SPR
LLB

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

TITLE: IS THERE ADQUATE JUVENILE JUSTICE? A CRITICAL ANALYSIS OF THE LAW OF DEFILEMENT BY JUVENILE OFFENDERS AND THE ISSUES RAISED IN **KAPYA KANDEKE V THE PEOPLE.**

NAME OF CANDIDATE: SIMULYAMANA, NIPHEGIE. C.

NAME OF SUPERVISOR: MR. ZULU, L.

NAME OF CORDINATOR: PROF. MUNALULA, M.

DATE/ YEAR: 2012

An Obligatory Essay submitted to the school of Law of the University of Zambia in partial Fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

Supervisor:

Signature.....

Candidate:

Signature.....

IS THERE ADQUATE JUVENILE JUSTICE? A CRITICAL ANALYSIS OF THE LAW OF DEFILEMENT BY JUVENILE OFFENDERS AND THE ISSUES RAISED IN **KAPYA KANDEKE V THE PEOPLE.**

BY

SIMULYAMANA, NIPHEGIE.C

(28017340)

An obligatory essay submitted to the school of the University of Zambia in partial fulfillment of the requirements for the award of Degree of Bachelor of Laws (LLB).

The University of Zambia

School of Law

P.O Box 32379

Lusaka.

May 2012

COPYRIGHT DECLARATION

I, SIMULYAMANA, NIPHEGIE. C, of computer number 28017340, do hereby declare that the contents of this Dissertation are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so

I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

Date..... ... Signature.....

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that this Obligatory essay prepared under my supervision

BY

SIMULYAMANA, NIPHEGIE. C

(28017340)

Enititled

IS THERE ADQUATE JUVENILE JUSTICE? A CRITICAL ANALYSIS OF THE LAW OF DEFILEMENT BY JUVENILE OFFENDERS AND THE ISSUES RAISED IN **KAPYA KANDEKE V THE PEOPLE.**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing directed research essays.

Supervisor.....

MR. ZULU, L

Date.....11/5/12.....

ABSTRACT

This dissertation considers whether there is adequate juvenile justice with regard to the law of defilement paying particular attention to the case of Kapya v the people. In approaching the subject matter, the research begins by giving a general background of the juvenile justice system. The research has gone further to explain the position of the law of defilement in Zambia.

To favourably evaluate the adequacy of the juvenile justice system, the dissertation has compared the Zambian juvenile justice system with that of other jurisdictions, particularly South Africa and United States of America.

Since Zambia is a common law country, hence religiously follows the doctrine of judicial precedent, the research has thus paid particular attention to the decision of the Supreme Court of Zambia in the case of Kapya v the People. The research has, however, indicated that much as that the decision is law, it does not reflect the best of the juvenile offender. The dissertation has indicated that juveniles are unique individuals who are not developmentally and fully grown and thus need to be treated with delicacy and care in case they contravene the law.

As such, the dissertation recommends that the approach to addressing juvenile delinquency involving defilement should be revisited. Thus, the paper recommends the vigorous campaign for diversion, restorative and ubuntu in their treatment. The paper further recommends for imprisonment to be used as a measure of last resort, education for police officers, law reform and infrastructure development among others.

ACKNOWLEDGEMENTS

My loving creator and Father, thank you for being my strength and source of wisdom. Without your love in abundance, ultimate care, direction, counsel and guidance.

I owe a debt of gratitude to my excellent supervisor, Mr. Zulu who awakened in me an appreciation for effective and clear writing. I was privileged and honoured in particular for inspiring me and put in hours correcting and commenting on everything I wrote. Correcting somebody else's writing is a thankless task, but he took the task on with grace and perceptive insight. He pointed out gently as possible each time I violated the principles of my research. To him I say "you are a legal jurist par excellence and it was, and is still is, an honour to have been taught and supervised by you."I will eternally be grateful.

This research has also benefited from careful and thoughtful editing by a number of people. In particular, I want to acknowledge the excellent help from my friends Kelly, Diana, Womba, Chisenga, RMC, Mapange, Nasillele, Chibi, Nyambe, Obetty, Jeremiah and Raymond. Thanks friends.

To my family, Bristone, Mostah, Hudson and Mutinta, I thank you for your patience, support and care rendered to me when undertaking this research.

A paper without a mention of Lindilani Nkhoma, Lilian would be incomplete. Thank you for believing in me and for bringing smiles and true happiness in my life. I pray that you will follow my steps as you always promise. I love you. Finally, I would like thank all those who, though not expressly mentioned above, contributed in making this research a reality and its successful completion imminent. Any deficiencies in this research are solely my responsibility.

DEDICATION

To my mother, Belitha Muleya and my brother, Aspha Simulyamana, for teaching me the language of success and to learn to cherish my visions and my dreams, as they the children of my soul, the blueprints of my ultimate achievements. Mum, as I dream, so I shall become. My vision is the promise of I shall one day be; my ideal is the prophecy of what I shall at last unveil. Thank you for your everlasting love, I love you. To Aspha, though so hard on me, you are more than a brother to me and leaning shoulder to me. From the time daddy died some 11 years ago, you have been a source of hope. I owe you more than you think I do. Thank you for tolerating my weaknesses and your limitless love and care

TABLE OF STATUTES AND INTERNATIONAL INSTRUMENTS

The Juvenile Act, Chapter 53 of the Laws of Zambia.

The Penal Code (Amendment) No. 15 of 2005, Cap 87 of the Laws of Zambia

Convention on the Rights of a Child (CRC)

The Child Care Act

The Criminal Procedure Act 51 of 1977

Child Justice Act no.75 of 2008

The constitution of South Africa

Juvenile Justice and Delinquency Prevention Act of the United States of American

TABLE OF CASES

TABLE OF CONTENTS **PAGE**

Chapter 4

Chapter 5

CHAPTER 1:

General introduction and background of the concept of justice system

1.0 Introduction

Violation of children's rights represents a common problem world over. This evil practice may occur in form of unfair judgments, child labour, child harassment, torture, inhuman treatments and other forms of human rights violations. However, this paper considers the adequacy of juvenile justice in light of defilement in Zambia. The paper pays particular attention to the case of *Kapya v the People*, a recent case involving a juvenile who was sentenced to fifteen years imprisonment with hard labour for defiling a girl young than sixteen years of age in contravention of section 138 of the Penal Code. To consider this, the paper is divided into five chapters, each dealing with a particular issue.

Chapter one is an introductory chapter which basically gives the general sentiments of this research paper. The chapter generally introduces the research paper and gives an outline of the most important aspects of the research. These include introduction, background, statement of the problem, definition of concepts, research questions, methodology and purpose of the study. The chapter is designed in such a way as to give a broad outlook on the study and to pave way for the main elements to be discussed in the research paper. Chapter two addresses issues that were raised in Kapya v the People. The chapter will consider how the court handled the case whereby sentencing the juvenile to 15 years imprisonment. Chapter three will consider how juvenile delinquents are treated in other jurisdictions, particularly United States of America and South Africa. This will help in determining the adequacy of juvenile justice in Zambia by comparing the system with those provided by the two countries. Chapter four considers how juvenile delinquents are treated in other offences such as murder, robbery and other related offences and

determines whether they are treated better than in defilement cases. Finally chapter five is a conclusion and recommendation chapter. The paper will give a summary of juvenile justice and its guiding principles and indicates whether Zambia meets those principles in juvenile justice.

1.1 Background to the study

Historically, adult and children offenders were treated with no distinction and punitive sanctions were equal. But the advent of juvenile delinquency saw the need for the creation of a way to promotion of juvenile justice which, an umbrella term for maladjustment and delinquent behaviour of children which is also intended to protect deprived and neglected adolescent representing juvenile offenders and juveniles in need of care respectively.[1]

The specific mechanisms for administering juvenile justice have varied over time among societies and even among jurisdictions within countries. The concept of delinquency, as well as special trials and institutions for confining and controlling juveniles, was established in the mid-19th century in Great Britain, where courts acquired the authority to intervene as *parens patriae* "parent of the land" to protect the property rights of children.[2] Yet juveniles were tried in the same courts as adults until the Juvenile Court of Law was founded in Chicago in 1899. The first court dedicated to cases involving delinquent children was a success, which led to the creation of other juvenile courts, known colloquially as children's courts or family courts, in other states.

[1] M. P. Nundwe. *Child Defilement: the need for stiffer Punishment.* (A research paper submitted to the University of Zambia, in partial fulfillment for the award of Bachelor of Laws Degree, 2003.)

[2] Larry J. Siegel and Brandon C. Welsh. *Juvenile Delinquency: The Core*, 3rd ed. (Chicago: Univ. of Chicago Press, 2008)765

The model was soon adopted in other countries such as Canada and Great Britain (1908), France (1912), Russia (1918), Poland (1919), Japan (1922), and Germany (1923). [3]

Juvenile justice as a matter of practice concerns all regions and all legal systems. Children are mystically being trapped in the net of legal systems as accused or even accusers, victim or witnesses and in situations outside conflicts with the law, such as asylum seeking, refugee. The juvenile justice system tries to treat and rehabilitate juveniles who become involved in delinquency. The methods can be categorized as community treatment, residential treatment, non residential community treatment, and institutionalization.

1.2 OPERATIONAL DEFINITION OF TERMS

Defilement: is understood as a deliberate, criminal and sexual assault injurious to personal integrity of a girl under sixteen years of age, thereby depriving her of her chastity, in cases involving virgins or otherwise self-esteem and inflicting serious cal injuries physical and psychological on her.[4]

Juvenile justice: a system of laws, policies, and procedures intended to regulate the processing and treatment of non-adult offenders for violations of law and to provide legal remedies that protect their interests in situations of conflict or neglect.[5]

Justice: A moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs.[6]

---

[3] "***juvenile justice.***" Encyclopædia Britannica. Encyclopædia Britannica 2009 Student and Home Edition. Chicago: Encyclopædia Britannica, 2009.

[4] R.Bird. **Osborn's Concise Dictionary**, 7th ed. (London: Sweet and Maxwell, 1983).

[5] J. Hatchard and M. Ndulo, Readings in Criminal Law and Criminology in Zambia. (Lusaka Multimedia Publications,1994), 128-135

[6], E. Martin. *A Dictionary of Law.* 5th ed.(London: Oxford University Press ,Great Clarenton Street London, 2002),754

Criminal justice: interdisciplinary academic study of the police, criminal courts, correctional institutions (e.g., prisons), and juvenile justice agencies, as well as of the agents who operate within these institutions.[7]

Juvenile: means a person who has not attained the age of nineteen years; and includes a child and a young person.[8]

Delinquency: criminal behaviour, especially that is carried out by a juvenile. Depending on the nation of origin, a juvenile becomes an adult anywhere between the ages of 15 to 18, although the age is sometimes lowered for murder and other serious crimes. Delinquency implies conduct that does not conform to the legal or moral standards of society; it usually applies only to acts that, if performed by an adult, would be termed criminal. It is thus distinguished from a status offense, a term applied in the United States and other national legal systems to acts considered wrongful when committed by a juvenile but not when committed by an adult.[9]

1.3 The law of defilement

By section 138 of the penal code, it is an offence punishable to have unlawful sexual intercourse with a girl under age of sixteen. The section provides:

(1) Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life[10].

