on which the expert bases his conclusions so as to enable it arrive at a proper decision”. But there may be circumstances in which an expert, by reason of the very nature of the subject on which he is giving his opinion, is unable to present any documentary or pictorial evidence to the court, and in such cases the court has nothing more on which to rely to assist it in coming to a conclusion than the explanations and reasoning of experts.

In *Sithole case* the Supreme Court stated that when dealing with the question of ‘expert’ testimony, two interrelated but separate questions should be considered:

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<sup>35</sup>(1975) Z.R. 213

Firstly, whether the issue in question is such that the trier of fact may appropriately receive assistance in the form of expert evidence, and secondly, whether the witness at hand is an individual qualified to render the assistance.

## 2.7 CONCLUSION

The discussion above has shown the general nature of expert evidence and who an expert witness is and has also shown that an expert witness is different from an ordinary witness. It has been observed that expert evidence is opinion evidence given by an expert and an expert witness has been defined as one who has specialized knowledge by education, training, experience or skill.

It has been pointed out that witnesses who hold themselves as experts must give their opinion evidence in a professional manner that is devoid of bias. The court has set the standards of how experts should give evidence. For example in *Chuba case*, the Court said that an expert called by the prosecution to give expert evidence in handwritings is only to point out the similarities and draw conclusions from them and not to point out that these similarities have a strong degree of certainty that the writer of the specimen in column (b) is one and the same person who wrote the disputed cheque.

The discussion above has also revealed that expert evidence differs from ordinary evidence in that expert evidence is not based on what a person has observed, but on specialized training or experience. It has also been argued that, it is important for the court to know what facts have been relied on by an expert as the basis of his opinion before such an opinion is accepted.

The next chapter discusses the relevance of expert evidence and its admissibility in the courts of law.

## CHAPTER THREE

### 3.0 INTRODUCTION

In order to achieve a comprehensive understanding of expert evidence, this chapter discusses the relevance or importance of expert evidence and its admissibility in the courts of law.

The general rule governing the entire subject of evidence is that all evidence which is sufficiently relevant to an issue before the court is admissible and all that which is irrelevant is excluded<sup>36</sup>.

### 3.1 RELEVANCE OF EXPERT EVIDENCE IN CRIMINAL CASES.

The relevance or importance of expert or scientific evidence in criminal trials is to provide necessary evidence that seeks to secure a conviction. There has been an increasing use of forensic science by law enforcement agencies as a form of expert evidence in the fight against crimes. The relevance or importance of forensic evidence has been observed in criminal cases such as money laundering, fraud, forgery, aggravated robbery and murder just to mention a few.

In Zambia, the Anti Fraud Unit at Police Force Headquarters provides experts in fraud cases. By definition, cases involving fraud will involve some form of deception. It usually consists of misrepresentation or concealment of a material fact<sup>37</sup>. In fraud cases the authenticity and the truth of documents are often disputed. This requires a fraud expert to carry out investigations to ascertain whether a particular document contains false information or not. It is only after these issues have been determined by fraud expert that the court can arrive at a proper judgment.

It is important to say that the vast majority of business documents are created electronically and stored in that format only. These electronic documents can also be easily manipulated to change the content, or so that they appear to have been created earlier or later or by a different author.

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<sup>36</sup>Rupert Cross and Nancy Wilkins, *Outline of the law of evidence* (London: Butterworth's Publishers, 1980), p. 23

<sup>37</sup>Jason Wood, *The Expert Witness Institute News Letter* (London: Warwick court, 2012), p.1

The forensic information technology experts become important in this regard and are often called upon to examine these electronic documents suspected to have been manipulated and give their opinion. The forensic information technology expert in this regard assists the court determine whether the person accused of fraud is guilty or not. Without forensic fraud experts in fraud cases it is very difficult for the accused person to be convicted by the court.

Expert evidence has also been found to be very important in money laundering cases. For example for the prosecution to record convictions in money laundering cases there is need for professionally expert evidence in such cases. The term 'money laundering' is typically used to refer to any financial transaction that was meant to be kept secret, but was eventually found out<sup>38</sup>. In short money laundering is the act of hiding or concealing large amounts of money in the banking system that was earned through illegal activity such as drug trafficking, tax evasion just to mention a few<sup>39</sup>. In money laundering, illegal transactions appear legitimate and legal.

