

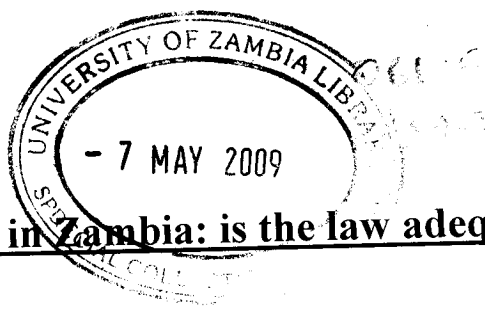
**Defilement cases in Zambia: is the law adequate to end
the scourge?**

BY

MUNKOMBWE NCHIMUNYA

February, 2009

UNZA



Defilement cases in Zambia: is the law adequate to end the scourge?

BY

NCHIMUNYA MUNKOMBWE

A research paper submitted to the school of law of the University of Zambia in partial fulfillment of the requirements for the award of the degree of Bachelor of Laws (LLB).

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW
P.O BOX 32379
LUSAKA.
February 13, 2009**

THE UNIVERISTY OF ZAMBIA

SCHOOL OF LAW

I recommend that the obligatory essay prepared under my supervision by:

MUNKOMBWE NCHIMUNYA

Entitled:

**DEFILEMENT CASES IN ZAMBIA: IS THE LAW ADQUATE TO END
THE SCOURAGE?**

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

.....
Date

.....
Judge K.C. Chanda
Supervisor

DEDICATION

This research study is dedicated to my family and my late mother Mrs. L.N Munkombwe and sister Gertrude and brother Peter Munkombwe. To my father Mr. Peter Munkombwe, my brothers Geoffrey and Godfrey thank you very much for your support. To my sister Mutinta get back to school and work hard. To my brother Geoffrey, you set the pace and wish you success in your Masters Degree. To my nephews and nieces work hard for yourselves as we have set the pace for you to follow.

GOD BLESS.

ACKNOWLEDGEMENT

In a work of this kind, one usually finds that there have been lots of help at various stages in its preparation that one always has difficulties to fully thank all those who helped and encouraged me to during the writing of this essay. That notwithstanding, I wish to thank all the Almighty God, for the unwavering support and faithfulness to me. At one-point friends support wavered, He remained an ever-present companion and provider.

I sincerely wish to acknowledge the assistance that Judge K. C. Chanda rendered towards this work. Sir, your patience and willingness to scrutinize the draft chapters; the valuable and incisive suggestions all go towards edifying this work, my weaknesses and mistakes not withstanding.

I also wish to acknowledge my indebtedness to my employers, Zambia Police, for the support both materially and morally. In particular I thank the office the Director training, the Victim Support Department particularly Inspector Chilabi, the officer in-charge Lusaka division traffic Mr. Luwisha and the administrative officer, C/inspector Tembo. To all work mates thank you for your support.

To my wife, faith and my daughter Buumba, am grateful for your love and understanding. To my brothers Dr G. M. Muuka and G. C Munkombwe, I am grateful for your support both morally and financially. To my sister Mutinta please work hard to my late mother Mrs. L.N Munkombwe thank you very much for seeing to it that I completed my secondary education. To my late siblings Gertrude and Peterson rest in eternal peace. To my father thank you very much for very thing. I however, remain responsible for any shortcomings and weaknesses in this presentation.

Nchimunya Munkomwe

FEBRAURY 13, 2009

ABSTRACT

The fact that there has been a spite of defilement incidences across the length and breath of Zambia is incontrovertible. Thus, the law has been amended to deal with this ugly vice. The girl child in Zambia is no longer safe when left alone with any male person. After the amendment of the law the boy child has been encompassed under the legal definition of defilement. But despite the law on defilement being stiffened the the country has continued to witness an increase in cases of defilement. The question is whether the law is adequate to end the scourge?

Table of statutes

Criminal Procedure Code, Chapter 88 of the laws of Zambia.

Penal Code, Chapter 88 of the laws of Zambia.

Subordinate Act, Chapter 2 of the laws of Zambia.

Juvenile Act, Chapter 284 of the laws of Zambia.

Table of cases

Ackson Banda v The people (1974) 392
D (A juvenile) v R
Emmanuel Phiri v The people (1967) ZR 311
Henry Njobvu v The people-unreported
Kalasa Mvula v R (1945) 5 NRLR
Kalebu Banda v The people (1972) ZR 264
Kapewpwe v the Queen (1949-54) NRLR
Phiri v The people (1963) R AND N
The people v Hara Stephen 2000 High Court case HJ/07/2004
Nsofu v The people (1973) Supreme Court of Zambia
Nosokolo v The people (1972) ZR 125
R v Chinjamba (1949-54) 5 NRLR
R v Njoni (1963) R and N LR
Sibande v The people (1975) ZR 101 (SC)
Willams v R (1923) 1 KB 34

TABLE OF CONTENTS

CHAPTER ONE..... P1-7

1.0 Introduction	1
1.1 statement of a problem	3

CHAPTER TWO	P 8- 27
2.0 Law on defilement	
2.1 The legal definition of defilement	8
2.1.2 Unlawful carnal knowledge	10
2.1.3 mens rea of defilement	11
2.1.4 actus reus of defilement	14
2.2 The amended section 138	18
2.2.1 Elements of defilement	21
2.3 corroborative evidence	24
CHAPTER THREE	P 28- 37
3.0 Analysis of the law on defilement	28
3.1 analysis of the amended section 138	29
3.1.2 Defilement of boys	32
3.1.3 Removal of the statutory defence	29
3.2 mandatory HIV/AIDS test	32
3.3 minimum sentence imposed	33
CHAPTER FOUR	P 38-45
4.0 Causes of defilement	
4.1 customary law	38
4.1.2Cultural beliefs	
4.1.3 Poverty	42
4.1.4 Law enforcement	43
4.1.5 Decay of morals in society	44
4.1.6 Ignorance of law	44
4.1.7 Lack of knowledge of the law by girls	44
4.1.8 Peer pressure among girls	45
4.1.9 Intoxication	45
CHAPTER FIVE	P 46- 51
5.0 Conclusion and recommendations	46
Bibliography	53

CHAPTER ONE

INTRODUCTION

The fact that there has been a spate of defilement incidences across the length and breadth of this country is incontrovertible. Every now and then, the media both electronic and print carry news of defilement. Thus, the girl child in Zambia is no longer safe when left alone with any male person. They have been victims of this ugly vice regardless of their age. It is very unfortunate that some children as young as three months have been defiled. From the statistics of defilement cases taken to court, it can be noted that defilement is mostly perpetrated by well-known people to their victims. These are People like their own Fathers, Stepfathers, Uncles, Stepbrothers, Servants, or even the Clergy. It is very unfortunate because these are the people who play a significant role in children's life such that they cannot be done away with. In very rare circumstances are children defiled by total strangers.

A sense of desperation could be discernible from the many attempts by all the concerned to address the plight of the children. Some sectors of society had even called for the castration, amputation of the perpetrator's private parts or even death penalty. Further, the courts out of desperation to control this vice had resorted to imposing harsher sentences. This can be illustrated by the case of **THE PEOPLE V STEPHEN HARA**¹.

In this case, the accused on 25 October 2003 in Lundazi of the Eastern Province unlawfully had carnal knowledge of Shelly Mkandawire, a girl under the age of sixteen.

¹ 2004 High Court Case HJ/07/2004

He pleaded guilty to the charge. Judge Kajimanga when delivering the judgment stated as follows:

“I have considered the record and the mitigation given by the accused. I agree with the lower court that although the accused is the first offender and readily admitted the charge and therefore deserves lenience, the offence he committed is very serious and There is need to exclude him from the society for a longer period. i consider that a man who of thirty nine years to defile a young girl of eleven years causing pain to her private parts is an abominable act in our society, which must be condemned in the strongest possible terms. Such condemnation would be meaningless if the accused is not given a custodial sentence which is consumensurate with his barbaric act. I accordingly sentence Stephen Hara to twenty-five years imprisonment with hard labour.