The offence under this section is one of strict liability with respect to age element. Thus, a belief that the girl is over the age of sixteen, no matter how reasonable it is, will not suffice. Thus in *R v*

[7] Martin, 754

[8] Section 2 of the Juvenile Act, Chapter 53 of the Laws of Zambia.
[9] Encyclopædia Britannica, 2009.
[10] Section 138, Penal Code (Amendment) No. 15 of 2005.

Harrison and Others[11] where four youths appealed against their conviction carnally knowing a girl of 15 years, the Court held that it was necessary that in such a case, for the defence to prove that the prisoner had reasonable cause to believe and did in fact believe that the girl was over 16 years of age. However, the law no longer has this allowance or defence. This was affirmed by lord Steyn in *B v DPP*,[12] where he stated that the offence of under age is of strict liability. In Zambia, the law with regard to defilement equally does not allow for any defence. As opposed to the repealed law, which provided for a defence of belief that a girl was above 16 years, the current law does not provide for this defence. In this case, the element of consent is replaced by under-age, that is, a child under the age of sixteen. The picture painted by the phrase 'who unlawfully and carnally knows' is that the term unlawful signifies the prohibition of sexual intercourse outside marriage. [13] This is a view held by many persons regarding the term 'unlawful' as employed by section 132 of the penal code. It is clear from the wording of section 138 that it is not criminal for a person to have sexual intercourse with a girl under the age of sixteen if at the time the act done, the two were partners in marriage hence cannot be convicted of defilement.[14] This is seen in *Rex v Chinjamba*,[15] where the court held that: "it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married, despite the fact that the girl is under sixteen years of age."

In Zambia, defilement is an intolerable offence, described as a deliberate, criminal and sexual assault violative of the personal integrity of a girl under sixteen years of age, thereby depriving

[11] 22 Q.B.D 23.
[12] (2000) 2 WLR 452
[13] S.E Kulusika. "Zambia Law journal" Legislative and Criminal Justice Responses to Sexual Violence in Zambia. Volume 38, UNZA, Lusaka. (2006). 15- 20
[14] Kulusika, 15- 20
[15] (1949) NRLR 384

her of her chastity, in cases involving virgins or otherwise self esteem and inflicting serious physical and psychological injuries on her.[16] Thus, the law attaches serious penalty. Section 138(1) provides that upon conviction the offender shall be sentenced to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life. Similarly an attempt to defile equally attaches gravy sentence under section 138(2) where the offender shall upon conviction be sentenced to fourteen years imprisonment and may be liable for life imprisonment.

1.4 STATEMENT OF THE PROBLEM

Juvenile justice is a system of laws, policies, and procedures intended to regulate the processing and treatment of non adult offenders for violations of law and to provide legal remedies that protect their interests in situations of conflict or neglect. Punishable offenses that are classified as criminal offenses for adults such as murder, robbery, and larceny are referred to as delinquency when committed by juveniles. Whereas juvenile offenses mandating legal intervention only such as alcohol and tobacco use, truancy, and running away from home are referred to as status offenses.[17] It suffices to state that criminal law proceeds upon the principle that it is morally right to hate criminals and hence desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred and to justify it so as far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.[18] This condemnation does not spare the children. They are also subjected to specialized laws, procedures, and policies designed to protect their interests when parents or other legal guardians are unavailable, negligent, or involved in custodial disputes.

[16] .Kulusika, 15- 20
[17] C. Bartollas. *Juvenile Delinquency*, 7th ed. (New York; Oxford University Press. 2006), 871
[18] S. Joel. *Criminal Law*. 8th ed. (Thomson Wadswoth, University of Minenesota, 2005), 654.

Juvenile administration as Friendlander[19] correctly puts it; is a concept that reflects the recognition of childhood as a special phase in human life cycle distinct from adulthood. Children are no longer treated as adults but as human beings with different rhythm of life that has different laws of bio logical and neutral growth. The child's drives, social forces and motivation are basically different from those governing adult behaviour. To the child, the world is identical to his or her personality fantasy and reality begin to part.

It suffices to note that Children are a very important segment in society because in them lies the future and in the past years, questions as to how children should be treated upon them infringing the law is a concern that most countries have taken so seriously to resolve. It is realized that unlike adults, children are fragile beings in whom reality and fantasy has not yet been separated, therefore information is only the key to preserve that future that lies in them.[20] In Zambia, parliament enacted a legislation specifically to address the need for a fair juvenile justice. The Juvenile Act, in its preamble states that it's an Act to make provision for the custody and protection of juveniles in need of care, to provide for the correction of juvenile delinquents; and to provide for matters incidental to or connected with the foregoing.[21]

This paper therefore aims to establish whether there is adequate juvenile justice in Zambia, a critical analysis of the law on defilement by juvenile offenders. In light of this, the paper considers the case of *Kapya v the People*, a case which involved a juvenile who defiled a girl

[19] W.Friendlander. etal. *Introduction to Social Welfare*. 5th ed, New Jersey, Pretice Hall,1980)132-143.
[20] E. Simulwani. *The juvenile justice in Zambia* (A research paper submitted to the University of Zambia, School of Law in Partial fufilment for the award of Master of Laws Degree, 1994).
[21] Preamble of the Juvenile Act, Cap 53.

below the age of 16 and was sentenced to 15 years imprisonment. The research attempts to determine whether this amounted to adequate juvenile justice.

1.5 SIGNIFICANCE OF THE STUDY

The world today is dominated by wars, use of nuclear weapons, hunger, poverty, earthquakes, border disputes in most parts, but these are not the only threats to humanity. Children around the world are subjected to sexual abuse and exploitation.[22]Children are caught up by legal systems in defiant activities. This paper addresses the adequacy of justice to juveniles who are caught up by section 138 of cap 87 of the laws of Zambia; this is achieved by analysing issues raised in *Kapya v The People*, some of which include the sentence, the court's interpretation of the law and others. These issues are critical as they will assist in determining whether justice was accorded to the juvenile.

1.6 RATIONALE AND JUSTIFICATION

The study is pertinent and timely in view of the serious juvenile delinquency. It is well settled that the role of law in society is to afford the common man and any citizen with the opportunity to seek redress of wrongs to declare his or her rights and to stand before any court of justice and ask for justice to be done. The law should take the interests of both parties to heart and balance the conflicting interests. It should not only protect or safeguard the interests of one the parties but must safeguard interests of both parties (defiled and the offender) otherwise it fails in its role as a

[22] M.P.Nundwe *Child Defilement: the need for stiffer Punishment.* (A research paper submitted to the University of Zambia, in partial fulfillment for the award of Bachelor of Laws Degree 2003).

regulation of social conduct. In this regard, the law should take a balance between the interests of the two victims who are both children.[23]

From time immemorial, our culture, traditions cherished children, but it seems that the trend is dwindling and turning into a nightmare. Children are in a more crisis situation today than ever before. This implies that childhood has been lost to children through child defilement or sexual abuse.[24] Far from being a rare act, juveniles are also involved in satisfying their perverted lusts by targeting fellow naïve, trusting and defenceless children. It is therefore very important that society never overlooks this criminal act, but the question is, will there be full justice in the judicial litigation? In exposing children to justice systems it is important to note that a child occupies a unique and privileged position in society and that full and harmonious development of his personality. The child should grow up in a family environment in an atmosphere of happiness, love and understanding. Moreover due to his physical and mental development requirements, a child needs particular care with regard to health, physical, mental and social development.[25] In this regard therefore special courts are set for purposes of juveniles who come into conflict with the law. These special courts handle problems of delinquent, neglected, or abused children. The juvenile courts fulfil the governments' role as substitute for parent, and where no juvenile court exists, other courts must assume the function.

Walker[26] provides very useful information in the mode of treating juveniles who come into conflict with law. He states; the rise in juvenile justice system was on the basis of distinguishing juveniles from adult offenders, as the juveniles were regarded more likely to respond to parental

[23] M. Bertha. *Defilement as a sexual offence in Zambia and why the increase in Defilement cases.* (A research paper submitted to the University of Zambia, in partial fulfillment for the award of Bachelor of Laws Degree 2003.)
[24] M.P. Nundwe. *Child Defilement: the need for stiffer Punishment.* (A research paper submitted to the University of Zambia, in partial fulfillment for the award of Bachelor of Laws Degree, 2003.)
[25] Anonymous. www.African-union.org/child/home (accessed on 12 December 2011 at 15:00)
[26] N. Walker. Sentencing in a Rational Society. (New York, Oxford University Press. 1969),677

influence and as such, that influence should be given a fair chance to correct the juvenile before resorting to more costly and drastic measures.

With this basic theme, the paper analyses the juvenile justice system in Zambia, investigates if there is any mal administration of justice for children, take a close look at the juvenile systems in United States of America and South Africa to determine whether there is adequate juvenile justice in Zambia. The paper further aims to give a comprehensive analysis of defilement law in Zambia by juvenile offenders to give a comparative study of the law of defilement with other offences in relation to juvenile offenders. To achieve this, the paper considers to what extent the provisions of the juvenile Act protect the rights of juveniles in Zambia and address issues were raised in *Kapya v the People.*

Therefore this research emphasises on the need for careful consideration of the juvenile by authorities before depriving him of his liberty for defiling his fellow juvenile. The research further considers that all proceedings which are brought before authorities such as the courts should be done in the best interest of the juvenile.

1.7 RESEARCH OBJECTIVES

The ultimate objective of this research is to critically analyse the adequacy of juvenile justice in Zambia. This will be achieved by making a comparative study of juvenile systems in other countries. The research will in respect consider juvenile justice systems in South Africa and United States of America. The two states seem to offer better juvenile systems and therefore will help determine whether Zambia has adequate juvenile justice system. The research further analyses the law of defilement on juvenile offenders. This is achieved by comparing it with other

offences committed by juveniles. This is done in order to establish whether other juvenile offenders are treated differently upon commission of those offences.

1.8 METHODOLOGY

This research is a qualitative one. It shall embrace both desk research and occasionally field investigations. In this regard the desk research will be through the collection of secondary data in the form of Law Reports, books, journals, dissertations and as well as the internet. Field investigations shall be in the form of open ended interviews conducted with the relevant officials from the Judiciary like judges experienced in this particular field. However, field investigation and open ended interviews shall not be embraced in chapter one. Chapter one will purely depend on secondary information.

