



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

Trial Monitoring of People v. Miti et al.

(ZAMBIA 2018)

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TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE



ABOUT THE AUTHORS

The **Columbia Law School Human Rights Clinic** works to advance human rights around the world and to train the next generation of strategic advocates for social justice. The clinic works in partnership with civil society organizations and communities to carry out human rights investigations, legal and policy analysis, litigation, report-writing and advocacy.

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice** focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, religious minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

EXECUTIVE SUMMARY



Between September and December 2018, TrialWatch monitored the trial of six activists in Zambia, who were arrested and charged under the Public Order Act in connection with an anti-corruption protest they organized in 2017. On December 21, 2018, the judge dismissed the charges and acquitted all six defendants. This trial was monitored by Clooney Foundation for Justice's (CFJ) TrialWatch partner Columbia Law School Human Rights Clinic.

TrialWatch Advisory Board Member Professor Beth van Schaack assigned this trial a grade of C.

Grade: C

This grade is based upon the fact that while the judge generally adhered to core fair trial and procedural principles, the charges in this case should never have been brought—or, if they were brought, should have been immediately dismissed once the prosecution realized that the police did not adhere to Zambian law in attempting to prevent the planned demonstration or in arresting the defendants. There are, moreover, slight concerns with the length of the proceedings and the multiple continuances sought by the prosecution, particularly given how flimsy the prosecution's case turned out to be.

To be sure, the defendants were ultimately—and appropriately—acquitted of the charges against them; however, they had this indictment hanging over them for many months, unnecessarily. Although the trial itself was generally fair, and Judge Mwaka Chigali Mikalile is to be commended in this regard, the proceedings were infected with prosecutorial misconduct in pursuing spurious charges based upon patently insufficient evidence.

BACKGROUND INFORMATION



A. POLITICAL & LEGAL CONTEXT

Zambia is a constitutional republic governed by a democratically-elected president. Zambia has ratified the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR),¹ among other human rights treaties, both of which protect freedom of speech and assembly² and prohibit discriminatory state action on the basis of political opinion.³ Despite Zambia's reputation as a stable democracy, human rights organizations have called attention to a worrisome slide towards authoritarianism, as evidenced by crackdowns on free speech and public opposition activities.⁴ In recent years, Zambia's human rights record has been marred by concerns over the use of arrests, selective prosecutions, and arbitrary detention, most notably against critics of the government and/or the ruling party, the Patriotic Front.⁵

In particular, and as documented by several international human rights organizations, the current Zambian government has significantly curbed the right to freedom of speech, threatening or punishing individuals who speak out against the government or participate in public protest.⁶ As a result, in 2018, Freedom House dropped Zambia's score on the ability of opposition parties to gain power through elections, citing restrictions on opposition events and the harassment of party leaders through arbitrary arrests and "trumped up charges."⁷

¹ Zambia ratified both treaties in 1984.

² See International Covenant on Civil and Political Rights (ICCPR), art. 19, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [ICCPR]; African Charter on Human and Peoples' Rights, arts. 9-11, Oct. 21, 1986, U.N.T.S. 1520 (1988) [Banjul Charter]. For additional information regarding the political context in Zambia, see also Alfred Magagula, "Update: The Law and Legal Research in Zambia," Sept. 2014, available at <http://www.nyulawglobal.org/globalex/Zambia1.html>.

³ See ICCPR art. 2; Banjul Charter art. 2.

⁴ Ernest Chanda, "How to Gut a Democracy in Two Years," *Foreign Policy*, Aug. 3, 2017, available at <https://foreignpolicy.com/2017/08/03/how-to-gut-a-democracy-in-two-years-zambia-state-of-emergency-lungu/>.

⁵ Amnesty International, *Zambia 2017/2018*, available at <https://www.amnesty.org/en/countries/africa/zambia/report-zambia/>; see also U.S. Department of State, *Country Reports on Human Rights Practices for 2017, Zambia*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dliid=277061>.

⁶ See, e.g., Front Line Defenders, "Creeping Towards Authoritarianism?," Nov. 14, 2018, available at <https://www.frontlinedefenders.org/en/statement-report/creeping-towards-authoritarianism>.

⁷ See Freedom House, *Zambia Profile*, available at <https://freedomhouse.org/report/freedom-world/2018/zambia>.

Many of the arrests and charges relating to free expression and opposition activities have arisen under the 1955 Public Order Act.⁸ The Act provides:

*Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years.*⁹

For instance, in 2017 and 2018, Amnesty International reported that government authorities used the Public Order Act to crack down on critics—including human rights defenders, journalists and opposition political party members—through prosecutions and arrests involving the use of “unnecessary and excessive” force against protestors.¹⁰ Documenting the frequent and increasing arrests of human rights defenders, Front Line Defenders noted that the Public Order Act “has been interpreted by the government and police to give them wide latitude to silence critics and target civil society; reform is badly needed, but unlikely given the ‘capture’ of state institutions by the ruling party.”¹¹

These arrests and crackdowns on opposition figures are occurring in a context in which the President of Zambia, Edgar Lungu, has made public statements signaling that judges should not seek to check the executive. For example, in November of 2017, President Lungu warned judges not to block his planned run for reelection in 2021, cautioning them against “following Kenyan judges who, in September, had ruled to annul the results of Kenya’s presidential elections.”¹²

⁸ Mwai Daka, *Open Democracy*, “Zambia’s Public Order Act 1955 and its impact on political participation,” April 9, 2018, *available at* <https://www.opendemocracy.net/en/zambia-s-public-order-act-1955-and-its-impact-on-political-participation/>; Amnesty International, Zambia 2017/2018, *available at* <https://www.amnesty.org/en/countries/africa/zambia/report-zambia/>; *Lusaka Voice*, “Bloggers of Zambia concerned with the arrest of a journalists,” Sept. 17, 2018, *available at* <http://www.lusakavoice.com/2018/09/17/bloggers-of-zambia-concerned-with-the-arrest-of-a-journalists/>

⁹ Republic of Zambia, Public Order Act (1955), Sec. 127.

¹⁰ Amnesty Int’l, *supra* note 5; *see also* *Lusaka Times*, “Police Used Excessive Force to Arrest HH and Five Others—Amnesty International,” Feb. 27, 2018, *available at* <https://www.lusakatimes.com/2018/02/27/police-used-excessive-force-arrest-hh-five-others-amnesty-international/> (discussing arrest of opposition leader Hakainde Hichilema); Front Line Defenders, *supra* note 6; *Al Jazeera*, “Zambia Arrests 133 Protesters after Contested Election,” Aug. 16, 2016, *available at* <https://www.aljazeera.com/news/2016/08/zambia-arrests-133-protesters-contested-election-160816080236912.html>; Mwai Daka, *Open Democracy*, “Zambia’s Public Order Act 1955 and its Impact on Political Participation,” Apr. 9, 2018, *available at* <https://www.opendemocracy.net/en/zambia-s-public-order-act-1955-and-its-impact-on-political-participation>.

¹¹ Front Line Defenders, *supra* note 6, at 5.

¹² Amnesty Int’l, *supra* note 5.

Concerns have also been expressed about Zambia's restrictions on freedom of expression in the context of Zambia's 2017 Universal Periodic Review (UPR) before the U.N. Human Rights Council. The United Nations country team submission to Zambia's UPR noted that the Public Order Act had been used "to control and prevent access to public space rather than provide for the safe use of that space."¹³ The United Nations Educational, Scientific, and Cultural Organization (UNESCO) also recommended the decriminalization of defamation and the enactment of a freedom of information law.¹⁴ And in their submissions to the Council, a range of international and domestic stakeholders—including the Zambian Human Rights Commission—highlighted the government's overreliance on criminal defamation laws and the Public Order Act, accused the government of being intolerant to criticism, and highlighted its increased hostility towards various media organizations, human rights defenders, and civil society activists.¹⁵ In particular, these organizations identified the government's ownership of media outlets, its closure of rival media houses,¹⁶ and its repeated use of the Public Order Act to harass and arrest members of the opposition political party.¹⁷

While these concerns were not new (some had been raised in the 2012 UPR recommendations),¹⁸ respect for freedom of assembly and expression in Zambia has not improved—and appears to have deteriorated—since the 2016 general election.¹⁹ In its final report, a number of members of the UPR Working Group recommended that Zambia reform its Public Order Act and instruct its law enforcement agencies to apply the Act without political bias.²⁰ Other members also called upon Zambia to ensure that freedom of association and the right to peaceful assembly are respected and protected²¹ and that journalists, human rights defenders, and activists can operate without fear of persecution, harassment, or intimidation.²²

B. THE CASE: "42-FOR-42"

It is against this context that the trial of six anti-corruption activists occurred. On September 29, 2017, the six (Fumba Chama, a.k.a Pilato, Laura Miti, Sean Tembo, Bonwell Mwewa, Lewis Mwape and Mika Mwambazi) had organized a public

¹³ Human Rights Council, Compilation on Zambia, Report of the Office of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/WG.6/28/ZMB/2, Aug. 28, 2017, at ¶ 32.

¹⁴ *Id.* ¶ 30.

¹⁵ Human Rights Council, Summary of Stakeholders' Submissions on Zambia, U.N. Doc. A/HRC/WG.6/28/ZMB/3 (Aug. 19, 2017), at ¶¶ 40, 44.

¹⁶ *Id.* ¶¶ 42, 13.

¹⁷ *Id.* ¶ 42.

¹⁸ *Id.* ¶ 39.

¹⁹ *Id.* ¶ 11.

²⁰ Human Rights Council, Report of the Working Group on the Universal Periodic Review: Zambia, U.N. Doc. A/HRC/37/14, Jan. 8, 2018, at ¶ 129.4 (Norway), ¶ 131.70 (Canada), ¶ 131.73 (France).

²¹ *Id.* ¶ 131.67 (United States); ¶ 131.69 (Ireland); ¶ 131.71 (United Kingdom).