Non-governmental organizations, the church, lawyers, and other interested groups of society have had to call for the amendment of the law on defilement so that it could be stiffened, as a way of deterring would be perpetrators of this evil vice. Most of the people considered the law at the time as being inadequate to counteract the ever- spreading evil. In response to these calls, the law was thus subsequently amended in 2005 by the enactment of the penal code [amendment] Act, 2005 [Act no. 15 of 2005]. Under the new law, the punishment for defilement was stiffened. For example, in the amended Act a

person convicted of defilement is sentenced to fifteen years imprisonment as a mandatory minimum unlike the repealed section, which had no obligatory minimum penalty. This was to in line with the calls made by the interest groups. The heavy sentence is to act, as a deterrent to would be offenders and the offenders themselves. As Hutchard and Ndulo state, “when a particular type of offence is prevalent the passing of deterrent sentences is justifiable as being in the public interest. The deterrent theories of punishment’s premise are that punishment, as an imposition of punitive sanctions and the infliction of suffering, is unjustified unless it can be shown that more good is likely to result from the imposition of punitive sanctions than the absence of sanction.”² The differences between the amended Act and the repealed Act will be outlined in chapter two when dealing with the law on defilement as provided that is the law as it was before amended and after amendment.

STATEMENT OF A PROBLEM

Despite the amendment, cases of defilement have continued being perpetrated at alarming levels. According to the statistics obtained from the Police Victim Support Unit, in the month of April 2008, there were sixty-seven cases of defilement reported.³

The question that arises now, is what happens that cases of defilement have continued at alarming rates in the wake of heavy imprisonment sentences? Rather than devoting all attention to punishment, which is aftermath, the solution would be to implore other measures. This will necessarily call into question the root cause. Some of the key causes of defilement are breakdown of morals, cultural-believes, economic problems, which

² Hutchard J and M Ndulo, readings in criminal law in Zambia p. 69

³ Police Victim Support Unit monthly report.

rendered a lot people idle (poverty).⁴ Causes of defilement will be discussed in great deal in chapter four.

According to Iherin, “Law is an instrument for serving the needs of society. Its interest is to further and protect the interest of society.”⁵ But the law on alone is insufficient to control the high levels of defilement. This is a social problem and therefore all members of society should take up the challenge to fight defilement. A thorough public sensitization of the evils of defilement will help arrest this vice.

Despite the amendment of the law on defilement, incidences of defilement have continued to be on the upswing. Statistics from police, courts and the media continue indicating an up wards trend. This has in turn cast doubt upon the effectiveness of the new law. Is the stiff punishment really a solution to control the ever-increasing rates of defilement?

The study will be designed to critically analyze the phenomenon of harsh penalties of defilement in order to enable the research arrive at the correct conclusion and make variable recommendations which can effectively contribute to the eradication of this vice which is on the upswing despite the harsh punishment imposed by the Penal Code.

From the statistics obtained from the police victim support unit, one would rightly assert the negative. The continued increase of cases of defilement despite the stiff punishment that the penal code slaps on convicted defilers one can rightly assert that the cases of

⁴ Embassy of Sweden- Annual country report.

⁵ (1818-1892) one of the proponents of the sociological school of thought.

defilement are on the increase not because of inadequate punishment. Hutchard and Ndulo rightly noted:

“What do people who argue for stiffer penalties hope to achieve? If they aim at preventing crime then they should be prepared to try new methods the moment it is demonstrated to them that the deterrent nature of severe punishment is a fallacy and their faith in deterrence is not supported by known data on the subject. An Attorney-General of Liberia, Mr. Hennes, was reported to have said: ‘For centuries imprisonment has been a means of punishing offenders and preventing them from escaping, committing new crimes or causing harm to others. It has also been regarded as a deterrent to criminality. It has, however, proved ineffective as a deterrent rather, in some instances it contributed to criminality.’”⁶

As has been noted above, other measures need to be put in place in to control the sporadic cases of defilement rather than devoting all attention on punishment. To effectively tackle this vice, it is prudent to identify the root cause of defilement. Any other measures that will be employed should be aimed at addressing the root cause rather than concentrating on punishment, which tries to address the aftermath of the problem. One of the measures, which can be implored to control the increased cases of defilement, is the involvement of the public.

⁶ Hutchard J and M Ndulo, readings in criminal law in Zambia p. 69

RATIONALE

The research seeks to analyze the adequacy of the law on defilement in order to provide recommendations that will help reduce cases of defilement in Zambia. The research is conducted at the time when cases of child defilement are on the upswing despite the law having been amended in 2005 to impose a heavy custodial sentence for defilers. Defilement is an offence that is being talked about almost every day because it has become rampant at the time when most people are advocating for gender equality and respect for women rights. Further, defilement is not only a social problem but it is also a human rights violation, which the state has an obligation to take effective steps to prevent.

There have been a number of people who conducted studies on defilement and this work is expressed in obligatory essays, reports, proposals, the Internet or books. Bertha Musonda Chileshe wrote some of the obligatory essays referred to in 2003 and by Musonda Daniel in 2003. However, most of the obligatory essays were conducted before the repeal and subsequent amendment of the law. Other materials have been written by non-governmental organizations such as YWCA, WILDAF and WILSA. Other materials were obtained from newspapers such as the POST and TIMES OF ZAMBIA. The research was conducted by way of reviewing relevant pieces of legislation and materials on defilement in obligatory essays conducting interviews with experts in this field.

This research will be structured in the following manner:

Chapter two of the essay focuses on the law of defilement as it appears on the statute books and case law. The analysis considers the element of defilement. Further, it will also try to compare section one hundred and thirty-eight before it was repealed and the current law after amendment and the differences will be brought to light. The focus of the analysis is to establish whether stiff punishment is the solution to control rampant cases of defilement.

Chapter three of the essay focuses on the analysis of the new section 138. the analysis is meant to consider whether the law is adequate in curbing the rampant cases of defilement.

Chapter four will focus on the causes of the rise in defilement cases. The root causes of defilement will be analyzed.

Chapter five, the conclusions of the research will be outlined and recommendations will also be presented.

The major problem that the research had encountered was limited financial resources to effectively reach some institutions to get material on the subject.

The second limitation is the non-willingness of some institutions to give out information on defilement.

The third limitation is the non-availability of reliable statistics at police stations. Truly speaking, statistics at the police stations do not reflect the true character of defilement cases as some cases are unreported by victims or their guardians.

CHAPTER TWO

THE LAW ON DEFILEMENT

The law that creates the offence of defilement was first enacted in 1931 in the then Northern Rhodesia when the Penal Code was enacted for the first time. Since its enactment the law of defilement has undergone several amendments. In 1933 there was an amendment, which changed the age of limit of defilement from twelve to sixteen. This was effected by amendment No. 26 of 1933. This has remained the age limit to date. Further amendments were effected in 1941 by amendment No. 25 of 1941 and in 2005 by amendment No. 15 of 2005.

This paper is designed to analyze the defilement cases in Zambia and the effectiveness of the penalty for the offence. This will be achieved by looking at the law prior to 2005 and the law post 2005.

THE LEGAL DEFINITION OF DEFILEMENT

Before the amendment of the penal code in 2005 the law on defilement was regulated by section 138 of the penal code, as amended by NO. 26 of 1933 and NO 9 of 1941. The Penal Code, which is the principal source of the Law on defilement, defined the offence of defilement as:

- (1) Any person who unlawfully and carnally knows any girl
under the age of sixteen is guilty of a felony and is liable

to imprisonment for life.

An attempt to defile is also an offence as provided under the same section.

