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**The Role of Medical Evidence in Determining the Cause of Death
in Murder Cases in Zambia**



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The Role of Medical Evidence in Determining the Cause of Death in Murder Cases in Zambia



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Abstract

Purpose: This paper seeks to demonstrate the necessity of medical evidence in determining the cause of death in Murder cases. Further, to show that the use of ocular observations to determine the cause of death is not always sufficient or accurate. It is important for medical evidence to be adduced to determine the cause of death in murder cases because a conviction for murder carries the ultimate punishment of death. Secondly, determining the cause of death in a murder case is not only a legal question but also a medical question. Combining both approaches is likely to lead to a more just determination of the matter.

Methodology: The research was conducted by analysing statutes, judicial precedents, journal articles and other legal authorities that address the legal principles and issues underpinning this subject matter.

Findings: Firstly, the use of expert medical evidence in determining the cause of death in murder cases is not mandatory in Zambia. Secondly, relying solely on ocular observations to determine the cause of death will not always lead to a just and or accurate determination of the cause of death. Thirdly, there is a lack of trained experts in the field of Medico legal Death Investigations. Fourthly, the use of a combination of both eye witness testimony and expert medical evidence will lead to a just conclusion of murder cases. Lastly, determining the cause of death is both a legal and medical question

Unique contribution to theory, practice and policy: The study highlights the importance that must be attached to the use of medical evidence in murder cases in view of the fact that determining the cause of death is not just a legal question premised on eye witness accounts but a medical question requiring expert opinion. It further advocates a mandatory requirement for the state to adduce medical evidence in prosecuting murder cases. Lastly it calls for investment in training experts in the field of medicolegal death investigations to provide the much-needed expert opinion in these cases

Keywords: *Expert Opinion Evidence, Murder, Cause of Death, Medicolegal Death Investigations*

1. INTRODUCTION

1.1. General Introduction

Murder is the most serious criminal offence in Zambia. It is one of only 3 offences in Zambia that attract a mandatory death sentence. These offences are Murder, Treason and Aggravated Robbery (Penal Code CAP 87).

Section 200 of the Penal Code creates the offence of Murder whose key ingredients are that the Accused person caused the death of the deceased by an unlawful act or omission with the requisite mens rea which is malice aforethought. These ingredients are defined in the Penal code (CAP 87) in Sections 207 and 204 respectively. Section 209 of the Penal Code (CAP 87) also requires that the victim of the offence must have met their death within 1 year and 1 day of the act or omission complained of. The burden of proof rests with the Prosecution who must prove the accused's guilt beyond reasonable doubt. Both the Constitution and judicial precedents confirm this. Art.18 (2) of the Constitution upholds the presumption of innocence rebuttable by proof of the Accused's guilt from the State or the accused's own admission of guilt.

In *Woolmington v DPP (1935)* Lord Sankey L stated that, 'it is the duty of the prosecution to prove the prisoner's guilt . . . No matter what the charge or where the trial, no attempt to whittle it down can be entertained'.

This places a significant burden on the Prosecution to prove each element of the offence to the requisite standard. In order to achieve this the Prosecution often makes use of various forms of evidence available to it. These forms may include eye witness accounts; documentary evidence, forensic evidence and expert opinion evidence. The focus of this paper is the use of expert opinion evidence in murder trials in establishing the cause of the victim's death.

1.2. Background

Expert opinion evidence of varied types may be used to assist in determining the guilt of the Accused person(s) in a murder trial. For instance, the State may call upon the services of a ballistic expert to ascertain whether or not a particular firearm was used to commit the crime under consideration or they may call upon a pathologist to ascertain whether or not the victim in a murder case died as a result of an assault inflicted on him or her by the accused person or if he or she died from natural causes where this is in dispute; they could also engage an expert to examine food or drink consumed by the victim if there is a suspicion that it contained a poisonous or noxious substance.