²² *Id.* ¶ 131.81 (Finland); 131.82 (Netherlands).

demonstration before the National Assembly of Zambia to protest the Zambian government's alleged misuse of funds—in particular, the procurement of 42 fire trucks at a cost of \$42 million. Fumba Chama (Pilato) is a famous hip-hop musician whose music often tackles political issues, such as public corruption. Laura Miti is the director of the Alliance for Community Action, an organization devoted to promoting the responsible and accountable management of public resources. Sean Tembo is party president for the opposition group, Patriots for Economic Progress. Lewis Mwape is the Executive Director of the Zambia Council for Social Development, which works on sustainable, socio-economic development in Zambia; and Bornwell Mwewa and Mika Mwambazi are both civil society activists in Zambia. This case was widely watched in Zambia due to the prominence of the defendants and its potential broader implications for the protection of freedom of expression in Zambia.

The defendants' demonstration was scheduled to coincide with the National Assembly's annual budgetary review. In advance of the protest and in keeping with Zambian law, the organizers sent a letter to the police informing them of the intent to gather outside the National Assembly building. This letter provided additional details about their intentions:

[W]e wish to hold this demonstration on Friday, 29 September, 2017 from 14 Hours to 16 Hours . . . The procession will take the form of members of civil society and ordinary citizens peacefully holding up placards on the side of the road leading up to Parliament . . . Members of Parliament proceeding to the house will not in any way be disturbed.²³

Three days before the demonstration and two days after the date on which the authorities were supposed to respond (according to the law),²⁴ the police replied that September 29 was not a convenient date, and urged the protesters to choose an alternate date.²⁵ The police did not, however, suggest an alternate date and therefore the organizers chose to proceed on the basis that they had complied with the law, which required the government to reply in timely fashion and offer alternatives in order to preterm a protest, and therefore the government had no legal basis for preventing the demonstration.

²³ See Letter from Alliance for Community Action, to the Commissioner of Police, Lusaka Province, Re: Notice to Hold Peaceful Public Demonstration at Parliament of Zambia, Sept. 20, 2017 (see Annex).

²⁴ Resident Doctors Association of Zambia v. Attorney General (SCZ Judgment No. 12 of 2003), [2003] ZMSC 31 (Oct. 27, 2003) (Zam.). After litigation, the Public Order Act now requires the police to inform organizations of a public meeting, procession or demonstration if they cannot adequately police the event *at least five days* before the event and requires that the police propose an alternative day and time for the event. The Public Order Act, Sec. 5(6).

²⁵ See Letter in Monitor's Notes (in Annex).

On September 29, 2017 (the date of the demonstration), the police detained the six organizers before the protest began as they approached the exterior of the National Assembly building. They were held for approximately ten hours before they were released on their own recognizance or on bail.²⁶ In December 2017, Pilato fled to South Africa after receiving death threats from supporters of the Zambian ruling party over his song “*Koswe Mumpoto*” (“Rat in the Pot”), which was interpreted as being critical of President Edgar Lungu and his ministers.²⁷

C. PRE-TRIAL PROCEEDINGS

In January 2018, while Pilato was in South Africa, Mr. Dennis Manda of the National Prosecution Authority filed formal charges against the six organizers for “disobedience of lawful orders contrary to section 127 of the Penal Code Chapter 87,” the penalty for which is up to two years in prison.²⁸ The charge sheet specified that the defendants had disobeyed “a lawful order to stop demonstrating at Zambia National Assembly” given by the Chief Inspector Anthony Phiri.²⁹ The prosecutor set the date of the first hearing of all six defendants for January 22, 2018, in the Magistrate Court of Lusaka in Lusaka, Zambia, before principal magistrate judge Mwaka Chigali Mikalile.³⁰ The six defendants were all represented by a well-known private attorney, Keith Mweemba, who appeared on their behalf at the first hearing and thereafter.

The first hearing was on January 30, 2018, after Pilato had left Zambia for safety in South Africa. On February 5, 2018, the Magistrate issued a bench warrant for Pilato on account of his failure to appear for the first hearing.³¹ Police arrested Pilato at Kenneth Kaunda International Airport on his return to Zambia in May 2018. After

²⁶ Teldah Mawarire & Laura Miti, *Al Jazeera*, “Corruption in Zambia: 42 fire trucks for \$42m,” June 23, 2018, available at <https://www.aljazeera.com/indepth/opinion/corruption-zambia-42-fire-trucks-42m-180620084648448.html>.

²⁷ *Channel 24*, “Activist Musician Who Fled to South Africa Arrested as he Arrives Home in Zambia,” May 17, 2018, <https://www.channel24.co.za/Music/News/activist-musician-who-fled-to-south-africa-arrested-as-he-arrives-home-in-zambia-20180517>.

²⁸ Penal Code Act, Cap. 87 (2005), § 127 (Zam.) (“Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years.”), available at https://zambialii.org/zm/legislation/consolidated_act/87.

²⁹ See Charge Sheet in Monitor’s Notes.

³⁰ Magistrates’ courts are subordinate courts with limited jurisdiction in civil and criminal cases. More information about the Zambian judicial system and their jurisdictions can be found at http://saipar.org/wp-content/uploads/2013/10/CHP_03_Law_in_Zambia.pdf.

³¹ *Zambian Observer*, “Magistrate Issues Bench Warrant against Pilato,” Feb. 5, 2018, available at <https://www.zambianobserver.com/magistrate-issues-bench-warrant-against-pilato/>.

spending three nights in jail, he was reportedly released on bail, set at \$3,000, on May 21, 2018.³² All six accused pleaded not guilty on September 24, 2018.³³

D. TRIAL PROCEEDINGS

The criminal proceedings in the case began on January 22, 2018, and continued over several months with several postponements, most initiated by the prosecution. Under Zambian law, at this first stage in the proceedings, the prosecution is obliged to demonstrate that there is a “case to answer.”³⁴ In other words, and in the words of the judge, “if the accused elected to remain silent could a reasonable tribunal properly directing itself convict the accused on the evidence so far before court?”³⁵ If the court finds the prosecution has made out a case to answer, the case proceeds to a full trial. If not, it is dismissed.

Over the course of this phase of the case, the prosecution presented seven witnesses in an effort to establish sufficient evidence that the defendants had breached the Public Order Act. The magistrate conducted two hearings in June and August of 2018, at which the prosecution proffered the testimony of a police officer and the deputy chief of police. Columbia Law School Human Rights Clinic monitors or their local partners observed the next three proceedings in-person. These occurred on September 24, November 29-30, and December 21, 2018. A brief summary of the three monitored hearings follows.

September 24, 2018: Prosecution Examination of Witnesses

At the hearing on September 24, 2018, the prosecution conducted a direct examination of three witnesses: (1) a police officer who was present at the demonstration, (2) a principal clerk for public and international relations at the National Assembly, and (3) a National Assembly security guard. Defense counsel cross-examined each of the witnesses. The trial monitor noted that in a magistrate court, defense counsel does not know who will be testifying until the proceedings begin. This hearing lasted about three hours, and the trial monitor noted that approximately 35 people attended the hearing, which was open to the public.

³² See Sarah Smit, *Mail & Guardian*, “Exiled Zambian activist-rapper arrested in Lusaka,” May 16, 2018, available at <https://mg.co.za/article/2018-05-16-exiled-zambian-activist-rapper-arrested-in-lusaka>; *Lusaka Times*, “Pilato Returns Home, Gets Arrested at the Airport,” May 17, 2018, available at <https://www.lusakatimes.com/2018/Legal/05/17/pilato-returns-home-gets-arrested-at-the-airport/>; Amnesty Int’l, “Activist Released on Bail, Set to Stand Trial,” June 7, 2018, available at <https://www.amnestyusa.org/urgent-actions/urgent-action-update-activist-released-on-bail-set-to-stand-trial-zambia-ua-94-18/>.

³³ See Amnesty Int’l, “Zambia: Trial of Activists for Protesting Government Spending an Affront to Justice,” Sept. 24, 2018, available at <https://www.amnesty.org/en/latest/news/2018/09/zambia-trial-of-activists-for-protesting-government-spending-an-affront-to-justice/>.

³⁴ Gov’t of Zambia, Criminal Procedure Code Act, Ch. 88 Sec. 222-23.

³⁵ *The People v. Laura Miti et al.*, Ruling, SSPB/017/2018, Dec. 21, 2018, at R2.

November 29-30, 2018: Prosecution Examination of Witnesses Continues

At the hearing on November 29, 2018, the prosecution called its last two witnesses: (1) a traffic officer who had been tasked with delivering the denial of the permit application for the protest back to the office of the Alliance for Community Action and (2) the Detective Chief Inspector based at Emmasdale Police Station, who formally charged the individuals when they were brought to this station upon arrest. The prosecution conducted a direct examination and defense counsel cross-examined each of the witnesses. The hearing lasted around one and a half hours.

On November 30, 2018, defense counsel continued the cross-examination of the Chief Inspector, which lasted for approximately half an hour. Afterwards, the judge ordered that the parties' written submissions be filed on or by December 10, 2018, and stated that her ruling on whether the prosecution had presented a case to answer would be delivered on December 21, 2018.

December 21, 2018: Judgment

At the final hearing, the Magistrate delivered the verdict of “no case to answer,” ruling in favor of the defendants. Judge Mikalile subsequently issued her written opinion.³⁶ She concluded that although the police were acting in a public capacity, the order to stop protesting was not backed by law. Most importantly, although the protesters adhered to the procedural requirements of the Public Order Act, the police did not. Specifically, the authorities failed to provide a written response to the request to hold a demonstration within the prescribed period of time (and to propose an alternative date) and thus failed to provide the defendants with an opportunity to appeal the rejection of their request to assemble. Judge Mikalile also noted that all witnesses agreed that the Parliamentary proceedings were not disturbed and that the demonstration was peaceful until unruly counter-protesters (potentially Patriotic Front cadre) appeared, but that none of the latter were arrested. She concluded:

As was rightly submitted by the defence the police did not act professionally and lawfully and they are indeed the major obstacle in the proper administration of the Public Order Act.³⁷

The accused were thus acquitted of all charges.

³⁶ *People v. Miti*, *supra* note 35.

³⁷ *Id.*

METHODOLOGY



A. The Monitoring Phase

CFJ TrialWatch partner Columbia Law School Human Rights Clinic monitors with local Zambian partners monitored the hearings of September 24, November 29-30, and December 21, 2018. The first hearing was monitored by Sarah Mehta for Columbia Law School; the two subsequent hearings were monitored by Benedict Chipipo and Dalitso Mtonga, law students from the University of Zambia.

