

**A LEGAL REVIEW OF THE CURRENT SUBSTANTIVE AND
PROCEDURAL LAW ON DEFILEMENT CASES IN ZAMBIA
AND ITS IMPACT**

SPR
LLB
mul
2013
C-1

WRITTEN BY: MULIKITA MUBITA PAUL

(20066732)

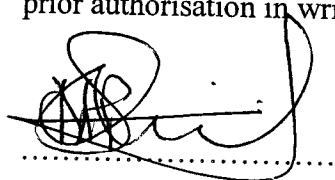
Being a Directed Research essay submitted to the University of Zambia Law
Faculty in Partial fulfilment of the requirements for the Award of the Bachelor
of Laws (LLB) Degree

UNZA

2013

DECLARATION

I, MULIKITA MUBITA PAUL, do hereby declare that this Directed Research Essay is my legitimate work and to the best of my knowledge, information and belief, no similar piece of work has previously* been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorisation in writing of the author.

A handwritten signature in black ink, appearing to read 'Mulikita Mubita Paul', written over a dotted line.

MULIKITA MUBITA PAUL

07/08/13

DATE

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I Recommend that the Directed Research Essay under my supervision by:



MULIKITA MUBITA PAUL

(Computer No.20066732)

Entitled:

**A LEGAL REVIEW OF THE CURRENT SUBSTANTIVE AND PROCEDURAL
LAW ON DEFILEMENT CASES IN ZAMBIA AND ITS IMPACT**

Be acknowledged for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the regulations governing Directed Research Essays.

Ms L. Sian'gandu

Date

ABSTRACT

Despite the heavy penalty imposed by Act No 15 Of 2005, defilement has been on the increase. Whereas a number of studies have been done on defilement which focused on pre-trial and trial process, this paper has taken an original approach which focuses on the substantive law and procedural law of defilement. Apart from a review on various literatures on the subject, a number of interviews were conducted with personnel from the police, legal Aid Clinic, and research was done at the magistrates Complex. The study revealed that there is need to re-examine the substantive law and procedural law factors that inhibit injustice in defilement cases. This could be enhanced by advocating for substantive and procedural reforms on factors that negate justice in defilement cases such as the legal pluralism emanating from the use of customary law and statute which is both recognised by the Constitution but not harmonised in the Penal Code, the procedural factors that tend to protect the accused than the victim such as strict adherence to *stare decisis*, corroboration, cross-examination and mistrust or legal prejudice on the evidence of a child in defilement cases.

The study further revealed that there is no specific law that deals with defilement cases in Zambia except the general criminal law. This makes the trial process and environment of defilement hostile to a child as it does not take keen interest in a child as a witness such as cross examination which is inhibitive in an adversarial system or the court flaws that exist at magistrate complex in violation of section 121 Of the Juveniles on the power to clear the court due to higher numbers of court cases, and lack of the special court to deal with defilement cases. Furthermore defilement cases are subjected to corroboration making it difficult for the prosecution to prove. In such situations society has opted to use customary law which seem to award them “virginity damages” and quick to resolve the matter unlike in criminal law where a case would take too long to be disposed or only end up in an acquittal. The research contains recommendations which if implemented would not only result into justice but also protect the child against sexual predators.

ACKNOWLEDGEMENTS

I would like to thank Ms. L. Sian'gandu, my supervisor for the task that she undertook reading through my chapters and offering valuable suggestions and comments. She has a liberal yet intelligent and exceptional way of bringing the best out of her students. However the views expressed and the way they are expressed remain my sole responsibility.

I also owe a profound debt of gratitude to my daughter Sebate, my sons Shwaana, Cihuna and Ke-elohim, for their ability to endure hardships I exposed them while perusing this degree as a self sponsor student. Your endurance my children especially in my final year have been unwavering, even when the easier option for me would have been to stop. I shall forever remain grateful.

Special admiration and mention goes to IDAH LUNGU. You played your part in my life and education and your contribution will always be remembered. Grandmother your wisdom has time and again been useful, moulding me to the person that I am today. Your wisdom will forever be stamped on my heart, *nitumezi musalimuhulu*. My Mother Geogina, your support and encouragement have been exceptional, always going the extra mile in my life as a mother. Your support has been infallible even when required at short notice. Martha you have been both my sister and my best friend. Though you have not directly contributed to this work, you have done so in ways that you can only imagine.

I further wish to express my profound gratitude to Dr. Matakala who offered insightful help during the Alternative Dispute Resolution Lectures which better placed me on a definite understanding of the research. I remain indebted.

I would further wish to express my special appreciation to ISABEL KAFUNDA, my friend and love. The expedition has been an extensive one with a lot of hurdles and at every stop you have been there to offer back-up even when all hope seemed lost. Your relentless effort to press on a treasure hunt, inspire value to our memories of victories. The future is in sight and mutually we shall complete the race. My gratitude will never diminish on your wisdom and your person as a woman.

It would be economic to my faith if I did not admit and thank God almighty for His grace in Christ Jesus that has seen me during the dark hours of my life and studies during this academic study. It is only through time and patience that this work has come to zenith.

DEDICATION

This work is dedicated to the memories and relentless efforts of my school days at UNZA. The university has been a revolutionary centre to the core person in my life. Thanks to the gallant men like Dr Kenneth Kaunda and the rest who saw the need for University knowledge which gave me an opportunity to pass an ordinary mind for real life orientation and for universal adaptation to higher knowledge beyond the philosophy of men for self actualisation.

TABLE OF STATUTES

1. The Penal Code, Chapter 87 of the laws of Zambia
2. The Penal Code(Amendment Act) Act No 15 of 2005
3. The juveniles Act Chapter 53 of the laws of Zambia
4. The Extension Act, Chapter 11 of the laws of Zambia
5. The Constitution, chapter 1 of the laws of Zambia
6. The Subordinate Act, Chapter 29 of the laws of Zambia

TABLE OF CASES

- Chisha v The People, [1980] ZR P36
- Director of Public Prosecutions v. Kilbourne, [1973] A C729
- Fawaz and Chelelwa v The People, [1995-1997] ZR 3
- Haamenda v The People, [1977] ZR184
- Klink v Regional Court Magistrate and others [1996] 3 BCLR, 402[SFO at 410A]
- Kombe v The People [2009] Z.R 282
- Muwowo v The People [1969] ZR 67
- Nsofu v The People [1973] ZR 136
- R v Bell [1929] CPD 478
- R v Chance [1945] AC 234
- R v Chinjamba [1949] NRLC 384
- R v Khan [1981] 73Cr App R 190 at 192(CA)
- R v Turnbull [1976] 3ALL E R549
- Tembo v The People [1966] ZR 126
- The People v Thomas Manroe, [2011] HPS/45/

TABLE OF CONTENTS

	Page
RESEARCH TOPIC.....	i
DECLARATION.....	ii
SUPERVISOR’S APPROVAL	iii
ABSTRACT.....	iv
ACKNOWLEDGEMENT	v
DEDICATION.....	vii
TABLE OF STATUTES	viii
TABLE OF CASES	ix
CONTENTS.....	x

CHAPTER ONE

GENERAL INTRODUCTION TO THE LAW OF DEFILEMENT AND THE PRINCIPLE OF CORROBORATION

1.0 Introduction.....	1
1.1 Statement of Problem.....	1
1.2 Purpose of the study.....	3
1.3 Significance of the Study	3
1.4 Methodology.....	4
1.5 Historical Development of Corroboration.....	4
1.6 The Rational for Corroboration.....	5
1.7 The legal Paradox of Corroboration.....	8
1.8 Conclusion.....	10

CHAPTER TWO

FACTORS OF SUBSTANTIVE LAW THAT OBSTRUCT JUSTICE IN VIEW OF CORROBORATION IN DEFILEMENT CASES

2.0 Introduction.....	12
2.1 The Penal Code	13
2.2 The Title of Chapter xv of the Penal Code (Offences Against Morality).....	14
2.3 The Definition of Defilement	15
2.4 Sentencing.....	17
2.5 Compensation.....	18
2.6 The Constitution.....	21
2.7 Conclusion.....	21

CHAPTER THREE

FACTORS OF THE ADJECTIVE LAW THAT ABSTRACT THE PRINCIPLE OF CORROBORATION IN DEFILEMENT CASES

3.0 Introduction.....	23
3.1 Stare Decisis.....	24
3.2 Corroboration.....	26
3.3 Competency of the Child as a Witness.....	28
3.4 Cross- Examination.....	30
3.5 Conclusion.....	32

CHAPTER FOUR

OVERALL ANALYSIS OF THE PREVAILING ANALYSIS OF THE PREVAILING SITUATIONFROM THE RESEACH FINDINGS

4.10 Introduction.....	33
4.11 Factors Discussed.....	33
4.12 The Constitution, Chapter One of the Laws of Zambia.....	33
4.13 The Penal Code, Chapter 87 of the Laws of Zambia.....	35
4.14 The Juveniles Act, Chapter 53 of the Laws of Zambia.....	36
4.20 Factors under Review on Procedural Law.....	37
4.21 Strict Adherence to Stare Decisis.....	37
4.22Cross-examinaton.....	39
4.23 Requirement of Corroboration.....	40
4.24 Conclusion.....	42

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Conclusion	44
5.1 Recommendations.....	48
Bibliography.....	50

CHAPTER ONE

GENERAL INTRODUCTION TO THE LAW OF DEFILEMENT AND THE PRINCIPLE OF CORROBORATION

1.0 INTRODUCTION

This research paper is a review on the legal challenges in the adjudication process of defilement cases in Zambia. The paper will commence by a historical development of corroboration, its rationale, and it shall briefly explain the legal paradox of corroboration. Further the presentation will analyse the current substantive and procedural law regulating defilement by identifying the weakness thereof. In addition, the paper will also evaluate the effectiveness of corroboration in defilement cases in the light of such legal challenges. A substantial section will be devoted to identifying pragmatic solutions that can be applied in the Zambian context. The paper will conclude by underscoring the critical bridge of proposed substantive and procedural law reforms.

1.1 STATEMENT OF THE PROBLEM

Defilement cases in Zambia have been on the increase in the recent past despite the stiff penalty that has been implemented through amendment No 15 of 2005 of the Penal Code. This is reflected through a number of stake holders such as the Churches, the Media, Non Governmental Organization (NGOs) and other cooperating partners who have raised the concern and the alarm for such increase in defilement cases. For example in 2008, the United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) Zambia's report said that sexual violence against women and children had

increased drastically in the country over the preceding few years.¹ This is further buttressed by records of data entry from criminal registry.²

✱

DATE	NUMBER OF CASES COMMITTED FOR TRIAL	PERCENTAGE INCREASE
1 st January to 31 st December ,2009	32	100%
1 st January to 31 st December ,2010	47	146.8%
1 st January to 31 st December ,2011	103	321.88%
1 st January to 31 st December ,2012	179	559.38%
1 st January to 29 th January ,2013	9	Not conclusive

The above data exposes the legal challenges in dealing with defilement cases in a Zambian society.