1.9 Conclusion

This chapter has given a general overview of the study. The chapter has defined juvenile justice as system of laws, policies, and procedures intended to regulate the processing and treatment of non-adult offenders for violations of law and to provide legal remedies that protect their interests in situations of conflict or neglect. The chapter has indicated that children are an important part of society, hence deserve a delicate treatment when they contravene the provisions of the law. It has been stated that juvenile justice is a very important concept as it separates juvenile from adult treatment upon being trapped in the net of legal systems. Additionally, the chapter has given an overview of the statement of the problem, rationale and justification, significance of the study, objectives and methodology of the research.

CHAPTER 2

An analysis of the issues raised in Kapya Kandeke v the people.

2.0 Introduction

In endeavouring to determine whether there is adequate juvenile justice, the preceding chapter has given the background of the research. In this regard, the basic theme of this chapter is to consider and attempt to analyse the issues that were raised in *Kapya v the People*. The chapter will consider whether the appellant was fairly sentenced to fifteen years imprisonment with hard labour. The chapter will analyse the court's interpretation of certain provisions relied by the court in sentencing the appellant.

2.1 Background

The brief facts of the case are that on 27th August, 2007, the appellant was convicted of defilement contrary to section 138(1) of the Penal Code, chapter 87 of the laws of Zambia as amended by Act No. 15 of 2005. The particulars of the offence were that on 9th January, 2006, at Nchelenge, the appellant wilfully and unlawfully had carnal knowledge of a girl under the age of 16 years. The appellant appeared before the Subordinate Court, of 1st class, Nchelenge. Upon conviction, he was committed to the High Court for sentence. He was sentenced to 15 years imprisonment by the Court.

The sentencing judge observed that the Juvenile Act does not allow courts to impose imprisonment sentence on juveniles aged 16 and below. That it permits the imposition of sentence of imprisonment on juveniles aged 18 years and above. That since the appellant was

then aged 20 years; it would be illegal to send him to a reformatory. It is on this premise that the appellant appealed to the Supreme Court.

On appeal, the Supreme Court religiously relied on sections 64, 72 and 73 of the Juveniles Act in upholding the decision of the High Court. Accordingly, the Supreme Court sentenced the juvenile to 15 years imprisonment with hard labour.

The position of the law is that the person should be convicted with reference to the age when he committed the offence. In *Kapya v the People* the Court took note that the appellant was 18 years at the date of the commission of the offence and at trial. Section 2 of the Act defines a juvenile as a person who has not attained the age of nineteen years. Therefore, he was a young person, as defined by section 2 of the Juvenile Act.

2.2 The law applicable to the case

Having shown that the appellant was a juvenile at the time of committing the offence, the process of litigation and sentencing of juvenile is to be governed by the Juveniles Act. The Juvenile Act is the principal legislation passed by parliament to promote the justice of juveniles. In addition to the Juvenile Act, are other international instruments which have been ratified for example the Convention on the Rights of a Child (CRC).The aim of this law as regards juveniles in conflict is to provide early treatment of behaviour problems or changes in environmental conditions that may lead to delinquency. This, if done can direct juveniles from the path that may lead to adult crime and imprisonment to one in which they would be responsible citizens.[1] The Act in its preamble provides: "Act to make provision for the custody and protection of juveniles

[1] Amos, Chitembwe. *Juvenile Justice Administration in Zambia; How effective does it reach out to the intended targets.* (A research paper submitted to the University of Zambia, in fulfillment for the award of Bachelor of Laws Degree, 2004).

attitude of the police, "despite them lacking training, the police have the knowledge on how they should handle juveniles but sometimes it is just their attitude which is bad, it is a pity that the police are not equipped on how to deal with juveniles."[3]

She further stated that due to lack of knowledge on how to deal with juveniles, the police had sometimes detained the minors together with adults in the cells notwithstanding the fact that detention should be the last resort according to the juvenile administration system,[4] and that such acts contravenes section 58 of the Juveniles Act.

2.4 The appellant before the Court

Like an adult offender a juvenile in Zambian law requires to be brought before the courts of law to face its adversaries as soon as possible. In Zambia this should be done within the period of 48 hours. Furthermore, however, juvenile law in Zambia requires that when a juvenile is apprehended with or without warrant and cannot be brought before the courts, the arresting officer should release the offender on recognisance with or without sureties.[5]

The Act under section 63 establishes a juvenile court. The Section[6] provides that; a subordinate court sitting for the purposes of- (a) hearing any charge against a juvenile; or (b) exercising any other jurisdiction conferred on juvenile courts by or under this or any other Act; is in this Act referred to as a juvenile court. The juvenile courts have exclusive jurisdiction to try all criminal matters charges against juveniles, except in cases where a juvenile has been charged with a crime

[3] Ruth Banda. "Attitude of some police officers handling juvenile offenders is wrong" *The Post Newspaper*, Wednesday September 15, 2004, 7
[4] Ruth Banda, 7
[5] Section 59 of the juvenile Act.
[6] Section 63 of the juvenile Act.

of homicide or attempted murder or charged jointly with an adult.[7] It does not matter how trivial the crime committed is, it must be disposed by the juvenile court as established in *Siwale v the People.*[8] This therefore entails that if a person is being tried by the High Court and during the proceedings it comes to the attention of the court that the accused is a juvenile, the trial is to be discontinued and be referred to the Juvenile Court. The appellant in this case was subjected to the right trial court. In this case, the trial court had the discretion to discharge the juvenile as the offence committed was not a homicide upon discovering that the appellant. The juvenile Act in Section 59 of the Juvenile Act provides for exceptions under which a juvenile offender cannot be released. That is; homicides or other grave offences, where it is for the interest of such a juvenile to remove him from association with any reputed criminal, where the officer believes release of such a juvenile would defeat the ends of justice. If not released on bail, the juvenile should be placed in a place of safety, which includes any institution, police station, prison or detention camp, unless where it is impracticable to do so as provided by section 60 of the Juvenile Act.

2.5 Sentencing and disposal of the case

Juvenile courts have a wide range of sentencing options usually called disposition orders that they can impose on juveniles or youth offenders who are found to be delinquents. In *Kapya v the People,* the court in disposing sentence for the appellant relied on sections 63, 64(1), 72 and 73. Sections 63 and 64(1) deal with jurisdiction of the juvenile court where as sections 72 and 73 deal with sentencing. The Supreme Court in upholding the decision of the Magistrate Court in sentencing the appellant relied on section 73(1) (i). It is clear that the court did not read the whole provision. Section 73 in its entirety provides that where a juvenile charged with any

[7] Section 64(1) of the Juvenile Act
[8] (1973) ZR 218

offence is tried by any court, and the court is satisfied of his guilt, the court shall take into consideration the manner in which, under the provisions of this or any other written law, the case should be dealt with, such as dismissing the charge, make a probation order, send offender to be caned, order offender to pay fine, damages or costs, order the parents or guardian of the offender to give security for good behaviour of the offender.[9]

These disposals were available to the court but instead it decided to rely on one subsection of the provision. Both the juvenile and the Supreme Courts admitted that the appellant was a juvenile and in the face of the law, a juvenile is any person under the legal age. Thus, slapping the appellant with 15 years as a minimum sentence for adults seriously violated the spirit of the Juvenile Act. Moreover, the court decided to ignore other means available under section 73 to deal with the offender. This was in contravention of section 72(2) of the Juvenile Act which prohibits imprisonment of juveniles when other means are available. In *Siwale and Another v the People* the Supreme Court held: "*the intention of the legislature in enacting section 72 of the Juveniles Act was to ensure that no child (i.e. a juvenile under the age of sixteen years) should be sent to prison in any circumstances whatever, and that no young person (i.e. a juvenile over the age of sixteen and below the age of nineteen) should be sent to prison unless he cannot be suitably dealt with in any other manner. Clearly the legislature had in mind the importance of rehabilitating the juvenile and avoiding having him associate with criminals, and generally suffering the traumatic experience of prison, if this could be avoided.*"

Additionally, the Act under section 73(2) provides that even if there is a mandatory imprisonment sentence provided, a court shall not order the juvenile to serve the imprisonment but make a reformatory order. Moreover, the court could also have relied on section 138(4) of

[9] Section 73 of the Juvenile Act

the penal code since the appellant was a juvenile. The subsection gives an option of community service or counselling as the court may determine, in the best interests of both children.[10]

The juvenile Act expressly prohibits imprisonment of juveniles under section 72(1) and the provision was correctly read by the court. The section provides that in place of imprisonment juvenile deliquents are to be sent to a reformatory school for which they will be detained for a period of 4 years subject to extension if the superintendent feels that the juvenile needs care or training but no juvenile should be detained after his or her 23rd Birthday.[11]

Thus, the court should have considered the option of imprisonment only as a last resort and that it should be only for the shortest period of time. It was the responsibility of the court to uphold the cardinal objective of the juvenile justice by treating the juvenile in a manner consistent with the promotion of the sense of dignity and worth, which re-enforces respect for the rights and freedoms of the appellant and see to it that he was treated in a manner which takes account of his actions and the desirability of promoting his re-integration into society to assume a constructive life.

One is however not arguing that the court did not correctly interpret the provisions of the Act in sentencing the juvenile; one is nevertheless contending that the court should have balanced the best interest of the juvenile and the law. This is to say that the court should have read in to prevent such injustices on the juvenile. It is the duty of the court to interpret the intentions of parliament but where it is seen that can cause some injustice, the court has the duty to read in and correct the injustice. In *Christine Mulundika and 7 others v the People*[12] where the appellant challenged the constitutionality of certain provisions of the Public Order Act Cap 104, especially

[10] section 138(4) of the penal code
[11] Section 72(1) of the Juvenile Act
[12] (1995) S.J.

section 5(4). The challenge followed on the fundamental freedoms and rights guaranteed by arts 20 and 21 of the Constitution. The court in this case declared the provisions of the Public Order Act as void. One further argues that the role of the law in society is to balance the interests of individuals and society. This entails that even individual interests are to be considered as fundamental. The court in interpreting the provisions of the Act should have considered the best interest of the juvenile.

In furtherance of this argument, Zambia has ratified the Convention on the Rights of a Child but not domesticated it. The Convention is therefore of persuasive value. In *Roy Clark v AG*,[13] the court held that international instruments not domesticated are of persuasive value. The Convention on the Rights of a Child specifies that deprivation of liberty of children shall *be used only as a measure of last resort and for the shortest appropriate period of time,* and that *every child deprived of his or liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision.*[14] Article 40 further emphasises that the primary aim of juvenile justice is the rehabilitation and reintegration of the juvenile into society. Sentencing juveniles to imprisonment without the possibility of release or denial of all possibility of rehabilitation and rehabilitation is specifically prohibited by international law.

The United Nations Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) embody the aims of each and every juvenile justice system in rule 5.1, which provides that: *The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure*

[13] (96A/(2004)) [2008] ZMSC 4 (24 January 2008)
[14] Convention on the Rights of A Child, Articles 37(b) and 37(d).

that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

It is clear from this rule that it refers to two rules of the important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile, thus contributing to the avoidance of merely punitive sanctions.

The second objective is the "proportionality principle." This principle is well known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances of the offender, for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances should influence the proportionality of the reactions, for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn wholesome and useful life.