In advance of monitoring mission, the Clinic informed the defense attorney of its intention to monitor the case and procured the charge sheet from him. The Clinic prepared a background memorandum for the monitors outlining key information on human rights and freedom of expression in Zambia, the judicial system, the right to a fair trial under Zambian law, and laws in Zambia regarding freedom of expression. This report also included information on the trial, including the charges against the defendants and the facts of the case.

None of the monitors experienced any impediments to their entry into the courtroom. All three trial monitors provided letters of introduction to the Magistrate Court informing the court of their presence and intention to monitor the proceedings. Translation was not necessary because court proceedings in Zambia are conducted in English and all monitors were English-speakers.

All monitors used a standardized CFJ TrialWatch questionnaire to record and track what transpired in court and the degree to which the defendants' fair trial rights were respected in the proceedings. These questions requested factual information about all stages of the proceedings (pretrial through sentencing). During the first trip, the trial monitor also met with defense counsel Keith Mweemba, defendant Fumba Chama, the Human Rights Commission of Zambia, and individual attorneys handling freedom of expression cases in Zambia.

B. The Assessment Phase

1. Grading Methodology

To evaluate the trial's fairness and arrive at a grade, Beth Van Schaack, the member of the CFJ TrialWatch Experts Panel responsible for evaluating the fairness of the trial, reviewed materials provided by the trial monitors, including answers to a standard set of questions (collected via the CFJ TrialWatch App), notes taken during the

proceedings and related meetings, and court documents related to the case. She also had available to her notes from one monitor's meetings with defense counsel and other local contacts.

These materials provided the expert with a factual record to review in order to evaluate the trial's fairness under human rights law. The expert then evaluated the trial against the following components of the right to a fair trial: the right to be presumed innocent; right to be informed of the charges; fitness to plead; the right to interpretation; the right against double jeopardy; the right to a speedy trial; the right to be tried by a competent, independent and impartial tribunal established by law; the right to counsel; the right to adequate time and facilities to prepare a defense; the right to a public hearing; the right to be tried in one's presence; the right not to incriminate oneself; the right to call and examine witnesses; the right to fairness; and the right to appeal, including the right to a public, reasoned judgment.

A grade was then assigned to the trial reflecting the expert's view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"³⁸ or retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustifiably convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pre-trial detention, even if they were ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant's reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

2. Fair Trial Analysis

As a party to the ICCPR and other human rights instruments, Zambia is obliged to respect its citizens' freedom of speech, assembly, and association without distinction

³⁸ ICCPR art. 26.

of any kind, including political or other opinion.³⁹ The African Commission on Human and Peoples' Rights has confirmed that Article 9 of the ACHPR "reflects the fact that freedom of expression is a basic human rights, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country."⁴⁰ These rights, as well as the freedom of the press, are also constitutionally guaranteed in Zambia.⁴¹ Despite these legal protections, rights groups have increasingly documented infringements in practice. To be sure, under the ICCPR, the protection of public order constitutes a legitimate ground on which states may restrict the right to freedom of expression.⁴² However, states may place limitations on the free exercise of these rights in only limited circumstances: when such restrictions are provided by law, serve a legitimate purpose, and are necessary and strictly proportionate to achieve that purpose.⁴³ Any constraints must be narrowly drawn and their necessity convincingly established.⁴⁴

The Zambian Public Order Act threatens to run afoul of these protections because while the text is not necessarily overbroad on its face, it has been applied in ways that stifle freedom of speech and assembly and that discriminate against members of the political opposition and other critics of the government.⁴⁵ As such, its implementation is in need of reform.⁴⁶ Of particular concern is that the Act carries rather stiff criminal penalties, which put individuals who might criticize or peaceably demonstrate against the government at acute risk of unfair and abusive prosecutions. Police regularly invoke the Act to limit opposition activities, for example by arbitrarily denying or cancelling permits for opposition demonstrations.⁴⁷ Prosecutors then bring sham charges against critics of the government on spurious grounds.⁴⁸

³⁹ ICCPR art. 2(1).

⁴⁰ *Media Rights Agenda & Others v. Nigeria*, Communication Nos. 105/93, 130/94, 128/94 and 152/96, African Commission on Human and Peoples' Rights, ¶ 52 (Oct. 31, 1998).

⁴¹ Constitution of the Republic of Zambia, art. 20 (freedom of expression), art. 21 (freedom of assembly and association).

⁴² *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Human Rights Committee, ¶ 9.7 (July 21, 1994) (finding that imprisoning a journalist for advocating multiparty democracy was not necessary to safeguard public order).

⁴³ *Lohe Issa Konaté v. Burkina Faso*, No. 004/2013, Judgement on Merits, African Court on Human and Peoples' Rights, ¶¶ 125-166 (Dec. 5, 2014).

⁴⁴ *Thorgeirson v. Iceland*, Application No. 13778/88, European Court of Human Rights, ¶ 63 (June 25, 1992).

⁴⁵ Front Line Defenders, *supra* note 6, at 12 ("Police forces regularly use the provisions of the Act to restrict freedom of expression, assembly and association, and have increasingly violated the human rights of citizens citing the Act as justification.").

⁴⁶ *Lusaka Times*, "Human Rights Commission Welcomes Plans to Amended [sic] Public Order Act," Apr. 3, 2018, <https://www.lusakatimes.com/2018/04/03/human-rights-commission-welcomes-plans-to-amended-public-order-act/> (quoting the Human Right Commission Spokesperson as stating that the "public order act has been used more to violet [sic] civil rights, political rights and freedoms than to protect and promote them.").

⁴⁷ Freedom House, *supra* note 7.

⁴⁸ Front Line Defenders, *supra* note 6, at 7.

In the *Miti et al.* case, the charges against the defendants were wholly unsubstantiated by the facts and evidence. The demonstrators adhered to the procedural regulations governing the Public Order Act (while the police and counter-protesters did not) and, as determined by Judge Mikalile, they did not disobey any lawful command by a person acting in a public capacity. And yet, the police arrested the six demonstrators without grounds to do so, and the prosecution proceeded to charge the defendants and subject them to prolonged criminal proceedings on the basis of insufficient evidence. Although Zambia has no prosecutorial code of conduct, the National Prosecution Authority Act (No. 34) of 2010, which created the National Prosecution Authority (NPA), requires that prosecutors carry out their functions impartially and without discrimination, protect the public interest, and act with objectivity at all times.⁴⁹ Likewise, international norms governing prosecutors dictate that prosecutors should discharge their duties evenhandedly and refrain from initiating or continuing prosecutions when “an impartial investigation shows the charge to be unfounded.”⁵⁰ In pursuing the charges in *Miti et al.*, the prosecution breached these legal duties, abused his office, and contributed to widespread impressions that the NPA lacks independence and operates as a tool for the executive.⁵¹

The Constitution of Zambia provides for independence of the judiciary.⁵² Judge Mikalile exemplified this independence when she ruled that the six activists had no case to answer and dismissed the charges leveled against them. In so doing, she provided the defendants with the majority of the procedural protections to which they were due. This case is thus an example of a procedurally fair trial that should never have been initiated in the first place because the alleged wrongdoing is constitutionally-protected conduct. The following material discusses the application of other fair trial rights during the pendency of these proceedings.

⁴⁹ The National Prosecution Authority Act, No. 30 (2010), art. 10, *available at* <http://www.parliament.gov.zm/sites/default/files/documents/acts/National%20Prosecution%20Authority%20Act%202010.pdf>.

⁵⁰ Guidelines on the Role of Prosecutor, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990), *available at* <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>; African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247 (2003), at § F, *available at* http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf.

⁵¹ Chris Phiri, *Zambia Reports*, “Opinion: Fixing Our Broken Prosecution,” Mar. 9, 2015, *available at* <https://zambiareports.com/2015/03/09/opinion-fixing-broken-prosecution/>.

⁵² Constitution of the Republic of Zambia, art. 122.

Investigation and Pretrial Stage

The defendants were not detained during the pre-trial proceedings except upon initial arrest. Although most of the defendants were released expeditiously, Pilato did spend three nights in jail after returning to the country following threats to his life.

Trial

Based on the information presented to the expert, most of the components of the right to a fair trial were respected in these proceedings.⁵³ Defendants were entitled to enter a plea, were not subjected to double jeopardy, were given adequate time and facilities to prepare their defense, were not required to incriminate themselves, and enjoyed the presumption of innocence. In terms of the right of defendants to appear before a competent, independent, and impartial tribunal established by law, the court was appropriately constituted, and the judge conducted herself with admirable objectivity, impartiality, and judiciousness. The monitor did not report any evidence of outside interference with the judicial process. The proceedings were open to the public and media, and our monitors did not experience any restrictions on their ability to carry out their mandate. No interpretation was necessary.

For the duration of these proceedings, the defendants were tried in their presence and enjoyed representation by able counsel. Although the practice in Zambia is that defense counsel are not given advance notice of witnesses at this stage of the proceedings before a magistrate court, Mr. Mweemba was able to forcefully cross-examine the prosecution's witnesses and, in so doing, vitiate the prosecution's case by showing that the police had no lawful grounds to halt the peaceful protest, order the defendants to disperse, or arrest the defendants for exercising their constitutionally-protected rights of free expression and assembly. Although certain questions were objected to, there were no inappropriate restrictions on defense counsel. Given their expert counsel, the defendants enjoyed equality of arms vis-à-vis the prosecution. With the acquittal of the defendants, there was no need for an appeal. The judgment was released expeditiously and provides a reasoned decision.

3. Other Issues

One area of concern relates to the arrest and detention of Pilato on a bench warrant. Pilato had fled the country after he received a video message threatening his life. An arrest warrant was issued against him when he missed a court appearance,

⁵³ See ICCPR art. 14; Principles and Guidelines on the Right to a Fair Trial, *supra* note 49, at § A.

which led to him spending three nights in police custody upon his return.⁵⁴ Such a period of detention was unnecessary given that fact that Pilato returned voluntarily to Zambia to face the charges against him and his co-accused.

There are additional concerns raised by the multiple continuances of this trial—which can implicate the defendants’ right to be tried without undue delay—particularly given how flimsy the charges proved to be once all the prosecutor’s facts were in evidence. That said, the proceedings themselves were not excessively prolonged.