The increase in defilement cases is due to family breakdown, high levels of moral breakdown, unemployment and traditional beliefs that young girls cure AIDS.³ As a result of high level of moral breakdown in families, parents or guardians take advantage of the trust of the girls and boys under their care through defilement. This epidemic demands urgent answers to panacea it. Further, it has been cited that one of every three females is sexually abused before the age of fifteen.⁴ The law is not a stagnate concept; it is a dynamic and living concept.⁵ In order for it to be viable it has to undergo consistent revolution/change reflecting political and social changes in society otherwise it will be obsolete. Therefore many gaps in the law such as the retributive approach of criminal law and the excessively formalistic and bureaucratic procedures, transform justice into something exclusive, which only “experts”

¹ Convention on the Elimination of All forms of Discrimination Against Women [CEDAW] Report on sexual violence against women and children 2008. P12

² Defilement Data obtained from Criminal Registry on the 29th January, 2013 at the Lusaka Magistrate Court Complex.

³ M. Siame and S.Longwe. Beyond Inequalities :Women in Zambia [Lusaka: UNZA Press,1999]p14

⁴ Ibid.p14

⁵ Carlson Anyangwe, An Outline of the Study of Jurisprudence, [Lusaka: UNZA Press, 2005], p.241

can understand, make it difficult for the victims to access justice due to the technical legal jargon,⁶ are among the major reasons that have led to high levels of defilement cases.

1.2 PURPOSE OF THE STUDY

The study will evaluate the substantive law and the procedural law in defilement case. It look on how the provision of the law on defilement has been a source of injustice in defilement and how this has been further compounded by the procedural law making defilement case all most impossible to be proven by the prosecution during trail. In this regard the study will focus on the following questions:

1. Does the Zambian substantive law in its legal pluralism offer justice to a child in defilement case?
2. Does the procedural law provide an environment that would enable justice for a child in defilement case?

1.3 SIGNIFICANCE OF THE STUDY

This study will focus on analysing the impact substantive law and procedural law on justice in defilement cases. The justification for the study is that there is a need to establish factors that hinder justice and strike the right equilibrium between the substantive law and procedural law so as to give a legal balance that effetely deals with defilement case. The study will further highlight the inherent factors that hurdles that victims of defilement face in the adjudication before they can secure a conviction. In so doing problem areas in the substantive law and procedural law will be identified. The identification of such problem areas will help to come up with means upon which the law can be enacted or indeed amended to existing laws so as to attain justice for the victims of defilement.

⁶ R. Gargarella, Access to Justice for the Poor: The Case of Latin America, 2000, [online]. Available at: www.undp.org/oslocentre/PAR_Bergen_2002/latin-america.pdf, pp. 3-5, [Accessed 19 September 2012].

1.4 METHODOLOGY

The basic research tool will be structured with interviews with personnel that are in charge of handling defilement cases. This will further augmented by observation of the proceedings of court sessions of defilement cases. The author will also refer to the various laws and documents on defilement. Thus includes primary and secondary sources of law.

1.5 HISTORICAL DEVELOPMENT OF CORROBORATION

As a principle, corroboration is a long standing common law rule that required the trial judge in all sexual offences to warn the jury of the dangers of convicting the accused on the evidence of the complainant which is not corroborated.⁷ If the judge failed to warn the jury about the dangers of doing so it might result in the jury's decision being overturned on appeal. In the case of **Tembo v The People**,⁸ common law position was affirmed when the court held that "the absence of any warning on corroboration is prima facie fatal to a conviction.

Corroboration in Zambia was imported through colonialism under the English Law (Extent of Application) Ordinance of 1963⁹ and this statute has been repealed and is now the English Law (Extent of Application) Act chapter 11 of the laws of Zambia which states that pre 1911 laws apply to the republic of Zambia unless expressly excluded by statute in Zambia and not in England. Through this statute, corroboration was imported in Zambia. However it must be noted that the application of common law and English statutes in Zambia is limited by local

⁷ R v Henry [1968] 53 Cr App Rep 150 at 153 as per Salmond LJ who stted that "human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is easy to fabricate, but extremely difficulty to refute"

⁸ [1966] ZR 126

⁹ Section 2 of the Ordinance No 4 of 1963, reintroduced in 1970 under the laws of Zambia, now chapter 11 of the Laws of Zambia

circumstances of the country may permit. This is affirmed in section 14 of the Subordinate Court Act¹⁰, which stipulates that

“All British Acts declared by any Act to extend or apply to Zambia shall be in force so far only as the circumstances of Zambia permit; and, for the purpose of facilitating the application of the said British Acts....”

Corroboration as rule of practice seems to have become, for practical purposes, a rule of law, for it has been stated that the absence of any warning on corroboration is prima facie fatal to a conviction as was held in **Tembo v The People**.¹¹

1.6 THE RATIONALE FOR CORROBORATION

In Zambia there is no universal rule of law or practice which requires corroboration of evidence of a single witness.¹² A court is at liberty to act on the uncorroborated evidence of one witness even in the face of more than one witness to the contrary. In Zambia and other common law jurisdictions there are exceptional instances where corroboration is either necessary or desirable.¹³ The exceptional instances are in two categories namely where corroboration is required as a matter of statute¹⁴ and where it is required as a matter of practice¹⁵.

The justification of corroboration can be fully appreciated by considering the remarks of Montesquieu, who commented that,

¹⁰ Chapter 28 of the Laws of Zambia

¹¹ [1966] ZR 125

¹² M. Sekaggya, The Law of Corroboration With Specific Reference to Zambia, LLM Thesis 1909.p.65

¹³ Colin Tapper, Outline of the Law of Evidence, (London: Butterworth & Co. Ltd ,1986).p73

¹⁴ Section of 122 The Juveniles Act, Chapter 53 of the Laws of Zambia

¹⁵ Colin Tapper, Outline of the Law of Evidence, [London: Butterworth & Co. Ltd, 1986].p73

“reason require two witness because a witness who affirms and a party who denies make assertions against assertion, and it requires a third party”¹⁶

Thus, it is imperative to state that the essence of looking for corroborating evidence is to ascertain whether the evidence given before the court is to be believed or not. In addition, the law requires that evidence of a single indentifying witness need to be corroborated because of the apparent possibility of an honest mistake or mistaken identification. This is due to the fact that criminals who become expert defilers use sophisticated methods such as use of masks; a correct identification is sometimes difficult. In **Fawaz and Chelelwa v The People**,¹⁷ it was held that in single witness identification, corroboration...is required to exclude the possibility of mistaken identification. Previously in **Haamenda v The People**,¹⁸ Chomba J.S recalled with approval the remarks of lord Widgery in **R v Turnbull** where he stated that

“Where the quality of identification is good and remains so at the close of the defence case, the danger of mistaken indemnification is lessened, but the poorer the quality, the greater the danger. In the latter event the judge should direct the jury that they should look for supporting evidence which has the effect of buttressing the weak evidence of identification”¹⁹

In addition, the rational of corroboration under statute²⁰ is based on the immaturity of the child. This is based on fact that the law requires evidence of a child of tender years²¹ on specified types of offences such as defilement to have corroborative evidence in order for the court to convict on the basis of them. The reason for necessitating corroboration of the

¹⁶ J.H Wigmore, Wigmore on Evidence, [London: Butterworth & Co. Ltd,1940] p275

¹⁷[1995-1997] ZR 3

¹⁸ [1977]ZR184

¹⁹ [1976]3ALL E R549

²⁰Section of 122 The Juveniles Act, Chapter 53 of the Laws of Zambia

²¹ There is no specified age below which a child is to be regarded as being of ‘tender years’ the reason for this is probably because children vary in their intellect and understanding. The Court of Appeal appears to have decided as a working rule, on the age of fourteen years as the limit below which an inquiry (*voire dire*) should normally be held. **R v Khan**[1981]73Cr App R 190 at 192[CA] and this was affirmed in **Muwowo v The People**[1969] ZR 67

evidence of the child of tender years is premised on the fact that the child's power of observation and memory of children are less consistent than that of an adult.²² Hammelman in his article on "children as witness" expressed his doubt on the memory of children of tender years when he²³ stated that "it is a well known that the altitude of children to reality and truth differs widely from that of adults and that where young children will make fairly reliable witness, it is observed to expect true testimony from others though older"²³

In addition, inspector Peter Imanga²⁴, a criminal investigations officer at Chilanga Police Station in Lusaka has experience that there are inherent dangers in placing reliance upon the evidence of a child because children are undeveloped in mind such that they are vulnerable to be predisposed by both adults and other children to invent untrue stories. Further, in **Chisha v The People**,²⁵ Silungwe C.J as he then, noted that owing to the immaturity or perhaps to lively imaginative gifts, children are more under the influence of third parties and may fail to appreciate the gap that separate truth from falsehood. Although children may be less likely to be fraudulent or acting from improper motives than adults, suffice to point out that children have little notion of the duty to speak the truth and they may lack true appreciation of the importance of their evidence in a case. In **Director of Public Prosecutions v. Kilbourne**,²⁶ Lord Simon stated that the "rational of Corroboration is therefore nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence ...It is, in short, evidence which renders other evidence more probable to implicate the accused". Sometimes a conviction cannot be obtained without corroboration. Thus the rational of corroboration is to render protection to the accused person against false accusation till proven guilty beyond reasonable doubt.

²²

²³ H.A. Hammelman "Children as Witness" 1950. 13 MLR 235

²⁴ Interviews conducted on the 10th November 2012 at Chilanga Police Station in Lusaka District. Lusaka Province

²⁵ [1980] ZR P36

²⁶ [1973] A C729

1.7 THE LEGAL PARADOX OF CORROBORATION

On the contrary, the requirement of corroboration in sexual offence has resulted into injustice. A large number of offenders, who have genuinely committed the sexual offence in this case defilement²⁷, are not convicted because of the element of corroboration missing or based on its legal technicalities²⁸. The rationale of corroboration is based on myth and beliefs that the female folks are more prone to falsehood before the law than men. This fallacy is clearly discriminatory as Wood explained it:

“it is stressed that the present practice is regarded as being grossly offensive to female folks and discriminatory. It is really possible that rape or defilement victims as a class more prone to falsehood than, for example, businessmen giving evidence in cases where their own financial advantage is an issue? Why not also have a rule that judges should always warn juries that it would be ‘dangerous to convict’ on uncorroborated evidence.”²⁹

Such gross offensive and discriminatory tendencies against women coupled with the discretion of the patriarchy judges have tended to work against a girl child in defilement cases. Thus procedural requirement of corroboration under the current law operates as a shield to the defilers who are left at will to defile a child, who remains as a victim without compensation or rehabilitation. While appreciating the rationale and justification on the principle of corroboration on defilement cases, the principle is based on patriarchy suspicion that looks at the female or women as people not worthy to be trusted during trial and its use has been paradoxical in nature in dealing with defilement cases. This prejudicial perception of the patriarchy has been reflected through the substantive and procedural law in Zambia.

