

CRISIS OF THE GIRL CHILD'S RIGHTS: VICTIMS OF DEFILEMENT AND THE ZAMBIAN COURTS

BY

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**A dissertation submitted to the University of Zambia in Fulfillment of the
requirements for the degree of Masters in Human Rights Law**

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ABSTRACT

Crisis of The Girl Child's Rights: Victims of Defilement and the Zambian Courts

Defilement of female children is prevalent all over Zambia. Statistics show that due to widespread concern, the number of reported cases has increased over the years. However, the increased reporting has not translated into increased numbers of conviction of perpetrators of defilement. Previous research on the issue of defilement indicates that the problem is partially attributable to the difficulty of discharging the burden of proof under the stringent laws applicable in such prosecutions.

This dissertation is therefore a socio-legal investigation based on child rights concepts and their application in the courts of law. By employing a qualitative methodology and drawing on data from both desk research and field work, the study provides an enlightening review of the psychology of child witnesses and how its exclusion in the treatment of child witnesses results in a devaluing of their testimony due to the legal process during trial. Having highlighted the difficulties the child witness encounters during trial and the challenge faced by the courts, the dissertation then discusses the child witness with a view to understanding the child's ability to recall an event and communicate that information. Therefore, it is shown that with age appropriate questions and when required to freely recall or communicate an event, children are good and credible witnesses.

The dissertation makes a number of important findings including showing the imbalance in the rights of child victims of defilement vis-à-vis the rights of alleged perpetrators. It thereby challenges the constitutionality of section 122 of the Juveniles Act which provides that a child must either testify on oath and be subjected to vigorous cross examination by an experienced lawyer or by the perpetrator as the case may be or be, denied an opportunity to speak. It highlights the inconsistencies in the children's testimonies that come about as a result of the vigorous cross examination and the effects of the said inconsistencies on the decision of the court and credibility assessment of the witness. It further highlights the difficulties that courts face in trying to not only obtain cogent evidence from the child victim but to also have that evidence corroborated to levels that will satisfy the requirements of the criminal justice system.

The dissertation concludes by recommending the adoption of more scientific based sources of evidence such as DNA testing, as well as the repeal of section 122 of the Juveniles Act. This dissertation contributes to the growing literature and jurisprudence on the girl child's defilement crisis by examining in-depth the law and practice in the courts relating to the treatment of the evidence of child victims of defilement and the requirement as a matter of law for its corroboration. Such in-depth analysis necessitated going beyond the black letter law.

DEDICATION

I WISH TO DEDICATE THIS DISSERTATION TO:

My dearest sons **Aaron, Joshua** and **Nathanael**; and daughters **Jane** and **Achazia** I am thanking you again for your patience whenever I was busy with this work. Am saying to you, “this is a step I have set for you.” It is my prayer that you emulate my efforts and achieve more than I have. My children, life without education and hard work is a struggle and unbearable. I am confident that with God and this counsel I have given you, you will reach greater heights. Surely goodness and mercy shall follow you all the days of your life and you shall dwell in the presence of the Lord for ever and ever amen. Psalms 23:6. With God all things are possible. Go out there and achieve in Jesus’ name.

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First and foremost I thank God for the gift of life without which I could not have seen this work to completion.

I would like to express my gratitude to my supervisor Prof. Margaret Munalula on her commitment and encouragement that kept pushing me to ensure that I concluded my work. The time it has taken me to conclude this work was no fault of hers. I take full responsibility.

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To my dear husband Hector Chilembo: I appreciate your understanding, support and endurance through-out the period of my research for this dissertation. I did not give you and our dearest children the best of me as I had focused on the completion of this dissertation, yet you did not complain. I say thank you.

To my dearest parents Bishop George Mbambi and Pastor Josephine Mbambi not forgetting my only sister Charity Mbambi: you have been so wonderful. Words are not enough to express my gratitude. I cannot imagine life without you, great people. I am blessed to have you.

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The Penal Code, Chapter 87 of the Laws of Zambia
The Constitution of Zambia (Amendment) Act No. 2 of 2016
Penal Code (Amendment) Act No. 15 of 2005
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INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights (ACHPR) Adopted in Nairobi June 27, 1981, entered into force 21 October, 1986 – Regional Instrument
African Charter on the Rights and Welfare of the Child
Convention on the Rights of the Child (CRC) Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entered into force 2 September, 1990, in accordance with Article 49
International Convention on Civil and Political Rights (ICCPR) Adopted and opened for signature, ratification and Accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49
Universal Declaration of Human Rights (UDHR) Adopted by General Assembly Resolution 217A (III) of 10 December 1948
United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) Adopted by General Assembly Resolution 40/33 of 29 November, 1985, 96th plenary meeting

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AIDS	Acquired Immune Deficiency Syndrome
ARRS	Arrest Reception and Referral Services
AU	African Union
BEIJING RULES	United Nations Standard Minimum Rules for Administration of Juvenile Justice
CESCR	Economic, Social and Cultural Rights
CJF	Child Justice Forum
CRC	Convention on the Rights of the Child
DFID	Department for International Development
DNA	Deoxyribonucleicacid
HIV	Human Immuno-deficiency Virus
ICCPR	International Convention on Civil and Political Rights
JDLs	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
OAU	Organisation of African Unity
RIYADH GUIDELINES	United Nations Guidelines for the Prevention of Juvenile Delinquency
SVA	Statement Validity Analysis
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children’s Fund
VSU	Victim Support Unit
WHO	World Health Organisation
YWCA	Young Women Christian Association
ZLDC	Zambia Law Development Commission
ZPD	Zone of Proximal Development
ZP	Zambia Police Service