Finally, Judge Mikalile echoed the views of a number of human rights organizations when she noted that the police are notorious for abusing the Public Order Act, saying that “the police . . . are indeed the major obstacle in the proper administration of the Public Order Act.”⁵⁵ And that appears to have been what happened in this instance.

4. Grade

This trial received a grade of C primarily because of the state’s decision to pursue charges that were wholly unsubstantiated by the facts and evidence and appear to be politically motivated. There were otherwise no serious fair trial violations, only slight concerns stemming from the length of the proceedings, the multiple continuances sought by the prosecution (both implicating the right to a speedy trial), and the questionable bench warrant issued against Pilato. The continuances denied the defendants a speedy trial, especially given that the prosecution knew that he had no evidence against the defendants under the applicable Zambian law.

⁵⁴ Front Line Defenders, *supra* note 6, at 20.

⁵⁵ *The People v. Laura Miti et al.*, Ruling, SSPB/017/2018, Dec. 21, 2018 at R 11.

CONCLUSION AND GRADE

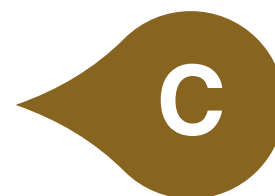


Judge Mwaka Chigali Mikalile presided over a fair trial on charges that should never have been brought in the first place. The prosecution abused his professional responsibility by leveling, and then vigorously pursuing, charges under the Public Order Act that were entirely unsubstantiated given the uncontested facts in the record.

Indeed, rather than simply dismissing the indictment as she did, it would have been appropriate for Judge Mikalile to admonish the prosecution for pressing these charges given the utter lack of any supporting evidence. Under many systems of law, this proceeding might rise to the level of a malicious prosecution—the bringing of criminal charges without probable cause and for an improper purpose (such as malice), which is inconsistent with an intent to genuinely bring an alleged offender to justice. This would entitle the defendants to compensatory damages.⁵⁶

The Zambia National Assembly should also take a hard look at the way in which the Public Order Act is being abused by its police and prosecutorial authorities to intimidate, silence, and violate the constitutionally-protected rights of its citizens, including critics of the government. Legislators and responsible members of the executive branch should undertake appropriate statutory or regulatory reforms to protect against the patterns of abuse occasioned by this vague piece of legislation.

GRADE:



ANNEX



A. Trial Monitor Notes and Related Case Documents

⁵⁶ Myles Frederick McLellan, “Innocence Compensation: The Private, Public and Prerogative Remedies,” 45(1) *Ottawa Law Rev.* 59 (2013-14).

People v. Miti et al. Annex

Trial Monitoring Notes and Related Case Documents

TABLE OF CONTENTS

Trial Monitor Hearing Notes: Zambia 2018	3
Letters to the Police Announcing Demonstration Plans (September 2017).....	15
Letter from the Police to the Alliance for Community Action	18
Charge Sheet.....	19
Affidavit of Fumba Chama	20
Police Report/ Court Date Notice, Bornwell Mwewa.....	21
Police Report/ Court Date Notice, Sean Tembo.....	22
Ruling on <i>The People v. Laura Miti et al.</i> (2018).....	23

Trial Monitor Hearing Notes: Zambia 2018

From Trial Monitor 1 (September 24, 2018)

Background Information

A. Attendance at the Hearing and Access to Court

This hearing took place in the Lusaka Magistrate Court (Lusaka, Zambia). Scheduled to start at 9am, the hearing began at approximately 10:15am in a public courtroom, after the prosecutor had briefly addressed two detained cases (at arraignment). There were approximately 35 people in attendance (a few possibly there for the other cases). They keep the doors open during proceedings, with people allowed to walk in and out during the hearing. It made it difficult to hear even in a smaller courtroom, sitting in the middle row area (the front rows are for non-detained parties). The defendants sat in the audience until their case was called, at which point they moved into the box on the side of the courtroom, in the parties' section, opposite the stand where the witness testified. Defense prosecution teams sat around a U shaped table in front of the judge.

B. Information on the Judge

Principal Chief Resident Magistrate Mwaka Mikalile

C. Information on the Jury (if applicable)

NA

D. Information on the Charges

“Disobedience of lawful orders contrary to section 127 of the Penal Code Chapter 87 of the laws of Zambia.”

Transcript of the Proceedings

A. Opening Speeches

No opening statements; this was the third hearing where the prosecution was presenting its case through witness examination.

B. Prosecution Witnesses-Direct

**note that the defense cross-examined each witness right after the direct examination*

(1) **Patience Chitonge** (at approx.. 10:30am):

- The first witness was a young female police officer. She is 30 years old and has been a police officer for 8 years.
- After giving her name, address, etc., the prosecutor asked her to recount the events of September 29, 2017. She said she reported for duty at 6am and was told she needed to be deployed for

special duties. She says her role at the Parliament procession was to maintain law and order and man the junction of Parliament road.

- Arriving at the Parliament building, she says she saw a group of people carrying placards. "As juniors we can't approach them so the senior member approached them." The group stopped and said they wanted to go to Parliament. She asked them, "are you invited" and they said no.
- She recalls there were more than 10 of them and they insisted they wanted to go inside. "They refused to go and some of them were even sitting down in the ground." The officers detained and apprehended the group then proceeded to the police station. She identified Laura Miti (sitting in the box) as the person she personally detained.

(2) **National Assembly witness** (post-break, started around 12:30 pm):

- Prosecutor asks about the witness's age, employment and job functions; witness responds that he coordinates functions including budgetary address. He sends letter to other wings of Parliament to come up with a master guest list for any event--seating is limited and they need to regulate entry.
- Witness 2 says he also calls for reinforcements from Zambia police so only people with invitation cards can enter. Prosecutor asks if witness gave cards to any members of the community group (whose representative, Laura Miti is on trial). He says no.
- (this all lasts around 5 minutes).

(3) **National Assembly security guard** (questioning lasted maybe 5 minutes, starting around 12:40)

- Prosecution asks about officer's job. Witness says he scrutinizes people for permission to enter the premises.
- Prosecution asks what he recalls of Sept 29, 2017; T responds that he was focused on the vehicles arriving at Parliament.

Prosecution Witnesses-Cross (by defense attorney Keith Mwemba)

(1) **Patience Chitonge** (starting around 10:40am directly after direct)

- KM asks about the procession and if PC would agree it was peaceful: "At first they were peaceful but then when approached, they were stubborn and didn't want to listen." She eventually agrees they were peaceful but stubborn.
- She says the group were apprehended a few meters from the junction. Keith asks, "If someone said [the group] made it to the gate, that would be a lie, correct?" Answer: yes they would be lying.
- K: You agree it is a democratic right to demonstrate?
 - P.: but to demonstrate you must have [permission].
 - K: is that what the law says? Educate us, which law? Are you refusing to answer or do you not know?
 - P: "I don't know exactly."
 - Keith: "I'm not asking the section of the law or of which code but you are a police officer and you should know what law. Let's assume you are right and they needed permission, would you agree that if the demonstrators had informed the police they were intending to demonstrate that it was lawful?"
 - P: "you are not supposed to demonstrate inside; you can demonstrate but not on the premises."
 - Keith: "where are you getting this information from?"

- Patience: "we are to maintain law and order, and they said they were not invited to the meeting at Parliament."
- Keith: "you agree that if they informed police, they could demonstrate at any time on that day?"
- Patience: "I agree"
- Keith: "Once informed, police then have a duty to actually respond to the notice, yes?"
- P: If the police haven't responded they shouldn't go ahead. If they applied within short notice they won't get a response. You can't act without a response."
- Keith: "but they applied within 7 days as required and they didn't get a response--did they have to wait in perpetuity?"
- P: I can't answer on behalf of the police
- K: Okay, between an order of a superior and an order of law, which is higher?
 - P: Order of a superior
 - K: that is what you were taught [at the academy]? That an order of your superior is above the law?
 - P: no I'm not saying their order was above the law but when [the demonstrators] didn't have a response [from the police] my supervisor gave the order to arrest
 - K: So you are testifying that you arrested that day acting on a superior's order and not based on your independent judgment?
 - P: yes
- K: and these people didn't ever go within the vicinity of the gate to parliament
 - P: they were near
 - K: how far
 - P: 50 meters?
- [Back and forth about whether demonstration was on the side road or the main road; K then asks to show witness photos of the protest.]
- K: these people are already on the ground and surrounded by police officers when you say you apprehended them.
- P responds that Laura Miti, as time of arrest, refused to stand up. But yes they interviewed them and they said they wanted to go inside the building
- More back and forth about whether the demonstrators were on the side road or not
- K asks P to read out a letter to the commissioner of police, dated 20 Sept. 2017; it is a letter informing police of intent to hold a peaceful protest outside parliament on September 29th. The letter is stamped as received by police on sept. 20th.
- K says the letter also states that the protest was planned for the side of the road and this complies with the law
- K introduces another letter for the witness to read, this one to the inspector general of police also dated Sept. 20th--notice of a planned procession against gov't corruption. P says "it is to whom the letters were addressed to answer"
- K offers a third letter from the deputy chief of police. The letter says protestors should offer alternative dates; police offer some but one is the date of the letter. K says to the court that the law requires the police to provide alternative dates, not the requestors
- K: do you agree that sitting down is a sign of stubbornness from the protestors?
 - P it is a sign of stubbornness, not peace. They had been ordered to go back where they came from. The chief inspector made an order to the officers
 - K: do you agree the order was unlawful?
 - P: No but agrees the demonstrators obeyed the law by notifying the police of intent to protest
 - K: did the police provide alternative dates
 - P: No
 - K: to your knowledge there was no response to the letter from the accused?
 - P my supervisors are the ones who can answer whether they did anything illegal

- Gilbert Phiri (other defense counsel): On the 29th there was no demonstration at Parliament, correct?
 - P they were about to demonstrate; if they had not been stopped there would have been
 - G: the charge is that they were ordered to 'stop demonstrating at Zambia National Assembly' but you and I have agreed that there was no demonstration. There was no breach of law and order when you made the arrest
 - P: yes there was
 - G: what breach? You said they wanted to demonstrate, not that they demonstrated
 - P : they didn't obey orders to go back
 - G: do you agree this was a public place and that when they were told to go back they were in a public place?
 - P:yes
 - G: the woman you arrested, at what time did she say she wanted to access parliament?
 - P: she didn't
 - G: despite that and her sitting down on the ground, you still decided to arrest her?
 - P: by order we were told to
 - G: was anyone stopped entering parliament?
 - P: no

*this cross-examination ended just before noon, at which point we stepped outside for a recess and changed courtrooms.