(2) Any person who attempts to have unlawful carnal knowledge of any girl under the age of sixteen is guilty of a felony and is liable to imprisonment for fourteen years.⁷

This section did not provide a definition of what may constitute an offence of attempted defilement. This was therefore left to speculation. Thus, an attempted defilement would have been defined as a situation where someone before making a full act of defilement fails to fulfill the ultimate aim. There is no penetration to so as constitute a full act of defilement. As already stated above, the offence of defilement is constituted where there is penetration whether total penetration or slight penetration. In order to succeed in a charge of defilement, the prosecution must prove the elements of defilement beyond any reasonable doubt. This can be done by analyzing the actus reus and the mens rea. These two elements are necessary in defining any offence. The actus reus means the prohibited act. "The law does not punish someone for entertaining wild wishes or evil intentions as long as these do not amount to serious purpose to actuate the thoughts or intention."⁸ The law only forbids harmful conduct and not in thoughts that have not been manifested in harmful conduct. The act must be done voluntarily. On the other hand, mens rea means the mental element in

⁷ Section 138 of the penal code chapter 88 of the laws of Zambia.

⁸ Kulusika s. text, cases and materials on criminal law in Zambia.

the crime. The mens rea is whatever state of mind an accused person must be proved to have at the time of the offence. Williams⁹ also defines men's rea as the mental element necessary for the particular crime, and this mental element may be either intentional to do the immediate act or recklessness with respect to elements of the offence.

The actus reas and the men's rea of the offence of defilement are now considered. The following are the actus reas for defilement:

UNLAWFUL CARNAL KNOWLEDGE

The penal code under section 138(1) makes it an offence to have carnal knowledge of a girl below the age of sixteen. The phrase 'carnal knowledge used in the penal code means sexual intercourse. Blacks Law Dictionary defines carnal knowledge as:

“ The act of the man having sexual bodily connections with a woman; carnal knowledge of a child is unlawful sexual intercourse with a female child under the age of consent. While penetration is an essential element, there is carnal knowledge if there is slightest penetration of the sexual organ of the male.¹⁰”

In simple terms the Penal Code simply makes it an offence for any person to have carnal knowledge or attempt to have sexual intercourse of any girl below the age of

⁹ Williams. G Criminal law. The general part (2nd ed) (1961)

¹⁰ Henry Campbell, 1968. 4th edition.

sixteen. It must be borne in mind that for an act of sexual intercourse to defilement, penetration is essential. According to Cross and Jones;

“Penetration is the entry of the penis into the vagina or the anus; the slightest degree is enough and where the intercourse is per vaginam the hymen need not be broken.”¹¹

Thus, the most essential thing for the charge to subsist is that the accused must insert his penis into the vagina. This entails that a woman who interferes with the private parts of a girl below the age of sixteen would not be charged with the offence of defilement. Further, a man who inserts any other thing other than a penis would not be charge with the offence of defilement.

MENS REA OF DEFILEMENT.

The accused person must have the required mental element. In defilement cases the accused must have the intention of having carnal knowledge of a girl below the age of sixteen or must be reckless as to the age of the age.

Under this section the age of the victim is of prime importance to both the prosecution and the accused. The prosecution must prove beyond reasonable doubt the fact the child defiled is below the age of sixteen. In the case of KALASA MVULA V R¹²

Francis J stated as follows:

¹¹ Cross and Jones (1988), Criminal Law, 6th edition.

¹² (1945-54) 5 NRLR PAGE 240

The question of age in a charge of this descriptions is of the greatest importance and must be proved, moreover, proved beyond reasonable doubt.

The question of the victim's age arose also in the case of **KAPEWPWE V THE QUEEN.**¹³ The appellant was charge by a class two magistrate's court of defilement contrary to section 119 (1) of the penal code and was sentenced to five years with hard labour. In the subordinate court, medical evidence was led to the effect that the apparent age of the girl was approximately fifteen years. The medical witness stated that he could not say that the girl was under the age of sixteen years of age beyond all reasonable doubt. The age of the victim of defilement is also important to an accused when putting up the defence under section 138 of the penal code. The penal code provision for provides for a defence for the charge of defilement and it state as follows

“Provided that it shall be a sufficient defence to any charge under the this section if it can shall be made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe, and did in fact believe, that the girl was of or above the age of sixteen years.”

¹³ (1949-54) NRLR 168.

The above provision was a sufficient defence to any charge that is defilement or attempted defilement if it can be made to appear to the court that the accused had reasonable cause to believe, and he did so believe that the girl was of or above sixteen. In the case of **D (A JUVENILE) V R**¹⁴ the appellant was convicted of defilement of a girl below the age of 16. his appeal against the conviction was based on the ground that he reasonably believed that the girl was above sixteen. In arriving at the decision, the learned judge cited the case of *R V Jarvis* where Lord Mansfield C.J. said:

“for it is a known distinction that what comes by way of proviso in a statute must be insisted on the by the party accused; but where exceptions are in enacting part of the law, it must appear in the charge that the defence does not fall within any of these.”

The learned judge related the relevant passages of the appellant’s evidence as:

“I had a slight knowledge of the law but I did not realize it was a very serious offence to have intercourse with a girl under the age of sixteen and I knew it wrong but I did not realize it was very serious, but if I had known she was realize it was very serious, but if I had known she was under sixteen, I would have left her alone.”

¹⁴ High court of Northern Rhodesia, 1960.

Taking into account the above statement the judge came to the conclusion that appellant satisfactorily made out his case for the protection under the defence and accordingly the defence could not stand. The appeal was allowed.

In another case of **NSOFU V THE PEOPLE**¹⁵ the appellant was convicted on three counts of defilement. Two of the girls were nine years old and the other seven years old. The girls said they were playing at the house of one of them, Kaini, when the appellant arrived. After a short time he took each of the girls in turn into the kitchen of the house and had intercourse with them. Afterwards he gave them ten ngwee to share. Later in the evening the girls reported the incident to their parents and the appellant was approached and he admitted having had sexual intercourse with each of them, claiming that he had just been playing with them. Medical evidence showed that the hymen of each girl had been ruptured by the insertion into the vagina of a rough object. Counsel for the appellant argued that the provision of section 138 of the Penal Code had not been denied the opportunity to make out the defence that the provision creates. For the defence under the provision to succeed, an accused must satisfy the court that he had reasonable cause to believe that he in fact believed this. The magistrate in his judgment specifically considered this question and said:

“Having seen the girls myself, I am satisfied that no one can think that any of them could be over the age of sixteen years.”

¹⁵ Supreme court of Zambia, 1973.

Therefore, if the appellant had satisfied the court that he did in fact believe the girls or any of them was over the age of sixteen, it could have been a sufficient defence to the charges. Thus, the court rejected this argument.

The second defence available to the charge of defilement is if a man goes through a form of marriage particularly customary marriage with a girl below the age of sixteen, it is a sufficient defence for him to the charge of defilement. This was considered in the case of **R V CHINJAMBA**¹⁶ where Woodman, J stated:

“The carnal knowledge must be unlawful and it is not unlawful
For a man to have carnal knowledge of a girl to whom he is
Married, despite the fact that the girl is below the age of sixteen
Years of age.”