The Zambian juvenile in this vain is not different from other juveniles in other parts of the world and as such international approved standards of treatment should be administered to him or her as well. One notes regrettably that in sentencing the appellant the court did not pay attention to these principles. These rules however, are recommendatory and non- binding on states they are, they serve as a useful guide in dealing with juveniles. They are detailed norms for the administration of justice in tandem with juveniles' rights and have a development oriented approach.

2.6 The means by which evidence was obtained

Evidence is the means by which disputed facts are proved to be true or untrue in any trial before a court of law or an agency that functions like a court. Evidence is relevant when it has any tendency in reason to make the fact that it is offered to prove or disprove either more or less probable. There are many ways of proving the truth under the law of Evidence.[15]

In this case, according to the trial magistrate the appellant was detained by police for being a Congolese. The appellant was taken to the hospital with the belief that it was a way establishing his nationality. It is stated from the facts that the appellant's urine and blood were collected. This is to say therefore that the appellant being a juvenile did not understand anything. For the appellant the whole process of blood test was with reference to his nationality. The magistrate impliedly admitted this when he stated that: "*People who are found to be prohibited immigrants are usually sent to remand prison to wait for their deportation to their country of origin and not hospital unless they complain of ill health and accused did not complain of ill health to the police. It confirms the other evidence by the state, and I am satisfied that there is sufficient corroboration in this matter for the accused to be convicted.*"

Considering that both the magistrate and the prosecutor were aware that they were handling a juvenile, who has not completed the psychological stages of development. One expected that the juvenile should clear understanding of whatever was taking place. Therefore, since little attention was paid towards the appellant being a juvenile, the evidence was obtained through trickery. The prosecutor in obtaining evidence should have considered the fact that they were dealing with a juvenile.

---

[15]E. Raymond, E. *Evidence.* (London, Mcmillan Publishers ltd,2006), 997

This is to say that, the magistrate should have rendered the evidence inadmissible as it was illegal. In *R v Leatham*[16] Crompton J asserted: "it matters not how you get it; if you steal it even, it would be admissible in evidence." Yet according to Lord Goddard CJ in *Kuruma v R*[17] the ammunition might have been excluded if it had been obtained by mere trickery. He stated: "*No doubt in a criminal case the judge always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused...If, for instance, some admission of some piece of evidence, e.g, a document, had been obtained from a defendant by trick, no doubt the judge might properly rule it out.*"

In *Kapya v the People*, one argues that, on merit, the magistrate should have ruled that the evidence be inadmissible as it was obtained by trickery.

2.7 The principle of first offender

It suffices to state that the appellant in this case was a first offender. The facts do not show that he was a persistent offender as no previous records were produced. In this case, he deserved to be treated as such, meaning he had the right to leniency. Considering the sentence slapped on the appellant, it is clear that there was no leniency at all. Gardner, J in *Phiri v the People*[18] stated: "*A first offender should not be denied leniency although circumstances may make the application of that leniency minimal. The reason for dealing with a first offender leniently is in the hope that a severe sentence is not necessary and that a lenient sentence will be sufficient to teach a previously honest man a lesson.*"

[16] (1861) 8 Cox CC 498
[17] (1955) 2 WLR 223
[18] (1970) SJZ 178

2.8 The Social Welfare Report

A social welfare report is a guiding tool for what order a court will make against a juvenile offender. It is expected that the Social Welfare Report will give hindsight report as to why the offender has come into conflict with law. Ideally, the social welfare should give a background of the offender in terms of the family, social status of the offender, education level, and general wellbeing of the offender.

It is therefore, the duty of the social welfare officer to compile the social welfare report (social report or pre-sentence reports) which are an indispensable aid in most legal proceedings involving juveniles. The competent authority should be informed of relevant facts about the juvenile, such as social and family background, school career, and educational background and so on. For this purpose, use of special social services attached to the court or board is of great importance. Other personnel, including probation officers, may serve the same function. The rule therefore requires that adequate social services should be available to deliver social enquiry reports of a qualified nature.[19]

It is clear in this case that the court did not appreciate the relevance of the social welfare report. Section 64(7) of the juvenile Act provides that when a juvenile court is satisfied that an offence was committed by the juvenile, it shall, if practicable, obtain information as to the background of the juvenile vis-a-vis, general conduct, home surroundings, school record and medical history, as may enable it to deal with the case in the best interest of the juvenile.[20]

---

[19] Amos, C. *Juvenile Justice Administration in Zambia.* (A research paper submitted to the University of Zambia, in partial fulfillment for the award of Bachelor of Laws Degree, 2003.)

[20] Section 64(7) of the Juvenile Act

It is therefore a requirement or mandatory that a juvenile court must have as much information on the juvenile as possible and invariably a heavy onus lies on the social welfare officer to compile an adequate report. This implies that the report must be of sufficient quality to facilitate a judicious adjudication of the case once it comes before the court. To underscore this requirement, Rule 16.1 of the United Nations Minimum Standards on the Administration of Juvenile (Beijing Rules) provides; *In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by a competent authority.*

In *Mvula v the People*,[21] the social welfare officer presented a report on the juvenile and that report recommending that the juvenile be put on probation. Despite that recommendation the trial magistrate sent the juvenile to prison for a term of 18 months with hard labour and gave no reasons. On appeal, the sentence was set aside. The court in *Kapya v the People* should have relied on this decision and also *Siwale and Another v the People*[22] however the Court stating that, *"it is unnecessary for us to decide whether the court having considered the welfare report and having decided that the juvenile cannot be suitably dealt with otherwise than by sending him to prison, it is obligatory to impose the statutory minimum sentence; we leave this point open for decision should it arise."* The Court was on the other hand quick to note that *section " ...section 72 of the Juveniles Act we are satisfied that the provisions of that section apply equally to cases where a statutory minimum sentence is prescribed as to any other case."* It is on this ground that the court set aside the sentence of the juveniles.

[21] (1976) Z.R 80 (SC)
[22] (1973) ZR 182

2.9 Analysis and recommendation

The court should have taken note that objective of the Act and ultimately the intention of parliament is not to punish juvenile offenders by sending them to prison but to rehabilitate them so that they could become useful members of society. This was established in *Chishala v the People*[23]where the Supreme Court held that the objective of the Act is to rehabilitate the juveniles. Further, the court should not have regarded the appellant as being an accused of a criminal offence warranting punishment but instead should have offered assistance and guidance. Intervention by the courts in the appellant's life is not supposed to carry the stigma of a criminal record. [24] The court should also have considered that the appellant was an immature being who needed special safeguards. The court's decision therefore defeats the aims of the Convention on the Rights of a Child whose objective is to safeguard the rights of every child including those in conflict with the law. The Convention in its preamble partly provides: "the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[25]

However, it should be admitted that the Supreme Court well addressed the issue of applying the Juveniles Act in handling the case. It is clear from the commencement of the case that the court referred to the Juveniles Act as a principle Act governing juvenile justice.

It should also be mentioned that procedurally, the court conducted itself in accordance with the law with regards to juveniles. Additionally, however, the court being rigid in not reading in, one recommends it for strictly applying the law as it is written. One further appreciates the fact that the law as the positivist school of thought proposed, should be interpreted as it is. The

[23] (1975) ZR 240
[24] Section 68
[25] Preamble to Convention on the Rights of a Child

proponents further propose that law is an instrument of social order in society, thus should be interpreted in a manner that order is maintained in society.

2.1.0 Conclusion

From the analysis of the issues raised in kapya case, one is on firm ground to argue that the court did not take recognition of the fact that the appellant had special needs and capacities different from the adults and so deserved to be treated with delicacy. This implies that the treatment rendered to the appellant should have been one that would see him through to adulthood. If young offenders were labelled as criminals and processed through such unjust treatment as kapya, they would grow up and live up to that identity and the country would be doing a lot of harm to its young population who are considered as an integral part of social development. In this case therefore, issues raised in this case show a lot of maladministration of justice for juvenile

CHAPTER 3

Comparing how other selected countries, that is; United States of America and South Africa deal with such issues as raised in Kapya Kandeke v the People.

3.0 Introduction

This chapter explores and compares the juvenile justice systems of South Africa and America with that of Zambia. The chapter highlights on how juveniles are protected in terms of how they are handled, perceived by judges and what sentences are recommended by courts. This will help in determining on whether the Zambian juvenile justice system is adequate. The chapter will also give an appraisal to the country that offers the best treatment of juveniles amongst the three.

3.1 Juvenile justice in South Africa

Crime is one of South Africa's major social problems presently. All South Africans recognise crime as an issue of national concern. In fact, the general epidemic of crime sweeping South Africa goes so deep that all South Africans fear that crime has to be defeated in order for them to achieve peace, stability and development.[1] In committing these evil acts such as theft, murder, armed robbery, rape and other criminal offences, children are not left out. But like the rest of the world, South Africa has an obligation to protect the young giants of its generation.

3.2 Overview of the juvenile justice system of South Africa

Like in Zambia, there is no separate criminal court for juveniles in South Africa. Thus, in certain urban areas where there are sufficient numbers of accused persons under the age of eighteen to afford it, a court can be set exclusively for that purpose and is called a juvenile court. It should also be appreciated that this Court exclusively set to deal with such overwhelming criminal cases is

[1] Anonymous. http://myfundi.co.zae/juvenile deliquency in south africa. (accessed on 30th January, 2012 at 12:00)

created by the terms of the Child Care Act 74 of 1983 and for this reason it is not part of the criminal process, that is to say the procedure is different from that of adult criminal courts. For example, it is a requirement by that trial of juveniles be held camera without regard to which court is hearing in.[2] It is also clear that those between the ages of 18 and 21 and it provides special procedure in dealing with them at arrest and during Court proceedings.[3] It should however be stated that there are overlaps with the criminal juvenile system. In South Africa, every magistrate is automatically a commissioner of the Child Welfare as provided by section 6 of the Child Care, meaning that every magistrate qualifies to handle cases involving juvenile delinquents.[4]

3.3 Pre trial detention

The South African juvenile system provides for very interesting provisions regarding arrest and pre-detention. The juvenile system is in full compliance of with the letter and the spirit of the CRC which it ratified in 1995.[5] An example is on its emphasis on the need to act with speed, with provisions of the child act requiring the police to supply information to probation officers within 24 hours and that the juvenile be brought to the probation officers within 48 hours. In addition to this, there is the possibility of realising the juvenile with the prohibition of detention in prison of juveniles between 10 and 14 years.[6] In furtherance of this, the system for a legislative framework that promotes a co-ordinated mechanism for the juvenile justice, Crime Prevention and Security Cluster

[2] Section 153 of the Criminal Procedure Act 51 of 1977.
[3] Section 50, Criminal Procedure Act, No. 51 of 1977
[4] Section 6 of the Child Care Act
[5] D. Amanda. *Children Serving Gaol Sentences: A profile on children sentenced to prison*. Research report written for the Centre for the Study of Violence and Reconciliation, August 1999.
[6] Gallinetti, Jacqui Daksha and louse. Conference Report. *Child Justice in South Africa: Children's Rights Under Construction*. Open Society Foundation For South Africa, 2006.