²⁷ Defilement Data obtained from Criminal Registry on the 29th January, 2013 at the Lusaka Magistrate Court Complex as on Page 2

²⁸ G D Woods, *Sexual Assault Law Reform: A Commentary on the Crimes*, 1981.28, [online]. Available at: www.undp.org/oslocentre/PAR_Bergen_2002/Sexual_Assault.pdf, pp. 3-5, [Accessed 19 November, 2012]

Munalula argues that “this makes the law problematic to combat and hence need to set up new criminal law standards that are gender sensitive”³⁰. As such corroboration as a principle, render the law of criminal justice loop sided and fair to the accused and not seem to give the fair justice to the victim³¹ whom the court has proof that she has been defiled.³¹

The Penal Code on defilement is deterrence tailor made through retribution and does not reflect the process of rehabilitation nor restoration despite it being the premise of criminal justice. This entails that many victims of defilement cases are partially unprotected by law. The accused person remains at liberty perhaps to repeat the same defilement on some other victims. Thus, corroboration warning requirement has led to absurd consequences in sexual offences as held in the case of **R v Chance**³²; in that case it was pointed out that:

“where, for example, if a girl was defiled and then robbery takes place in a home presumably a judge would be required to explain to the jury that it would be dangerous to convict the accused on uncorroborated evidence of the victim in relation to her story of the sexual offence, but not dangerous as for as robbery was concerned”³³

In of **Tembo v The People**,³⁴ the court held that “the absence of any warning on corroboration is prima facie fatal to a conviction. The warning is given in all cases even where evidence is corroborative of the complainant’s story.”³⁵ Anderson argues that “the complaint require ment, corroboration requirement and cautionary instructions were three adjacent bands in a spectrum of unique legal rules designed to make the crime of defilement

³⁰ Mulela M. Munalula. Legal Process, [Lusaka: UNZA Press, 2004] Pg121

³¹ Ibid

³² [1945] AC 234

³³ Senate Standing Committee on Legal and Constitutional Affairs [1994] p 39.

³⁴ [1966] ZR 126

³⁵ Ibid. p70

harder to prove than other felonies³⁶”. This is utmost resistance that a child must overcome legally before the accused is convicted.

1.8 CONCLUSION*

In conclusion, it has been established that the rational of corroboration is to avoid false implication by linking the accused to the crime as stated by Lord Simon in **Director of Public Prosecutions v. Kilbourne**,³⁷ it confirms or supports or strengthens other evidence. It is, in short, evidence which renders other evidence more probable to implicate the accused. However its wholesale importation of corroboration with the patriarchy view has led to partial oppression of the women and girls not only in defilement cases but all sexual offences³⁸. In addition, the fact that there is no provision for rehabilitation or restoration or compensation on the part of the defilement victims, has made the law to deal with the effects of defilement only on the convict and not the victim. Thus, as Anyangwe³⁹ states that “the history and linguistic expression of what is characteristically human in our society has been based upon the male person. The law has, moreover, in other subtle ways used language to portray the human agent as neutral, objective and universal when it is not.” As such, the seriousness of the defilement as an offence has been watered down by such technicality of corroboration.

Knowing that the Zambian legal system, like most other contemporary legal systems is striving to ensure that its laws are lacuna-free, in that all potential problems and disputes are catered for by the law,⁴⁰ as evidenced by the existence of the Constitution, massive volumes of the Laws of Zambia, subsidiary legislation, and the importation of English Common law,

³⁶ Michelle Anderson, Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates, (New York: Penguin Classics , 2003)p.45

³⁷ (1973) A C729

³⁸ ³⁸ Karl Popper. The Open Society and Its Enemies (New York: Harper Poros, 1945), p.891.

³⁹ Carlson Anyangwe, An Outline of the Study of Jurisprudence, (Lusaka: UNZA Press, 2005) P.108

⁴⁰ Mulela M. Munalula. Legal Process. (Lusaka: UNZA Press, 2004),p. 5.

equity, and some English statutes⁴¹, and customary law as sources of law. However, notwithstanding the desirability of a legal system with comprehensive law, the law must be responsive to social challenges as the law is not an end in itself but merely a means to an end. The ultimate objective of the law is the attainments of justice on the victims, in this case the defenceless girls and boys against the predatory sex abuse.

Having examined the rationale and weakness of corroboration, the next chapter evaluates the factors of substantive law which are coined as weakness in defilement cases.

⁴¹ English common law, doctrines of equity and English statutes apply to Zambia by virtue of the English Law [Extent of Application] Act, Chapter 11 of the Laws of Zambia [Section 2].

CHAPTER TWO

FACTORS OF SUBSTANTIVE LAW THAT OBSTRUCT JUSTICE IN VIEW OF CORROBORATION IN DEFILEMENT CASES

2.0 INTRODUCTION

In deliberation of the substantive law on defilement in Zambia the chapter addresses issues underlying the penal code, the constitution as well as decided cases. The definition of defilement is considered, followed by issues in regards to sentencing. The chapter ends with a conclusion on issues raised in the chapter.

Substantive law refers to all categories of public and private law, including the law of contracts, real property, torts, and criminal law.⁴² In criminal law, substantive law is the law that defines certain behaviour as illegal and lists the elements the government must prove to convict a person of a crime⁴³. It encompasses principles of right and wrong as well as the principle that wrong will result in penalty. It is substantive law that defines what constitute defilement and the elements that must be proved for one to be convicted. Substantive law therefore refers to the body of rules that determine the rights and obligations of individuals and collective bodies in a given society, In Zambia the penal code and other statutes define crime and the punishment.⁴⁴

The two major principles that influence the legal tone in the penal code are the *principle of harm*⁴⁵ and the *principle of de minimis*⁴⁶, which is retribution. Kulisika⁴⁷ argues that

⁴² Daniel L. Dreisbach, Substantive Law, Microsoft Encyclopaedia Standard [New York: Penguin Classics 2004].

⁴³ Walston Dunham, Introduction to Law [London: University Press, 2006] P. 94

⁴⁴ Section 47 of the Juveniles Act, Chapter 53 of the laws of Zambia: Causing or encouraging the prostitution of girls under sixteen is a crime. Section 3(1) and 3(2) of the Criminal Procedure Code, Chapter 88 of the laws of Zambia deals with trials of offences under Penal Code and trials of offences under other written laws respectively.

⁴⁵ J. Feinberg, Harms to others [Oxford University Press, 1988] p.313. The principle was stated by John Stuart Mill who stated that "the only purpose for which power can be rightfully exercised over any of their member of a civilized community against his will, is to prevent harm to others," J. Feinberg, Harms to others [Oxford University Press, 1988] p.313

“Zambian criminal justice’s... failure to shine is its concern with low-level disorder: it pays too much attention to control the less powerful”. This entails that the law is tailor made to protect the strong and not the weak who in this case is a child. Thus, the need to review the weakness in the substantive law is eminent so as to deal with defilement cases effectively. Clarkson⁴⁸ argues that “substantive rules shall make sense when the needs of reform are to the extent they do not make sense is dealt with”. Thus law has to be responsive to social challenges by giving them legal effect. Thus mere increase in sentence to the sanction of life imprisonment alone cannot deter would be offenders in defilement.

2.1 THE PENAL CODE

Defilement law is simply based on the Penal Code and the justification for State’s authority to punish is based on the deterrent measure that the legislators have endeavoured to attain through the increase of sentence to life imprisonment⁴⁹. Kulisika⁵⁰ affirms the above by stating that “the aim of criminal law is to impose severe penalties because they are seen as anti-social and that the offender must be punished for failing to be responsible.” The above legal tone has made substantive law to promote one goal which is to impose severe penalties and conflict with rehabilitation of the offender and the victim in defilement,⁵¹ which is cardinal to criminal justice. The current law does not deal with the rehabilitation of the convicts and rehabilitation of the victims of defilement and embrace the theory of restoration which takes a victim-oriented approach to crime that emphasizes restitution or compensation

⁴⁶ Ibid.p330. Prof. Ashworth stated the minimalist approach clear focus of criminal law is penal sanctions in order to protect the interest of the individual, the public and state.

⁴⁷ S. Kulisika, Criminal Law in Zambia [Lusaka: UNZA Press, 2005] P24

⁴⁸ C.MV Clarkson, and H.M Keating, Criminal Law 4th Edition [London: Sweet& Maxwell, 2003] p.2

⁴⁹ Section 138 of Cap 87 of the Laws of Zambia (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

⁵⁰ S. Kulisika, Criminal Law in Zambia [Lusaka: UNZA Press,2005] P.1

⁵¹ N. Walker, Crime and Criminology : A Critical Introduction .[Oxford: Oxford UniversityPress,1987]p.140

for victims like customary laws. Matakala⁵² states that “customary laws tend to encourage mediation and to reach decisions that are restorative where fines or compensation tend to go to the aggrieved party, even in criminal cases”. Lack of restoration of a victim and emphasis to restitution or compensation for a victim to defilement has made criminal alien to in an African culture forcing many in the rural areas use customary law in pursuit of restorative justice which is very appropriate to the needs of poor people and tends to rebuild community relations, as opposed to the formal judiciary which is largely adversarial. Thus substantive law which just focuses on criminal punishment through imprisonment is not in touch with customary norms and tends to discourage people to seek criminal justice on defilement cases. This is reflected through a higher level of withdrawal cases. Thus statute must intervene through restoration or compensation clause to capture the indigenous judicial system characterized with compensation. Where the perpetrator cannot afford to restore or compensate the victim, the state must intervene.⁵³ This shall reduce settlement of defilement cases outside litigation accessing justice to the victims and compensation. The current substantive law has not reacted to the cynical disbelief many feel toward defilement victims who muster the courage to come forward with the truth. By contrast, the criminal justice system has overreacted to infamous anecdotes of men falsely accused.

2.2 TITLE OF CHAPTER XV OF THE PENAL CODE (Offences Against Morality)

The substantive nature of the penal code under Chapter XV is paradoxical in nature in that it is tilted as offences against morality when in reality it deals with legal matters on sexual offences⁵⁴. The phrasing of the chapter has a sense of depicting that offences are

⁵² Working Paper by Lungowe Matakala, Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012.p.25

⁵³ Adopted General Assembly Resolution 40/34 of 29 November 1985, item [12] it stipulates that where compensation is not available from the offender or other sources, states should endeavour to provide financial compensation to victims.

⁵⁴ Part XV of Penal Code, Chapter 87 of the laws of Zambia

conceptualized and prosecuted on the basis of morality of the victim. Munalula affirms that “morality plays a big role in that, victims of the offences must themselves be above reproach in terms of moral behaviour in order to merit protection.”⁵⁵ Thus any doubt of the moral standard of the victim cast doubt on justice. With the high levels of sexual offences, it is expedient to title Chapter XV as ‘*Offences Against Sexual Violence*.’

2.3 DEFINATION OF DEFILEMENT (Unlawful Carnal Knowledge: Section 138 of the Penal Code)

The definition of defilement as unlawful carnal knowledge has been problematic in the adjudication process. The study of the Zambian criminal jurisprudence indicate that decisions made by the court have in some cases created a loophole in the law when it comes to curtailing defilement cases in Zambia. For example, if one marries a girl of who is below the age of sixteen under customary law and carnally knows her, the law does not criminalize his actions.