Ascertaining the cause of death may not be easy where there is no eye witness to the circumstances surrounding the offence or where there is a witness but the state of the deceased's health or condition is unclear and may not be determined by simply looking at the circumstances surrounding the death of the victim in a murder case. In these circumstances, the opinion of an expert witness may be the essential link tying the accused person to the offence or indeed the much-needed evidence to vindicate the accused person. Bearing in mind the grave consequences of a conviction and the injustice that an acquittal will cause if a guilty person is

set free, it is contended that the use of expert opinion evidence ought to be an essential requirement for the just determination of murder cases particularly in ascertaining the cause of death of the murder victim.

Hatchard and Ndulo (2013) observed that, ‘When dealing with the question of ‘expert’ testimony, two interrelated but separate questions should be considered; first whether the issue in question is such that the trier of fact may appropriately receive assistance in the form of expert evidence, and second, whether the witness at hand is an individual qualified to render assistance.’

The sentiments expressed in the above statement form the cornerstone for the discussion that ensues in this article because it raises 2 important concerns: firstly, it implies that expert opinion evidence is not required in all circumstances and secondly that when it is required it must be given by a person that qualifies to give an expert opinion. This paper argues that determining the cause of death must be viewed as one of those circumstances in which expert opinion evidence should be used routinely rather than as an exception or option. The Evidence Act (CAP 43), Penal code (CAP 87) and the Criminal Procedure Code (CAP 88) do not provide any guidelines to the courts on who an expert is broadly speaking, or which circumstances require the input of an expert witness nor the role and qualities an expert witness must possess. However, Section 191 A of the Criminal Procedure Code provides guidance on how reports by medical officers in the public service should be treated. This section defines a medical officer as a medical practitioner registered as such under the Medical and Allied Professions Act. Section 192 of same Act also outlines how the evidence of an analyst described as ‘being a person with the necessary skill and knowledge to carry out an examination or process requiring chemical or bacteriological skill’ should be received. However, the requisite qualifications are not indicated.

Further, there are a plethora of local judicial precedents and English common law decisions that are instructive on these matters.

This paper will examine the traditional position of the courts on the use and application of expert evidence in determining the cause of death in murder cases in Zambia whilst advocating for a change in that position.

2. METHODOLOGY

The research was conducted by analysing statutes, judicial precedents, journal articles and other legal authorities that address the legal principles and issues underpinning this subject matter.

3. RESULTS AND DISCUSSION

3.1. The Expert Witness

In order to ascertain who an expert is, courts consider whether or not the witness has the requisite academic or professional qualifications and or whether or not they have experience in the field of particular concern (Matire and Edmond, 2017). In the latter instance, the case of *R v Silverlock*(1894) is particularly instructive. In that case the court was willing to recognise a

solicitor as a handwriting expert because he had studied handwriting as an amateur for a decade. He was asked to give his opinion on whether or not the disputed handwriting belonged to the Accused. Also noteworthy is the fact that a person will not automatically qualify as an expert just because they have an academic qualification in a particular field. In order to qualify, the qualification must be at a level at which they can be recognised as an expert. In providing an illustration of this idea Keane (2006) observes that: ‘. . . a medical orderly experienced in the treatment of cuts is not sufficiently qualified to express an opinion on whether a cut on the forehead was caused by a blunt instrument or a head-butt’.

Thus, the court may have to exercise its discretion in arriving at what kind of qualification or amount of experience is adequate to accept a witness as an expert in a particular field. However, in some cases the law prescribes which persons qualify to provide an expert opinion in a court matter. In Zambia a medical report must be under the hand of a medical officer who is defined as a medical practitioner under the Medical and Allied Professions Act (CAP 297).

3.2. The Status of Expert Opinion Evidence

It is conceded from the outset that the courts are not required nor is it necessary to engage the services of an expert witness in all criminal cases. The evidence adduced by an expert witness is merely a guide to a trial court and not so authoritative as to replace the courts’ role in assessing the evidence before it and arriving at an independent decision in a particular matter.