(JCPS) specifically to handle issues of juveniles awaiting trial and ensures the implementation of child-friendly criminal system.[7]

3.4 Sentencing and disposal

The legal principles of juvenile sentencing in South Africa are closely related to those of pre-detention and that they relate to Article 37 of the UNCRC and section 28(1)(g) of the Constitution, namely that juveniles should only be detained as a measure of last resort and for only for a short and appropriate period. Section 69(1) of the Child Justice sets out the objectives of sentencing which are: (a) to encourage the child to understand the implication s of his or her actions and be accountable for the harm caused, (b)promote and individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society, (c) promote the reintegration of the child into the family and community, (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration, and (e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.[8]

In *S v Van Rooyen*[9] the Cape High Court, referring to the Convention on the Rights of the Child as underlining the policy that as far as possible children should be dealt with by the criminal justice system in a way that takes into account their special needs, held that it was difficult to see how the court could properly have determined an individualised punishment without the benefit of pre-sentence report. In *S v D*[10] the Courts, sitting as appeal and review courts, set aside the sentences

[7] C. Frank. "Young Guns: Children in Organised Armed Violence", 2005, SA Crime Quarterly, No. 14
[8] Section 69(1) of Child Justice Act no.75 of 2008
[9] 81/91,325/91(1991) ZASCA
[10] 1999 (1) SACR 122 (NC)

imposed by the courts a quo as in none of the cases pre-sentence reports were provided despite the fact that in all of the cases sentences of imprisonment were imposed.

It suffices to state that sentences for convicted juveniles in South Africa vary although the majority are sentenced to non-custodial sentences. More than 50% of the sanctions handed down involve differed, postponed or suspended sentences.[11] The Criminal Procedure Act of 51 of 1977 also contains specific provisions with regard juveniles under the age of 18 years. Section 290(1) of the same Act states that if a person under 18 years of age is convicted of any offence, the Court may in place of imposing punishment upon the juvenile, order that the juvenile be sent to reformatory school as which is defined in section 1 of the Child Care Act.[12] It should also be mentioned that section (290)(3) makes this sentence applicable to any young person who has turned 18 years old and that he has not reached 21.[13]

It is thus, clear that the law in South Africa provides for very impressive variety of alternative sanctions showing or illustrating the basic philosophy that deprivation of liberty has to be a measure of last resort. In this sense, cases of detention must be of only short period.[14]Therefore the in South Africa encourages juveniles to be accountable for the harm caused by him, thus the law promotes an individualised response which is appropriate to the juvenile's circumstances and proportionate to the circumstances surrounding the harm. Additionally, the law in South Africa is said to promote the re-integration of the juvenile into the family and the community. This in consequence ensures that any necessary supervision, guidance, treatment or services which form part of the sentence can assist the juvenile in the process of reintegration. In this sense, the Juvenile Courts have a wide range of

[11] Anonymous. http://myfundi.co.zae/juvenile deliquency in south africa. (accessed on 8th May, 2012 at 20:00)
[12] Criminal Procedure Act of 1977
[13]Anonymous. http://www.css.gov.za/reports/00 11a. htm (accessed on 21 December, 2011 at 05:45)
[14] Section 28(g) of the Constitution of South Africa of 1996

options of dealing with a juvenile offender. These options may include; community based sentences,[15] correctional supervision,[16] sentences with a compulsory residential requirement,[17] referral residential facility,[18] prison,[19] postponement or suspension,[20] fines or prohibition on certain forms of punishment.

3.5 The policy of diversion

In South Africa, there has been a greater emphasis on exploring possibilities to divert criminal prosecution of juveniles. The concept of diversion has been defined as: the election in suitable and deserving cases of a manner of disposal of a criminal case other than through normal court proceedings. It usually implies the provisional withdraw of the charges against the accused, on condition that the accused participates in particular programs and / or makes reparation to the complainant.[21] Therefore, if at any time before the end of the state's case, it comes to the knowledge of the presiding person that the juvenile acknowledges responsibility for the offence, the may in that case, in the knowledge of the prosecutor refer the juvenile to a diversion and may postpone the matter to enable the juvenile to comply with the given diversion conditions. If the juvenile successfully completes the diversion, the court must acquit the juvenile.

It suffices to state therefore that in South Africa the law aims to protect the best interest of the juvenile. The approach to young people in trouble with the law focuses on restoring societal harmony and putting wrongs right rather than on punishment. The law holds the young person accountable for their wrongs

[15] Section 72(1) of the Child Justice Act no.75 of 2008
[16] Section 75(1) of the Child Justice Act no.75 of 2008
[17] Section 72(1) of the Child Justice Act no.75 of 2008
[18] Section 72(1) of the Child Justice Act no.75 of 2008
[19] Section 77(1) of the Child Justice Act no.75 of 2008
[20] Section 74(1) of the Child Justice Act no.75 of 2008
[21] A.M. Anderson. *Restorative Justice, the African Philosophy of Ubuntu and the Diversion of the Criminal Procedure.*(University of the North, South Africa, 1998), 1

and where possible make amends.[22] It is appropriately approximated that 30,000 juveniles were diverted from the criminal justice system in 2005.[23]

Therefore, the objective of the juvenile Justice Act is a way promoting the culture of the ubuntu and this is achieved through recognising juvenile's sense of dignity and worth, reinforcing juvenile's respect for human rights and support for reconciliation by means of restorative justice and involving parents, families, victim and continues in child justice process in order to encourage the integration of juveniles.[24]

3.6 United States of American Juvenile justice system

The establishment of the first Children's Court of Law in Chicago in 1889 represented a major innovation in juvenile justice. Throughout the 19th century, juveniles in the United States who were accused of criminal behaviour were tried in the same courts as adults and subjected to the same punishments. For criminal offences, they were subject to the same sanctions, placed in same institution and hanged from the same gallows.[25] The reformist philosophy instituted in the juvenile court stressed probation (conditional release to parents or guardians) and the resolution of family problems presumed to be reflected in delinquent behaviour. Juvenile detention centres were intended to replace jails as the primary forms of temporary secure confinement during the processing of cases. Court proceedings were to be non-adversarial, operating "on behalf of" rather than against the juvenile. It was widely agreed that the emphasis on probation and family treatment was innovative, but the new system also extended the state's control over the behaviour of juveniles via the

[22] Inter-Ministerial Committee on Young people at risk ; Iterim Report Policy for Transformation of the child and Youth Care system. Pretoria, 1996.

[23] Muntingh, L "Children in Prisons: some good news, some bad news and some questions" Article 40, Vol. 7, no. 28,2005

[24] South African Law Commission, Report on Juvenile Justice, Project 106. Pretoria, 2000.: URL: *http://www.saflii.org/za/other/zalc/ip/9/9-9_.htm (accessed on 21 December 2011 at 10:00)*

[25] J. Sutton, *Inventing the stubborn Child in juvenile delinquency*, 2nd ed. (Thousand Oaks, CA: Pine Force Press, 2001), 138- 139.

designation of status offenses. Moreover, confinement and imprisonment in a juvenile correction centre or reformatory (also known by the term training school) persisted as a common outcome, especially for disadvantaged youths.[26]

Cases are inserted into the juvenile justice system by the process of referral. Referrals may come from schools, parents or child welfare agencies that believe the child is at risk from others. Referrals may come to the court come law enforcement agencies. This type of referral is functional equivalent of an arrest. Depending on the age of the juvenile and the seriousness of the crime, the processing of the juvenile may closely resemble the arrest of an adult, although the process is often very different. Based on the philosophy of doing what is best for the juvenile, many of the larger law enforcement agencies will have specialised juvenile units that are familiar with the community resources available to treat the juvenile. Often, as many as one third of the juvenile cases handled by law enforcement agencies are diverted from the juvenile justice system, and juveniles are either released of funnelled into alternative programs.[27]

3.7 Sentencing and disposition

In America, the underlining principle is that the juvenile justice be designed with the philosophy that special status of juveniles requires that they be protected and corrected, not necessarily punished. The system is founded on the concept of *parens patriae* with the medical model of treatment to establish a system of juvenile system designed to reform and rehabilitate young offenders.[28]The underlining philosophy is that when juveniles go astray it is the parents who have failed. The court can take over the role of the parents, diagnose the problem, and prescribe the appropriate treatment.

[26] A.I. James. *Criminal Justice*. 8th ed, New York, McGraw-Hill companies, 2007), 612 -638
[27] James),612-638
[28] A.I.James. *Elements of Criminal Justice*. 2nd ed, New York, Oxford University Press, 2000) 498

It does not matter what the juvenile has done, his deviant behaviour is merely a symptom of the problem. Hence the court is not to blame the juvenile or bring a finding of guilty, but to identify and treaty the underlining problem. Moreover, the juvenile's welfare is to be central concern to the court.[29] This does not only protect the future of the juvenile but also permit an informal court process that considered the entire history and background of the juvenile's difficulties, without being hampered by limitations and requirements of official criminal procedure Thus, the process will be a civil rather than a criminal matter.[30]

At the disposition hearing, the court makes its final determination of what to do with a juvenile officially labelled delinquent. Some of the options available to the juvenile courts are probation, placement in a diversion programme, restitution, community service, detention, placement in foster care, placement in a long term residential treatment programme, placement with a relative and placement with the state for commitment with the state for commitment to a state facility.[31] As noted, when juveniles are adjudicated, a number of disposition options are available to juvenile courts, although the options typically used in any one jurisdiction are fairly narrow. Three general types are dismissal of the case, which is used in small percentage of cases, the use of a community based- programme and the use of institutional programme.[32]

A high proportion of cases involving juvenile offenders are handled informally by means of cautions or counselling. The procedure followed in juvenile courts is distinct from that of criminal courts.[33] The juvenile court was originally founded as a coercive social-work agency rather than as a criminal

[29] James, 612- 638
[30] F, Belva, "Violence Against and By Children," The State of America's Children Yearbook 1996, (Washington, DC: Children's Defense Fund, 1996), 58.
[31] James, 622
[32] A.I. James), 612- 638
[33] James, 633- 638

court. Thus, juvenile courts normally have not been concerned with determining guilt or innocence so much as with making a finding of fact that the juvenile is, for one reason or another, legally subject to the jurisdiction of the court. This finding of fact is comparable to conviction at a criminal trial in an adult court and is generally referred to as adjudication.[34] The adjudication of a juvenile as delinquent is the basis for a disposition, comparable to sentencing, in which either freedom in the community under supervision or confinement in a correctional facility can be ordered.