Section 138 of the Penal Code (amendment No 15 of 2005) provides that “any person who unlawfully and carnally knows any child under the age of sixteen years is guilty of a felony and is liable to imprisonment for life”. Thus from the above section, under customary law the issue of age does not arise provided the girl has reached puberty and a man does all the traditional requirement to marry the girl, sex under such customary tendencies, is not criminalized by law. This was affirmed in case of **R v Chinjamba**⁵⁶ where a villager married a girl under the age of sixteen years and lived with together as husband and wife. The accused, who was a village headman knew of these facts and never took steps to prevent or report the matter. He was charged as an accessory after the fact to unlawful carnal knowledge

⁵⁵ Munalula, Women, Gender Discrimination and the Law [Lusaka: UNZA Press, 2005] Women, Gender Discrimination and the Law [Lusaka: UNZA Press, 2005] P150

⁵⁶ [1949] NRLC 384

of the girl under the age of sixteen and was convicted. The court held that it was not unlawful for a man to have carnal knowledge of the girl to whom he is lawfully married to.

Thus, in the above case it is clear that a man who carnally knows a girl under sixteen years of age and is married to her is not committing defilement. This can simply be concluded that defilement in Zambian law is actually not based on carnal knowledge with a girl under sixteen years but carnal knowledge to a girl under the age of sixteen who is not a wife. Failure to reconcile customary law and statutory law has provided a defect in the defilement law in that the protection of a girl child against sexual offences has been derogated through customary law exposing them to masculine sexism which continues traumatizing girls sexually through traditional marriages.

Additionally, English common law defined carnal knowledge as the “penetration of the female sex organ by a male sex organ.” The above definition for carnal knowledge is inconsistent with the spirit of the amendment Act No 15 of 2005 which defines defilement under section 138.

- (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.⁵⁷

This creates a dilemma on the defilement of boys and the need to prove penetration eludes the definition of carnal knowledge for an act to amount to defilement. Thus there is need to strike out the word ‘carnal’ so as to capture gender neutral definition for defilement which shall be applicable to boys.

⁵⁷ Penal Code, Chapter 87 of the Laws of Zambia

2.4 SENTENCING

Although under the Penal Code, the offence of defilement carries a maximum penalty of life imprisonment, on the grounds, the levels of defilement cases have not reduced in Zambia⁵⁸.

There has been an increase in defilement cases as reported in the graph.

DATE	NUMBER OF CASES COMMITTED FOR TRIAL	PERCENTAGE INCREASE
1 st January to 31 st December ,2009	32	100%
1 st January to 31 st December ,2010	47	146.8%
1 st January to 31 st December ,2011	103	321.88%
1 st January to 31 st December ,2012	179	559.38%
1 st January to 29 th January ,2013	9	Not conclusive

The above data exposes the legal challenges in dealing with defilement cases in a Zambian society.

Thus focus of substantive law on sentence alone has made the stagnate concept. There is need for substantive law to be dynamic and living concept.⁵⁹ In order for it to be viable it has to undergo consistent revolution or change reflecting political and social changes in society otherwise it will be obsolete. Therefore the emphasis on sentence alone in the penal code is among the major reasons that have led to injustice in defilement cases in Zambia.

Parents are forced to “*ukumutakatila*” so that their daughter is traditionally married and have financial benefit through “*lobola*” than let the potential husband be imprisoned. This is made possible by the existence of the legal pluralism propagated by statutory law and customary law. Former Chief Justice Mathew Ngulube⁶⁰ stated that defilement cases have mostly been reported to police and taken to court when prior discussion for marriage fails. Thus lack of compensation on defilement in the penal code has made the dealing of defilement cases unpredictable in a legal pluralism. The Zambian constitution recognizes the application of

⁵⁸ S.Kulusika, *Criminal Law in Zambia* [Lusaka: UNZA Press,2005]P.502

⁵⁹ Carlson Anyangwe, *An Outline of the Study of Jurisprudence*, [Lusaka: UNZA Press, 2005], p.241

⁶⁰ NLACW, “National Legal Aid Clinic for Women, 6th Edition Newsletter” Lusaka, January, 2012.,7

customary law⁶¹. Where statutory law prohibits child marriages on the contrary customary law legalizes it.

2.5 COMPENSATION

In Zambia the courts have no power to order an accused person to pay compensation to the victim of defilement.⁶² This has been in the Zambian law for a long time despite vigorous efforts of updating the laws.⁶³ When an accused person is convicted by court for defilement, the victim who is a minor and has suffered material loss or personal injury in consequence of the offence committed, the court will only convict the accused despite the substantial injury to the victim.⁶⁴ This legal approach in Zambia is based on the fact that compensation is recoverable by the victim through a civil suit⁶⁵. This is far from reality due to the fact that many victims do not understand or know of such provisions in the law and further, the high cost of legal fees hinder pursuant of compensation through civil suit.

However a lot of civil suits are abandoned due to high legal fees on the party of the victim. This legal environment is hostile to justice for the child and is contrary to the UN's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Item (8) which stipulates that "fair restitution must be done to the victims such as payment for the harm or loss suffered"⁶⁶ further Item (12) it stipulates that where compensation is not available from the offender or other sources, states should endeavour to provide financial

⁶¹ Article 23(4)(c) of Chapter one of the laws of Zambia

⁶² Section 138. (1) of Chapter 87 Of the Laws of Zambia, 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

⁶³ Amendment No 15 of 2005, the one which changed section 138 by expanding the ambit of defilement to include boys and increase sentence to life imprisonment.

⁶⁴ Ibid

⁶⁵ The imposition of a penalty or fine by or under the authority of any written law shall not, in the absence of express provision to the contrary, relieve any person from liability to answer for damages to any person injured: Section 40 of Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia.

⁶⁶ Adopted General Assembly Resolution 40/34 of 29 November 1985

compensation to victims.⁶⁷ However, Zambia is a dualist state, international human rights treaties, though ratified, are not enforceable in Zambian courts of law unless and until Parliament passes an enabling Act. Therefore rights of the child, which are guaranteed in international treaties⁶⁸ that Zambia has ratified⁶⁸ and are not been domesticated is a clear indication of the contradiction of justice to the child. That notwithstanding, Zambia is, by virtue of ratification, obliged to ensure the realisation and enjoyment of these rights. The current status of substantive law has made victims of defilement not to be awarded compensation against their assailants upon conviction but left to alone to deal with the their mental injury and emotional suffering.

2.6 THE CONSTITUTION

The substantive nature of the law that discriminates a girl child on sexual offences is further buttressed by the supreme law of the land, the constitution. Article 23 states that

“(1) Subject to clauses (4)..., a law shall not make any provision that is discriminatory either of itself or in its effect.” Clauses (4) states that

“Clause (1) **shall not apply to any law** so far as that law makes provision-

(d) for the application in the case of members of a particular race or tribe, **of customary law** with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;”⁶⁹ This creates a legal pluralism system propagated by statutory law and customary law, as such where statutory law prohibits child marriages on the contrary customary law legalizes it. Such legal discrimination that emanate from the supreme law of the land empower judges with a discretion to discriminate in the adjudication of

⁶⁷ Ibid

⁶⁸ Convention on the Rights of the Child, Adopted by the General Assembly of the United Nations on 20 November 1989

⁶⁹ Chapter 1 of the Laws of Zambia

defilement cases as was in the case of Chijamba⁷⁰ on grounds of customary law. Further under Article 23(3)

“the expression “discriminatory” means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”⁷¹”

Such a sweeping expression of discrimination has unlimited effect on legal issues that arise under it in that the judge has unlimited application as long as it is the law. The above provision that allows customary law but does not harmonise it with statute has reflected itself into different position on how society treats defilement due to legal pluralism.

Clearly the retention of discriminatory laws means that the child's full citizenship is lacking or best compromised. As long as this status quo remains in the constitution, it results in unqualified acknowledgement of inequality through such discriminatory tendencies in the supreme law of the land. Munalula argues that “substantive reforms can therefore only be brought about by a reconstitution as opposed to gradual reform.”⁷² This is a clear proof why gradual reforms through the amendment of the Penal Code has been of less help if not non, on defilement cases in that the constitution still derogates the rights of the girl child through such discriminatory clause which has been problematic in Zambian constitution. The inclusion of such a clause actually served to make discrimination on those grounds explicit.

⁷⁰ [(1949)NRLC 384

⁷¹ Chapter 1 of the Laws of Zambia

⁷² Munalula, Women, Gender Discrimination and the Law [Lusaka: UNZA Press, 2005] Women, Gender Discrimination and the Law [Lusaka: UNZA Press, 2005] P.58

Munalula,⁷³ states that “the protection of fundamental rights and the non –discrimination are all subject to personal and customary laws regardless of whether the same are discriminatory or not”. However it is important to note that the application of customary law is applicable only when it is not unjust as per the Local Court’s Act.⁷⁴ The conflicting provision in the constitution on discrimination, the definition of defilement in the Penal Code and the legal provision in the Local’s Act pose uncertainty on which side the legal pendulum would fall when dealing with defilement cases in that the application of customary law which is particular to people creates double standards and is discriminatory to women. This is a clear indication that these lacunas in substantive law either in the Penal Code or the constitution are a major source of the problem in dealing with defilement cases in Zambia.