(2) National Assembly witness (post-break, started around 12:45pm in a courtroom around the corner)

- K: The invitation is for the chambers inside parliament, correct?
 - S: correct
 - K: And the invitation has nothing to do with a protest outside the building?
 - S: no
 - K: the invitation doesn't extend to what people do outside?
 - S: no
- K: anyone who wants to demonstrate cannot go past the gate?
 - S: correct
 - K: is the gate close to the side road?
 - S: it's far away
- K: did the budget negotiation go on without interruption?
 - S: yes
 - K: did you receive a complaint about a disturbance at parliament
 - S: I only read about it on social media
- Def atty G steps in and asks: is parliament fenced in?
 - S: yes
 - G: when you leave junction road can you be said to be at Parliament?
 - S: no, you are only at Parliament when you get through the gate

(3) National Assembly security guard (starting at around 12:55; lasted maybe 5 minutes)

- Cross by K: did you stop anyone from entering parliament that day?
 - a. T: no
 - b. K: everyone at the gate had an invitation?
 - c. T: yes

Prosecution Other Evidence

none

Defense Witnesses-Direct

NA at this stage

Defense Witnesses-Cross

none

Defense Other Evidence

One photo of the protestors at the time of the arrest and one photo of the arrest location. The first wasn't visible to us in the audience—small photo shown only to the first witness and the judge. I believe this was a photo of the accused sitting down on the side of the road.

The second photograph was of the side road approaching Parliament. This was also shown only the first witness (police officer) and was the subject of the back and forth regarding where the protestors were and whether the protest had begun at the time of arrest.

Notes from Trial Monitor 2 (November 29, 2018)

- The matter came up for continuation before Hon. Mwaka Mikalile. it begun at 10:50am (CAT), it was scheduled at 09:00am (CAT). There was no opening speech as the matter had been ongoing. The hearing was in Courtroom 2 of the Magistrate Courts Complex in Lusaka.
- At this point the Prosecution was calling it's last two witnesses and the first witness was sworn in at 10:54 (CAT)

Prosecution Witness (PW6), Examination in Chief (Direct)

- **Mr Robert Undi Phiri**, aged 35 was called. He works with the Traffic Department at Lusaka Central Police Station.
- He has been in his position for 10years and has worked in the police service for 12years.
- The Prosecution asked the witness about the events that occurred on 26th September, 2017.
- Witness said he was on parade on the day in question. He said he was told by his supervisor Mr Ngoma that he had to deliver mail which he picked up from the Secretary to the Deputy Commissioner of Police. He had to deliver it to the offices of Alliance for Community Action for which Laura Miti is Director.
- The witness said he took the mail and upon arrival to the offices, he found a man who later called a lady. He gave her the mail and asked if he could sign to acknowledge delivery but the said lady said the offices were closed, he could not sign. He further asked her to sign his documents but she said the offices were closed hence she did not sign.
- The witness said the mail has a heading "application for permit". The documents were already before Court hence were verified.

Cross Examination (by Keith Mwemba)

- The cross examination begun around 11:10am (CAT)
- The defence lawyer, Keith Mwemba, reminded the witness of the consequences of lying on oath. He further asked the witness if he knew the consequences of lying on oath to which the witness stated he did not know.
- Keith alleged the witness was being untruthful in relation to the day he went to deliver the mail. He told the witness it is always important to tell the truth and the court gives such opportunity to every person.
- Witness was asked his phone number and on which day he went to deliver the letter. The witness said he delivered the letter on 26th September, 2017, Keith Mwemba objected and claimed the letter

was delivered on the 29th of September, 2017, the day of the National Budget presentation at Parliament.

- This was on the basis that the witness called Laura Miti on that day to get directions to the office. Keith Mwemba even sought to enter into evidence call records but he did not produce such records and the witness rejected the claims. Furthermore, Keith Mwemba states the only reason the witness was not able to deliver the mail to the intended people was because the offices were closed as the defendants has already left for parliament by the time he got there.
- The witness however disagreed and stated that he had gone to deliver the letter on 26th September, 2017. The offices were closed because he had gone there around 07:30am. Keith Mwemba then reminded the witness that government offices open at 08:00am and therefore it was not plausible that the witness had been working before that time and even went to deliver a letter before such time. The witness however informed the Court that their department actually starts operations at 06:30am.
- Keith Mwemba directed the Court to the fact that in the documents before Court, there was no provision for the witness to sign for delivery or the recipient of the letter to acknowledge such receipt of the letter. Furthermore, it was submitted before court that the document that was submitted was a photocopy and it had no provision for signing. Finally, the defence lawyer said due to no proof of delivery of the said letter on the alleged date, 26th September, 2017. The burden to prove the letter was delivered as claimed, rests on the Prosecution.
- No further questions asked, cross examination ended around 11:27am (CAT).
- Prosecution did not re-examine the witness.

Prosecution Witness (PW7), Examination in Chief (Direct)

- **Mr Mubita Moya** was called to the stand at 11:28am (CAT). He is Chief Inspector who is a Criminal Investigation Officer. He works at Emmasdale Police Station and has been in the Police Service for 26years. After giving other details including his address, he was asked, by the Prosecution, if he recalls the events of the 29th September, 2018.
- After reporting for duty around 07:00am (CAT), Mr Mubita stated that the Chief Inspector General approached and informed him he had apprehended six individuals at Parliament suspected of disobeying orders.
- Witness was asked why the policemen were deployed at Parliament, to which he said they were deployed to maintain law and order during the Parliamentary proceedings on the National Budget. Witness, as asked, identified each witness by name.

- He later said he took them to Criminal Investigations where he interviewed them and asked them why they were arrested. He mentioned that despite the defendants having not had evidence for their permit to march, the demonstration was peaceful. They did show him the letter they sent notifying the police of their wish to march as well as the response they got. The defendants also stated that the police had no authority to stop their march and Mr Moya stated that the most vocal of the six was Laura Miti.
- The witness said he later left the defendants in custody and went to Parliament to find out which people were allowed to listen to the budget presentation. He was directed to public relations, Mr Kawimbe who had appeared before the Court in earlier proceedings (PW3). Only the invited guests were allowed to enter Parliament, this, the witness said the head of security at Parliament informed him.
- The witness said he later went to see the Deputy Commissioner of Police, Mr Kunda. After the Prosecutor asked why, he said it was so he could confirm if he had written the reply that was shown to him by the defendants. The Deputy Commissioner confirmed receipt and reply to the letter sent by the defendants. Furthermore, the Deputy Commissioner stated that the police were willing to cover the procession by the defendants but were engaged in other duties concerning the presentation of the national budget.
- The witness then asked the Chief Inspector General why he arrested the defendants. He said when he saw the defendants along Parliament road marching with placards, he got concerned and asked the defendants why they were marching in such a group. Apparently, the Chief Inspector had no knowledge of the demonstration n he therefore asked for proof of invitation to the proceedings, the defendants did not have such invitation hence he asked them to go home. They disobeyed the order, he therefore asked other officers to arrest them.
- They were warned and cautioned in English and arrested for disobeying Section 127 of the Penal Code.
- Prosecutor asked the witness why he was convinced that the defendants did not get permission to demonstrate.
- Keith Mwemba objected, asking if it was a fair question as the witness was not present to get first-hand information.
- Prosecutor rephrased and asked the witness what supported the charge to which the witness said, the information from the Inspector General as well as that which he obtained during the questioning. The defendants further said the police had no authority to arrest them and it was their right to demonstrate. The witness also stated that he proved that the defendants were not invited to parliament.

- Prosecutor asked what order was disobeyed and witness said the defendants were ordered not to march inside to demonstrate as they were not invited. They insisted on marching and decided to go ahead.
- Prosecutor asked, if the witness was certain that the letter (“P II”) was delivered by PW6 as claimed. The witness said he was told so and he questioned the said witness who told him he delivered the letter on 26th September, 2018 but did not sign for it.
- Examination in Chief ended with no further comments from the witness, at 12:03pm (CAT).

Cross Examination (Keith Mwemba)

- Started at 12:04pm
- Keith Mwemba asked Hon. Mikalile to proceed as other matters were set for around this time.
- Hon. Mikalile granted leave to proceed as the other Magistrate was on leave.
- Keith Mwemba asked witness if he agrees that the defendants complied with the Public Order Act (“POA”), the witness agreed.
- He further asked if the witness agrees that in their response, the Police did not comply with the provisions of the POA. The witness was asked what day the letter was delivered to the defendants and he stated that it was the 26th September, 2018. On this note, the defence lawyer stated that this was in itself a violation of the POA which required that notice be given in not less than five days to the day requested for the protest or demonstration. Furthermore, the Act requires that where the police cannot police the procession on the requested day, they are mandated to suggest an alternative to the persons who seek to have such public demonstration. Keith Mwemba therefore asked at this point, who should provide an alternative date for the demonstration, the witness said the person notifying must give such alternative date.
- Keith then turned to the Court to address “the big problem in the Country”, as he called it. He said it is frightening that the witness thought so. He further stated that it is the police to state the alternative date for the procession and such notice must not be given less than five days.
- The witness however was of the view that such decision of the alternative date for the demonstration is at the discretion of the police.
- Keith Mwemba made the witness aware that the police have no discretion, it is law that the police provide the alternative date. However, he decided to leave the matter for the written submissions.
- The witness was asked, in the event that the law provides a particular action that should be taken by the police in relation to the defendants but they breach such law, what should the defendants do in that case? Which route should they take, the police instructions or the law? The witness said in such

event the POA should be followed by the defendants. He sought to explain further but Keith Mwemba cut him off and he only required a yes or no answer.