The facts of the case were that the accused Chinjamba was a village head man and he was charged as an accessory after the fact to unlawful of a girl under the age of sixteen years contrary to section 119 (1) of the Penal code. A villager, Fulani Njamba, married a girl under the age of sixteen years, and lived with as man and wife. The accused, was a village headman, knew of these facts and took no steps to prevent or report the matter. He was therefore charged with being an accessory after the fact to unlawful carnal knowledge of a girl under the age of sixteen years, and convicted. On

¹⁶ (1949-54) 5 NRLR, 184

review the conviction was set aside. It was held that at the time the carnal knowledge took place there was a valid marriage subsisting between Fulani Njamba and the girl in question according to native customary law. The court drew its attention to the true meaning of lawful marriages. A marriage with a girl less than sixteen years can only be lawful when her parents or guardians give permission for her to marry and it is in accordance traditional norms. Consent of the girl alone cannot make a marriage lawful. So a man that elopes or starts staying with a girl under the age of sixteen cannot claim to be married to her. Such a marriage is void, and a man should be arrested for defilement. A binding precedent is that of **SIBANDE V THE PEOPLE**.¹⁷ The accused was charged with defilement of a girl aged twelve. The appellant made an sworn statement in which he said that twice he sent someone to see the girl's parents but that they refused. He spoke to the girl, who was read to go with him, and they went off together. When the girl and the appellant returned, they were taken to the where the girl was repeatedly asked about the marriage and she repeatedly said she was formally married to the appellant. In dealing with the question of marriage the magistrate said that, "in Zambia it is not an offence for a man to have carnal knowledge of a girl he is lawfully married to. Lawfully here means that both the parents and the girl have consented to the marriage. But unfortunately, unlike rape, consent of the girl alone cannot be raised as a defence to a charge of defilement." The court held that the accused was guilty because there was no consent to the marriage by the parents of the girl as mere agreement between the man and the girl does not make

¹⁷ (1975) ZR101 (SC)

the marriage valid. Therefore the carnal knowledge was unlawful. Further, in the case of **R V NJONI**¹⁸ the court stated that:

“The question of the wrongfulness of the accused person’s conduct depended on whether the purported marriage had been duly solemnized. If it was not, then as the girl was under sixteen, the intercourse was wrongful. If it was solemnized, the intercourse would be lawful and the accused would have committed no crime.”

In defilement cases, the accused cannot claim that the girl had given consent to the act. Whether the victim consented or not, it does not matter. This is because the law regards the girl below the age of sixteen as incapable of giving adequate consent. Hence, the law is set to protect these girls from being sexually abused as well as disallowing them from engaging in any unlawful sexual activities.

Section 138 (1) of the Penal Code provides that the maximum sentence that a person convicted of defilement is life imprisonment. The trial magistrate had power to impose any sentence within his powers as conferred by the Criminal Procedure code. Any sentence beyond the powers conferred by the Criminal Procedure Code could only be imposed by the High Court upon the accused being committed by the Magistrate court. The Act however, did not impose a minimum sentence.

¹⁸ (1963) R AND N LAW REPORTS.

THE NEW SECTION 138 ON DEFILEMENT

Prior to the amendment of the law, there was a sense of crisis concerning the security of children. This was due to the rampant cases of girls being defiled. It was alleged that the law on defilement was weak to deter the perpetrators and would be perpetrators. Many concerned Zambians called for the revision of the law so as to provide for a stiffer punishment to those convicted of defilement. Others even called for the castration of the genitals of the defiler's as a way to deter other would be defilers. The drastic increases in the number of defilement cases can be illustrated by the following table:

DEFILEMENT CASES REPORTED

YEAR	1999	2000	2001	2002
NO. OF CASES	263	306	366	865

SOURCE: THE VSU OFFICE, POLICE HEADQUARTERS.

As a response to all these concerns parliament repealed and amended section 138 of the Penal Code. The law on defilement was drastically altered by the Penal Code (amendment) Act, 2005 (i.e., Act NO 15 of 2005). It was amended in order to demonstrate in part, the convention on the rights of the child and to provide stiffer penalties in respect of sexual offences committed against children and other persons so as to deter offenders from committing such crimes.

Under section 136. A, a child was defined as a person below the age of sixteen years. This insertion was new as it was not there in the repealed Act. Further, section 136 and 137 were repealed and replaced by new provisions. However, this presentation will only concern itself with section 138 of the amendment Act. Act No 15 of 2005 provides as follows.

“The principal Act is amended by the repeal of section one hundred and thirty -eight to one hundred and forty seven and the substitution therefore of the following:

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.

(2) Any person who attempts to have unlawful carnal knowledge of any child commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fourteen years and not exceeding twenty years.

(3) Any person who prescribes the defilement of a child as a cure for the Ailment commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and may be liable

(4) A child above the age of twelve years who commits a felony under this subsection (1) or (2) is liable, to such community service or counseling as

the court may determine, in the best interest of both children.¹⁹

There isn't much difference between the old section 138 and the new section 138.

However, defilement now is applicable to both boys and girls under the age of sixteen years. In the old section 138 defilement was only applied to girls below the age of sixteen but the new definition of defilement talks about a 'child' and section 131 defines a child as, 'a person below the age of sixteen years. There is no specific sex mentioned but it cuts across all sexes. In one reported case, which was prosecuted by police officers from Chawama police victim support unit, a named female teacher was charged and prosecuted for defiling a named schoolboy of the same school. The case was successfully prosecuted in the magistrate court and she has been committed to the high court. This is the first defilement case that has been dealt with by the police involving the defilement of a boy under the amended Act and taken to court.

The amended Act also has introduced community sentencing and counseling for those between the age of 12 and 16. This is a positive stance as it the law now covers for what should be done to child convicted of defilement. Cases of children convicted of defilement were rampant and they were subjected to the same penalty upon conviction.

The sexual intercourse must be unlawful. Therefore this means that where an accused person may have carnal knowledge of the child in circumstances that may be considered lawful, the accused may not be convicted. This may occur in circumstances such as where the accused is married to the child below sixteen with the full consent of the child's parents under customary law. The burden of proof lies on the

¹⁹ Penal Code, Chapter 88 of the laws of Zambia.

prosecution to prove beyond reasonable doubt that the victim was below the age of sixteen years. Failure to prove this would entitle the accused to be acquitted. The consent of the victim is immaterial. This is because the law considers a child below the age of sixteen as not capable of giving a valid consent. It is easy for males to persuade them into having sexual intercourse because they are immature. They can be easily convinced to having sexual intercourse. For example in an English case of **WILLAMS V R**,²⁰ a singing master was convicted of having sexual intercourse with a girl below the age of sixteen by pretending that it was a method of training her voice. This clearly shows how vulnerable children are especially to adults.

The acts reus and the mens rea of defilement must be proved in a charge of defilement under the amended Act as was the case in the repealed section 138. The ingredients of the mens rea and the actus reus under the new section 138 are almost similar to these of the repealed section 138 as looked at above. However, there are minor differences as will be seen below. The actus reus of the new section 138 comprises of the following element;

(a) There must be carnal knowledge.

For one to be guilty of this offence under the Act, it must be proved that the accused had sexual intercourse with a child below the age of sixteen. As already stated above the sexual intercourse must be unlawful. It was stated **in R V NYONI**,

“The question of the unlawfulness of the accused persons conduct depends on whether the purported marriage had been duly solemnized. If it was not, then as the girl was under the age of sixteen, the intercourse

²⁰ (1923) 1 KB 340

was wrongful. If the marriage was solemnized, the intercourse would be lawful and the accused would have committed no crime.²¹

The prosecution must prove that there was penetration. Penetration is the entry of the penis into the vagina and any slightest degree is enough. Cross and Jones stated that where intercourse is per vaginam the hymen need not be broken.²² Therefore what matters is the entry of the penis into the vagina. Any act less than this would not amount to defilement but may be indecent assault on females. Further cross and Jones stated that it is not necessary to prove completion of the sexual intercourse by the emission of the seed, but the intercourse shall be deemed complete upon proof of entry only.

(B) The victim must be below the age of sixteen.

The age of the victim in the crime of defilement is quite essential in the definition of the offence. Just like in the repealed Act, the prosecution has to prove beyond reasonable doubt the fact the victim was below the age of sixteen years. In the case of **PHIRI V THE PEOPLE**,²³ the appellant was convicted of defilement of a girl age eleven years. The only evidence that was available was that of the girl who was said that the mother told her she was in 1961 that twelve years before the case appeared in court. The court of appeal ordered a retrial and held that the age of the person is an essential ingredient of the charge; the age must be strictly proved.

²¹ (1963) R & NLR p, 143.

²² Cross and Jones criminal law p 269.

²³ (1973) Z.R145

(C)The victim must be a child

The prosecution must prove that the victim of defilement must be a child. If she or he is not then the prosecution must not succeed and the accused must be acquitted. Hence there must be good evidence to prove that at the time of the offence the child was under sixteen years of age. The prosecution must prove the age of the child before the court hearing the case of defilement. For this reason evidence merely as to the age of the child is not sufficient. Birth records and certificates of the girl can be produced in court as evidence. In the absence of such evidence, one of the parents or a guardian to the girl should tell the court what the girl's age was at the time of the offence.