2.7 CONCLUSION

In conclusion, it is clear that the state of the substantive law in defilement cases plays a pivotal role as it becomes a bases or a yard stick upon which the accused and victims’ rights are tabulated. Kulisika states that “the attainment of criminal justice depends on the effectiveness and machinery of criminal law which is ... conditioned by new ideas, new pressures and changes affecting the fabrics of society.”⁷⁵ Zambian criminal justice’s failure in defilement to shine is its concern with deterrence and it pays too much attention to control the less powerful. This approach to criminal punishment promotes one goal which is to impose severe penalties and conflicts with rehabilitation of the offender and the restoration of the victim in defilement. Thus, the need to review the weakness in the substantive law is eminent,

⁷³ Ibid. P.60

⁷⁴ Local Court’s Act, Chapter 29 of the laws of Zambia: Section12. (1) Subject to the provisions of this Act, a local court shall administer(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

⁷⁵ S. Kulusika, Criminal Law in Zambia [Lusaka: UNZA Press, 2005] P24

being alive to the fact that society exists in a customary law with an indigenous judicial system is characterised with compensation rather than punishment.⁷⁶

Being deficient in capturing the right to compensate and rehabilitate the victims, the penal code has made the law to respect the rights of the accused while there remains big silence on the rights of the child in the adjudication of defilement cases. Munalula has well stated that “substantive reforms can therefore only be brought about by a reconstitution as opposed to gradual reforms.”⁷⁷ This entails harmonisation of the constitution and all statutes that deal with defilement. Where statutory law prohibits child marriages on the contrary customary law legalizes it. Further the definition of defilement as unlawful “carnal knowledge” in the current status does not take cognizance of the gender neutrality of defilement and contradicts amendment Act No 15 of 2005. This is a clear proof why gradual reforms through the amendment of the Penal Code has been of less help if not non

⁷⁶ Winnie Sithole Mwenda, *“Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia”*. University of South Africa, November 2006.p.63

⁷⁷ Ibid. P. 58

CHAPTER THREE:

FACTORS ON THE PROCEDURAL LAW THAT OBSTRUCT JUSTICE IN DEFILEMENT CASES

3.0 INTRODUCTION

Procedural law defines and deals with procedures for enforcing the rights and duties⁷⁸. The rules of procedure and jurisdiction determine the court or administrative agency that may handle a claim or dispute; the form of the trial, hearing, or appeal and the time limits involved. Related rules also cover the kinds of evidence that may be presented. Criminal procedure is concerned with the legal rules followed and the steps taken to investigate, apprehend charge, prosecute, convict and sentence to punishment the individuals who violate substantive criminal law⁷⁹. For example, criminal procedure describes how a defilement trial must be conducted in the court in the administration of justice. Therefore the function of procedure law is more significant in the criminal justice in defilement cases. When the inherent procedural complexities are not dealt with, they thwart the truth seeking process. The inherent difficulty of prosecuting sexual offence was recognized long ago by Lord Chief Justice Sir Mathew Hale who said: that "*rape is an accusation easily to be made and hard to be proved and harder to be defended though never so innocent.*"⁸⁰ This clearly shows the judicial recognition on the implication of procedure law on criminal justice

This chapter will examine factors related to practice and procedure in the judiciary, and its operations. This will include the principle of *stare decisis*, corroboration, competency of the

⁷⁸ Daniel L. Dreisbach, Procedural Law, Microsoft Encyclopaedia Standard [New York: Penguin Classics 2004].

⁷⁹ Walston Dunham, Introduction to Law. [London: University Press, 2006] Pg. No. 94

⁸⁰ La Fave, Rape –Overview; act and mental State 3rd edition, [New York: Penguin 2000] P.34

child as a witness, cross-examination placed by the defence on the traumatized victim and then a conclusion shall be drawn.

3.1 STARE DECISIS

According to Anyangwe,⁸¹ the precedent and *stare decisis* principle is the judicial practice of following what has already been laid down by other judges. This judicial practice has led to a sleepy kind of habit which is mostly easily impressed and acted on by that which is handed down. Thus innovation in the legal system on defilement cases is extremely difficult due to the fact that strict adherence to *stare decisis* has made the room for innovation limited and the law on defilement has become anarchical in relation to social relations. In **Tembo v The People**,⁸² the court held that “the absence of any warning on corroboration is prima facie fatal to a conviction. Thus convicts are acquitted on such technicality of the law despite the commission of the offence due to rigid adherence of *stare decisis*. As a judicial function it denies the judges creativity or initiative and inevitably leads to judicial passivity, nevertheless it is a view to which many famous judges have subscribed as being consistent with the taught tradition of the law. Take for example the eloquent words of caution of the great American judge Mr. Justice Cardozo:

“The judge, even when he is still free, he is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in the pursuit of his own ideal of beauty of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiments, to vague and unregulated benevolence. He is to excise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinate to primordial necessity of order in the social life.”⁸³

⁸¹ Carlson Anyangwe, Outline of the study of Jurisprudence [Lusaka: UNZA Press, 2005] p.10

⁸² [1966] ZR 126

⁸³ Y. Vyas, The Independence of the judiciary: A Third World Perspective, Third World Legal Studies [New York: Penguin, 1992] p.138

In England, Lord Simonds counselled against judicial filling in of gaps in statutes, arguing that to do so would be tantamount to a 'a naked usurpation of the legislative function under the thin disguise of interpretation.'⁸⁴ This old school of jurisprudence hinders innovation in the judicial system and is becoming a myth in that there is a wind of legal activism that fosters legal activism through the words of Lord Denning who argued that:

"the judicial function is not merely interpretive and that described judges who still stick to the 'old school' of judicial passivity as 'timorous judges.' Progressive judges are said to be 'bold activist'. They are said to belong to the new school of judicial creativity. They espouse the purposive or teleological method of statutory interpretation."⁸⁵

The aforesaid statement by the legal pendant is a pertinent observation that every legal order faces the problem of the role of the courts in the evolution of the law. Thus the Zambian court must be proactive in coming up with legal activism in refining the law of defilement cases. Modern jurisprudence in Zambia tend to embrace this approach on defilement cases as affirmed in the case of **Kombe v The People**⁸⁶ in which the Supreme Court held that law is not static; it is developing and therefore there is need not now to be technical the approach of corroboration... as long as the court is satisfied that the danger of false implication has been excluded, it is safe to rely on evidence of "something more." In addition, Balkin⁸⁷ argues that "judicial legislation may be necessitated by the need to keep the law in touch with modern developments, especially when the legislature is supine." Thus as an acknowledged agent of social change, the judiciary may become 'activist' within the constraint of the law due to the fact that government and parliament may be burdened with great issues of the state worsened

⁸⁴ Mayer & St Mellons Rural District Council v Newport Corporation [1952] AC 159

⁸⁵ Carlson Anyangwe, Outline of the study of Jurisprudence [Lusaka UNZA Press, 2005] p.118

⁸⁶ [2009] Z.R 282

⁸⁷ J.M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence 103 Yale [New York: Knopf, 1993] p.105

by understaffed : lack of enough lawyers, clerks and research workers to advise and to draft proposals.⁸⁸

When the pace of change is great and demands for the recognition of new claims, such circumstances make⁸⁹ it necessary for judicial activism provided the court does not thwart the role of the legislature. Allen⁸⁹ affirms this by stating that “no judge can escape the actual circumstances in which he lives or attempt to apply the laws of Utopia to existing society.” This is because judges in interpreting the law fill in any gaps in the law by using their discretion. This makes the relationship between the judiciary and the legislature more of partnership than that of agent and principle. For the court complement parliament by the creative elaboration of the words in a statute. In **The People v Thomas Manroe**,⁹⁰ Mwanamwambwa JS stated that “using a less technical approach as to what constitutes corroboration the court can convict the accused on evidence constituted as ‘something more.’” The court took a bold complementary step to lay down a new rule of principle which itself contained the potentiality of creative expansion and development. This is because judge made law is never created completely in *vacuo* because the court will strive to follow such analogies as are to be derived from established legal principle and root its decision so far as may be within the intricacies of the existing fabric of the law. Thus judicial activism through judge made law in Zambia is a window of hope to thrust justice in defilement cases while still negotiating for statutory provision.

3.2CORROBORATION

Corroboration is most known to impede effective application of our criminal justice as a means for the protection of the dignity, integrity and liberty of any child in defilement. It is a notorious fact that that acts of defilement are not done in public. They are among the most

⁸⁸ Carlson Anyangwe , Outline of the study of Jurisprudence [Lusaka UNZA Press, 2005] p.235

⁸⁹ Ibid.p 245

⁹⁰ [2011] HPS/45/

clandestinely committed offences. Essentially, the victim, who is also vulnerable by virtue of their age, becomes the only witness. Worse still, medical reports may not be available due to shy or fear of reporting the cases by the victims. Further, the rationale for corroboration is watered down due to the fact that a medical report in Zambia is considered as expert evidence which only indicates that a crime has been committed without pointing to the person who has committed it due to lack of DNA facilities.

In addition, the victim who is vulnerable by virtue of their age becomes the only witness who is expected to give evidence under very difficult circumstances such as emotional stress, fear and shyness due to the traditional view of sexual matters. Further, there is no statutory provision to compel the accused to undergo DNA tests for the purpose of linking him or her to the crime. It is worth noting that South Africa have been re-examining the requirement for corroboration in sexual offences involving children. According to the South African Law Commission, "the application of the corroboration warning rule for child victims generally makes successful prosecution a difficult task and its retention must be questioned."⁹¹ In **Kombe v the People**,⁹² Mwanamwambwa, JS in delivering judgment stated that "law is not static, there is need not to have a technical approach to corroboration, the court can rely on the evidence of "something more" as long it is satisfied that the danger of false implication has been excluded. This is a clear indication by his Lordship that the technicality of corroboration is a source of injustice in defilement cases and the need to embrace more, a less technical approach is urgent to make the law responsive to social challenges such as defilement. This clearly shows that the principle of corroboration is religiously done in sexual offences as rule of practice, founded upon the wisdom and prudence of courts. Nevertheless, it should not be applied so strictly as to render it appear to be a rule of law, so that in the

⁹¹ South African Law Commission (Project Paper 101) Sexual Offence: process and Procedure, 2005
⁹² [2009] Z.R 282

event corroboration is not found in a given case, it should not follow as day follows night, that on appeal the conviction will have to be quashed, rather, in absence of such corroboration, despite the failure of the trial subordinate court to warn itself on the danger of convicting someone⁹³ of a sexual offence without corroboration, the appellate court should still exercise its power of reviewing the evidence before the trial court. Should it be satisfied upon such review of the evidence before the lower court that in the light of the evidence available and there was no danger for any failure of justice having been committed, then the conviction of the trial court should not be disturbed.

On the contrary, this does not really solve the problem. All that it amounts to is to a creation of another approach on the issue of corroboration in sexual offences: one being for the automatic rejection of the complainant's case in the absence of corroboration where the trial court has convicted an accused person without warning itself of the danger of passing such conviction; and the other being that notwithstanding the failure of the trial court to so warn itself, the first appellate court will not interfere with the conviction on being satisfied, upon review of the evidence before the trial court, that there was no danger at all of their having been a failure of justice resulting upon such conviction. As woods⁹³ stated that, "it is time that this strict requirement by the courts that no conviction of a sexual offence will stand unless corroborated, is abandoned, either legislatively or through changed attitude on the part of our judges".

3.3COMPETENCY OF THE CHILD AS A WITNESS

Under common law, there is no fixed age limits governing competence to testify.⁹⁴ This is because the judge had to be satisfied that the proposed witness appreciated the nature and consequences of an oath. However this position in relation to criminal proceedings has been

⁹³G. Woods, Sexual Assault Law Reform in New South Wales [Sydney: Longman, 1981] p.78
⁹⁴ Colin Tapper, Outline of the Law of Evidence 6th Edition [Lodon:Butterworths, 1986] P.63

modified by statute. Section 122,⁹⁵ states that, “no conviction could proceed from the lone evidence of a child of tender years, unless there was corroboration of the same with some material evidence of an adult person implicating the accused.” In **R v Bell**⁹⁶ Gardner stated as follows “whilst the law may allow the testimony of a child of four and half years to be taken if the magistrate is satisfied that she is competent to tell the truth, it is exceedingly dangerous to convict on such evidence unless strong corroboration is supplied.” The rationale to this is to do a preliminary examination by a magistrate or judge of a witness to determine the child’s competence.