- Hon. Mikalile then told the witness to answer as the question was simple and clear.
- Keith Mwemba: answer the question witness, should the defendants follow written law or police order?
- The witness said they should follow the written law.
- Keith Mwemba further asked if the witness agrees that the police officers involved breached the law and he agreed that the officers breached the law. On that note, Keith Mwemba asked if the police officers who broke the law have been arrested. Witness said no police officer broke the law.
- Asked witness to read paragraph 3 of the letter sent to the defendants, in that paragraph, the police asked the defendants to provide an alternative date for their procession. Keith Mwemba further claimed the latter was done in a hurry as a cover up and it was not headed. The defence lawyer further asked the witness who was given the burden to select such alternative date in the letter and he said the accused had been given the burden.
- The Prosecutor objected, that the defence lawyer was not using law. What law was breached.
- The defence lawyer referred to Section 5 of the POA. He asked if the witness was familiar with the provision. When he said yes, Keith Mwemba asked if the witness has handled such notifications before and he said yes.
- Where the police cannot police, who suggests an alternative date then, the witness said the police do and he also agreed that the police breached the law by requiring the defendants to suggest an alternative date.
- The Prosecutor objected stating that the provision in question (Section 8) was silent on the issue.
- Hon. Mikalile asked Counsel to check if there were amendments to the law.
- Keith Mwemba stated that the law the prosecution is relying on was repealed, it was Chapter (Cap) 104 of the laws of Zambia but now Cap 113 of the laws of Zambia. The provision relied on by the prosecution was not in the amended POA and was now covered under Section 5.
- At this point the matter was adjourned to the following day, 30th November, 2018. Scheduled at 09:00am (CAT). Counsel was required to verify the provisions they relied on and bring the actual documents to Court.
- Matter ended at 12:23

Notes from Trial Monitor 3 (November 30 & December 21, 2018)

The matter was scheduled to commence at 09:00 hours for continuation of cross-examination, but only took off at approximately 10:15 hours.

Defence: *In view of what you just read police had breached the law right?*

Witness: *Yes they did.*

Defence: *Who is to give the alternative date according to that letter by the police?*

Witness: *The accused.*

Defence: *so who should issue a date according to the law?*

Witness: *The police.*

Defence: *You agree that if an officer gives an order breaching the law that order is unlawful?*

Witness: *I agree.*

Defence: *The written law is superior to any order of the police, correct?*

Witness: *Precisely.*

Defence: *You also agree with me that what you were telling the court is exactly what you were told by inspector Phiri because you were not there yourself?*

Witness: *I agree.*

Defence: *so who should issue a date according to the law?*

Witness: *The police.*

Defence: *You agree that if an officer gives an order breaching the law that order is unlawful?*

Witness: *I agree.*

Defence: *So if the police breached the law, can the accused be blamed?*

Witness: *They can't be blamed.*

Defence: *You agree with me that in a democracy citizen participation is fundamental and this includes demonstrations and processions?*

Witness: *I agree. It is not illegal to demonstrate if you follow the law.*

Defence: *where you aware of any security concerns tendered for stopping the police from facilitating the procession?*

Witness: *No.*

The Defence rested its cross examination at approximately 10:55 hours.

Re-examination

No re-examination. This marked the close of the prosecution's case. Both sides were ordered to file written submissions on or before 10th December 2018. The ruling on the case to answer is scheduled to be delivered on 21st December 2018 at 11:00 hours.

DAY 3 (21st December 2018)

The matter was scheduled to come up for the delivering of the Ruling on the no case to answer stage at 11:00 hours. The court room was packed largely with supporters of the accused. At approximately 10:00 hours the court arose as the Judge entered to deliver the ruling. At approximately 10:03 the Judge begun reading out the ruling. At approximately 10:15 the Judge finished reading out the ruling and proceeded to acquit the Defendants.

Letter from Laura Miti to Zambia Police (September 20, 2017)

Alliance for
community
action ►►

20 September, 2017

The Commissioner of Police
Lusaka Province
Zambia Police Service
Lusaka, Zambia

Dear Sir,

RE: Notice to Hold Peaceful Public Demonstration at Parliament of Zambia

The Alliance for Community Action (ACA) is a Non- Governmental Organisation whose main purpose is to advocate for the prudent and accountable use of public resources in Zambia. In particular, the ACA aims to work with other civil society organisations to empower citizens to understand and speak up about public resource management as it is linked to service delivery.

In line with our objective and in accordance with the Public Order Act, Chapter 113 of the Laws of Zambia, the ACA wishes to notify your office of our intention to hold a peaceful procession and demonstration at the Parliament of Zambia. We notify your office because we have been sent from Lusaka Central Police, to Chelston police with all these stations saying the notification should not come to them. We are hoping that your office will receive the notification.

The purpose of this peaceful demonstration is to raise citizen concern on the procedure and cost of the 42 fire truck recently bought by the Ministry of Local Government and Housing and public resource mismanagement generally.



In accordance with the law, we wish to hold this demonstration on Friday, 29 September, 2017 from 14 Hours to 16 Hours. This is the day the national budget will be presented by the Minister of Finance and we feel it is an appropriate day to raise our concern on public resource management in the country.

The procession will take the form of members of civil society and ordinary citizens peacefully holding up placards on the side of the road leading up to Parliament. We would like to assure you that the Members of Parliament proceeding to the house will not in anyway be disturbed

We look forward to the police service facilitating this constitutional citizen right and duty to raise their concerns to those that govern the country.

Yours faithfully,

Laura Miti
Executive Director



Letter from Patriots for Economic Progress Providing Notice of Planned Demonstrations

PEP
Lusaka
Zambia
E-Mail: info@pep-zambia.com
Website: www.pep-zambia.com



Tel: +260 211 285 551
Fax: +260 211 285 550
Unit 12, Paine Business Park
Off Great North Road
Lusaka, Zambia

20th September 2017

The Inspector General of Police
Zambia Police Service Headquarters
Lusaka, Zambia

FILE COPY

Dear Sir

Ref: Notice of Country-Wide Demonstrations Against Government Corruption in the Purchase of 42No. Fire Tenders at a Total Cost of \$42 Million, in Accordance with Section 5 Subsection (4) of the Public Order Act Chapter 113 of the Laws of Zambia

1. Notice is hereby given that the Patriots for Economic Progress (PeP), a political party duly registered in accordance with Section 7 subsection (2) of the Societies Act Chapter 119 of the Laws of Zambia, will be facilitating a series of country-wide demonstrations in all 10 provinces of Zambia, against the recent corrupt and inflated purchase of 42No. Fire Tenders by the Government of the Republic of Zambia, at a total cost of \$42 Million.
2. The demonstrations will be held on Friday, 29th September 2017 from 1200hrs to 1700hrs. The protestors will walk peacefully from various parts of each town to the City, Municipal or District Council offices, as the case may be. Our party officials will provide Marshals to ensure that the demonstrations are peaceful and orderly.
3. You are advised to inform your respective ComPols in all provinces, so that these demonstrations can proceed without any misunderstandings with your officers on the ground.
4. This notice is being given in terms of Section 5 Subsection (4) of the Public Order Act, Chapter 113 of the Laws of Zambia.
5. We thank you.

Yours Sincerely,

Sean E. Tembo

PARTY PRESIDENT (0971 195 870)

PATRIOTS FOR ECONOMIC PROGRESS (PeP)

Received by:..... Signature:..... Designation:..... Date:.....

Letter from the Police to the Alliance for Community Action



26th September, 2017

The Executive Director
Alliance for Community Action
P. O. Box 33132
Lusaka

RE: NOTICE TO HOLD A PEACEFUL PUBLIC DEMONSTRATION

Refer to your letter dated 20th September, 2017 pertaining to your notification for a peaceful demonstration on 20th September, 2017 at Parliament of Zambia.

We would like to inform you that we were willing to facilitate your planned demonstration, unfortunately, Police Officers who were expected to provide security coverage during your activity will be very occupied with other national duties and arising from this, you are advised not to proceed with your demonstration.

However, you are encouraged to come up with an alternative date convenient to you other than 20th September, 2017 and then notify the police accordingly for consideration.

Charge Sheet

S.C. CRIMINAL No 33
Stocked by Govt. Printers

REPUBLIC OF ZAMBIA

CASE No. _____

IN THE SUBORDINATE COURT of the FIRST Class for of 2000.

this LUSAKA District, Holden at LUSAKA Before: C R. M. on

this 22nd day of January, 2018 at, 0900 hours in the FORE noon

THE PEOPLE versus: LAURA MITI, SEAN TEMBO, FUMBA CHAMA, BONWELL MWEWA, LEWIS MWAPE AND MIKA MWAMBAZI.....

Residential address: HSE. NO. 122 PHI, 605 AVODDALE, KANSENSHI-PLOT NO 23648 PHI, PLOT NO 270-BARASTONE VILLA AND UNKNOWN.....

Sex: FEMALE, MALE, MALE, MALE, MALE AND FEMALE.....

Age: 52, 37, 33, 43, 44 AND 30.....

Occupation: LECTURER, ACCOUNTANT, MUSICIAN, IT COUNSULTANT, PROGRAM SPECIALIST AND FREELANCE COUNSULTANCE.....

Tribe: NGONI, NGONI, UNKNOWN, LUNDA, BEMBA AND MAMBWE.....

Village: MUCHACHA, JABU, LUWINGU, TUPA, CHIFUMBE AND UNKNOWN.....

Chief: NZAMANI, KAPATAMOYO, MPOROKOSO, TUPA, KATUTA AND TAFUNA.....

District: CHIPATA, CHIPATA, MPOROKOSO, MWENSE, LUWINGU AND MBALA.....

Accused was served on..... the Summons dated.....

Accused was arrested without Warrant on..... under Warrants dated.....

Accused was arrested without Warrant on 02/10/17.....

Accused was released on bail or on his own recognizance on.....

CHARGE:
COUNT 1
(if space insufficient, continue overleaf)


Statement of Offence: DISOBEDIENCE OF LAWFUL ORDERS contrary to section 127 of the Penal Code Chapter 87 of the Laws of Zambia

Particulars of Offence: LAURA MITI, SEAN TEMBO, FUMBA CHAMA, BORNWELL MWEWA, LEWIS MWAPE AND MIKA MWAMBAZI On 29th September, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other unknown persons did disobey a lawful order to stop demonstrating at Zambia National Assembly issued or given by No 4830 C/Insp Phiri an officer on duty employed by the Zambia police Service.