MENS REA OF DEFILEMENT.

The accused person must have the required mental element under the amended section 138 as was the case in repealed section 138. In defilement cases the accused must have the intention of having carnal knowledge of a girl below the age of sixteen or must be reckless as to the age of the girl.

Section 138 (1) of the Penal Code (amendment) Act provides that the maximum sentence that a person convicted of defilement is liable to imprisonment for life. The trial magistrate has no power to impose any sentence on the convicted person. This is because the Act has set a minimum sentence of fifteen years. This is beyond the sentence that can be imposed by a magistrate as provided by the Criminal Procedure code. Any sentence beyond the powers conferred by the Criminal Procedure Code

could only be imposed by the High Court upon the accused being committed by the Magistrate court.

The penal code (amendment) Act provides under section 138 subsections 3 that any person who prescribes the defilement of the child as cure is for an ailment commits an offence and is liable to imprisonment to a term not less than fifteen years. This subsection was enacted to curb the notion that is attributed traditional healers who are allegedly prescribing sexual intercourse with a minor as a cure for HIV/AIDS.

The penal code (amendment) Act further under subsection 4 provides that a child who is convicted for the offence of defilement should be liable to community service or counseling as may be determined by the court. The Act defines a child under section 2 as a person below the age of sixteen.

Corroborative evidence

Corroborative evidence is any information that supports the statement of the compliant and it is independent of the statement of the compliant but it should not be different. It should show that the crime was committed and it should also point to the accused as the person who committed it. In every defilement case, there must be corroborative evidence to indicate that the claims by the accused are genuine. In this regard, good corroborative evidence is the opinion of a medical doctor. In the absence of a medical report, learned judge, Baron, the then Deputy Chief Justice of Zambia, in the case of **KALEBU BANDA V THE PEOPLE**, gave an example of in a rape case. He said: “thus, in a rape case failure to obtain medical evidence when there was a duty to do so means that, the court must proceed as if a medical doctor had examined the victim and found no evidence that force was used, nor any evidence of sexual intercourse.”

Therefore a medical report is of prime importance in any defilement case as it corroborates the evidence given by the victim. The importance of corroboration was stated in the case of **ACKSON BANDA V THE PEOPLE**. The facts of the case were that the appellant was convicted of rape for having unlawful carnal knowledge of a woman without her consent. He was alleged to have seized a woman in the bush and raped her and thereafter, the woman was seen crying by an independent person. The complainant stated that during rape she sustained scratches on her legs, and she said that the third person whom she met had asked her how she obtained those scratches. That particular person did not corroborate as to those scratches nor did the medical report refer to any external injuries to the complainant at all. The learned judge in delivering judgment of the court indicated that in the circumstances, there was complete lack of corroboration in the case. The court considered whether the fact that complainant was crying, when she was seen by an independent witness could amount to corroboration. Evidence of distress at the time of making a complaint may not be enough to amount to corroboration as it may be stimulated. Meaning that such evidence may not be real; it may as well be pretended. The appeal was allowed and the conviction was quashed and the sentence was set aside.

In another case of **EMMANUEL PHIRI V THE PEOPLE**, the appellant was convicted for rape to two years imprisonment with hard labour. On appeal to the High court the sentence was enhanced to five years and he appealed to the Supreme Court. The victim was eight months pregnant and as she walked along a road near her village, a man on a bicycle came to her, forced her to the ground and beat her up, threatened to kill her if she refused. He then had sexual intercourse with her against her will.

Throughout the incident she struggled and shouted for help. After raping her, the man beat her again for not succumbing quietly. She was bruised and covered in dirt and she was crying. She immediately made a report to several people. She gave a description of her assailant and has the bicycle he had. After sometime one of the people she told saw the appellant who fit in the description given both the attire and the bicycle. The next day the complainant identified the appellant when he came to the village to retrieve the uncle's bicycle. He was apprehended and handed over to the police.

One of the grounds of appeal was that the prosecution had not established that the crime had not been committed all. The court considered the evidence of her early complaint, her distressed condition, her very untidy appearance, and the substance of the medical report, which supposed that something had been inserted in her private parts. The court agreed with the state advocate and said, " In the instant case, there are no single factors to suggest that any situation that any situation existed to falsely single out the appellant, a man previously not even known to the complainant. We have seen no motive for the complainant to falsely implicate the appellant and in the circumstances, we are satisfied that not withstanding the misdirection, the conviction cannot be upset." The appeal against enhanced sentence was equally dismissed.

There are some notable similarities between the new and the old section 138. However, the new section has gone far by incorporating new provisions that were not provided by the old section. The new section has progressive provisions, which effectively deal with defilement cases.

CHAPTER THREE

ANALYSIS OF THE NEW SECTION 138

There is no much difference between the old section 138 and the new section 138 as already observed in the proceeding chapter. However, as already discussed in the previous chapter, defilement is now applicable to both boys and girls under the age of sixteen. It is legally stated that defilement has to do with penetration, and a girl cannot be penetrated. According to the dictionary meaning, defilement means the act of making some thing dirty or no longer pure, especially something that people consider to be important or holy.²⁴ Before the amendment of section 138, that was the position of the law. For there to be defilement, there must be the destruction of the hymen but a boy has no hymen hence it was regarded that a boy child could not be defiled.

Defilement of boys

However, this is not the case. A boy just like a girl can be defiled. A woman just like an infant female girl may infect him with HIV/ AIDS. The problem comes when adducing corroborated evidence in court. If an elderly man penetrates a young girl, medical evidence will be easily gathered. The hymen may be broken, or there may be injuries to the private parts or the semen may be found in the private parts. To the contrary, if a woman has canal knowledge of a very young boy it will be difficult to

²⁴ Oxford dictionary p 489

prove. The frenulum of the boy cannot be torn. The only evidence will be in form of oral evidence of the boy. This in effect means that corroborative evidence will no longer be a prerequisite. Corroborative evidence is always necessary in order to prove that not only has the crime being committed, but it was also committed by the accused. Heavy reliance on oral evidence means that women will be falsely accused of defiling young boys as there will be no proof. The medical report issued by the doctor only has a provision relating to girls such as the breaking of the hymen and injuries to the vagina and it does not have provision for defilement of boy children to suit the current law. It must be realized that this law was last amended in 1941. At this time there could have been few or no predatory women to lure boys into sexual intercourse.

Removal of the statutory defence

The new section 138 does not have a statutory defence as provided in the old section 138 as indicated in the previous chapter. A defence is an excuse, which an accused person can use to negate criminal responsibility. The accused is not fully accountable for his or her actions owing to the fact that it was not his or her fault fully. The defence that was available in the case of defilement is one, which operates to negate an element of the crime such as men's *rea*. As regards a defence Paul Robinson writes:

“These defences may admit the wrongfulness of the accused
Person's act but excuse the actor because conditions suggest

That the actor is not responsible for his deeds.”²⁵

In other words the defence did not entail that the accused did not commit the offence but that he did although he did not the girl was below the age of sixteen. He was mistaken of the true age of the girl. As indicated in chapter two in every crime, the actus reus and the men's rea must be proved. In the offence of defilement, the actus reus is the causation of the crime and is described as the conduct of having intercourse with a girl less than sixteen years. On the other hand men's rea is the guilty state of mind and is described as knowledge by a man that a girl is under sixteen or is reckless as to the age of the girl. An accused person is deemed to have knowledge of the victim if:

- He is a close relative to the age.
- He is a teacher to the girl.
- If he stays in the same neighborhood with the girl
and he has seen her grow.

It is in this regard that the prosecution had to prove that the accused had knowledge of the age of the girl and the accused was required to prove that he had reasonable belief that the girl was above sixteen. The idea behind such a provision was to make a man who had reasonable cause to believe that the girl was of or above sixteen to advance reasons as to why he so believes. Failure to do so would mean that his defence is rejected.