In **Muwowo v The People**,⁹⁷ the court rejected the evidence of a 12 year old for failure to conduct a *voire dire* on him. It has become a settled practice that any child aged 16 and below should go through a *voire dire* before giving evidence. If the child is not competent and cannot be sworn, it entails that they will not be able to give evidence or if they do, the court should not rely on such evidence to convict the accused.⁹⁸ This legal status does not take cognizance of the fact that in defilement cases, the child is very often the only witness to the incident, and a finding on non competence shall in effect amount to an acquittal. If the child is not competent and cannot be sworn, it entails that they will not be able to give evidence or if they do, the court should not rely on such evidence to convict the accused. This legal status does not take cognizance of the fact that in defilement cases, the child is very often the only witness to the incident.⁹⁹ Muller¹⁰⁰ argues that “one of the myths of sexual abuse is that children will immediately disclose incidences of abuse. The reality is that children rarely report sexual abuse straight after the event.” Further a research done by Berliner¹⁰¹ of 583 sexually abused children it was found that only 16% of them disclosed the incident within 48

⁹⁵ Juvenile Act Chapter 53 Of the Laws of Zambia

⁹⁶ [1929] CPD 478

⁹⁷ [1969] ZR 67

⁹⁸ L. Berliner “ The testimony of the child victim of sexual assault” Journal of Social Issues ,40(2):124

⁹⁹ K. Muller, The Judicial Officer and the Child Witness [Chicago: University of Chicago Press, 2002] p.45

¹⁰⁰ Ibid p.45

¹⁰¹ L. Berliner “ The testimony of the child victim of sexual assault” Journal of Social Issues ,40(2):125

hours of its occurrence. These realities and legal technicalities have protected the sexual predators of young girls and boys to be free from persecution as evidence of a child is always subjected to doubt. In order to balance the interest of a child and that of the accused, Karen¹⁰² stated that “a child must be offered an environment which is non-threatening in which to tell the story; if a child is questioned in a development appropriate manner using proven scientific methods(that is avoiding repeated and leading questioning to minimize suggestion); and if a child is questioned using linguistically appropriate language, then a child will be competent and as accurate , if not more so than an adult.” This shall enhance evidence to prove defilement and easy to prove by the prosecutor.

3.4 CROSS-EXAMINATION

The rationale for cross examination in a court proceedings is to try to elicit information that is complementary to the party conducting the examination and strives by all means to cast doubt upon the accuracy of the evidence given by the opposing party's witness.

Myers¹⁰³ states that

“Cross-examination is lauded as being the best available safeguard against the risks of ambiguity, lack of memory and misperception.”

Further, Myers observes that it is designed to reveal any deficiencies in the witness' ability to observe, remember and relate, and disclose lack of sincerity or outright fabrication.”¹⁰⁴ For a child this immense legal tool is a source of distress, instead of facilitating the discovery of truth it can be used by the accused who is more skilful and experienced than the child to subvert the truth. This point was affirmed in **Klink v Regional Court Magistrate and**

¹⁰² K. Muller, *The Judicial Officer and the Child Witness* [Chicago: University of Chicago Press, 2002] p243

¹⁰³ JEB Myers, *Child Witness: Law and Practice* [John Wily & Sons, United States ,1987] p.23

¹⁰⁴ Ibid P.23

others¹⁰⁵ in which it was affirmed that” ...a child witness may often find it traumatic and stressful to give evidence in an adversarial atmosphere of the court room and that the forceful cross-examination of young person by a skilled counsel may be more likely to conceal than reveal the truth.” *

The courts have a duty to create the enabling environment that fosters the truth to be brought out. Berliner states as follows,

“There is urgent need to revisit the process of cross-examination of children in cases of defilement...with the ultimate objective of ensuring that a child is availed an environment where he or she can freely account the event without undue intimidation.”¹⁰⁶

In order to access justice in defilement cases, courts must enhance the accuracy and competence of testimonies of child witnesses from unnecessary stress, trauma and intimidation. Further, Muller has observed that

“it is universally accepted that children who testify are generally nervous, upset and unsure of themselves in an adult dominated environment in which they are forced to share intimate details about their lives. Although the accused has a right to cross-examination and it is necessary that this right must be protected, this right should be balanced against the child’s right to be protected from abuse or degradation.”¹⁰⁷

Therefore cross –examination shall only be safeguard against the risks of ambiguity, lack of memory, misperception and be able to reveal any deficiencies in the witness’ ability to observe, remember and relate, and disclose lack of sincerity or outright fabrication in defilement cases when a child is offered an environment which is non –threatening in which to tell the story, then a child will be competent and accurate.

¹⁰⁵ [1996] 3 BCLR, 402[SFO at 410A]

¹⁰⁶ L. Berliner “ The testimony of the child victim of sexual assault” Journal of Social Issues 40(2):125(2009)p32

¹⁰⁷ K. Muller, The Judicial Officer and Child Witness [Chicago: University of Chicago Press, 2002] p.235

3.5 CONCLUSION

This chapter has shown the inherent procedural law challenges in dealing with defilement cases. However serious our society takes such offences to be, the enforcement of the law has, in practice seriously been watered down through strict adherence to *stare decisis*, gender biased requirement of corroboration for proof of such offences, very restricted construction of child's competence as a witness, the traumatizing effect of cross-examination on the child and lack of mandatory compensation provisions for the victims of such crimes in the Penal Code. All these have rendered the intended protection of the child's right to personal integrity, dignity and liberty under our Penal Code very ineffective. Such situation has been contributed partly by our courts in lagging to remedy the injustice judicial activism and partly by our Legislature who have not dealt with the procedural and substantive encumbrances that exist in the current law.

CHAPTER FOUR:

OVERALL ANALYSIS OF THE PREVAILING SITUATION FROM THE RESEACH

✱

4.10 INTRODUCTION

This chapter will analyze chapters of all the research findings on the impact of substantive and procedural law on the principle of corroboration in defilement cases. Further it has been shown that failure to achieve criminal justice has been the result of a number of factors. Though the law to protect a child against defilement is very clear indeed, it is however not always easy for a child to have recourse to the law because there are other circumstances which must be taken into consideration.

4.11 FACTORS UNDER REVIEW ON SUBSTANTIVE LAW

The factors under review on substantive law borders on the provisions of the Constitution, the Penal Code and the Juveniles Act.

4.12 THE CONSTITUTION, CHAPTER ONE OF THE LAWS OF ZAMBIA

In Zambia the constitution is the supreme law of the land and the provisions thereof supersede any Act of parliament¹⁰⁸. Thus its provision does not only create the three organs of the state but also how the function under a written constitution. Article 23(1) stipulate that "Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect." Further clause 4 states that "Clause (1) shall not apply to any law so far as that law makes provision- sub clause (c) which states that "with respect to adoption, **marriage**, divorce, burial, devolution of property on death or other matters of personal law; and sub clause (d) for the application in the case of members of a particular

¹⁰⁸ Article(1) 3

race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;”

The above provisions make it clear that customary law in Zambia is respected and recognized by our judicial system¹⁰⁹ hence the recognition of its use in the local court system. However this puts a child in a limbo as to what side of the legal pendulum should they seek redress so as to protect their interest, whether customary law or statute. Matakala¹⁰⁹ affirms it when she states that Africa is still struggling to bridge the gap between the African customary law that is practised by the people and that followed by the judiciary.

Despite the fact that the Local Court has a limited criminal jurisdiction; and child sexual abuse is not one of the cases that the Court is permitted to hear, Matakala¹¹⁰ states that one of the types of cases that they hear in Local Courts is a claim called ‘virginity damages’. This is a claim lodged in instances where a person has carnal knowledge of a child and takes away that child’s virginity in cases where the child’s parents or guardians did not consent to that person marrying the child, and therefore having carnal knowledge of that child. I emphasise the latter because traditionally, parents do allow early marriage and therefore permit carnal knowledge of their minor daughters. In actual effect, this is child sexual abuse, permitted by parents.

So while they lack the criminal jurisdiction to hear child sexual abuse cases, Local Courts hear these matters under the name ‘virginity damages’¹¹¹ claims which are among the top five cases heard by the Local Courts.¹¹² Thus, when a Local Court hears child sexual abuse cases;

¹⁰⁹ Working Paper by Lungowe Matakala Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012p.24

¹¹⁰ *ibid*

¹¹¹ Lungowe Matakala states that “Virginity damages is a claim lodged in instances where a person has carnal knowledge of a child and takes away that child’s virginity in cases where the child’s parents or guardians did not consent to that person marrying the child”, Working Paper. Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012P.18

¹¹² Access to Justice Database

it treats them as civil matters as virginity damages cases and not criminal matters¹¹³. As a result it is a common practice for Local Courts not to report to the Police the virginity damages cases that come before them as 'defilement' cases, perhaps the adjudicators of the Local Courts are of the opinion that if they reported these kinds of cases to the Police, they would be giving up their powers to adjudicate over such matters.¹¹⁴ The adjudication given to the Local Court to deal with defilement cases as virginity damage cases undermines the severity of the offence and violates the Penal Code.

Further, it is important to note that the application of customary law is applicable only when it is not unjust as per the Local Court's Act.¹¹⁵ However, the conflicting provision in the constitution on discrimination, the definition of defilement in the Penal Code and the legal provision in the Local's Act pose uncertainty on which side the legal pendulum would fall when dealing with defilement cases in that the application of customary law which is particular to people creates double standards and is discriminatory to women. This is a clear indication that these lacunas in substantive law either in the Penal Code or the constitution are a major source of the problem in dealing with defilement cases in Zambia.

4.13 THE PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA

In addition, lack of the compensation provisions in the Penal Code on defilement cases in the traditional environment that embraces *lobola* (bridal price) or virginity damages in the proceeding for sex abuse, has give poor people the option to use local courts to deal with defilement cases as virginity damages or as early marriages unlike the courts where statute

¹¹³ Section 11, of the Local Courts Act, Chapter 28 Of the laws of Zambia: Subject to any express provision of any other written law conferring jurisdiction, no local court shall have jurisdiction to try any case in which a person is charged with an offence in consequence of which death is alleged to have occurred or which is punishable by death.

¹¹⁴ Working Paper by Lungowe Matakala, Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012. P.22

¹¹⁵ Local Court's Act, Chapter 29 of the laws of Zambia: Section12. (1) Subject to the provisions of this Act, a local court shall administer(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

puts it as capital punishment. This has made defilement cases not to be reported to the courts of records especially in rural areas where compensation is more lucrative: When dealt with customarily or informally, the family of the victim is able to receive compensation for the harm caused to the abused child. For this reason, many poor people in the indigenous judicial system prefer not to report the case to the Police but rather deal with it in a manner that has a rewarding end. Thus, to the traditional setup, defilement law is perceived as a broad day robbery against virginity damages hence the high levels of withdraw cases. In this context, statutory law has not protected adequately the child in defilement cases in Zambia due to lack of compensation.

Failure by the legal profession and the law to reconcile the two has manifested itself into justice in the legal lens of statute law while in the lens of customary law as injustice. In addition, the effectiveness of the Penal Code to deal with defilement effective is eluded legally through the use of customary law which allows marriage under the age of 16 years as in Chjamba case due to the definition of defilement as unlawful carnal knowledge. Thus the legal gap between customary law and statute is a source of injustice to deal with defilement in Zambia under the current substantive law.