The money laundering process usually involves several steps that make it difficult to trace the original source of money. Some of these steps include transferring the money between bank accounts, breaking large amounts of money into small deposits. This process is usually planned and organized so that the criminal cannot be caught. Quite often, a criminal will use the internet as a tool to launder money. For example they will initiate a bank transfer from one account to their account and they will claim it as their money. The money launderer is a sophisticated criminal and can only be found guilty of laundering money if an expert witness in this area produces evidence that connect the accused to the crime as the one who initiated a bank transfer. The failure to produce such expert evidence makes it difficult to convict a money launderer and the criminal may end up being acquitted.

<sup>38</sup>Shukla L.Salwan and Uvarsh. Nurang, *Legal Dictionary*, 21<sup>st</sup> edition (New Delhi: Academic (India) Publishers, 2011) p.248

<sup>39</sup>Jason Woodland, *The use of experts in Fraud cases* (London: Warwick Court Publications, 2012) P.1

In Zambia the Anti- Money Laundering Unit of the Drug Enforcement Commission is charged with the responsibility of investigating money laundering cases.

The consequences of fraud and money laundering are the effects they have on society. For example when perpetrators of money laundering cases are not being convicted by the courts, money laundering cases will increase and because large amounts of money are tied up in the laundering process the economy of the country may be affected negatively.

Expert evidence of a pathologist has also been found to be very important in murder cases. *Section 200* of the penal code<sup>40</sup> provides that “any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”. The role of a pathologist in a murder case is to carry out a postmortem examination of the deceased body to ascertain the cause of death. A pathologist will give a report as to whether the deceased was physically murdered or died as a result of a natural death or heart attack or any other factors. In the case of *The People v Davies Mumeno*<sup>41</sup>, a pathologist postmortem report was an important document that connected the accused to the offence of murder and he was later convicted. The postmortem report indicated that the deceased died of multiple gunshot injuries which were inflicted on him by the accused person, thereby assisting the court to find the accused guilty of murder after examining all the evidence adduced by the witnesses. It is important to mention that in murder cases the pathologist evidence is given more weight than the evidence from ordinary witnesses. The case shows that where a pathologist’s evidence is in conflict with that of ordinary witnesses, usually the court relies on the evidence of a pathologist. The courts in Zambia have treated pathologist evidence in murder cases as mandatory and have acquitted accused persons in cases where there have been no postmortem reports. This was shown in *Kasumu v The people*.

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<sup>40</sup>Chapter 87 of the laws of Zambia

<sup>41</sup>(1990) Z.R. 14

Expert evidence has also been found important in forgery cases. According to *section 332* of the penal code<sup>42</sup>, forgery is defined as “the making of a false document with intent to defraud or to deceive”. A document is said to be forged if it is purported to be what in fact it is not. In forgery cases a handwriting expert is called to assist the court to determine whether the disputed document is forged or not. A handwriting expert will only point out the similarities between the accused person handwriting, say in column (a) to the handwriting in the disputed document, column (b), thereby assisting the court to arrive at a conclusion that the accused is the person who wrote the disputed document. In *Chuba v The People*<sup>43</sup>, a handwriting expert assisted the court to arrive at a conclusion that the writer of the specimen writing in column (b) was the same person who wrote the disputed cheque and the accused was convicted of forgery.

It has been observed from the above case that without a handwriting expert in a forgery case it is very difficult to convict a person for the offence of forgery.

Forgery cases have become rampant in Zambia today and if not addressed may have serious effects on the economy of the country. Forgery can only be reduced when the culprits are being convicted by the courts and this is possible by calling handwriting experts to testify against them. Ballistic expert witnesses have also been found to be very important in aggravated robberies involving the use of fire arms under *section 294(2)* of the penal code<sup>44</sup>. A ballistic is a person who is specialized in fire arms. He or she is able to classify the gun whether it is a lethal barreled weapon such an AK 47 riffle or an ordinary gun such as a greener that is used for killing rabid dogs.

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<sup>42</sup>Chapter 87 of the laws of Zambia

<sup>43</sup>(1986) Z.R. 123

<sup>44</sup>Chapter 87 of the Laws of Zambia

The ballistic expert will examine a fire arm that is presented to him and classify it whether it is a fire arm capable of firing live ammunitions or not.

For example when empty cartridges are found at the scene of the crime it is very difficult to tell whether they were fired from an AK 47 or a pistol or an ordinary gun. It is only a ballistic expert who can tell that the empty cartridges were fired from an AK 47 or an ordinary gun thereby assisting the court to arrive to a proper decision. For example his report can connect the suspect to the scene of crime after examining the live ammunitions or empty cartridge found on the scene with the gun found in the accused's possession. Otherwise the court itself may not come to that conclusion without being assisted by an expert. In *Ndumba v The People*<sup>45</sup>, the appellant was convicted for aggravated robbery after the ballistic expert testified that the two empty cartridges which were found on the scene of crime were fired by the appellant's pistol. Where there is no ballistic expert evidence in an aggravated robbery case involving a fire arm an accused person may be acquitted. The court in the case of *Kasanda and Another v The People*<sup>46</sup>, acquitted the appellant on the ground that the charge of aggravated robbery could not be proved beyond reasonable doubt as a ballistic expert was not called to examine a fire arm and the empty cartridges found on the scene.