There are five competing philosophies that guide sentencing in adult courts-retribution; vengeance, incapacitation, deterrence and rehabilitation. By contrast, actions taken in juvenile courts are, at least in theory, deemed to be "in the best interest of the child." The juvenile justice system is based on the notions that every juvenile is treatable and that judicial intervention will result in positive behavioural change. It is thus, assumed that juvenile courts sanctions are based on rehabilitation model and do not include any other sentencing objective.[35] In *Re Gault*,[36] the court emphasised that, "juvenile justice system should emphasize rehabilitation, not punishment, of juvenile offenders," and that, "where a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order 'confinement' until the child reaches 21 years of age. . . ." [37]. Similarly in *McKeiver v. Pennsylvania*,[38] the Supreme Court of America opined that; "the juvenile justice system should emphasize rehabilitation, not punishment, of juvenile offenders." Thus, the only hope for turning the tide of juvenile crime is a combination of intensive treatment and rehabilitation of juveniles in juvenile facilities and effective community-based intervention.[39] In *Roper v. Simmons* [40]the Court

[34] James, 633-638
[35] James,633
[36] 387 U.S 551(1967)
[37] 387 U.S. 1 (1967)
[38] 403 U.S.528 (1971).
[39] "States Revamping Laws on Juvenile Crime," The New York Times, 12 May 1996, 34.

barred imposition of the death penalty for crimes committed by juveniles, and similarly in *Graham v. Florida*[41] the court forbade life imprisonment without possibility of parole (LWOP) for juveniles who commit non-homicide offenses. Both decisions held these penalties violated the Eight Amendment's prohibition on cruel and unusual punishment because they were disproportionate given juveniles' distinctive cognitive, psychosocial and neuroanatomical characteristics.

Further, section 10[42] provides that the juvenile justice system should give additional attention to the problem of juveniles who commit serious crimes, with particular attention given to the areas of sentencing, providing resources necessary for informed dispositions, and rehabilitation, section 11[43] states that emphasis should be placed on preventing youth from entering the juvenile justice system.

In recent past, the Social, psychological, and behavioural experts proposed a new understanding of children based on their youth. Their progressive theory declares that juveniles should be considered innocent and vulnerable and as lacking the mental state required for them to be held responsible for a criminal offense because they have not acquired the wisdom that comes with age. The argument is that, juveniles are still growing in their sculp. It follows therefore that juveniles should not be punished for their criminal behaviour. Instead, they should be reformed, rehabilitated, and educated.

3.8 Policy of diversion

In America, the goal of diversion as in South Africa is to respond to juveniles in ways that avoid formal juvenile justice processing. Diversion can occur at any stage of the juvenile justice process, but it is often employed before adjudication. The policy operates on the premise that formal

---

[40] 543 U.S 551(2005)
[41] 2143 U.S (2010)
[42] Juvenile Justice and Delinquency Prevention Act of the United States of America
[43] Juvenile Justice and Delinquency Prevention Act of the United States of America

responses to juveniles who violate the law, such as arrest and adjudication, do not always protect the best interests of the juveniles or the community. Consequently, efforts to divert juveniles from the juvenile justice process by warning and releasing them as well as efforts to divert juveniles to specific diversionary programmes such as counselling have been a part of juvenile justice practices. Diversion strategies are in two basic types. Some diversion strategies are based on the idea of radical non intervention. Other strategies are designed to involve juveniles and possibly parents, in a diversionary programme. Radical non intervention is based on the idea that juveniles should be left alone if at all possible, instead of being formally processed.

Thus, in America, the mission of juvenile courts differs from that of adult courts. Juvenile courts do not have the authority to order punishment. Instead, it responds to juvenile misconduct and misfortune by ordering rehabilitative measures or assistance from government agencies. The juvenile courts response to misconduct generally is more lenient than the adult court response. The juvenile justice system of America seeks to rehabilitate children, rather than punish them for their juvenile criminal behaviour.[44]

3.9 Boot camps

This is a 3 to 6 months regimen of military drill, physical exercise, hard labour and academic in return for having several years removed from an individual's sentence in lieu of traditional prison sentence, or as part of a sentence of probation. Available to young nonviolent offenders, the idea is to "shock" budding felons out of careers in crime by imposing large amounts of rigor and order in what appear to be chaotic and otherwise purposeless lives.[45]

[44] M.K, Rosenheim. *A Century of Juvenile Justice*. (Chicago: University of Chicago Press.2002), 222
[45] James, 631

3.1.0 An appraisal to the American juvenile justice system

From the foregoing analysis, one would argue that the American juvenile system so far offers the best juvenile justice. The system is modeled on psychological basis. It is based on the premise that juveniles are mentally not fully grown individuals. In this case, the psychologists believe that juveniles are not responsible for their actions. Basing on this, the justice system treats them with maximum delicacy. Detention of juveniles is used like in South Africa as a measure of last resort. Most convicted juveniles it is emphasized are sent to rehabilitation centres, counselling centres, and community based service and so on. The American juvenile system campaigns for turning the tide of juvenile crime through a combination of intensive treatment and rehabilitation of juveniles in juvenile facilities; and effective community-based intervention.[46]Additionally, the American juvenile system promotes restorative justice which allows juvenile delinquents to be restored back into society. The concept of diverting juvenile delinquents from the criminal system is also promoted and this allows juveniles not to come into contact with the criminal system.

3.1.1 Comparing the juvenile justice systems

Having discussed critically the three juvenile justice system and after considering the case of Kapya, it suffices to state that the current state of the Zambian juvenile system is not impressive and not helping the juvenile delinquents. From the kapya v the People case, it is clear that the Court did not adhere to the spirit of the Juveniles Act. The spirit in the Act is to protect the juveniles who come in conflict with the law. The ultimate purpose of the juvenile Act is not to punish juvenile delinquents but help them be restored into society and be responsible citizens. In *Kapya v the People*, the juvenile was sentenced to 15 years imprisonment with hard labour, meaning the possibilities of the juvenile being restored into society are minimal and is likely to become a hardcore criminal.

[46]M.B, Robert. *Criminal Justice*. 4th ed (New York, McGraw-Hill, 2007), 234

Therefore, it is clear that there is little attention paid to the fact that the juvenile justice system should protect the best interest of the juveniles. However, the sentence was within the but not for best interest of the juvenile.

On the other hand, the South African juvenile system offers good protection for juvenile delinquents. The system emphasizes on the best interest of the juvenile as the ultimate purpose of the system. In the South African juvenile system, detention of juveniles is strictly used as a measure of last resort as provided in the constitution and the juvenile justice Act. Furthermore, the system encourages the philosophy of restoring the juvenile delinquents into society.[47] The campaign for diversion is vigorous as the government has stepped in through the inclusion of the programme in the Juvenile Justice Act. The system further promotes the concept of *ubuntu* which is a lifestyle or unifying world–view of African societies based on respect and understanding between individuals.[48]

Therefore, it is regrettably clear that the Zambian Courts, much as they well interpret the Juvenile Act, they do not pay particular attention to the fact that they are dealing with juveniles. The courts do not appreciate the fact that the law reflect the station and in this sense, the juveniles must be protected. This is to say that in interpreting statutory provisions, the best interest of the juveniles must be paramount. The spirit behind the Juvenile Act is to primarily to protect the interest of the juveniles and not to punish them.

It is on the other hand important to note that South African and American Courts have an impressive way of interpreting statutes. As noted above, the Courts will literally interpret the statutes but from the cases considered the courts in most cases read- in to make sure that the best interest of the

[47] Restorative Justice Centre, "*Retributive Community Justice*," Commissioned by the UN Child Justice Project, Pretoria, 2001

[48] Tutu , D. (1999), *No Future without Forgiveness.* (London: Rider, 1999), 300.

juvenile is upheld. For this reason, the American and the South African Courts have a plus in the way they adjudicate cases to do with juveniles.

3.1.2 Conclusion

Since the culprits are juveniles in such cases, there is need to have an effective system that will help reform them if brought to book. Effectiveness of the system in this regard entails that juveniles brought before the court are dealt with in accordance with the provisions of the law, cases disposed of in short time and ultimately the intended objective of juvenile justice achieved this objective being of reformation. This implies that the treatment rendered to them should be one that sees them through to adulthood. As stated in the preceding chapter, the Zambian juvenile is not different is not different from other juveniles in other parts of the world and as such internationally approved standards of treatment should be administered to him or her as well. The Zambian juvenile justice system should therefore strive to meet these internationally approved standards.

CHAPTER 4

A critical analysis of how the courts treat juvenile offenders in other offences

4.0 Introduction

The preceding chapter considered the issues raised in Kapya v the people. The chapter has critically shown how the court interpreted certain provisions of the Juveniles Act. The basic concept of this chapter is to consider how the courts have treated juveniles who are deemed to be trapped by the legal system in other offences. This will help determine whether juveniles are treated better in other offences. This will additionally help in assessing whether the juvenile in Kapya v the People was fairly treated. The chapter considers a few cases and decisions involving juvenile delinquents, analyse how the courts treat them and finally establishes whether juveniles are treated better as compared to defilement delinquents.

4.1 Consideration of how juveniles have been treated in other offences

Justice for juveniles is the by-product of good judicial decisions. Such decisions are only as good as the information upon which they are based. Without a just system of laws, combined with competent advocacy, justice for children will not be achieved. This is true of all litigants but particularly so for children who are least capable of speaking for themselves in a judicial proceeding.

In *Siwale and another v the people*[1] the appellants, both juveniles, were charged and convicted in the High Court of aggravated robbery. They were both sentenced to the statutory minimum sentence of imprisonment of fifteen years with hard labour. On appeal, the court of appeal held

[1] (1973) Z.R. 182 (C.A.)

that the provisions of section 72 of the Juveniles Act apply equally to cases where a statutory minimum sentence is prescribed as to any other cases. Questions that arose were whether the fact that the legislature has prescribed a minimum sentence for the particular offence overrides the provisions of section 72 of the Juveniles Act, and that assuming the answer to the first question to be in the negative, and the court having called for and considered a welfare report and having come to the conclusion that the juvenile cannot be suitably dealt with in any manner other than imprisonment, whether the court was then obliged to impose the statutory sentence. The court of appeal held; *"the intention of the legislature in enacting section 72 of the Juveniles Act was to ensure that no child (i.e. a juvenile under the age of sixteen years) should be sent to prison in any circumstances whatever, and that no young person (i.e. a juvenile over the age of sixteen and below the age of nineteen) should be sent to prison unless he cannot be suitably dealt with in any other manner. Clearly the legislature had in mind the importance of rehabilitating the juvenile and avoiding having him associate with criminals, and generally suffering the traumatic experience of prison, if this could be avoided."*

In *Nyoni v the people*[2] the appellant was convicted by the High Court for the offence of aggravated robbery and sentenced to fifteen years imprisonment with hard labour. The offence was committed when he was a juvenile. At the commencement of the hearing before the High Court the appellant was no longer a juvenile. The appellant appealed against the conviction and sentence for not having been treated as a juvenile for the purpose of trial in a juvenile's court and his not having been sentenced accordingly. It was held that: *"a person who is no longer a juvenile who had committed an offence when he was a juvenile should be tried as an adult in the appropriate court; but for the purpose of sentencing he should be treated as a juvenile. The appeal against sentence*

[2] (1987) ZR 99 (SC.)

was allowed. The conviction was to stand and the sentence was set aside. For sentencing purposes the appellant was treated as a juvenile."