4.14 THE JUVENILES ACT, CHAPTER 53 OF THE LAWS OF ZAMBIA

In addition, the provision in the law¹¹⁶ section 122 in which the evidence of a child has a judicial prejudice of suspicion as not being reliable has made it difficult for the prosecution to prove defilement as it makes the burden of proof higher on defilement cases making it extremely difficult to adduce evidence beyond reasonable doubt and in tandem to

¹¹⁶ The Juveniles Act, Chapter 53 of the laws of Zambia

corroboration. Matakala¹¹⁷ argues that this has led a lot of accused persons get acquitted, and discourages members of the community. Thus, there is need to harmonies the justice gap under customary law and the lacunas in the statute so as to deal with defilement cases effectively. *

4.20 FACTORS UNDER REVIEW ON PROCEDURAL LAW

On the other hand, the realization of justice in defilement case is further complicated by the procedural rules that do not take cognizance of the hostile environment legally. There are a number of factors to this respect such as;

4.21 STRICT ADHERENCE TO STARE DECISIS

Anyangwe,¹¹⁸ states that the precedent and *stare decisis* principle is the judicial practice of following what has already been laid down by other judges. This judicial practice if not checked can result to a sleepy kind of custom which is habitually, with no trouble impressed and acted on by that which is handed down in the judicial system. Rigid adherence of *stare decisis* as a judicial function has deprived the judges' creativity or initiative and inevitably leads to judicial passivity that has made defilers to walk free despite committing the offence as the result of the fact that the judge did not caution himself of the danger of convicting in the absence of any warning on corroboration. This judicial passivity, a view to which many famous judges have subscribed as being consistent with the taught tradition of the law has existed as a practice in the law. The great American judge Mr. Justice Cardozo argued that:

“The judge, even when he is still free, he is still not wholly free. He is not to innovate at pleasure. He is to excise a discretion informed by tradition, methodized by analogy,

¹¹⁷ Working Paper by Lungowe Matakala, Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012. P.22

¹¹⁸ Carlson Anyangwe, Outline of the study of Jurisprudence [Lusaka: UNZA Press, 2005] p.10

disciplined by system and subordinate to primordial necessity of order in the social life.”¹¹⁹

This deep rooted philosophy in the judges that is closed thinking hinders innovation in the judicial system and is becoming a myth in that there is a higher level of criminal sophistication that is able to evade the legal net. Time for legal activism in Zambia is ripe as Lord Denning argued that:

“the judicial function is not merely interpretive and that described judges who still stick to the ‘old school’ of judicial passivity but ‘bold activist’ method of statutory interpretation.”¹²⁰

The aforesaid statement exposes the role of the courts in the evolution of the law. A wind of bold activist on modern jurisprudence in Zambia is inclining to embrace this approach on defilement cases. In **Kombe v The People**¹²¹ the Supreme Court held that law is not static; it is developing and therefore there is need not now to be technical the approach of corroboration. Allen¹²² affirmed when he stated that “no judge can escape the actual circumstances in which he lives or attempt to apply the laws of Utopia to existing society.” In **The People v Thomas Manroe**,¹²³ Mwanamwambwa JS could not escape the actual circumstances when he stated that “using a less technical approach as to what constitutes corroboration the court can convict the accused on evidence constituted as ‘something more.’” He took a bold complementary step to lay down a new rule of principle which itself contained the potentiality of creative expansion and development. Lack judicial activism through adherence of *stare decisis* lagged the courts to convict using a less technical approach as to

¹¹⁹ Y. Vyas, The Independence of the judiciary: A Third World Perspective, Third World Legal Studies [New York: Penguin, 1992] p.138

¹²⁰ Carlson Anyangwe, Outline of the study of Jurisprudence [Lusaka UNZA Press, 2005] p.118

¹²¹ [2009] Z.R 282

¹²² Ibid.p 245

¹²³ [2011] HPS/45/

what constitutes corroboration. Bold activist in Zambia is a window of hope to propel justice in defilement cases whilst still bargaining for statutory proviso.

4.22 CROSS-EXAMINATION

As pointed out earlier, the current procedural requirement for cross examination in a court proceeding is to elicit information that is complementary to the party conducting the examination. However it must be made clear also that at times justice may be avoided through distressing a child instead of facilitating the discovery of truth. The sophisticated accused that is more skilful and experienced than the child can use cross-examination to subvert the truth as affirmed in **Klink v Regional Court Magistrate and others**¹²⁴ in which it was affirmed that "...forceful cross-examination of young person by a skilled counsel may be more likely to conceal than reveal the truth." Thus when a child is not given meaningful protection during cross-examination in a defilement case, and proceedings are allowed in a manner that clearly disregards the age of the child and in strict adherence of corroboration justice is eluded. There is urgent need to revisit the process of cross-examination of children in cases of defilement with the ultimate objective of ensuring that a child is availed an environment where he or she can freely account the event without unjustified intimidation.

When a child is offered an environment which is nonthreatening in which to tell the story, then a child will be competent and accurate. This is further hindered by the statute provision¹²⁵ that cast doubt on the evidence of the child. This makes evidence of a child in defilement cases treated with contempt in the eye of the law.

¹²⁴ [1996] 3 BCLR, 402[SFO at 410A]

¹²⁵ Section 122, states that "no conviction could proceed from the lone evidence of a child of tender years, unless there was corroboration of the same with some material evidence of an adult person implicating the accused Juvenile Act Chapter 53 Of the Laws of Zambia

In **R v Bell**¹²⁶ Gardner stated as follows “whilst the law may allow the testimony of a child of four and half years to be taken, it is exceedingly dangerous to convict on such evidence unless strong corroboration is supplied. The legal status of the Juveniles Act does not take cognizance of the fact that in defilement cases, the child is very often the only witness to the incident, and a finding on non competence shall in effect amount to an acquittal. Further Matakala¹²⁷ states that these cases of defilement are not filed in courts for several reasons including:

- a. Late reporting of the offences and disappearance of the victims, thus making it difficult to obtain sufficient evidence for prosecution.
- b. Reconciliation between the parties.
- c. Problem of identification of the suspects for most of such offences take place at night.
- d. Corruption and lack of seriousness on the part of the Police.

This current status has acted as safeguard to the sexual predators of young girls and boys against the law.

4.23 REQUIREMENT OF CORROBORATION

While the doctrine of corroboration seeks to guard against the danger of deliberate false implication by singly or jointly fabricating a story against the accused, It is trite that the essence of looking for corroborating evidence is to ascertain whether the evidence given before the court is to be believed or not. It must be clearly spelt out that the genesis of corroboration is based on a common law perception which looked down on women as people not capable of telling the truth. Sir James Stephen¹²⁸ stated that “the power of lying is

¹²⁶ [1929] CPD 478

¹²⁷ Working Paper by Lungowe Matakala Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012. p.17

¹²⁸ Colin Tapper, General View of the Criminal law in Cross on Evidence [London:Butterwoths,1986] P234

unlimited, the causes of lying and delusion are numerous, and many of them are unknown, and the means of detection are limited.” Further, it was argued that the rule of corroboration prevents a man of “honour” from being destroyed by assertions of a “single rogue.”¹²⁹ This perception has made judges to be prejudicial when dealing with sexual offences in the name of corroboration by calling the gallant female folks as “rogues” while protecting the sexual predators who majority of are men.

It must be noted that even following the rational of corroboration elucidated in **Nsofu v The People**¹³⁰ where the court stated that the corroborated evidence serves to satisfy the court that it is safe to rely on the complainant. If not, the accused will be acquitted. Thus corroboration as a principle maybe used to review the truth on sexual offences. This can be taken care with advance of technology, evidence can be taken from the realm of false implication to the realm where it clearly points that the accused committed the crime through use of the DNA test. Taking cognizance of the fact that DNA test when made mandatory in sexual offences shall vanquish the need of corroboration in that DNA test shall eradicate neither the fear of false implication nor the need of the independent witness as per section 122.¹³¹ In addition, DNA test shall not only state that a crime has been committed but also that a particular person did the crime. Lack of such legal effect in the law is what made Daka¹³² argues that it is easy to report the case of defilement but difficult to prove that the accused person actually committed the offence.

Expert defilers use sophisticated methods such as use of masks to elude identification, corroboration as a principle becomes a shield of defence for a defiler. This was affirmed in

¹²⁹ J.D Heydon, Cases and Materials on evidence [London; Butterworth. 1975] P.68

¹³⁰ [1973] ZR 136

¹³¹ The Juveniles Act ,Chapter 53 of the laws of Zambia

¹³² Joseph Daka, Sexual Offences and How to Deal with Them [Ndola: Mission Press,2004] p.19

Fawaz and Chelelwa v The People,¹³³ the court held that corroboration is required to exclude the possibility of mistaken identification. The law of evidence should specifically take away such requirement as strictly demanded by the courts, by providing that the mere fact that the evidence of the victim has not been corroborated by any other independent witness shall not entitle the accused person to be acquitted, but require courts to assess the credibility of the evidence of the victim as a lone witness, on its own merit, as they do in respect of other offences. This analysis was affirmed in the **Kombe v the People**,¹³⁴ Mwanamwabwa, JS in delivering judgment stated that “law is not static, there is need not to behave a technical approach to corroboration, the court can rely on the evidence of “something more” as long it is satisfied that the danger of false implication has been excluded. This is a clear indication by his Lordship that the technicality of corroboration is a source of injustice in defilement cases and the need to amend the law in this context is eminent so as to make the law responsive to social challenges.

However all what he lordship has succeeded to do in the above case is to create another school of thought as to how to deal with such requirement of corroboration in sexual offences. Furthermore, modern technology and science should be called into play to enrich forensic medicine such as the DNA methods, which could be of great help in identifying criminals with certainty and that DNA test in defilement cases must be mandatory by law.

4.24 CONCLUSION

In conclusion, knowing that substantive law refers to the body of rules that determine the rights and obligations of individuals and collective bodies in a given society it is important to review the problems with the substantive provisions of the criminal law. The attainment of

¹³³ [1995-1997]ZR 3

¹³⁴ [2009] Z.R 282

criminal justice depends on the effectiveness and machinery of criminal law which is ... conditioned by new ideas, new pressures and changes affecting the fabrics of society”¹³⁵. In addition, Kulusika¹³⁶ argues that “Zambian criminal justice’s... failure to shine is its concern with low-level disorder: it pays too much attention to control the less powerful. Thus, the need to review the weakness in the substantive law is eminent.

In addition, a panacea to access criminal justice in defilement cases is a partial achievement on substantive reforms if the procedural aspect of our law and the judicial application or interpretation of both such substantive and procedural laws that appear to have failed to give effective protection of the dignity, integrity and liberty of a child in our country, by way of minimizing acts of defilement of a child. These areas call for change. It is a change that has to be both legislative and in the attitudes of the members of the Bench, so that inadequate sentences, strict requirement for corroboration of the victims evidence and restrictive construction of acts required to constitute the offence of defilement shall no longer stand as impediments towards effective implementation of the substantive criminal law provisions already discussed through. The above, therefore, are what i consider, upon reform, could really improve or enhance the effectiveness of our criminal law as a vehicle for the protection of the personal integrity, dignity and liberty of a child in Zambia.