²⁵ Smith, J.S, Justification and Excuse in criminal law. London: Steven & sons (1987) p 7

The new section 138 does not provide for the defence for the offence of defilement. Even if he had good reasons to reasonably believe that the girl was above the age of Sixteen, he cannot advance such reasons, as they are now irrelevant under the current law. Advancing the reasons now would be a confession and may make the work of the prosecution easy. The reasons advanced for the removal of the statutory defence is that the accused heavily relied on it and ended up being acquitted.²⁶

From the research conducted it has been proved that Zambia is the first country in the region to do away with the statutory defence of defilement. Section 138(2) Of the Malawian Penal code provides a statutory defence as that which existed in the repealed Zambian section 138. In Botswana section 147(5) of the penal code also provides for the defence. In Zimbabwe section 8(2) also provides this defence and in Nigeria section 218 equally provides a defence to the offence defilement.

This under scores the importance of a defence in the charge of defilement. For justice to prevail people must be given an opportunity to defend themselves when there factors which tend to negative there criminal responsibility. Every crime has a defence. Even murder, which carries a mandatory death sentence upon conviction, has a defence, which can be relied upon by the accused. The current Zambian law does not effectively allow justice to prevail, as the accused is not legally given an opportunity to advance the reasons as to why he did what he did.

²⁶ Ywca annual boliten. 2006

Mandatory HIV/AIDS testing

In Botswana section 142(3) and section 8 of the Zimbabwean penal code, provides that any person convicted of defilement and rape should be subjected to a mandatory Test for HIV/AIDS. This is done in order to determine the sentence that should be given to the convicted person. If the convicted person infects the child with HIV/AIDS the accused should be given a stiffer punishment. However in Zambia this is not the case. Zambians have cried that most defilers sleep with children so that they can be cured of HIV/AIDS. This can be illustrated by an incident in Lusaka where a girl aged six years was defiled and infected with HIV by a twenty-six year old man. Some non-governmental organizations and the church argue that parliament should have included a mandatory HIV/AIDS test for defilers so that those found positive should be a harsh sentence. The failure to include such a provision could have been done for human rights reasons. Others have argued that children have human rights as well and those who do not respect children's rights should not have their rights respected as well. So Zambia could not have been the first country to have such a provision. Statistics of HIV/AIDS epidemic in Zambia indicate that there are a considerable number of children carrying the virus.

Minimum sentence of 15 years

Section 138 imposes a minimum sentence of fifteen years imprisonment to those convicted for the offence of defilement. This means that the person entrusted with the responsibility of sentencing the convicted person will have to impose a sentence,

which is equal, or above the set minimum. Kulusika in his book criminal in Zambia observed:

“There are certain sections in the penal code which proscribes certain criminal behaviour which have also fixed the minimum and the maximum sentences the court may impose. This system does not prevent disparity or inconsistency. What it does is that it denies the court to have a formal part in the selection of sentences.”²⁷

The implication of the above is that the role of the court is left only to decide whether the accused is guilty or not. The discretion of the judge or magistrate is curtailed. This system is not ideal in that certain legal principals are not done away with. For example, in the case of Nsokolo v The people chief Justice Law as he then was outlined five principles, which should guide the court when passing a sentence to the accused. They are:

1. The intrinsic value of subject matter;
2. The antecedents of the accused;
3. The youth of the accused;
- 4 The conduct of the accused during his trial, particularly with regards to his plea.

²⁷ Kulusika s. (2006) criminal in Zambia p 812.

Therefore, even although defilement of children below the age of sixteen years is unpardonable and perpetrators should be given a harsh sentence to show the gravity of the offence and to emphasis public disapproval of the act it should have provided for juvenile offenders. According to the juvenile Act²⁸ a juvenile is a person who has not attained the age of nineteen. The juvenile Act makes provision for sentencing juveniles. Section 72(1) and (3) provides that no young person above sixteen and under the age of nineteen may be imprisoned if he can be suitable dealt with in any other manner. There is a wide range of non-custodial sentences available with regards to juveniles compared to adults for example probation. The new section does not provide room for the application of these principles as the judge is given an opportunity to exercise his discretion. This can be illustrated by the case of **HENRY NJOBVU V THE PEOPLE**²⁹. In this case Henry Njobvu aged 18 at the time of the offence pleaded guilty to defiling a 13-year-old girl and was sentenced to fifteen years imprisonment. He said that he had proposed marriage to the girl and was only waiting to pay dowry. In passing the sentence Lusaka Judge Gregory Phiri stated as follows:

“The accused is a young man who is still energetic and can contribute to development if given an opportunity to go back in the society. I would have loved to send you back to society but am constrained by law. I will therefore send you to 15 years imprisonment as provided by law.”

²⁸ Chapter 217 of the laws of Zambia

²⁹ The Post Newspaper, Thursday August 7, 2008

The Purpose of sentencing a juvenile to prison is to rehabilitate and reform him so that he can be a useful member of society after serving his sentence. If the juvenile is set to jail together with adult there is a possibility that the juvenile not reform but became a hard-core criminal upon release.

Further, the sentence that should be given to the convicted person should take into account the age of the victim and the manner in which the act was done. It is common knowledge that girls between the ages of fourteen to sixteen these days tend to engage themselves in sexual relationships. The current law imposes a minimum sentence of fifteen years for defilers. The current law does not however, provide for a lenient sentence when there are mitigating factors. Further, the law should have made a way that sentences imposed should take into account the age of the victim. This means that the current law should have had a principle "the younger the age of the victim, the harsh the punishment."

Section 7 of the criminal procedure code provides the maximum number of year's magistrates can impose. The senior resident magistrate and the principle magistrate can impose up to nine years. This therefore, takes it beyond the jurisdiction of the magistrate to sentence a person convicted. This means that the high court has to exercise jurisdiction and not the magistrates.

Section 138(4) provides that a child between the age of 12 years and 16 who commit the offence should be subjected to counseling or community service as the magistrate may so decide. The section is weak, as it does not give room for the child to reform or be rehabilitated. The section should have had provision to send such a

child to imprisonment in order to reform him or her. There is a probability that the accused may repeat the act.

Minimum sentence for sexual offences

The new section 138 provides a minimum sentence of 15 years to the defilers. The repealed law on defilement provided no minimum sentence that could be given to the convicted person. Following the public outcry in the number of defilement cases, parliament came up with a minimum sentence. It is believed that a minimum sentence of 15 years will deter others from committing similar offences. This is not true considering the background of defilement. Even if ignorance of law is not a defence, many Zambians don't understand the act of defilement especially those in the remote areas of the country such as Shang'ombo in western province. Girls have the same perception about consensual sexual intercourse just like the males. An article published in the times of Zambia prior to the enactment of the new section 138 stated as follows:

“Government has advised the Zambia National women's lobby Group to sensitize the public on the dangers of child defilement before agitating for the enactment of stiffer laws against perpetrators of the vice. Chief government spokesperson Mike Mulongoti said that even if laws are stiffened against child defilers, the offence would continue being committed. He said that what should be encouraged at this stage is the

Sensitization of the public against defilement. Mr. Mulongoti said the law in itself was not sufficient to deter citizens from defiling children but the thorough sensitization against the vice.”³⁰

The offence of defilement is widespread in the country. A lot of people will continue to be offenders of this crime especially in rural areas and compounds unless a rigorous sensitization is carried out by government.

³⁰ Times of Zambia 10th June, 2005

CHAPTER FOUR

CAUSES OF DEFILEMENT

There has been a rampant increase of cases of defilement in Zambia. Before the year 2002, most people attributed the increase of defilement cases to the weak law at the time. But despite the amendment of the law to impose a minimum sentence of fifteen years imprisonment cases for those convicted for the offence of defilement, defilement cases have continued to be perpetrated at alarming levels. For example in the months of August and September of the year 2008 one hundred and twenty (120) cases of defilement were reported the law enforcement officers. This leaves one to wonder as to what causes defilement?