SIGNATURE OF MAGISTRATE OR PUBLIC PROSECUTOR

Affidavit of Fumba Chama

SWORN AFFIDAVIT / STATEMENT

SOUTH AFRICAN POLICE SERVICES  **SUID-AFRIKAANSE POLISIEDIENS**

I, the undersigned (Name & Surname) Fumba Chama

Of (address) 3374, KANSENGHI, NDOGA.

ID. No. 3434741611 Contact No. 0966233760

Hereby make a statement under oath that I am unable to attend my court session on the 5th Feb 2018 for fear of being attacked by political cadres who have vowed to pick me up even from court grounds. After releasing a song KOSWE MUMPOTO, I received very dangerous threats from political cadres who threatened to beat me up and even to kill me.

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE

2018-02-04

CSC
RANDBURG

SUID-AFRIKAANSE POLISIEDIENS

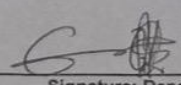
I know and understand the contents of this statement.

I have no obligations at taking the prescribed oath.

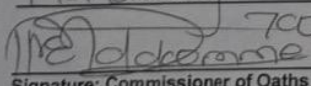
I consider the prescribed oath to be binding on my conscience.

Date : 04th FEB. 2018

Time : 13:05


Signature: Deponent

I certify that the above mentioned statement was taken down by me and that the deponent has acknowledged that he/she knows and understands the contents thereof. The deponent's signature was placed hereon in my presence at Randburg on 2018-Feb-04 at 13:05

 7009584-1
Signature: Commissioner of Oaths

Full first names and surname: Mdodokomme Nchakga

Street address of Police Station 20 Shepherd Avenue

Rank Sgt

LP Form 32
Revised by C. M. Shaw



ZAMBIA POLICE
POLICE BOND OR RECOGNIZANCE

HE FEAS Bornwell mwea
was arrested this 29th day of September 2017, in connection
Police Station for the purpose of investigation of criminal orders of
127 car 27 of the Penal Code of the Laws of Zambia
In witness whereof and in pursuance of this requirement hereby binds himself/herself to perform the following
duties:

to appear before the Court at (place) 27th day of October 2017
at 0230 hours in the fore noon, and on any other or subsequent day when
directed by the Court to answer to the said charge and to be dealt with according to law

And the said principal party together with the undersigned sureties hereby acknowledge himself/hereby
 jointly acknowledge themselves bound to forfeit to the Government of the Republic of Zambia the sum(s)
 owing, viz: the said principal party the sum of K 2 000 = 00
 and the said sureties the sum of K 2 000 = 00
 in the said principal party fails to perform the above obligation or any part thereof.

→ m. Bornwell m. 1999
→ d. r. c. no. 2045 15/8811
→ H. l. c. no. 234 864 P.H.I.
J. u. l. k. a.
→ cell no. 0927-22 5366

Signed

Principal Party

Signed

Subjects

Winningside Police Station
29th day of September

Officer in Charge

and admitted to refer +
on monday 2nd octobe.



Police Report/ Court Date Notice, Sean Tembo

to be issued to Police
by the Principal Party

Form 12
Revised by O.M. Gao



ZAMBIA POLICE

POLICE BOND OR RECOGNIZANCE

BEFORE ME, Sean Tembo
was arrested this 29th day of September 2017, at Emmasdale
Police Station for offence of disobedience of lawful orders
i.e. CAP 89 of the Penal Code of the Laws of Zambia.
The undersigned principal party to this recognizance hereby binds himself/herself to perform the following:

To appear before the C.M.A. (Court at (place) New magistrates Court
on the 27th day of October 2017
at 0830 hours in the forenoon, and on any other or subsequent day when
called by the Court to answer to the said charge and to be dealt with according to law

And the said principal party together with the undersigned sureties hereby acknowledge himself/thereby
acknowledge themselves bound to forfeit to the Government of the Republic of Zambia the sum(s)
viz. the said principal party the sum of K 2 000 = 00
the said sureties the sum of K 2 000 = 00 each.
in the said principal party fails to perform the above obligation or any part thereof.

Mr. Sean Tembo
Plot 605 Gardening
Road, Avondale.
A.R.C. No. 727514/1111
Cell no. 0979995870

Signed

Principal Party

Signed

Surety

in before me at Emmasdale Police Station
29th day of September 2017

Officer in Charge

in of additional conditions

and advised to report it

REPUBLIC OF ZAMBIA
ZAMBIA POLICE SERVICE
EMMASDALE POLICE STATION

9th SEP 2017
EMMASDALE POLICE STATION
CRIMINAL INVESTIGATIONS OFFICER

Your cooperation in this regard will be appreciated.

A handwritten signature in black ink, appearing to be 'G. Kunda', written over a horizontal line.

G. Kunda

Deputy Commissioner of Police

For/COMMISSIONER OF POLICE - LUSAKA

**IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA**

CAUSE No

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE

vs.

LAURA MITI AND 5 OTHERS

ACCUSED'S SUBMISSIONS ON NO CASE TO ANSWER

Messrs Keith Mweemba Advocates

No. 8749, Buluwe Road

Woodlands

keithmweembaadvocates@gmail.com

LUSAKA

Messrs PNP Advocates

Plot No. 28, Mpulungu Road

Olympia

P.O. Box 50034, Ridgeway

LUSAKA

Advocates for the Accused

Ruling on *The People v. Laura Miti et al.* (2018)

IN THE SUBORDINATE COURT OF THE FIRST
CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

SSPB/017/2018

THE PEOPLE

V.

**LAURA MITI, SEAN TEMBO, FUMBA CHAMA, BONWELL
MWEWA, LEWIS MWAPE & MIKA MWAMBAZI**

Before: Magistrate Mwaaka Chigali Mikalile - PRM

For the People: Mr D. Manda – National Prosecution Authority

For the Accused: Mr K. Mweemba and P. Muya – Messrs Keith Mweemba Advocates & Mr G.
Phiri – Messrs PNP Advocates.

RULING

Legislation referred to:

1. The Penal Code, CAP 87 of the Laws of Zambia
2. The Criminal Procedure Code, CAP 88 of the Laws of Zambia
3. The Public Order Act, CAP 113 of the Laws of Zambia
4. The Republican Constitution

Cases referred to:

1. Republic v. Simon Wabungu Kimani & 20 others C.R Rev No 1 of 2015
2. Resident Doctors Association of Zambia & Others v Attorney General S.C.Z Judgment No. 12 of 2003
3. Penias Tembo v. The People (1980) ZR 218

Other works referred to:

Garner. Black's Law Dictionary (8th Edition): Thompson West, 2007,
USA

R1

The accused persons stand jointly charged with one count of Disobedience of lawful orders contrary to section 127 of the Penal Code Chapter 87 of the Laws of Zambia.

Particulars of offence allege that on 29th September, 2017, the accused at Lusaka in the Lusaka District jointly and whilst acting with other persons unknown did disobey a lawful order to stop demonstrating at Zambia National Assembly, which order was issued or given by No. 4830 Chief Inspector Phiri, employed by the Zambia police Service whilst on duty.

The matter was allocated on 22nd January, 2018 but the accused only took plea on 17th May, 2018 due to the absence of A3 who had fled the country for the reason that his life was under threat.

The accused pleaded not guilty.

At this stage the court is called upon to determine whether or not on the evidence so far before it, a prima facie case has been made out against the accused persons.

The test to apply is this: if the accused elected to remain silent could a reasonable tribunal properly directing itself convict the accused on the evidence so far before court? If the answer is in the affirmative, then there is a case to answer. If the answer is in the negative, then there is no case to answer.

Reference is made to Lord Chief Justice Parker's famous practice note (quoted in 1962 1 ALL ER at P.448) where it was stated that a finding of no case to answer may be arrived at (i) when there has been no evidence to prove an essential element in the alleged offence; (ii) when the evidence adduced by the prosecution has been so discredited as a

result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

In a criminal trial the prosecution bears the burden to prove the guilt of the accused beyond all reasonable doubt. All elements of the offence in question ought to be proved.

Section 127 states that:

Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years.

According to Black's Law Dictionary (1) at page 540, duly means "in a proper manner; in accordance with legal requirements." Thus, the order issued by an officer acting in public capacity ought to be in accordance with legal requirements.

In the defence's submissions on no case to answer, I was referred to a Kenyan authority in the case of **Republic v. Simon Wabungu Kimani & 20 others C.R Rev No 1 of 2015** where the High Court discussed the requirements of the charge against the accused contrary to section 131 of the Kenya Penal code which has almost the exact wording as section 127 of Cap 87.

The court in that matter stated that section 131 of the Penal code under which the convicts were charged requires that such order has to be lawful and issued by a public officer, for its disobedience to constitute a crime...Disobeying an order not backed by law is not an offence under that section.

Taking into account the definition of duly and the above cited case, I am of the view that the essential elements of the offence to be proved are that:

1. an order was communicated to the accused
2. the order was given by a person acting in public capacity
3. the order was in accordance with the law
4. the order was disobeyed by the accused

In support of its case the state called seven witnesses. This is the gist of their evidence.

PW1 was No. 4830 Chief Inspector Anthony Phiri whose testimony was that on 29th September, 2017, there was budget presentation at Parliament and he was assigned to maintain peace and order and to ensure that people going into parliament were either members of parliament (M.Ps) or invited guests. Around 13h00, he observed a group of people along Great East road carrying placards. The group began approaching Parliament building and he was prompted to enquire if the members had invitation cards. They informed him that they did not have but that they had written requests to march at Parliament. According to PW1, he informed the marchers that a mere request did not grant them authority to march to Parliament but they insisted on going ahead. He ordered them to go back about 3 times but they insisted on entering.

PW1 told court that their service instructions authorise any police officer to order anyone not to do anything if it is a security risk or likely to cause public nuisance.

He further testified that those people did not obey his orders hence he ordered his officers to apprehend them. PW1 said he personally apprehended the now A2 and this was along Parliament road leading to Parliament building.

Under cross examination, PW1 stated that the demonstration was peaceful. He also stated that another group did arrive at the scene that came to disrupt or oppose the peaceful demonstration. He admitted that that group had not notified the police of its intention to disrupt the accused's demonstration. None of its members was apprehended.