Aggravated robberies are a great danger to society and if not reduced may have serious negative effects on the economy of the country. There are a lot of aggravated robbery cases taking place in Zambia and in some cases the victims end up being murdered in the process. Banks, Financial lending institutions, filling stations, shopping malls to mention a few have been targeted by armed robbers.

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<sup>45</sup>(1992) Z.R. 11

<sup>46</sup>(1986) Z.R. 210

In Zambia, the Zambia Police Service under the forensic department provides ballistic experts. These experts have been very instrumental in assisting the police in the fight against crime. The above discussion has shown that in technical or scientific fields experts are important to assist the court to arrive at a proper decision and are important for the prosecution to secure convictions.

However courts have treaded carefully in some instances with expert evidence and where the opinions of an expert are inconclusive the court will reject such expert evidence. In *Nkumbwa v The People*<sup>47</sup>, the Supreme Court rejected the expert evidence of a medical doctor on the ground that he made a casual examination instead of a scientific examination.

### **3.2 ADMISSIBILITY OF EXPERT EVIDENCE IN CRIMINAL CASES.**

As already stated an expert witness is there to assist the court to settle a variety of legal issues. For the court to admit evidence of an expert the expert evidence must be relevant, that is it must assist the court to come to a proper conclusion. The courts only admit information or opinions of experts in technical or scientific fields from which the court will not be able to draw inferences. If the court is able to draw its own inference on the matter before it then there is no need for the court to rely on expert evidence to make a decision.

This proposition led the House of Lords to develop the test for admissibility of the opinions of experts in the case of *Clarke v Ryan*<sup>48</sup> where the House of Lords held that “expert evidence is admissible by the courts if the expert is better qualified than the judicial officers to draw the inference”.

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<sup>47</sup>(1993) Z.R. 180

<sup>48</sup>[1901]2KB 215

In this case it was pointed out that to determine whether the expert is better qualified than the judicial officer to draw the inference the court will look at:

- (i) the relevant field of expertise of an expert witness
- (ii) the qualification of an expert witness
- (iii) the matter to which the material relates is not within the ordinary human experience – “common knowledge”

It was observed that if these three elements are satisfied then an individual can be said to be an expert in a particular field.

#### **(i) RELEVANT FIELD OF EXPERTISE OF AN EXPERT**

The case of *Clarke v Ryan*, defined a relevant field of expertise as a clearly organized branch of knowledge which is identifiable as a discipline in the social or physical science.

It was stated that as an expert provides his expertise on a particular matter he or she must give an opinion that is impartial and objective. This principle was also stated in *Field v Leeds City Council case*<sup>49</sup>, where Lord Woolf, the Master of Rolls, said that “for an expert to be qualified to give evidence as an expert he or she must be able to provide an objective, unbiased opinion on matters to which his or her evidence relates”.

#### **(ii) QUALIFICATION OF AN EXPERT**

Expertise could be gained from either a field of study or as a result of practical experience. It is generally assumed that the judge can sufficiently grasp the nature of the expert’s field of knowledge, relate to his own general knowledge and thus decide whether the expert has sufficient experience of a particular matter to make his evidence admissible<sup>50</sup>.

<sup>49</sup>[2001] CP LR 129

<sup>50</sup>John H. Wigmore, *Law of Evidence*, 3<sup>rd</sup> edition (Boston: Little, Brown and Company, 1983).p.231

This process involves an exercise of personal judgment on the part of the judge. The fact that an expert has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the judges' themselves<sup>51</sup>.

It has been argued that a person who acquires his knowledge professionally or through study or experience does not automatically become an expert. It is for the court to determine whether the witness has undergone such a course of special study, or has the experience, as will render him an expert in a particular subject<sup>52</sup>.

### **(iii) THE MATTER TO WHICH THE MATERIAL RELATES IS NOT WITHIN COMMON KNOWLEDGE.**

Expert witnesses are required in matters that go beyond the ordinary understanding of lay people. Experts' evidence will only be admissible in such matters where the court is incapable of forming a correct judgment without the assistance of an expert. For example where a person has been found dead without any physical signs to show that he was killed it is very difficult for the court to arrive to a decision that the deceased was killed by the accused because this is beyond its common knowledge. It is only when a postmortem examination has been conducted by the pathologist and given as evidence in the court that is when an accused person can be convicted of murder as it has been seen in *Kasumu v The People*. Otherwise an accused person may argue that the deceased person was not killed by him, but died from natural causes.