The position alluded to has been expressed in a number of court decisions. An example of such an authority is the case of *Chansa v The People* (1975) where ‘the appellant was convicted of aggravated robbery. The court held that: ‘When an expert gives evidence it is the duty of the court to come to a finding and the expert’s evidence is merely there to assist the court in coming to its conclusion’. Similar sentiments were expressed in another case where it was held that:

‘When dealing with the evidence of an expert witness, a court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the court to come to its own conclusion based on the findings of the expert witness. The purpose of expert evidence in establishing negligence in the realm of diagnosis and treatment is not necessarily to pit one professional opinion against another, but to guide the Court. At the end of the day, the Court still has to make its own conclusion based on all the evidence before it (Attorney General v Mwanza and Another (2017). Fawaz and Chelelwa v The People (1995-1997) followed’

The implication is that the courts are at liberty to accept or to reject the evidence adduced by an expert witness. However, this does not mean that they must disregard an expert opinion simply because they do not like it or technically do not need it. The Ngobeka (2020) case places a duty on the court to consider the evidence of the expert witness and if not in agreement with it to give reasons for discounting it.

3.3. The Necessity of Medical Evidence

‘The use of medical witnesses has a long history in common law. In the oft quoted case from 1554 of *Buckley v Rice*, Justice Thomas stated:

‘If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honourable and commendable thing in our law, for thereby it appears that we do not despise all other sciences but our own, but we approve of them, and encourage them as things worthy of commendation. . . In an appeal of mayhem the Judges of our law used to be informed by surgeons whether it be mayhem or not, because their knowledge and skill can best discern it’ (Milroy, 2017).

Case law in Zambia suggests that medical evidence is not always necessary in establishing the cause of death in all murder cases. For instance, in *Jack Chanda and Kennedy Chanda v The People* (2002) the court held that:

‘Lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for the death of the deceased’.

Also in *Kashende Njunga, Francis Kadonga Kangeya, George Musenga Chikatu, Chimanga Kangol Shamuzala and Oscar Maseke Makuwa v The People* (1988-1989), the Supreme Court held that:

‘It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Except in borderline cases, laymen are quite capable of giving evidence that a person has died. Where there is evidence of assault followed by death without the opportunity for a novus actus interveniens, a court is entitled to accept such evidence as an indication that the assault caused the death.’

On the face of it this position is logical and meritorious. It is true that lay men can verify the fact that a person has died. However, determining whether the actions or omission of the accused is responsible for the death of the victim cannot be left to ocular observation. The fact that the victim of a murder case was assaulted by the accused person does not necessarily mean that the deceased has died as a result of that assault. The degree and extent of those injuries and condition of the deceased prior to the assault are key to determining the cause of death. This can only be determined by a medical examination. Even determining the effect of an intervening act may likewise require the use of expert opinion evidence depending on the nature of the intervening act. All these questions are both factual and medical questions. In the premises a court should have the benefit of expert opinion evidence to expand its understanding of all the issues that require consideration.

Further, it is clear from Section 207 of the Penal code that determining whether or not the accused is responsible for the death of the deceased is not a straightforward matter.

Subsection (a) and (b) of Section 207 assumes that the accused caused the death of the victim if he assaulted that person and they died because they were subjected to defective surgical or medical treatment in the first instance or that the victim neglected to acquire proper surgical or medical treatment where the injuries would not otherwise result in death in the latter case. Determining the state of affairs in (a) and (b) require expert opinions that will either convict or

vindicate the accused person. For instance, in the scenario envisaged by subsection (b) how will the courts ascertain that the seriousness of an injury or whether or not it required medical or surgical treatment to prevent death from occurring?

Further, Section 207 (d) of the Penal code envisages that the accused merely hastened the death of a victim who was already dying as a result of a disease or injury. How will the courts arrive at a position that the accused's act or omission was sufficient or did in fact hasten the death of the victim if they do not get an opinion from a person or persons that can make that determination? Will it simply say that the death was hastened because it occurred shortly afterwards without establishing the window period in which death would be expected to have occurred without the actions of the accused?