In *Musonda and another v the people*,[3] three juvenile offenders aged 16, 15 and 13 were found guilty of burglary and theft. The trial magistrate on the recommendation of a probation officer ordered that they be sent to a reformatory. The learned trial magistrate ordered that the juvenile appellants be sent to a reformatory. On appeal the court held that a reformatory order is a very severe punishment, warranting as it does four years' detention, and should only be made when other methods of reformation are in the circumstances entirely inappropriate or have proved to be in vain in the past. The court of appeal substituted reformatory sentence with Probation order.

In *Mvula v the people* [4] the trial magistrate found the appellant to be a juvenile aged sixteen years. The appellant admitted the charge and a finding of guilty was made against him. The Social Welfare Officer presented a report on the appellant and that report was a recommendation that the appellant be put on probation. Despite that recommendation the trial magistrate sent the appellant to prison for a term of eighteen months with hard labour. The Court of appeal relying on section 72(2) of the juvenile Act stated that: *"the objective of the Juveniles Act is that as far as possible, juveniles should not normally be sent to prison. The reason for this is simple, namely, that if juveniles come into contact with adult hardened criminals chances are that they too will themselves become hardened criminals."* The Supreme Court further held that the trial magistrate could suitably have dealt with the appellant by, for instance, making a probation order or an approved school order and that the magistrate erred in principle by sending the appellant to prison.

---

[3] (1979) ZR. 53 (SC.)

[4] (1976) Z.R. 80 (S.C.)

4.2 Analysis

Another interesting case involves a fourteen year old Juvenile of Lusaka's Compound who was convicted on charges of burglary and theft. The juvenile was convicted together with twenty five year old who was to serve a six months jail sentences. This was the third that the boy was being convicted on similar charges. In passing judgment Lusaka Magistrate, Hamaundu expressed worry that if let loose the juvenile would in a few years to come become more dangerous to society. The magistrate said it is prudent that the juvenile is sent to a reformatory school so that he could receive parental guidance. The court sent the juvenile to Mazabuka's Nakambala reformatory school.[5]

Considering the treatment of the juveniles in other offences, one notes that the treatment of the appellant in *Kapya v the People* was beyond juvenile punishment. As a theme of this paper, juveniles are considered to be not fully grown individuals who need proper care where they breach the law. One regrets to state that the sentence in this case was too punitive. The decisions show clearly that juveniles in other offences juveniles are treated better than in defilement cases. It is clear that that there is total adherence by the court to the spirit of the Juvenile Act in other offences unlike in defilement cases where the courts seem to use emotions and not the law. The court had the law in its disposal emphasizing on the need to protect juveniles and not to punish them.

It is clear that on the present basis, the justice system was woefully inadequate in assisting a young offender to change his ways. In this case, it should be admitted that the mission of juvenile justice differs from that of adult justice. Juvenile courts should not order punishment, instead, they must respond to juvenile misconduct and misfortune by ordering rehabilitative measures or assistance

[5] Muvi tv Admin – Thursday May 27

from government agencies. The juvenile court's response to misconduct generally should be more lenient than the adult court response. Rehabilitation, not punishment, remains the aim of the juvenile justice system, and juvenile courts still retain jurisdiction over a wide range of juveniles.[6] One strongly argues that punishment to juveniles remains dehumanising, humiliating method and in the scheme of things, produces hardened, bitter children without faith in the goodness of society.

It is on this background that one argues that the juvenile in *Kapya v the people* deserved justice and not punishment. The court should have noted that strictly, punitive approaches are not appropriate to juveniles. Whereas in adult cases and possibly in cases of severe offences by juveniles (such as homicides), just desert and retributive sanctions could be considered to have some merit whereas in juvenile cases (non homicides as it was in Kapya v the People) such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the child.[7]This is shown by the court's decision in *Siwale and another v the people* where it stated that the intention of the drafters of the Juvenile Act was to protect juveniles and that clearly the legislature had in mind the importance of rehabilitating the juvenile and avoiding having them associate with criminals, and generally suffering the traumatic experience of prison.

It suffices to state that *Kapya v the people*, is a classic case where a juvenile is found to be an offender in a defilement case. It should thus be made clear that the decision in this case is a landmark one according to the research; this is to say that there is no other reported case with similar facts as in *Kapya v the People*. In this vein, Zambia practices the principle of stare decisis, meaning courts subordinate to the Supreme Court are bound by its decision and that the Supreme

[6] T. J. Bernard.1992. *The Cycle of Juvenile Justice*. (New York: Oxford University Press,1992), 234

[7] J.S. Sloth-Neilsen. *Statistical Research on Juvenile Justice: Examining Court Records of Juvenile Offenders*. (Cape Town, Unpublished, 1996), 53

Court itself is bound by the its own decisions. Thus, the court should have realized that it was dealing with a novel case which required extra care in handling it. To this end, one can regrettably state that *Kapya v the People* is law and any case with similar facts will be bound.

Having considered decisions of the courts in other offences, one admits that there has been serious inconsistence on how juveniles are treated especially with regard to Kapya v the People. It is clear from the court's decision that *Kapya v the People* was treated as an exceptional case where a juvenile could defile a fellow juvenile. This may be attributed to the fact that there is an increase in juvenile delinquencies, and the decision was a red flag to warn the would be juvenile delinquents. However, on principle, the decision in Kapya v the people sets a bad precedent.

4.3 Conclusion

In conclusion, one would state that it should be borne in mind that when juveniles breach the law, punishment is not the solution. The law states clearly that detention should be used as a measure of last resort. This is to say, that, the law has provided possible options that should be adhered to before resorting to sending the juvenile to prison. Decisions in other offences reflect true justice for as courts kept emphasising on the need to rehabilitate the juvenile offenders. In this case, the court in Kapya has set a very bad precedent which does not in any way help the juvenile. The courts should not be an enemy to juvenile but a parent where they can seek counsel. Courts should assist in determining what would be the most effective means of encouraging juveniles to keep away from crime. This may have to cover such aspects as helping juveniles develop intellectual and technical skills so that these young people can work to support themselves and their families. This can help juvenile to have high self-esteem, and have positive role modeling.

CHAPTER 5

Conclusion and Recommendations

5.0 Introduction

Chapter one of this research has given a general background of the research. Chapter two has specifically dealt with issues that were raised in *Kapya v the People*. The chapter has clearly indicated that the sentence slapped on the appellant did not reflect the principles of a good juvenile justice system and hence in contravention of the best interest of the juveniles. Chapter three analysed the juvenile justice systems of South Africa and the United States of America. From the analysis, it has been noted that the American juvenile system is a classic example of a good juvenile system. Chapter four has considered how juveniles are treated in other offences such as robbery, burglary, murder and other serious offences. It is noted that juveniles are treated better in other offences than in defilement cases.

The paper has also indicated that Juvenile justice refers to legislation, norms and standards, procedures, mechanisms and provision, institutions and other bodies specifically applicable to juvenile offenders. However, juvenile justice is understood not just to cover the treatment of juveniles in conflict with the law but also includes efforts to address the root causes of offending behaviour and implement measure to prevent such behaviour.

From the research undertaken, it suffices to indicate that there are principles that should govern every juvenile justice system. Firstly, that, the system must have a specialist and multidisciplinary approach. This entails that a juvenile system must aim at developing a distinct and unique system that treats juveniles in a manner appropriate to their age and level of maturity and that institutions must be designed to achieve this goal. Secondly, the system must be juvenile

centred, that is to say, a juvenile centred system recognises the juvenile as a subject to fundamental human rights and freedoms and ensures that all actions concerning the juvenile must be done in their best interest. Thirdly, the juvenile system must recognise that juveniles must be treated with humanity and dignity. The Convention on the Rights of the Child (CRC) clearly forbids torture, capital punishment and life imprisonment without the possibility of release for all persons below 18 years, while limiting the use of deprivation of liberty as a measure of last resort_ when all other alternative solutions do not seem possible or adequate. In those cases when it is required, it should only be administered for the shortest period possible.

From the foregoing, it is prudent to conclude that the value attached to juveniles is quite awesome and there is need to treat them in a manner that responds to their special needs. Taking into account that juveniles are an exceptional category, the laws that promote their interests must be seen to be effective in their application and they should be responsive to special needs, vulnerability and general situations in which juveniles find themselves in. The kind of treatment to be imposed on them must not be punitive but oriented towards rehabilitation so that they get reintegrated into society as responsible citizens in whom the future lies. Therefore, the court in *Kapya v the People* case made very bad law that kills the spirit of the juvenile justice. As earlier stated, rehabilitation, not punishment, remains the aim of the juvenile justice system and this was not upheld by the court. In *Kapya v the People,* procedure was properly followed, however, a sentence of 15 years for an 18 year old juvenile was too punitive and that this is not a way of helping the juvenile to be re-integrated back into society. Therefore, there is inadequate juvenile justice in Zambia in defilement cases as courts do not recognise the ultimate objective of the juvenile system.

5.1 Recommendations

These recommendations are nurtured by the sensitive concern for the general welfare of the juveniles in whom the future of this nation is vested, as well as help to improve on institutional effectiveness and efficiency.

Need for intensive Diversion of criminal prosecution: The philosophy of diversion provides a very important means of according juvenile justice. The main component in the diversion system is that the juvenile offender is to be diverted out of the criminal justice system. The juvenile is exposed to programmes designed to educate and change the views of the young person in order to prevent him or her to relapse into crime.[1] Thus, to juveniles, diversion may mean moving away from crime towards being productive members of society. In Zambia the establishment and development of diversion programmes has been entrusted to NGOs (Rural Youth and Children in need (RYOCHIN), Jesus ministries and YWCA.[2] For this reason there is lack of decentralization of programme as the programmes is concentrated only in Lusaka.[3]

Furthermore, unlike South Africa[4], in Zambia, this programme though very critical in juvenile justice has not been recognised in the juvenile Act. The consequence of this is that the programme lack enforcement as there is no guideline on how the progamme should operate. This shows lack of willingness by the government in promoting the programme. In this regard as Nawa Richard(National Coordinators for Diversion Project-YWCA) puts it, it is recommended

[1] Lukas Muntigh, Evaluation Report on Zambian Child Justice System, Government of the Republic of Zambia, 2007
[2] Ms Chanda, M, Deputy Registrar, speaking at a workshop at Mukuba Hotel, Kabwe held from 7th – 10th Nov 2005. Workshop funded by UNICEF.
[3] Mrs A, Mofya, Director of Programmes, Diversion (RYOCHIM) interviewed on 20th Jan 2012.