### **3.3 CONCLUSION**

The discussion above has shown that expert evidence has been found to play a significant and ever- increasing role in criminal litigations.

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<sup>51</sup> John H. Wigmore, *Law of Evidence*, 3<sup>rd</sup> edition, (London: Little, Brown and Company, 1940).p.653

<sup>52</sup> John H. Wigmore, *Law of Evidence*, 3<sup>rd</sup> edition, (London: Little, Brown and Company, 1940).p.654

For example it has been observed that there is an increasing trend towards greater use of and reliance on forensic science to provide the necessary evidence in the fight against crime. Forensic experts in cases such as money laundering, fraud, forgery, murder and aggravated robberies have been found to be very important and provide powerful tools in making sure that the culprits are convicted.

The discussion has also shown that it is not every opinion of an expert that is admitted by the court, but only relevant opinions of experts are admitted. In order for an opinion of an expert to be admitted by the court the opinion must be based upon his relevant field of his expertise, qualification and the matter to which the material relates must not be within ordinary common knowledge.

The next chapter discusses the findings obtained through the questionnaires, interviews, discussions and other literature about expert evidence, its importance and its admissibility in criminal cases.

## CHAPTER FOUR

### 4.0 INTRODUCTION

This chapter discusses the findings obtained through the questionnaires, interviews, discussions and other literature about the relevance of expert evidence and its admissibility in the courts of law. The chapter also gives the shortcomings of expert evidence.

### 4.1 FINDINGS ON THE RELEVANCE AND ADMISSIBILITY OF EXPERT EVIDENCE IN THE COURTS OF LAW

The research was conducted amongst the key players in the criminal justice system that is the Judges, Magistrates, Lawyers and the Zambia Police Forensic experts just to mention a few.

This research was conducted to investigate the importance of expert evidence and its admissibility in the court of law. The information below gives the views of the people about the importance of expert evidence and its admissibility in the courts of law.

#### (a) IMPORTANCE OF EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS

Mrs. Nawa, the principal state advocate in the office of the Director of Public Prosecution pointed out that expert evidence is the most important evidence in criminal cases. She indicated that in cases involving fraud, money laundering, forgery and other serious crimes such as aggravated robberies, murder and Causing Death by Dangerous Driving there is a mandatory requirement that expert evidence is produced before the court for the prosecution to secure a conviction. The Supreme Court in the case of *Kalebu Banda v The People*<sup>53</sup>

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<sup>53</sup>(1977) Z.R. 169

also dealt with this issue and made it obligatory that physical evidence which is capable of being examined scientifically has to be done because failure to carry out such an examination will give a suspect the benefit of doubt and the accused person may be acquitted.

This case has revealed that in offences where specialized knowledge of experts is required and the prosecution fails to bring an expert to testify on the matter before the court, the accused person may be acquitted.

Jason Woodland<sup>54</sup> in an article entitled “The use of expert evidence in fraud cases” has also shown that expert evidence is very important in fraud cases. He has said that in order for a person to be convicted for an offence of fraud there is need for professional fraud expert evidence.

Mrs. Nawa further pointed out that expert evidence is very important in assisting the courts arrive at proper decisions in matters that are beyond the understanding or knowledge of the court. She pointed out that in matters requiring specialized knowledge the court has given expert evidence more weight than ordinary evidence. The Supreme Court also pointed out in the case *Kasumu v The People*<sup>55</sup> that it depends on expert evidence to make sound decisions. The court said that where expert evidence has not been given in a matter requiring expertise, the accused person can be acquitted. She also stated that expert evidence is important because it is given by an expert witness who is a more reliable witness and is an independent person who gives his opinions based on his findings on a particular matter and that it is rare that an expert witness can be swayed to give false evidence.

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<sup>54</sup>Jason Woodland, The Expert Witness Institute Newsletter (London: Warwick Court, 2012), p.2

<sup>55</sup>(1978) Z.R. 252

Mrs. Nawa also pointed out that in cases where an accused person raises a defence of insanity or diminished responsibility it is important that experts are called to ascertain whether the person is really insane or has some abnormality of the mind. For example to determine insanity of an accused person, a psychiatrist will be called to examine the accused person and determine whether he or she has the disease of the mind.