Even when it appears that the accused is responsible for the death of the deceased this is not always the case. For instance, in *Raymond Mweetwa Banda v The People*(1984) (cited in *Patson Simbalula Chibele v the People* (1986) in which the prosecution failed to prove a causal connection between the brain abscess which caused death and the felonious injury by axing which occurred six months earlier, followed by medical treatment details of which were not placed before the court. He said there that the prosecution had, by their failure to adduce evidence of the treatment, failed to establish the connection as a matter of causation, between the injury and the immediate cause of death.

Clearly in the Raymond case above had there be no medical evidence or indeed testimony regarding the health condition of the deceased person the only logical outcome of that prosecution would have been the conviction of the accused on account of the injuries he inflicted on the deceased 6 months earlier. That is not to say that the accused should have been acquitted but rather that there are other offences that could be imposed on an accused person whose actions cause grievous bodily harm such as attempted murder; grievous harm with intent to maim, disfigure and disable which carry a maximum term of life imprisonment. Additionally, by subjecting the deceased's body to medical examination other hidden and actual causes may be uncovered that could point liability for the death to another person. All in all, justice will better be served when the perspective of the facts surrounding the death of the deceased are enhanced.

Di Maio (2003) also observes that: 'Medical expertise is crucial in death investigations. It begins with body examination and evidence collection at the scene and proceeds through history, physical examination, laboratory tests, and diagnosis in short, the broad ingredients of a doctor's treatment of a living patient. The key goal is to provide objective evidence of cause, timing, and manner of death for adjudication by the criminal justice system.

... Many lay coroners do not autopsy burned bodies, but a medical examiner would investigate the possibility of homicide masked as an accident. By interviewing, the medical examiner might uncover evidence of a crime'.

The observations of Oppenheim (2010) though not addressing the determination of the cause of death in a murder trial refers to a case that sheds light on the importance of medical evidence in the resolution of criminal matters in general. He refers to a case in which an assault had been

occasioned on the victim at a party using a broken beer bottle. The accused person had raised self-defence to counter the charge of aggravated assault. The medical witness in the matter disagreed with the prosecutions assertion that the victim had been struck twice- in the first place as self-defence and in the latter retribution. He concluded there was one blow based on the laceration pattern he observed. On this account, the accused was acquitted. Medical evidence confirmed his testimony and relieved him of criminal liability.

He further observes ‘in one case where the actual cause of death was in question, the state dismissed the case. The defendant got into a fight and did beat up the victim; he punched him. The defendant received medical care for injuries to his hands from the punches. The victim was found dead a day later, at least fourteen hours after the fight. The autopsy showed that the victim's skull had an impression from a 2.5-inch pipe. However, witnesses who saw the fight testified about punches said there was no 2.5-inch pipe. Here the defendant had committed a battery, but he did not cause death’.

Clearly, the determination of a person’s cause of death is both a medical question and a factual question. Had the proceedings excluded the use of expert medical evidence, the death of the deceased would have been attributed to the accused seeing that there was no indication of novous actus interveniens from the perspective of eye witnesses.

The author recalls years back in her work as an advocate representing an accused who was charged with murder on the ground that he had an altercation in which he assaulted the deceased person on a date prior to his demise. On a subsequent occasion to this just before the deceased passed on but after the known altercation with the accused the deceased was assaulted by unknown persons. The accused was the only person with known problems with the deceased. The case is of interest because one of the vindicating pieces of evidence that supported the accused was the post mortem report which indicated that there were 2 sets of injuries one more recent than the other. The latter injuries coincided with the approximated period in which the accused had an altercation with the deceased. Those wounds were healing. The pathologist was of the opinion that the latter wounds were responsible for the demise of the deceased person. Since there was no evidence linking the accused to the most recent wounds, the court acquitted him of murder but found him guilty of one of the legal species of assault. Had the courts relied purely on the fact that the deceased had suffered some injuries prior to the later injuries; the accused may have been convicted of murder. The post mortem report clarified the cause of death. This case can be distinguished from the case of *Patson Simbaiula v The People* (1991-1992) in which the court held that: ‘Where a person inflicts an injury and the injured person later dies of a cause not directly created by the original injury, but caused by it, the requirement of causation is satisfied. Where the cause of death can be traced back in a clear chain of the actions of the person causing the injury, it is not always necessary for direct evidence to be led that the injured person received proper medical treatment.’ Again, to meet the requirements in the Simbaiula case medical evidence may need to be adduced to show the link between the earlier and later injuries.