[4] Sections 51- 62 Child Justice Act No. 75, 2008

that the government should show willingness by recognizing the programme in the juvenile Act, media coverage should be intensified and need to adequately fund the programme.[5]

Need for immediate introduction of Restorative justice in juvenile justice administration: Restorative is a concept whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future. It should be understood that the aim is offender accountability, reputation to the victim and full participation by all those involved. Restorative attempts to repair the damage, re-establish dignity and reintegrate those who were harmed or alienated by the offence. It is based on the assumption within society a certain balance and respect exists, which can be harmed by crime. The purpose of the juvenile justice is then to restore the balance and to heal the relationships. It is not so much about punishment but about healing the wounds caused by crime and repairing the relationships that have been broken down. It enables all parties to the crime (victim, offender and affected members of the community) to be directly involved in responding to it with the state and legal professionals playing the role of facilitators.[6] The result of restorative is an agreement on how the offender will make amends for the harm caused by the crime. The traditional criminal justice sanctions of restitution and community service are used to restore the balance. The framework for restorative justice involves the offender, the victim, and the entire community in efforts to create a balanced approach that is offender-directed and, at the same time, victim-centred.[7]

Need to introduce the philosophy of Ubuntu in juvenile justice administration: Ubuntu is a lifestyle or unifying world–view of African societies based on respect and understanding

[5] Richard Nawa, Cordinator for Diversion Project –Young Women Christian Association, Interviewed by Niphegie, C. Simulyamana, on 20th January, 2012.

[6] Restorative Justice Centre, "Restorative Justice Training Manual for PRISCA(Zambia)", Education, Training and Development Department, 2012

[7] Restorative Justice Centre, "Restorative Justice Training Manual for PRISCA(Zambia)", Education, Training and Development Department, 2012

between individuals. The concept envelopes values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collectivity. In this regard, juvenile offenders will not be implicated as criminals but as productive members of society. This can be achieved through the decisions of the courts emphasising on the proposition and subsequently influencing the legislature to enact laws that promote solidarity, compassion and human dignity. This, without doubt will change the perception of the courts on juvenile delinquents.

Ensuring that detention of juveniles is used as a measure of last resort: Detention is a repressive and inappropriate treatment of children who contravene the law. It should be ensured that deprivation of liberty of juveniles is effectively only used as a measure of last resort. Society must develop alternatives to detention as diversion and rehabilitation programmes taking into consideration the vulnerability of children and their particular needs in terms of education and social recovery. Sections 72 and 73 of the Juvenile Act set out the sentencing options for juvenile offenders, and set forth that no juvenile should be sentenced to imprisonment, no child should be sentenced to a reformatory unless it is absolutely necessary, and that no young person shall be sentenced to imprisonment unless he cannot be dealt with otherwise.

Education for police officers: Police officers are the first people that juveniles come into contact with. Hence these officers should have special knowledge because how they handle the juveniles at first instance determines how the juvenile will react to the system. They should be trained on how to conduct an arrest of a juvenile, how they should detain a juvenile and how long. It is recommended that police should go through a mandatory course on how to handle juveniles. It is bemoaned that police brutally handle juveniles out of emotions without

considering their delicate nature.[8] It has also been pointed out that there does not appear to have been any change in the arrest patterns of the police, and children are still entering in the criminal justice system for petty offences.[9]

Call for Law reform: Current legislation is out-dated and is increasingly an impediment to transformation and improved service delivery. To enhance increased access to justice for juveniles, it is necessary that law reforms be embarked upon as a matter of priority. The scope of law reform should be determined from comprehensive consultations with all interested parties. One in this case advocates for a specific provision in the Constitution to protect the rights of juveniles. The current Constitution does not expressly protect the juveniles' rights.

Infrastructure development: According to Section 58 of the Juvenile Act juveniles shall be kept separated from adults while detained in police stations or while being conveyed to or from any criminal court, or while waiting before or after attendance in any criminal court. However, the protection is limited since the child may be kept in the same cell together with the adult he or she has allegedly committed the crime with, a practice which is contrary to the best interest of the child.[10] This is a common trend in Lusaka as most structures are dilapidated. A check at Lusaka Police Central cell, it was discovered that the juvenile cell was non-operational. The Police at the station indicated the lack of funding in infrastructure by the government. Indeed, there is need to invest in infrastructure in order to protect the interest of the future generation which may be trapped by the net of our legal system.

---

[8] Dr Chilembu, Agness, National Coordinator, Victim Support Unit, Zambia Police. Interviewed by Niphegie, C. Simulyamana on 23rd January,2012.

[9] Lukas Muntingh, Evaluation Report on Zambia Child Justice System, Government of the Republic of Zambia, 2007

[10] Helene Lindström and Ida Salomonson, *Juvenile justice in Zambia-An Evaluation of the three pilot projects,* 2005

BIBILIOGRAPHY

Anderson, A.M. *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution*, University of the North, South Africa, 2002

Bartollas,C. *Juvenile Delinquency*, 7th ed. Oxford University Press. New York (2006)

Bernard, Thomas J. 1992. *The Cycle of Juvenile Justice.* New York: Oxford Univ. Press.

Bird, R.(1983). *Osborn's Concise Dictionary*, 7th ed. Sweet and Maxwell, London.

Belva, F. *"Violence Against and By Children," The State of America's Children Yearbook* 1996, (Washington, DC: Children's Defense Fund, 1996)

Consedeine, J. *Restorative Justice: healing the effects of crime.* Plougshares Publications: Lyttelton, New Zealand, 1999.

Fine, N. *Through the walls: working with Youth in conflict, in crisis, in care, in custody. Community law centre*: University of Western Cape, 1996

Friendlander, W. etal, *Introduction to Social Welfare.* 5th ed, Pretice Hall, New Jersey, 1980.

Hatchard J, and M. Ndulo, *Readings in Criminal Law and Criminology in Zambia.* (Multimedia Publications, Lusaka,1994

James A. Inciardi, *Criminail Justice.* 8th ed,McGraw-Hill companies, New York, 2007. 387 U.S. 1, 1967

James, A. Inciardi. *Elements of Criminal Justice.* 2nd ed. Oxford University Press. New York, 2000

Joel, S. *Criminal Law.* 8th ed. Thomson Wadswoth, University of Minenesota, 2005.

John, S. *Inventing the stubborn Child in juvenile delinquency*, 2nd ed. Thousand Oaks, CA: Pine Force Press, 2001.

Larry J. Siegel and Brandon C. Welsh, *Juvenile Delinquency: The Core*, 3rd ed. Chicago: Univ. of Chicago Press,2008

Martin, E. *A Dictionary of Law.* 5th ed. Oxford University Press ,Great Clarenton Street London, 2002.

Muntingh L, "*Children in prisons: some good news, some bad news and some questions*", Article 40, 2005, Vol. 7, No. 2, 8.

Osborne, P. *Psychotherapy and analysis of a person.* (Stanford University Press, 1990

Raymond, E. *Evidence.*Mcmillan Publishers ltd, England,2006.

Rosenheim, M. K., et al., eds. 2002. A Century of Juvenile Justice. Chicago: Univ. of Chicago Press.

Robert, M. Bohm. *Criminal Justice.* 4th ed McGraw-Hill, New York, 2007.

Siegel, D.M., *The Supreme Court and the Sentencing of Juveniles in the United States: Reaffirming the Distinctiveness of Youth*, 2011

Skelton. A. *"Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control"*, in Davel, C.J. (ed) Children's Rights inTransitional Society, 1999

Thomas J. Bernard, *The Cycle of Juvenile Justice* Oxford University Press. New York. (1992).

Tutu , D. *No Future without Forgiveness.* London: Rider. 1999

Walker. N *Sentencing in a Rational Society.* Oxford University Press. New York 1969

Anonymous , www.African-union.org/child/home

Anonymous, http://www.css.gov.za/repports/prosecut/00_11_01a.htm

RESEARCH PAPERS

Amanda, D. *Children Serving Goal Sentences: A profile on children sentenced to prison.* Research report written for the Centre for the Study of Violence and Reconciliation, August 1999.

Bertha, M.*Defilement as a sexual offence in Zambia and why the increase in Defilement cases.* . A research paper submitted to the University of Zambia, 2003.

Chimente. A. *Juvenile Justice Administration in Zambia; How effective does it reach out to the intended targets.* A research paper submitted to the University of Zambia, 2004.

Nundwe M. P. *Child Defilement: the need for stiffer Punishment.* A research paper submitted to the University of Zambia, 2003.

Simulwani, E. *The juvenile justice in Zambia.* A research paper submitted to the University of Zambia,1994

Sloth-Neilsen, J. Said. *Statistical Research on Juvenile Justice: Examining Court Records of Juvenile Offenders,* Unpublished, Cape Town 1996

REPORTS

Helene L, and Ida Salomonson, *Juvenile justice in Zambia-An Evaluation of the three pilot projects*,(2005)

Inter- ministerial committee on Young People at Risk; Interim Report Policy for Transformation of the Child and Youth Care System.. Pretoria, 1996.

Jacqui Gallinetti, Daksha and louse, Conference Report. *Child Justice in South Africa: Children's Rights Under Construction.Open Society Foundation For South Africa*, 2006

South African Law commission, *Report on Juvenile Justice,* Project 106. Pretoria, 2000.

Lukas Muntingh, *Evaluation Report on Zambia Child Justice System, Government of the Republic of Zambia,* 2005

Frank, C. "*Young Guns: Children in Organised Armed Violence*", 2005, SA Crime Quarterly, No. 14

Skelton, A & Tshehla. *Child Justice in South Africa.* SS Monograph Series No 150, September 2008

Restorative Justice Centre (2001), Retributive Community Justice Commissioned by the UN Child Justice Project, Pretoria.

JOURNALS

Makhanya, M.R. Journal for crime Research in South Africa, Volume 1 (2000).

Zambia Law journal, Volume 38, 2006. UNZA, Lusaka.

PRESENTATIONS

Presentation by Henry .M. Musenge Enhancing access to justice for juveniles in Zambia AHSI/APRM Civil Society Golden Bridge Hotel, Lusaka, 26th August, 2010.

Chanda, M, Deputy Registrar, speaking at a workshop at Mukuba Hotel, Kabwe held from 7th – 10th Nov 2005. Workshop funded by UNICEF.

Restorative justice Training Manual for PRISCA (Zambia). Restorative Justice Centre, 2012

INTERVIEWS

Interview with Mrs A, Mofya, Director of Programmes, Diversion (RYOCHIM) interviewed on 20th Jan 2012.

Interview with Richard Nawa, Cordinator for Diversion Project- Young Women Christian Association (interviewed on 20th January, 2012.

Interview with Dr Chilembu, Agness, National Coordinator, Victim Support Unit, Zambia Police. Interviewed on 23rd January,2012.

NEWS

Muvi tv news by admin - Thursday May 27

Ruth Banda. "*Attitude of some police officers handling juvenile offenders is wrong*" The Post Newspaper, Wednesday September 15, 2004