Mr. Wilson Banda a private legal practitioner of Wilson and Cornhill legal practitioners based in Chingola also indicated that it is very difficult for the court to arrive at a good decision in matters calling for specialized knowledge without expert evidence. He indicated that it is in very rare circumstances that the court can convict an accused person in very serious cases without the assistance of experts.

He said that the only way an accused person can be convicted without expert evidence is in situations where there is so much overwhelming evidence against the accused person such that even if expert evidence was to be admitted it would still not influence the outcome of the case. An example of where an accused person was convicted without expert evidence was dealt with in the case of *James Mabuluku and Others v The People*<sup>56</sup> where the Supreme Court convicted the appellant despite the absence of ballistic expert evidence. The Supreme Court stated that the evidence adduced by the prosecution witnesses against the accused person was so overwhelming such that the absence of the ballistic evidence was not fatal to the final decision of the court.

Mr. Wilson Banda also pointed out that there has been a trend by the court to give more weight to expert evidence than ordinary evidence.

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<sup>56</sup>SCZ Judgment No.15 of 2010

He also said that in a situation where there is a conflict between the evidence of an expert and that of ordinary witnesses, expert evidence usually prevails and this is because an expert is considered as a person who has no interest to serve as opposed to an ordinary witness who may not speak the truth as he or she may have an interest to serve. He said that sometimes ordinary witnesses may be close relatives of the complainant and there is that possibility that they may not actually present matters before the court in a truthful manner until their testimonies are corroborated with expert evidence that is when the court can make a sound decision.

Mr. Ikechuku Iduma, the Principal Resident Magistrate for North Western Province pointed out that expert evidence is very important in criminal cases to assist the court to determine whether an accused person is guilty of the offence or not. He indicated that sometimes the prosecution witnesses may not bring out issues convincingly to clear a certain doubt and if an expert is not called to clear this doubt the court may acquit an accused person. He said that when an expert is called to testify before the court he or she has to stick to the findings on the matter.

Judge Makungu, the judge in charge at Kitwe High Court indicated that expert evidence is very important in criminal cases to assist the court to arrive at a proper decision. She pointed out that the court sometimes has been forced to acquit accused persons not that they have not committed criminal offences, but because the prosecution has failed to bring expert witnesses who are considered key persons to resolve certain matters which are beyond the knowledge of the court.

She indicated that in 2010 Kitwe High Court had 213 murder cases among other cases which were brought before it from some parts of Copperbelt and North Western province. She said that out of this total number of murder cases there were 32 cases where there were no postmortem reports from pathologists to corroborate the evidence of ordinary witnesses and as a result the

court was forced to acquit 30 accused persons due to inconclusive evidence. She pointed out that in cases where expert evidence is required and the prosecution fails to provide that evidence the courts have acquitted accused person as it has been observed in the *Kasumu v The People case* above. She said that the court in such instances will treat the prosecution to have failed to provide conclusive evidence against the accused person.

This clearly shows that expert evidence is very important in criminal proceedings to secure convictions of accused persons.

### **(b) ADMISSIBILITY OF EXPERT EVIDENCE IN THE COURTS OF LAW**

Mr Humphrey Mweemba, a Senior Legal Aid Counsel for North Western Legal Aid Board said that in order for expert evidence to assist the court to arrive at a proper decision that evidence must be accepted or admitted by the court. He said the evidence of an expert is only admissible by the court if it is relevant and reliable. Expert evidence is relevant when it provides assistance to the court to arrive at a decision. He said that the expert evidence is reliable if it is trustworthy and it will be relied on by the court to make a decision.

Judge Makungu also said that expert evidence is only accepted by the court where the matter before the court is beyond the knowledge or understanding of the court. She said that if the court is able to draw inferences from the evidence available before it without expert evidence, then it means that expert evidence in this regard is not important and even if it was accepted it would not influence the outcome of the decision. She pointed out that for expert evidence to be admissible it must provide the court with substantial assistance.

This issue was also dealt with in the case of *Clarke v Ryan*<sup>57</sup>, already cited, where the House of Lords held that “expert evidence is admissible by the courts if the expert is better qualified than the judicial officers to draw the inference”. According to this case the court will consider that an expert is better qualified than the judicial officer if he or she has expertise in the relevant field, has the relevant qualification of an expert and the matter to which his or her opinion is based on is not within common knowledge.

Lord Woolf MR, in his book, *Access to Justice*<sup>58</sup>, has indicated that it is not automatic that once expert evidence is given by an expert then it has to be accepted by the court. He said depending on its probative value the court may either accept it or refuse it. He says that the court will not accept expert evidence if its probative value is substantially outweighed by the dangers it will cause by admitting it.