¹³⁵ S. Kulusika, Criminal Law in Zambia [Lusaka: UNZA Press, 2005] P24

¹³⁶ Ibid p.25

CHAPTER FIVE

CONCLUSIONS AD RECOMMENDATIONS

This chapter will basically provide a summary of the research paper and outline pragmatic recommendations on the law on defilement in Zambia.

5.0 CONCLUSION

The paper has shown that injustices in defilement cases have been as a result of a number of factors that emanate from the substantive law which includes the recognition and use of customary law as per article 23¹³⁷ and the recognition of the Local Courts as per article 91 of the constitution has led to legal pluralism which seem difficult for the Acts of parliament to assimilate, such as the Penal Code which does not embrace compensation in defilement cases despite such a heavy social attachment with the traditional culture of most Zambian people.

Further, failure to assimilate cultural realities has made statute law, as a law imposed on the society, and not from the people. This is traced from the fact that Zambia legal system comes from the British colonial masters¹³⁸ who looked down on customary law and imposed theirs on the Africans. This syndrome of not coming with our own law seems to be difficult to sever, hence the adherence to the law that does not even take cognizance of the social realities. Time has come in which the legislature has to give legal effect to the social challenges by passing new laws and amending others so as to deal with the social crimes not only in the lens of statutory law but also in the lens of customary law. Failure to come up with the harmonization of the legal pluralism has made access to justice illusive to the public

¹³⁷ Chapter 1 of the Laws of Zambia

¹³⁸ Chapter 11 of the laws of Zambia

especially in the rural areas on defilement cases. Matakala¹³⁹ illustrates this point by this example;

“In 2009, at Mansa Police Station in Luapula Province: a boy below the age of 16 had had carnal knowledge of a girl aged 14. The two, together with their parents, went to the Police station. The intention of the girl’s family was to report the matter to the Police. But before doing so, the boy’s family apologised and offered to compensate the girl’s family for the ‘loss suffered’. They particularly offered a canoe, which the girl’s family found very attractive, as people in Mansa are mainly fishermen. The latter accepted the offer and the two families were at peace with each other. Soon after that, a Police officer took a statement from the two families and upon being told of the offer and acceptance of the canoe, he explained to them that that was not permissible in law as child sexual abuse is a criminal matter that violates section 138(1) of the Penal Code, and is punishable minimum by imprisonment of no less than 15 years and a maximum of life imprisonment”

The quarrel erupted between the Police officer on one hand and the two families on another, as the former relied on written law and the latter asserted African Customary Law. Despite the two families being told that this is a criminal matter which needed to be prosecuted by the state and could not be settled through mere compensation. They were unhappy as they both preferred to settle the matter traditionally, which included the giving and receiving of compensation. This is the preferred, harmonious and accepted form of justice in many rural settings¹⁴⁰

¹³⁹ Working Paper by Lungowe Matakala Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012. p.17

¹⁴⁰ Ibid 18

On the other hand, justice in defilement is further complicated by the procedural laws that do not capture the child's realities in the litigation. Seven¹⁴¹ court sessions were attended to observe the procedural adherence of the Juveniles Act in accordance with section 121 which reads as follows:*

"Where, in any proceedings in relation to any offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is a juvenile is called as a witness, the court may direct that all or any persons, not being members or officers of the court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of the juvenile"

A number of flaws were observed which are in violation of section 120, in that the same magistrates who deals with all criminal matters also deal with defilement cases, the child victim comes into the court room at the opening of the court with everyone else exposing the child to inappropriate adult testimonies a factor which tends to inhibit a child from telling all that she or he knows and is relevant to the case, affecting the accuracy of their testimony.

Further competence of the child as a witness in defilement is negated by the need for corroboration as per section 122 which reads as follows:

122. (1) *"Where, in any proceedings against any person for any offence or in any civil proceedings, any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing so as to comply with the requirements of any law in force for the time being, shall be deemed to be a deposition within*

¹⁴¹ 3rd, 4th, 5th, 6th, 7th, 10th and 11th June, 2013, Magistrates Complex

the meaning of any law so in force: Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."

The above section negates competence of the lone evidence of the child as a victim to defilement when DNA test is not mandatory, further a child cannot corroborate evidence of another child. Thus the law has made defilement not captured when done in situations where a child is alone or with a fellow child. This is watered down further by the depressing impact of cross examination.

The requirement of corroboration in defilement cases makes it difficult as it puts a higher burden of proof on the prosecutor which mostly is difficult to execute to convict the accused especially in rural areas where crime is reported late either due to distance of lack of police station of medical centres.

The above factors need reform so as to improve or enhance the effectiveness of our criminal law as a vehicle for the protection of the personal integrity, dignity and liberty of child in Zambia on defilement cases.

It is clear that both such substantive and procedural laws have areas that have failed to give effective protection to the dignity, integrity and liberty of a child in defilement. These the areas that call for change. It is a change that has to be both legislative and in the attitudes of the members of the Bench, so that the procedural flaws, strict requirement for corroboration of the victims evidence and restrictive construction of acts required to constitute the offence of defilement, shall no longer stand as impediments towards effective implementation of the substantive criminal law provisions already discussed

5.1 RECOMMENDATIONS

In view of the above conclusion, the following are the recommended

1. The law must take away the requirement of corroboration in defilement cases as strictly demanded by the courts, by providing that the mere fact that the evidence of the victim has not been corroborated by any other independent witness shall not entitle the accused person to be acquitted, but require courts to assess the credibility of the evidence of the victim as a lone witness, on its own merit, as they do in respect of other offences. This can further be supplemented by making DNA test mandatory in sexual offences.
2. In order to capture every victim of defilement in the ambit of statute and customary law. The Penal Code must be amended to make compensation mandatory in defilement cases. This would go a long way in implementing the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. A minimum amount of such compensation could be laid down by law: the younger the victim the higher such amount should be. This would further curtail the use of money as a bet to evade criminal punishment by perpetrators of defilement who want to take advantage of high levels of poverty in society. Cases withdrawn due to prayers from the victims or their representatives on grounds that there has been reconciliation between the parties shall be eliminated. Further, measures should be implemented to ensure that a child subjected to defilement where appropriate, should have specialized support such as rehabilitation assistance in child care, maintenance, treatment and counselling by government or nongovernmental organizations such as Legal Aid Clinic.

3. For many years our legislature has clearly demonstrated its serious concern over democratization of Zambia through various constitutional inquiries and the protection of Bill of Rights by amending the Public Order Act. It follows, therefore, that as compared with political rights, the legislature is lagging behind to amend and legislate laws that should protect the wellbeing of the child especially in defilement as highlighted in this paper. There is need to harmonize the existence of customary law and statute so as to make the law responsive to social challenges not only for the elite child but for the common Zambian child who is in the rural area. The research revealed that the rate of defilement offences is alarmingly high. Further it is shown that generally most of the cases are withdrawn by the parties. The common reason for such withdrawal is the impact of legal pluralism which is reflected through the supreme law of the land and not reflected in the Penal Code. This gap between customary law and statute has made society to depend on customary law unlike statute. Society would prefer to take defilement as a civil case in a Local Court for "virginity damages" unlike to report it to courts of record as a criminal offence. This then calls for the review of the state of our Criminal law as a vehicle for the protection of the very humanity of our future, their dignity, integrity and liberty, as a whole. This should be spear headed by legislature in coming up with legal reforms.

BIBLIOGRAPHY

Books

- Anderson, Michelle. *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offences by Intimates*, [New York: Penguin Classics, 2003]
- Anyangwe, Carlson.* *Outline of the study of Jurisprudence* [Lusaka UNZA Press, 2005]
- Balkin, J.M. *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence* 103 Yale [New York: Knopf, 1993]
- Colin Tapper, *Outline of the Law of Evidence 6th Edition* [London: Butterworths, 1986]
- Daka, Joseph. *Sexual Offences and How to Deal with Them* [Ndola: Mission Press, 2004]
- Dunham, Walston. *Introduction to Law* [London: University Press, 2006] Pg. No. 94
- Fave, La. *Rape –Overview; act and mental State 3rd edition*, [New York: Penguin 2000]
- Heydon, J.D *Cases and Materials on evidence* [London; Butterworth. 1975]
- Kulusika, Simon. *Criminal Law in Zambia* [Lusaka: UNZA Press, 2005]
- Longwe, S. and Siame. *Beyond Inequalities: Women in Zambia* [Lusaka: UNZA Press, 1999]
- Muller, K *The Judicial Officer and Child Witness* [Chicago: University of Chicago Press, 2002] p.235
- Munalula, M .M *Women, Gender Discrimination and the Law* [Lusaka: UNZA Press, 2005]
- Myers, J.E.B *Child Witness: Law and Practice* [John Wily & Sons, United States, 1987]
- Popper, Karl. *The Open Society and Its Enemies* [New York: Harper Poros, 1945], p.891
- Tapper, Colin *Outline of the Law of Evidence*, [London: Butterworth & Co. Ltd, 1986]
- Vyas ,Y. *The Independence of the judiciary: A Third World Perspective , Third Wold Legal Studies* [New York: Penguin,1992]
- Walker, N. *Crime and Criminology: A Critical Introduction*. [Oxford: Oxford University Press, 1987]

Book published electronically

- Dreisbach, Daniel L. *Procedural Law*, Microsoft Encyclopaedia Standard [New York: Penguin Classics 2004].

Journals

L. Berliner "The testimony of the child victim of sexual assault" *Journal of Social Issues*, 40(2):125[2009] p.32

Papers

South African Law Commission (Project Paper 101) *Sexual Offence: process and Procedure*, 2005

NLACW, National Legal Aid Clinic for Women, 6th Edition "Newsletter" Lusaka, January, 2012.

Dr. Lungowe Matakala, "Working Paper," Research Partnership Programme Danish institute for Human Rights [DIHR] December 2012.

Thesis or dissertation

Sekaggya, M. *The Law of Corroboration With Specific Reference to Zambia*, LLM Thesis 1909.

Winnie Sithole Mwenda, *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*, University of South Africa, November 2006)

Websites

G. D. Woods, *Sexual Assault Law Reform: A Commentary on the Crimes*, 1981.28, [online]. Available at: [www.undp.org/oslocentre/PAR_Bergen_2002/Sexual Assault .pdf](http://www.undp.org/oslocentre/PAR_Bergen_2002/Sexual_Assault.pdf), pp. 3-5, [Accessed 19 November, 2012]

R. Gargarella, *Access to Justice for the Poor: The Case of Latin America*, 2000, [online]. Available at: www.undp.org/oslocentre/PAR_Bergen_2002/latin-america.pdf, pp. 3-5, [Accessed 19 September 2012]