Defilement cases are on the increase because of a number of reasons. Some the reasons are cited below.

(a) Customary law marriages

The wording of the penal code section 138(1) does not prohibit sexual intercourse with a minor if it is done under customary marriage. The penal code states as follows;

- a. 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.

It is a complete defence for any person to engage into sexual intercourse with a girl below sixteen if they are lawfully married under customary law. This was considered in the case of R V CHINJAMBA³¹ where Woodman, J stated:

“The carnal knowledge must be unlawful and it is not unlawful
For a man to have carnal knowledge of a girl to whom he is
Married, despite the fact that the girl is below the age of sixteen
Years of age.”

For this defence to succeed the parents of the girl must give consent to the marriage and if the parents refuse to give consent the defence would fail to stand. In the case of

R V NJONI³² the court stated that:

“The question of the wrongfulness of the accused person’s conduct depended on whether the purported marriage had been duly solemnized. If it was not, then as the girl was under sixteen, the intercourse was wrongful. If it was solemnized, the intercourse would be lawful and the accused would have committed no crime.”

In the case of The People v Chinjamba, a villager Fulani Njamba married a girl under the age of sixteen and lived with her as a man and wife. The accused, which was the village headman know of these facts and took no steps to prevent or report the matter to the authorities. he was charged with being an accessory after the fact to unlawful carnal knowledge of a girl below the age of sixteen and he was convicted. On review it was held that it was not for a man to have carnal knowledge of a girl to

³¹ (1949-54) 5 NRLR, 184

³² (1963) R AND N LAW REPORTS.

whom he is lawfully married despite the fact that the girl is under sixteen years of age.

Woodman J; said

“At the time when the carnal knowledge took place there was a valid marriage subsisting between Fulani Njamba and the girl in question according to native customary law. The carnal knowledge must be unlawful and it is not unlawful for a man to have carnal knowledge of a girl to whom he is lawfully married.”

This ruling has not been overruled by any recent decision and since the legal system in Zambia is governed by ‘stare desis’ or to stand by the previous decision it means it is still law.

Most of these marriages are common in rural areas. This can be attributed to the high levels of poverty and illiteracy. Immediately the girl child reaches puberty the parents marry her off. The girl is stopped from going to school. This is very sad because the child is robbed of her childhood and made a wife at a tender age. One such incident was occurred at in lundazi where a fourteen-year-old age was married off to a seventy-year-old man and the parents wanted her to stop school. The girl had to run to the head teacher’s house for refuge.

Customary law marriages go against the very idea that the law wanted to curb. Statutory law recognizes customary law as long as it is not repugnant to natural justice and morality or if it is not repugnant to any other written law.³³ This provision clear states that customary law should not be inconsistent with any written law or should not be repugnant to natural justice or morality.

³³ Subordinate courts Act section 16.

In the true sense customary law marriages should not be allowed because there is no morality in an old man marrying a young girl as young as thirteen years old. Further, section 139(1) was meant to curb sexual intercourse with young girls. Therefore since customary law allows marriage of young girl it is contrary to section 138(1) and should therefore not be recognized.

Cultural beliefs

Some cultural practices and traditional beliefs contribute to the increase in the number of defilement cases. The traditional practices such as rituals and traditional healing are also a major contributing factor to the number of defilement cases. With an increase in the advent of HIV/AIDS there is a belief among the people that a person having HIV/AIDS virus can be healed if such a person had sexual intercourse with a minor or a virgin. This is the advice that these people with HIV /AIDS are given by traditional healers. When arrested and charged for defilement this is the defence that they give. In actual fact no one has truly proved that this is a cure.

The lawmakers have recognized this defect and in the amended section 138(3) they try to remake this verse. It provides as follows;

Any person who prescribes the defilement of a child as a
Cure for an ailment commits a felony and is liable, upon
Conviction, to imprisonment for a term of not less than
Fourteen years and may be liable to imprisonment for life.

Poverty

Zambia remains one of the poorest countries in the world and it is ranked number one hundred and sixty-six (166) out of the one hundred and seventy-seven (177) countries.³⁴

Poverty is mainly linked to low levels of productive assets coupled with low and uncertain return these assets, which in turn leads to high volatility of income and increased vulnerability, particularly among rural households and poor urban households.³⁵ The study suggests that the solutions are to be found in expanding economic opportunities for the poor and through board measures that improve the investment climate for private sector led growth, provision of tools to ensure a more active participation, by the poor in market led growth, reducing the vulnerable of the poor and risk and, finally through improved governance.³⁶ The future is bleak for the people caught up in the poverty trap. Job prospects show no sign of improvement. Therefore the poor tend to direct their frustration on unsuspecting young girls.

Further poverty has caused main young girls to engage themselves in premature sexual intercourse with adults as a way of earning a living. This is because most of their parents are unemployed and they are unable to provide the basic needs for their children. Because of poverty the poor rarely have the money need to keep their children in school. Thus main drop out and go into the streets where the also engage themselves in premature sexual intercourse.

Law Enforcement

³⁴ Embassy of Sweden annual country report

³⁵ ibid

³⁶ ibid.

The development of crime cannot be viewed adequately without considering the position of the Zambia Police service. There has long been a crisis of confidence on the part of the public as to ability of the police to deal with defilement cases and other crimes. Some people view the police viewed with suspicion as being corrupt and unable to effectively deal with the crime. There is no doubt that the performance of the police has left a lot to be desired, because of the many offences remaining unsatisfied. The can be attributed to the fact that the police are not properly trained to effective prevent defilement. The police only concentrate on the after-math of defilement. This is contrary to their primary objective, which is to prevent crime.

In order to effectively deal defilement cases and other related child affected offences; government has opened the Child Protection Unit (CPU) under the Ministry of Community and social development run by officers from the Zambia Police Service, Victim Support Unit. The majority of the members of the public do not know this Unit. This is a mere duplication of work and a worst of resources, which could have been used to improve the service in the Victim Support Unit.

Decay of morals in society

With the advent of satellite television people in our society have stated coping what they see on television. Social morals have eroded because of the assimilation of western culture. People's dressing and social behaviour has changed. A child was valued as everyone's child but this is no longer the case.

IGNORANCE OF LAW CONCERNING DEFILEMENT

According to the Coordinator, Victim Support Unit of the Zambia Police service many people lack knowledge on defilement. For young men, they go to an extent of claiming

that the girl is their girlfriend. Some men arrested have claimed that they did not know that having sex with a girl below sixteen years is an offence. However, ignorance of law is no defence as is provided by section 7 of the Penal Code. Section 7 provides as follows:

“Ignorance of law the law does not afford any excuse for any act or Omission, which would otherwise constitute an offence unless Knowledge of the law by the offender is expressly declared to be an Element of the offence.”

LACK OF KNOWLEDGE OF THE LAW BY GIRLS

The co-coordinator also observed that many girls under sixteen years do know that law protects them against sexual abuse. As such, they should not entertain any form of sexual intercourse.

PEER PRESSURE AMONG GIRLS

The majority of some girls may know that the law protects them from sexual abuse. However because of peer pressure the have resorted to premature sexual intercourse as sign of what they term modernity. Those that are not engaging themselves in sexual intercourse are considered to be old fashioned.

LACK OF RESPECT FOR VIRGINITY

According to some elderly people interviewed they attribute the increase in the number of defilement cases to the fact that society has lost respect for virginity, making many girls to have sex in the early days of their youth. If virginity is respected, girls will keep it for a longer time.

INTOXIATION

According to the research conducted by the Zambia Police Victim support Unit, most of the people that commit the offence are found to be drunk at the time of committing the offence. This is because most of them are unemployed and spend most of their time drinking. And most of them claim that they were drunk and did not know what they were doing.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

Conclusion

The fact that there has been a spate of defilement incidences across the length and breadth of this country is incontrovertible. A sense of desperation was discernable from the many attempts by all concerned Zambians to address the plight of children. Some had called for the revision of the law to provide for the stiffer punishment. Others even called for revision of the castration of the offenders to deter other would be defilers. Indeed the law was amended as in 2005 by parliament by ACT NO. 15 OF 2005, which was assented to by the President on the 28th of September 2005.