She stated that it is the responsibility of the court before which the person is called to testify to determine whether the person qualifies as an expert or not. She said that in court the prosecutor will lead the person they call as an expert to answer certain questions such as his or her occupation, the qualifications that he or she possesses, and the experience that the person has in dealing with matters like the one before the court. The court from the answers given by the person will then determine whether he or she is an expert for the matter before it.

Some legal scholars like Thayer in the book, *The Law of Evidence in South Africa*<sup>59</sup> has said that in specialized areas of knowledge requiring expert evidence which are relevant to the determination of a disputed factual issue, experts in those fields should explain to the court their

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<sup>57</sup>[1901]2KB 215

<sup>58</sup>Lord Simon Woolf, *Access to Justice* (London: Butterworth’s Publishers, 2002), p 12

<sup>59</sup>Robert Thayer, *The Law of Evidence in South Africa* (Cape Town: Juta and Co. Ltd), p,124

opinions because the court is presumed to be unfamiliar with such areas. Some magistrates interviewed also said that it is important for expert evidence to be explained to the court to ensure that the courts do not draw erroneous inferences from the evidence before it.

Judge Makungu stated that expert evidence should not be taken to be irrelevant and inadmissible by the court by reason only that it relates to the credibility of a witness or a failure to adduce evidence. She stated that expert evidence is only irrelevant where the court does not need it to make a decision.

Despite the persons interviewed and legal scholars showing the importance of expert evidence in criminal cases, they also pointed out problems or shortcomings with expert evidence. The following are the shortcomings of expert evidence.

#### **4.2 SHORTCOMINGS OF EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS**

Mr. Humphrey Mweemba, senior legal aid counsel, North Western Province pointed out that in his opinion he does not think that experts are really assisting the court to make good decisions. He said that the experts called to testify before the courts on technical matters are not best experts at all. This view is supported by the Supreme Court case of *Kasumu v The People*<sup>60</sup>, where the appellant's conviction for murder was quashed because the prosecution expert witness who was called to give evidence in the murder case failed to produce a postmortem examination report to corroborate the evidence of ordinary witnesses.

Mr. Humphrey Mweemba indicated that most of the experts called by the prosecution to testify on certain matters are not qualified at all to give expert evidence.

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<sup>60</sup>(1978) Z.R. 252

He gave an example of a case of Causing Death by Dangerous Driving which he dealt with where an expert from the Road and Transport Agency who was called by the prosecution failed to produce a satisfactory motor vehicle examination report to assist the court determine whether the motor vehicle in question had some mechanical faults or the death of the deceased was caused negligently by the accused. He said that it was difficult for the court to arrive at a proper decision. The accused in this case was fined a lesser amount because it was difficult for the court to establish whether the accident was caused due to the negligence of the accused or it was because the motor vehicle had developed some mechanical faults.

Mr Wilson Banda, a private legal practitioner also pointed out that there are difficulties with expert evidence when it comes to ascertaining its relevance. He pointed out that there is no specific test for determining relevance of evidence. Thayer in the Law of Evidence in South Africa<sup>61</sup> has also pointed out that the law of evidence furnishes no test of relevance for admitting expert evidence. He has stated that the judge or the presiding officer determines what is relevant through the application of common sense reasoning which may have been shaped by his or her personal experience. He has noted that what is relevant will vary depending on the judge's culture, gender, background, social origin and age.

In addition Deslie, in the Law of Evidence<sup>62</sup> has also observed some difficulties with the concept of relevance of expert evidence. He has stated that the same piece of evidence may be logically relevant to more than one issue before the court and it is also possible that the same evidence may be admissible for one purpose but inadmissible in relation to a different purpose.

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<sup>61</sup>Robert Thayer, *The Law of Evidence in South Africa* (Cape Town: Juta and Co. Ltd, 2003), p, 36

<sup>62</sup>Lumbert Deslie, *The Law of Evidence*, 2nd edition (London: Sweet and Maxwell, 1989),p, 124

Mr. Wilson Banda of Wilson and Cornhill legal practitioners pointed out that the problem with expert evidence is that it is sometimes admitted too readily by the court. He said that there is too much reliance by the court on expert evidence and this he said may pose a great danger of wrongful convictions and wrongful acquittals. He said that too much reliance on expert evidence by the court may distort the court's understanding of the real facts. The Supreme Court decision in the case of *Kasumu v The People*, where it said that the court depends on expert evidence to make a good decision confirms Mr. Wilson Banda's view that there is too much reliance by the court on expert evidence.

Some magistrates and lawyers were also of the view that often scientific evidence even if it is not sound enough has not been opposed by defence counsel to address its flaws and they have argued that this has not assisted the court to arrive at a proper decision.