PW2 was Chief Inspector Charles Hamooya who also told court that on 29th September, 2017, he was detailed at Parliament building with other officers. He testified that PW1 asked the group of people that arrived around 13h00 if at all they had invitation cards and when they did not produce any, PW1 ordered them to leave. They refused to leave saying they would go inside. PW1 then ordered the officers to apprehend the group for the offence of disobeying lawful orders. PW2 said he personally apprehended A3.

Under cross examination, PW2 was shown a photo of him as well as the accused persons seated on the road. He agreed that sitting was a sign of peace. PW2 erroneously stated that people wishing to hold a procession must get a permit from the police. He said the accused herein were arrested not because they had no permit but because they had no invitation cards. When shown a picture in which he was captured with other individuals wearing green barrets, PW2 denied the assertion that there were P.F cadres present at the scene and said he was not aware if the police had received notification from the P.F.

PW3 was Constable Patience Chitonge whose testimony was that PW1 approached the demonstrators as they tried to join the road to Parliament. The said demonstrators insisted on going inside despite not having invitation cards and PW1 later chased them. They refused to leave and some even sat down saying they wanted to go in. PW1 then directed the officers to apprehend the group. PW3 said she apprehended A1.

Under cross examination, PW3 stated that the demonstrators were initially peaceful but became stubborn when approached. She also erroneously stated that it is their democratic right to demonstrate as long as they have a permit. PW3 denied the assertion that sitting down by the demonstrators was a sign of peace. She said it was a sign of stubbornness as they did not want to go back as ordered.

PW6⁴ was Stephen Kawimbe, a Principal Clerk, Public and International Relations at National Assembly who told court that for budget presentation, the Ministry of Finance issues the invitation cards and his office simply regulates the numbers because of limited sitting capacity. Those not invited cannot go beyond the security gate.

Under cross examination, PW4 stated that the invitations are for those entering the August house and have nothing to do with those that want to demonstrate outside parliament gates. He also stated that when one leaves Great East road and enters Parliament road, they cannot be said to be within Parliament. He further stated that the budget presentation of 2017 went undisturbed.

PW5 was Jonathan Sikwaya, a Parliamentary Security officer whose testimony was that on 29th September, 2017 he was on duty at the main entrance at parliament building from 06 to 17h00. He has no idea what happened around 13h00.

PW5 was Geoffrey Kunda, the Deputy Commissioner of Police who ran court through some salient features of the Public Order Act. He testified that on 20th September, 2017, he received a notification from the Executive Director for Alliance for Community Action, A1, to conduct a demonstration at parliament building during the budget presentation. The letter was identified and marked ID1. According to PW5, he assessed the situation and called A1 to tell her that the date was not favourable for two reasons, firstly, there was a security

concern and secondly the officers were overstretched. He then advised A1 to find an alternative date and revert to him. A1 asked him to reduce that response in writing and on 26th September, 2017 he communicated in writing and the letter was delivered. The response was identified and marked ID2. According to PW5, he was surprised to learn that A1 and her members had proceeded to assemble at parliament. He said when A1 did not get back to him, he assumed she had understood his explanation

When cross examined, PW5 stated that A1 did notify the police even this year for the 2018 budget and she was turned down. He said the same reasons as last year were given. He is aware that the Minister overruled the police and allowed the demonstration to go ahead. The 2018 demonstration was incident free.

Still under cross examination, PW5 stated that he has no proof that his response was delivered on 26th September, 2017. He admitted that he should have written back to A1 5 days before the event and that he should have offered an alternative date.

PW6 was Sgt Robert Undi Phiri, a rider under Lusaka Central Police traffic department. His evidence basically was that he delivered a letter from PW5 to Alliance for Community Action on 26th September, 2017. He said he asked the lady to whom he handed the mail if there was anywhere he could sign and she said their offices were still closed. He identified the letter he delivered and it was marked ID3. Since ID3 is the original of ID2, it was remarked ID2.

Under cross examination, he denied having gone to A1's office on 29th September, the day of the budget presentation.

PW7 was Dt Chief Inspector Mubita Moya of Emmasdale Police Station whose testimony was that on 29th September, 2017, PW1 handed over

to him 6 suspects whom he had apprehended at Parliament for disobeying his orders. He interviewed the suspects, the now accused persons, who informed him that they were peacefully demonstrating and that they had notified the police in advance. The accused showed him the letter written to the Commissioner of Police and also the reply. They told him that the police had no authority to stop them from marching peacefully to parliament building. After conducting his investigations, he charged and arrested the accused for the subject offence. He produced IDs 1 and 2 admitted marked P1 and P2 respectively.

Under cross examination, PW7 conceded that the accused cannot be blamed for having gone ahead to demonstrate in light of the fact that the police did not comply with the law in their rejection. He further stated that PW1 did not inform him of any security concerns that were attendant at the time of the procession.

Having considered the evidence and the written submissions from the defence, I ask myself if a reasonable tribunal could convict the accused if they chose to remain silent. This question can only be answered if it is found that the essential elements of the offence as outlined above have been established.

It has been satisfactorily shown that on 29th September, 2017, an order was communicated to the accused persons by PW1, a police officer of Chief Inspector by rank for them to go back or to stop demonstrating. Clearly, PW1 was acting in a public capacity. But I ask myself if it has been established that the order issued by PW1 was backed by law.

In considering this issue, I have had recourse to the Public Order Act Cap 113 of the Laws of Zambia and particularly section 5 which provides for regulation of assemblies, public meetings and

processions. The law essentially provides that every person wishing to carry out any such activity must give notice to the police at least 7 days before the event. If the police deem it impossible to adequately police the event, they shall inform the conveners in writing at least 5 days before the event and shall propose an alternative date. The event shall then not be held. Where the conveners are not satisfied with the reasons advanced, they may appeal to the Minister and if not satisfied with the Minister's response, may appeal to the High Court.

It has been shown that the accused through A1 and A2 did notify the police and in the case of A1, she got a response from PW5. PW5 confirmed that he wrote back to A1 on 26th September, 2017 which was only 2 clear days from the intended procession earmarked for 29th September. This was of course in contravention of Chapter 113 which demands that the police inform the conveners at least 5 days before the event.

According to the defence, the letter from PW5 was only delivered on 29th September, 2017, the day of the intended procession. No concrete evidence was led by the prosecution to prove that the said letter was actually delivered on 26th September as alleged. All there is are verbal representations of the prosecution witnesses to that effect.

Furthermore, PW5 did not propose an alternative date as per law required.

Ultimately, A1 was deprived the opportunity to appeal to the Minister in time.

As regards the notification tendered by A2 for a demonstration on 29th September, 2017, it appears it was not attended to. There is no proof on record that the police did inform the convener whether or not it had the capacity to police the event.

From the foregoing, I am of the view that the conveners were well within their right to proceed with the planned demonstration along parliament road. They did what is required of them but the police failed to do what was required of them by law.

In the case of **Resident Doctors Association of Zambia & Others v Attorney General** (2) the Supreme Court stated as follows:

The petitioners complied with the law and duly notified the Police within the time allowed by law. The regulating officer had a duty to inform the petitioners in writing at least five days before the event, if they were unable to police the march and propose alternative days. The petitioners' right to assemble and march therefore accrued at this stage. The regulating officer's endorsement of a purported rejection of the march, a day before the event for reasons that the demonstration would cause a breach of the peace, was not a valid exercise of power under the Act. Section 5(7), which prohibits the holding of the event after the Police have indicated in writing their inability to police the event can only be invoked when there has been a valid notification to that effect.

Similarly, in this case, the accused's rights to assemble and march had accrued at the time PW5 purportedly responded on 26th September, 2017, which is 2 to 3 days before the demonstration and further by virtue of the fact that the regulating officer did not respond to A2's letter. In both instances, section 5(7) was not invoked.

It was submitted by the defence and I agree that any subsequent order that followed after the police failed to obey the law is and was illegal, unlawful and unconstitutional.

Through cross examination, it was established that the demonstrators, the now accused, were peaceful on 29th September, 2017. This court was told that no property was damaged, traffic on the nearby roads continued flowing undisturbed and the proceedings in Parliament were not disturbed.

I note the evidence of some prosecution witnesses that the accused wanted to enter Parliament building. However, this has not been proved because the accused were stopped just when they turned into Parliament road. Their notices are specific that they wanted to demonstrate along that road and not to enter Parliament building. In any case, it has been established that they could not have entered through the gates as they did not have invitation cards.

In light of this, it becomes abundantly clear that there was no basis upon which the police could stop the demonstration on 29th September, 2017. They had been properly notified and the demonstration was not a security risk.

There was, therefore, no need for PW1 to fall back on the service instructions, which according to him, authorise him to order anyone not to do anything if it is a security risk or likely to cause a public nuisance. In any event, the Constitution of Zambia gives the accused the right to assemble or demonstrate peacefully and the Constitution is superior to the said service instructions or rules of engagement.

If anything, the service instructions should have applied to the group in green barrets that came for the purpose of disturbing the peaceful demonstrators because it had clearly not notified the police of its intention to assemble.

As was rightly submitted by the defence, the police did not act professionally and lawfully and they are indeed the major obstacle in the proper administration of the Public Order Act.

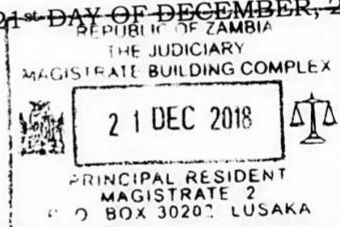

The inescapable conclusion, therefore, is that the order issued by PW1 to the accused persons was not duly made or was not backed by law. As such, I find that an essential element of the offence under

consideration has not been proved. Consequently, no reasonable tribunal could safely convict the accused.

In the case of **Penias Tembo v. The People** (3), it was held that "it is mandatory for a court to acquit an accused at the close of the prosecution case if the facts do not support the case against him, and no evidence that is led thereafter can remedy the deficiency in the prosecution evidence."

In the circumstances, I do hereby dismiss the charge. I accordingly ACQUIT all the accused persons in compliance with section 206 of the Criminal Procedure Code CAP 88 of the Laws of Zambia and set them at liberty forthwith.

DELIVERED IN OPEN COURT THIS 21st DAY OF DECEMBER, 2018.



PRINCIPAL RESIDENT MAGISTRATE