The focus of this paper has been to analyze the adequacy of the law to end the scourge of defilement. In this part of the essay, making general observation on the research findings will summarize the findings from the research. Further, the possible way to effectively deal with defilement cases and there by reduce it will be discussed by way of recommendations.

THE CURRENT LAW OF DEFILEMENT

The research analyses revealed that the law of defilement in Zambia can be traced back to 1941 when the penal code was first introduced by the British who were the colonial masters at the time. The analysis further revealed that there has been no much difference between the new section 138 and the old section 1389. However, the new law has

introduced good provisions that can effectively curb the ever-increasing cases of defilement. The new law has addressed some issues that contribute to the increase of defilement. The analysis revealed that the new law of defilement consists of three ingredients that the prosecution has to prove beyond reasonable doubt;

(a) That a man had sexual intercourse with a child: proof of penetration is

Not vital as it now also encompasses both girls and boys.

(b) The sexual intercourse was unlawful

(c) That the boy or girl was below the age of sixteen.

It has been discovered that the new law does not provide a defence to an accused person. Even if the accused had a reasonable ground to believe that the child was above sixteen, the accused cannot advance those reasons. It has been also observed that Zambia is the first country in the region to do away with the statutory defence. The reason behind its removal being that defilers were relying too much on it, as such, some ended up being acquitted. The truth is that the provision was being abused not by the defilers but the prosecution who did not bother to verify the assertion by the accused. Every crime has a defence even murder, which carries a mandatory death sentence. Accordingly it is fair that defilement should have a defence.

Section 138(3) deals with those that prescribe the defilement of a child as a cure for an ailment. It criminalizes the procuring of defilement of the child. However the penal code does not define what an ailment is. According to the Oxford advanced learners

dictionary, an ailment is an illness that is not serious. Section 138 (3) simply talks about counselors and procures. For example, a traditional doctor who prescribes that for a man to become rich or be cured of HIV needs to have intercourse with a virgin less than sixteen years, is a counselor who planned the defilement to occur. This subsection has potential of bring problems because from the definition HIV is not covered, as it is serious illness contrary to oxford advanced learners dictionary. Further section 138(3) is a repetition of the law as counselors. Arbiters, aiders or abettors are dealt with section 21 of the principle penal code.

Section 138(4) provides for the counseling or community service to those between the age of twelve and sixteen convicted of defilement.

The law further has provided for a minimum fifteen years sentence to those convicted of defilement. This tends to over burden the already burdened High Court with cases as the magistrate has no jurisdiction to sentence the accused to any sentence beyond nine years. This has resulted in the accused persons languishing in prisons for a long time before after being committed to the High Court.

It was further discovered the new law is in line with international convention on the rights of children (CRC). The international convention on the rights of children (CRC) is regarded as the most catalogues of children's rights ever made and the first to give such rights the force of law. This makes the convention generally acceptable as paramount in establishing international standards on the protection of children's rights.

It was observed that in Zambia the occurrence of defilement is alarming and it has been observed from the research that it is mostly perpetrated by people who are close to the child such as the biological fathers, step fathers, uncles, brothers, teachers, clergymen and other family members. In rare circumstances strangers abuse them. Most often than not the sexual abuse is preceded by threats, gifts, bribes, physical force and tricks.

The cases of defilement have continued in the wake of heavy deterrent sentences.

Therefore the law on its own is inadequate to curb the ever-increasing cases of defilement. Rather than devoting all attention on punishment which is an after the fact all concerned persons should also look at solutions before the fact. This will necessarily call in question the causes of as stated under chapter four.

Recommendations

It is the **recommendation** of this essay that the procedural law must be changed. According to the criminal procedure code, subordinate courts that are resident magistrate can only impose a maximum sentence of nine years. Beyond that, the case has to be submitted to the High Court for a higher sentence. In this vain the recommendation of this essay that the powers of the magistrate should be increased so that no limitation the sentence which the court can impose or the number of years that the magistrate should be capable of imposing should be increased to about fifteen years. This limitation has an effect of taking long for the cases to be heard before the High Court considering that we have the country has a limited number of High Courts.

Further, the law still continues to only concern itself with ‘unlawful’ sexual intercourse. It is the **recommendation** of this essay that the ‘unlawful’ should be removed from the law. Unlawful means illegal. Therefore a man having sex with a girl to whom he is married to be not unlawful if they are married under customary law. In the 21st century the law should not still permit marriages of girl below sixteen years as it tends to disadvantage children in terms of school as they will have to pull out of school.

The law alone will not be able to end the scourge of defilement. Preventive measures need to be employed rather than concentrating on punishing the accused. Awareness campaigns are admittedly a useful tool that society can use to prevent the commission of defilement. When potential victims are armed with information they may be able to avoid circumstances likely to attract prospective defilers. It is the recommendation of this essay that awareness campaigns should be vigorously employed in order to equip the victims of defilement as well as the potential defilers.

It is important to note that in defilement cases, the accused person is at the mercy of complainant. Should the complainant have mercy, the case can be withdrawn from the police at no cost at all. The law allows withdrawal of the cases from the police as long as there is a reason to do so, even if the reason is vague. It is the **recommendation** of this essay that the complainants should have not powers to withdraw cases from the police. These withdrawals are done mostly because those who perpetrate this crime are close relative to the victim. They are done to protect the interest of the family in the name of reconciliation at the expense of the interest of the child

There have been concerns raised by the concerned citizens and non-governmental organizations as regards efficiency by the prosecution. It is **the recommendation** of this

essay that there should be specific prosecutors who should prosecute defilement cases in order to promote efficiency. This should extend to magistrates as well.

BIBLIOGRAPHY

Cross and Jones (1988), Criminal Law, 6th edition, London: Oxford.

Chard J (1994), **Philosophy of law**, 4ed. London, university Press

Daka, J (2005) Sexual offences and how to deal with them, Lusaka: Mission Press.

Elias, T.O. (1962) The Nature of African Customary Law, London: Manchester University Press.

Hartchard and Ndulo. (1994). Readings in Criminal Law and Criminology in Zambia, Lusaka: Zambia.

Henry Campbell, (1968). Criminal law 4th edition. London, Edward Arnold

Kulusika s. (2006) Text, cases and materials on criminal law in Zambia, Lusaka: UNZA Press

Smith, J.S, (1987). Justification and Excuse in criminal law. London: Steven & sons

OTHER MATERIALS USED

Police Victim Support Unit monthly report.

Embassy of Sweden- Annual country report.

Oxford dictionary

Mabbolobbolo I (2004) legality journal. The law on defilement. Lusaka, UNZA

YWCA annual boliten. 2006

The Post Newspaper, Thursday August 7, 2008

Table of statutes

Criminal Procedure Code, Chapter 88 of the laws of Zambia.

Penal Code, Chapter 88 of the laws of Zambia.

Subordinate Act, Chapter 2 of the laws of Zambia.

Juvenile Act, Chapter 284 of the laws of Zambia.

Table of cases

Ackson Banda v The people (1974) 392

D (A juvenile) v R

Emmanuel Phiri v The people (1967) ZR 311

Henry Njobvu v The people-unreported

Kalasa Mvula v R (1945) 5 NRLR

Kalebu Banda v The people (1972) ZR 264

Kapewpwe v the Queen (1949-54) NRLR

Phiri v The people (1963) R AND N

The people v Hara Stephen 2000 High Court case HJ/07/2004

Nsofu v The people (1973) Supreme Court of Zambia

Nosokolo v The people (1972) ZR 125

R v Chinjamba (1949-54) 5 NRLR

R v Njoni (1963) R and N LR

Sibande v The people (1975) ZR 101 (SC)

Willams v R (1923) 1 KB 34