#### **4.3 CONCLUSION**

This chapter has revealed that expert evidence is very important in criminal proceeding to assist the court to make a good decision. The courts only require expert knowledge in matters calling for specialized knowledge that is beyond the knowledge or understanding of the court.

The importance of expert evidence for the prosecution is to secure convictions in criminal cases such as murder, forgery, money laundering and aggravated robbery just to mention a few. The cases cited above have revealed that in matters where experts are required and the prosecution fails to call experts, the courts have acquitted accused persons.

This chapter has revealed that for expert evidence to be admitted by the court it must be relevant. It is relevant where it will substantially assist the court to come up with a sound decision. The courts only admit expert evidence or opinions in scientific matters which are beyond its

knowledge or understanding. For the court to admit the opinion of a person called an expert, the person must show that he or she has expertise in the relevant field, he or she has the relevant qualification and the matter on which his opinion is based is not within the common knowledge.

This chapter has also indicated that there are some difficulties with expert evidence. Some of the difficulties are that expert evidence tends to influence the court to rely more on it than ordinary evidence and this has been argued to distort the facts of the case.

It has been revealed that it is difficult to ascertain what is relevant and what is not relevant. It has been said that the judge or presiding officer determines what is relevant through the application of common sense reasoning. It has been observed that the same piece of evidence may be logically relevant to more than one issue before the court and it is also possible that the same evidence may be admissible for one purpose but inadmissible in relation to a different purpose.

It has also been revealed that scientific evidence even if it is not sound enough the court has accepted it and the opposing advocates in most cases have failed to challenge its flaws.

The next chapter gives the final conclusion on this research. It also makes recommendations on some of observations and concerns raised on this topic during the discussions, interviews with judicial officers, lawyers and legal academicians.

## CHAPTER FIVE

### 5.0 INTRODUCTION

This chapter gives the final conclusion on this research. It also makes recommendations based on the findings obtained through questionnaires, interviews, discussions and other literature on this research.

### 5.1 CONCLUSION

The main purpose of this study was to show that expert evidence is very important in criminal cases requiring specialized knowledge, skill, training or experience and that the failure to provide expert evidence in technical or scientific matters is fatal to the prosecution case as the accused person may end up being acquitted.

The research has revealed that expert evidence is very important in criminal cases requiring specialized knowledge, skill, training or experience such as fraud, money laundering, forgery and other serious crimes like aggravated robberies, murder and many others.

It has been revealed that the importance of expert evidence in criminal cases for the prosecution is to secure convictions and failure to produce it may entitle the accused person to be acquitted as it was held in *Kalebu Banda v The People*<sup>63</sup>. It has been shown in *James Mabuluku v The People* cited above, that the only situations where an accused person may be convicted without expert evidence is where there is so much overwhelming evidence against the accused person that even if expert evidence was to be accepted by the court would still not influence the decision of the court.

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<sup>63</sup>(1977) Z.R. 169

In this case the Supreme Court stated that the absence of the ballistic expert evidence was not fatal to the prosecution case and the accused was convicted of murder.

The study has also revealed that there has been an increasing use of expert evidence by the prosecution in sophisticated crimes such as “white collar crimes” which include corruption, money laundering, fraud and cyber crimes just to mention a few. In these cases if there is no expert evidence it is very difficult to convict accused persons.

Expert evidence in matters requiring specialized knowledge or training has been found to be important to the courts to assist them arrive at proper decisions.

The research has also revealed that in scientific matters or technical matters, the court attach more weight to expert evidence than the ordinary evidence because expert evidence is given by an expert who is trained or who has special knowledge on a particular matter before the court. The other reason is that an expert witness is considered to be a more reliable witness than an ordinary witness because it is very rare that an expert can be influenced to give false evidence.

The study has also revealed that the courts relies more on expert evidence on technical matters than ordinary evidence to make good decisions. This view has been supported by the case of *Kasumu v The People*<sup>65</sup> where the Supreme Court stated that “the courts depend on expert evidence to arrive at proper decisions”.

The study has also revealed that in order for expert evidence to be used by the courts, it must be found relevant to the matter before it. Expert evidence has been found to be relevant where it provides the court with substantial assistance to arrive at a proper decision.

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<sup>64</sup>SCZ Judgment No.15 of 2010

<sup>65</sup>(1978) Z.R. 252

It has been revealed that for the evidence of an expert to be admissible it must be shown that the expert is better qualified than the court to draw the inference. It has been pointed out that a person qualifies as an expert if he or she has expertise in the relevant field, has a relevant qualification and if his opinion is not based on common knowledge. This was the decision of the House of Lords in the case of *Clarke v Ryan*<sup>66</sup>.