The importance of medical expert evidence cannot be over emphasised additionally in cases where there is no witness to identify the assailant and explain the way in which the deceased person met his or her death.

A brief and further consideration of these matters is made in 2 recent reported cases tabulated below:

Stephen Ngobeka v The People (2020) was a murder case in which the Pathologist was unable to ascertain the cause of death. He suggested 3 possibilities. Despite this, the trial court convicted the accused for the offence of murder. No direct evidence was available to establish that the accused was responsible for the death of the deceased person. The trial court did not address this dilemma, nor did it explain the basis for his conclusion that the deceased died from strangulation. The decision was overturned by the Court of Appeal. The court was of the view that the trial court should have discounted 2 of the 3 possible causes of death. They upheld the right of the judge to reject or accept a position of an expert. However, in doing so the court must give reasons for their answers. The court of appeal acquitted the accused person

Also, the case of Lazarous Kasonde and Jennipher Chanda v The People (2017) - the duo was convicted of murder. The pathologist was not called to interpret the post-mortem report. The report indicated that the deceased child died because of kwashiorkor and septic burns. The trial court concluded that the burns inflicted on the deceased were the immediate cause of death because she became very sick after the incident. Further that the burns became septic due to the negligence of the accused persons who did not take her to the hospital in good time. The court exercised its discretion and concluded that the child died from burns rather than kwashiorkor for reasons noted above.

Zambia has held onto the time limit in which an accused person's act or omission will be deemed to be the effective and immediate cause of death that was determined under common law. However, some countries including the USA have extended that period from 1 year and 1 day to as much as 3 years (Scheb and Scheb, 2011). This has been made possible due to the advancements in medical science. This suggests that medical science plays a role in connecting the accused's actions to the death of the victim in a murder case.

Having argued for the routine use of expert opinion evidence in establishing whether or not the accused is responsible for the death of the deceased person in a murder case it has not been the intention of the author of the article to suggest that experts in the field of medicine are infallible or omniscient but rather to encourage the use of this type of evidence in the determination of such matters that require technical knowledge. Heavy reliance on expert opinion evidence has proved disastrous in some cases resulting in the conviction of innocent persons. A case in point is the Sally Clarke case in which the expertise of a paediatrician was employed to prove that the accused was responsible for the murder of her 2 infant children. Roy Meadow was an internationally recognised expert in child abuse cases. He provided statistical evidence on the likelihood of a family experiencing two cot deaths. His statistics suggested it was virtually impossible for this to happen. The courts attached great weight to his testimony and the accused was convicted accordingly. She served 3 years imprisonment before she was exonerated on

appeal. Roy Meadow was struck off the register of medical practitioners because it was argued that he ought to have exercised greater care and skill in carrying out his duty as an expert witness. ‘The General Medical Council found Roy Meadow—an internationally recognised child abuse specialist who was knighted for his services to paediatrics—guilty of serious professional misconduct over evidence he gave at the trial of the solicitor Sally Clark for the murder of her two sons (Dyer, 2005). Thus, the court’s role in determining the cause of death cannot be replaced by the opinion of an expert. Indeed, the court may reject the evidence of an expert witness whose opinion is not consistent with the factual basis upon which it is based or the circumstances surrounding the commission of the offence (Chen et al., 2021).

Therefore, if the accused is to suffer the ultimate punishment for murder the court must be sure that he is indeed culpable for his actions. It is thus contended that the court must make full use of all the available tools to enable it to make the right decision and this should include witnesses with expertise in medical science.

