



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

# Trial Monitoring of People v. Miti et al.

**(ZAMBIA 2018)**

July 2019

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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),<sup>1</sup> among other human rights treaties, both of which protect freedom of speech and assembly<sup>2</sup> and prohibit discriminatory state action on the basis of political opinion.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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."<sup>7</sup>

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<sup>1</sup> Zambia ratified both treaties in 1984.

<sup>2</sup> 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>.

<sup>3</sup> See ICCPR art. 2; Banjul Charter art. 2.

<sup>4</sup> 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/>.

<sup>5</sup> 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>.

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

<sup>7</sup> 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.<sup>8</sup> 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.*<sup>9</sup>

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.<sup>10</sup> 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.”<sup>11</sup>

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.”<sup>12</sup>

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<sup>8</sup> 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/>

<sup>9</sup> Republic of Zambia, Public Order Act (1955), Sec. 127.

<sup>10</sup> 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>.

<sup>11</sup> Front Line Defenders, *supra* note 6, at 5.

<sup>12</sup> 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.”<sup>13</sup> The United Nations Educational, Scientific, and Cultural Organization (UNESCO) also recommended the decriminalization of defamation and the enactment of a freedom of information law.<sup>14</sup> 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.<sup>15</sup> In particular, these organizations identified the government’s ownership of media outlets, its closure of rival media houses,<sup>16</sup> and its repeated use of the Public Order Act to harass and arrest members of the opposition political party.<sup>17</sup>

While these concerns were not new (some had been raised in the 2012 UPR recommendations),<sup>18</sup> respect for freedom of assembly and expression in Zambia has not improved—and appears to have deteriorated—since the 2016 general election.<sup>19</sup> 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.<sup>20</sup> Other members also called upon Zambia to ensure that freedom of association and the right to peaceful assembly are respected and protected<sup>21</sup> and that journalists, human rights defenders, and activists can operate without fear of persecution, harassment, or intimidation.<sup>22</sup>

## **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

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<sup>13</sup> 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.

<sup>14</sup> *Id.* ¶ 30.

<sup>15</sup> 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.

<sup>16</sup> *Id.* ¶¶ 42, 13.

<sup>17</sup> *Id.* ¶ 42.

<sup>18</sup> *Id.* ¶ 39.

<sup>19</sup> *Id.* ¶ 11.

<sup>20</sup> 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).

<sup>21</sup> *Id.* ¶ 131.67 (United States); ¶ 131.69 (Ireland); ¶ 131.71 (United Kingdom).

<sup>22</sup> *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.<sup>23</sup>

Three days before the demonstration and two days after the date on which the authorities were supposed to respond (according to the law),<sup>24</sup> the police replied that September 29 was not a convenient date, and urged the protesters to choose an alternate date.<sup>25</sup> 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.

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<sup>23</sup> 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).

<sup>24</sup> 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).

<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

## 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> Police arrested Pilato at Kenneth Kaunda International Airport on his return to Zambia in May 2018. After

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<sup>26</sup> 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>.

<sup>27</sup> *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>.

<sup>28</sup> 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](https://zambialii.org/zm/legislation/consolidated_act/87).

<sup>29</sup> See Charge Sheet in Monitor’s Notes.

<sup>30</sup> 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](http://saipar.org/wp-content/uploads/2013/10/CHP_03_Law_in_Zambia.pdf).

<sup>31</sup> *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.<sup>32</sup> All six accused pleaded not guilty on September 24, 2018.<sup>33</sup>

## 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.”<sup>34</sup> 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?”<sup>35</sup> 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.

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<sup>32</sup> 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/](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/>.

<sup>33</sup> 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/>.

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

<sup>35</sup> *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.<sup>36</sup> 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.<sup>37</sup>

The accused were thus acquitted of all charges.

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<sup>36</sup> *People v. Miti*, *supra* note 35.

<sup>37</sup> *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,"<sup>38</sup> 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

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<sup>38</sup> ICCPR art. 26.

of any kind, including political or other opinion.<sup>39</sup> 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."<sup>40</sup> These rights, as well as the freedom of the press, are also constitutionally guaranteed in Zambia.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> Any constraints must be narrowly drawn and their necessity convincingly established.<sup>44</sup>

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.<sup>45</sup> As such, its implementation is in need of reform.<sup>46</sup> 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.<sup>47</sup> Prosecutors then bring sham charges against critics of the government on spurious grounds.<sup>48</sup>

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<sup>39</sup> ICCPR art. 2(1).

<sup>40</sup> *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).

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

<sup>42</sup> *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).

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

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

<sup>45</sup> *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.").

<sup>46</sup> *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.").

<sup>47</sup> *Freedom House*, *supra* note 7.

<sup>48</sup> *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.<sup>49</sup> 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.”<sup>50</sup> 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.<sup>51</sup>

The Constitution of Zambia provides for independence of the judiciary.<sup>52</sup> 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.

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<sup>49</sup> 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>.

<sup>50</sup> 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](http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf).

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

<sup>52</sup> 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.<sup>53</sup> 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,

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<sup>53</sup> 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.<sup>54</sup> 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.”<sup>55</sup> 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.

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<sup>54</sup> Front Line Defenders, *supra* note 6, at 20.

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



## CONCLUSION AND GRADE

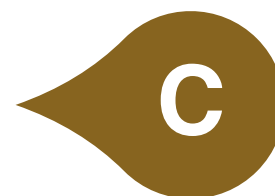


Judge Mwaka Chigali Mikalile presided over a fair trial on charges that should never have been brought in the first place. The prosecution abused his professional responsibility by leveling, and then vigorously pursuing, charges under the Public Order Act that were entirely unsubstantiated given the 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.<sup>56</sup>

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**

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