The study has also demonstrated that expert witnesses are different from ordinary witnesses in that expert witnesses do not give evidence based on what they have observed with their own five senses of sight, hearing, touch, taste and smell, but give evidence based on specialized knowledge, training, skill or experience.

The study has also revealed that since the court is presumed to lack knowledge in matters calling for specialized knowledge it is important that when experts give their opinions they should be able to explain them fully to the court to ensure that the court does not draw erroneous inferences from the evidence before it.

The research has revealed that some of the institutions providing expert evidence in Zambia are the Zambia Police Forensic unit providing experts in ballistics evidence, handwriting evidence and toxicology. The Drug Enforcement Commission provides experts in money laundering cases and medical doctors and pathologists give expert evidence in medical cases such as murder.

## **5.2 RECOMMENDATIONS**

As it has been mentioned above, expert evidence is very important for key players in the criminal justice system.

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<sup>66</sup>[1960] 130 CLR 486

The key players in the criminal justice system are the judiciary and the Law Enforcement Agencies such as the Zambia Police Service, the Anti corruption Commission and the Drug Enforcement Commission who are charged with the responsibility of fighting crime.

The Law Enforcement Agencies fight crime by making sure that the perpetrators of crimes are convicted. In sophisticated cases this is only possible when experts are called to testify on such matters before court. The failure to provide expert evidence in matters requiring specialized knowledge may lead to accused persons be acquitted by the court. To avoid unnecessary acquittals in these cases there is a requirement that expert evidence is provided whenever it is required in the matters before the court. In order for law enforcement officers to fight crime effectively in sophisticated or technical matters the following issues needs to be done.

#### **5.2.1 Sensitization of law enforcement officers**

In order for law enforcement officers to secure convictions and thereby combat crime, there is a need to ensure that experts are called to testify in all technical or scientific matters before the courts. Otherwise failure to do so may entitle an accused person to be acquitted which may be avoided if an expert is called to testify.

There is therefore the need to sensitize the law enforcement officers of the importance of expert evidence in matters calling for specialized knowledge which are beyond the understanding of the court.

#### **5.2.2 Adequate training**

In certain criminal cases such as cyber crimes, money laundering and other sophisticated crimes which are so technical, the law enforcement agencies have been facing a lot of challenges to deal

with such cases as they have no qualified persons to investigate them. This was revealed by Mr. Biemba Musole, the Director Criminal Investigations Officer at the Zambia Police Service Headquarter under which forensic section falls. He pointed out that these officers have not undergone into advanced training to deal with crimes such as cyber crimes, computer fraud which have become so rampant.

Having this in mind, it is therefore recommended that there is need to adequately train law enforcement officers to cope up with the new technological advancements as criminals are taking advantage of the new technological advancements to commit these crimes.

### **5.2.3 Need to produce accurate examination results.**

It has been observed that sometimes evidence that is being given before the courts by experts is not convincing enough to the court and the accused persons have ended up being acquitted. This has been found so due to the failure by experts to produce accurate examination results.

For example in *Chisampala v The People*, the Supreme Court observed that the report that was given by a medical doctor on the case of assault was of very little assistance to the court as it did show that the medical report was consistent with the alleged offence of assault.

There is therefore the need for experts to produce accurate examination results to avoid unnecessary acquittals which can be avoided if accurate examination results are produced before the courts.

### **5.2.4 Provision of proper and adequate equipment**

In cases requiring specialized knowledge such as cyber crimes, fraud, money laundering and many others cases, experts usually will need to have proper equipments such as computers and

other equipment to carry out their investigations effectively which in most cases not available to the law enforcement agencies and it has been difficult for these agencies to fight crime.

For example in solwezi there was a murder case that required the use of DNA machine to analyze the DNA of the deceased and that of the accused person so that the accused person can be connected to the crime. The samples were collected from the deceased and the accused person for DNA analysis. These were sent to Zambia Police forensic department who later sent the samples to South Africa since in Zambia there are no machines to conduct DNA analysis. Before the samples could even reach South Africa the samples got rotten this is because the samples were not properly stored and this was attributed to lack of proper storage facilities. This was going to be the only evidence available for the prosecution to connect the accused to the crime of murder. But since the evidence got destroyed the accused person was acquitted for lack of evidence against him.

There is therefore a need by the state to provide the law enforcement agencies with proper equipments such as DNA analysing machines and proper storage facilities to help them carry out their investigations properly so that they can be able to fight crime.

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