3.4. Safeguards Applied in the Use of Expert Opinion Evidence

To some extent, the potency of this position is demonstrated in the court’s desire to ensure that when medical evidence is adduced in court the evidence adduced is adequate for them to draw appropriate inferences from its content. For instance, firstly, where a medical report is relied on, courts have encouraged parties making use of those reports to call the person who carried out the examination and authored the report as a witness. This enables the parties involved in litigation and the court to appreciate the content of a medical report in layman’s language. In *Sipalo Cibozu and Chibozu v The People* (1981) ZLR 28 (SC) held among other things that:

1. Medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable for the person who carried out the examination in question and prepared the report to give verbal evidence.
2. Information relating to the severity of injuries sustained by the victim is essential to a proper consideration of the question of sentence and may in some cases be essential on the question of verdict.

In its assessment of the facts of the case the court held the view that the cause of death was not adequately proved by the prosecution whose post mortem report indicated that ‘the deceased met her death through being burnt to death’. They observed that pages 2 and 3 of the post-mortem report bore no entries thus indicating that the body had not been subjected to a full examination presumably because of the state in which the body was found. On that account the court concluded that the cause of death as indicated on the report was inconclusive. The accused persons were acquitted of murder. The court cannot be faulted for arriving at this decision since there was no evidence that the deceased was alive at the time when her body was burnt.

Also, experts are required to not only provide an oral account of their opinion regarding the matter for which their expertise is sought but must also provide a physical foundation where appropriate for the opinion that they give.

For instance, in the case of *Chansa v The People* [1975] the Supreme Court held that:

ii) Where there are photographs and other test material available to be placed before the court the failure to produce that material is fatal and then the opinion of the expert should not be accepted

3.5. Practical Challenges for the Prosecution

As noted in the preliminary sections of this paper, the State bears the burden of proving that the accused person caused the death of the deceased person. The arguments raised so far advocate for a blanket requirement for the state to adduce expert medical evidence in support of its case. However, under the current situation this may be deemed unattainable for a number of reasons identified by Muchelenganga, Telendiy, Simumba, Himwaze (2021):

1. The lack of qualified persons to provide that opinion. They observed that there was one (1) formally trained Forensic Pathologist and three Anatomical Pathologists who were based in Lusaka the capital city. Most of the country is being serviced by General Medical Practitioners with no formal training in Medicolegal Death Investigation
2. Burial sites may be inaccessible due to poor road network thus requiring considerable effort on the part of the medical personnel to access the deceased's body
3. Having to carry out the post mortem at the gravesite rather than in a facility that is designated for purposes of carrying out the post mortem examination

The challenges are numerous but not insurmountable. Some of the challenges can be resolved by government interventions that include training of its personnel and investment in the creation of facilities countrywide to enable experts to carry out their work. It is noteworthy that the government has shown its commitment to ensure that matters of this nature are attended to effectively by among other things creating a legal framework that provides for the creation of the office of the State Forensic Pathologist, The National Forensic Authority and the National Forensic Science and Biometrics department under the National Forensic Act No 2 of 2020.

4. CONCLUSION

The criminal justice system must make use of all the tools that this modern age has developed to enable it to arrive at just decisions. Advancements in medicine and other human endeavours must affect the way that the state gathers evidence to prosecute cases and courts analyse evidence. The use of experts such as forensic pathologists, anatomical pathologists, and medical practitioners in determining the cause of death in murder cases ought to become the rule rather than the exception. An assessment made solely on the facts adduced by eye witnesses or inferred from those facts is not always adequate to establish causation in matters of this magnitude. Further, Judges are experts of law and not medicine thus placing the burden on them to determine that the accused has caused the death of the deceased without any expert opinion is to make them respond to a technical question from a layman's perspective.

Hence, it is recommended that there is need to include a provision in the law that obliges the State or at least strongly encourages them to support their assertions that the accused caused the death of the victim in a murder case with expert medical evidence.

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