CHAPTER ONE

OVERVIEW OF THE STUDY

1.0 INTRODUCTION

This dissertation analyses the law on defilement to ascertain whether the law coupled with procedures applied during trial uphold the rights of girl children who are victims of defilement, especially in instances where a child gives sworn testimony and inconsistencies arise. Therefore, the dissertation will analyse how inconsistencies in the testimony of child witnesses are interpreted by the court in view of psycho-social perspective on child development

The dissertation has a bias towards the girl child because the majority of the victims are young girls. This position is supported by the case of *Charity Mulenga v The People*¹ in which the victim was a young boy. The accused was convicted and sentenced. On appeal to the Supreme Court, the sentence slapped on the convict by the High Court was reduced because according to the Supreme Court, defilement on a boy child is not prevalent in Zambia.

1.1 ABOUT THE STUDY

This is a socio-legal study of the manner in which the courts in Zambia handle cases of defilement of girl children. In Zambia, defilement is a criminal offence. The study considers defilement as a violation of a girl child's rights. The violation relates to the right not to be discriminated against and the right to be protected from sexual exploitation, the right to equality before the law and the right to freedom of speech as manifest in the child's ability to testify in

¹ SCZ Appeal No. 41/2007.

court. Therefore, the study will look at the law on defilement and its impact on child witnesses. The girl child witness is discussed in detail in relation to her abilities and limitations as a witness. Child witnesses are often viewed as inconsistent and incoherent in their testimony. Thus, the dissertation will look at how courts interpret such inconsistencies and the effect of the inconsistencies on the outcome of the case. Therefore, the study assesses both the content of the law on defilement and its application in the Courts. Of particular importance is the non consideration in this process of the child's psychology as the child goes through various stages of development.

The study is presented in six chapters. The first chapter provides the background to the study, the statement of the problem, objectives of the research and the methodological considerations used in answering the questions. The rights of the child as provided in international instruments and the implementation and domestication of the Convention on the Rights of the Child in Zambia will be addressed in the next chapter. The rights under discussion are with a bias to children's rights in sexual offences, or defilement to be specific, where discrimination against the girl child is evident in the disregard of her rights as a victim. The chapter pays particular attention to the implementation of the Convention on the Rights of the Child in Zambia.

The third chapter critically analyses the Zambian law in defilement cases. It discusses the Constitution as a grund norm as well as statutes on criminal law such as the Penal Code and the Juveniles Act. Chapter four sets out and analyses primary data in relation to the challenges courts and prosecutors encounter in defilement cases by highlighting the challenges the Penal Code and Juveniles Act have posed to the courts in dispensing justice in defilement cases. Further, this chapter seeks to show the strides the judiciary has made in ensuring that more

convictions are secured by relaxing the rules on corroboration and how this has not translated to high conviction rates in defilement cases.

Chapter five analyses the child witness. It looks at the child witness with regard to her ability to recall an event and be able to communicate that information in a manner that can be understood by the courts. This chapter is of importance in that it shows that child witnesses are as credible as the adults but for their limited vocabulary in communicating or passing information to the court. This chapter also focusses on the Zambian courts with regard to how they interpret the inconsistencies in the evidence of child witnesses that arise in cross examination. The chapter shows that when young children are inconsistent or incoherent in their testimony, it is viewed as an indicator of false testimony rather than an indicator of truth. Further, the inconsistencies in the child's testimony and demeanour that the child is not a credible witness have the potential to destroy the case for the prosecution, thereby affecting the outcome of the case. The last chapter consolidates the observations of the study, draws conclusions and makes recommendations.

1.2 BACKGROUND

Children's rights are everywhere an important part of the human rights agenda. Like adults, children have rights which require upholding and protecting for them to become mature responsible adults. One such right is protection from sexual exploitation, in this case, protection from being defiled. With regard to protection of children from sexual abuse, Zambian law has undergone various reforms some of which are aimed at ensuring that children's rights are protected and enforced by the courts of law.

Prior to the year 1998, there were no accessible statistics on cases of defilement reported to the police. By the year 2004, there were 1375 reported cases; while in 2005, the reported cases

drastically reduced to 132.² It is important to note that in the year 2005, the Penal Code was amended by Act No. 15 of 2005 which introduced the minimum mandatory sentence of 15 years on those convicted of defilement. However, in the year 2006, the number sharply rose to a colossal 2668. In 2008, the number of reported cases was at 1224. Of the 1224 cases, 516 were taken to court. Of these, there were only 150 convictions.³ In the year 2013, there were 2234 reported cases. Of these, 1050 cases were taken to court and out of which there were 292 convictions and 40 acquittals while 30 cases were withdrawn. The cases pending before the court were 578 while 109 cases were withdrawn at the police station.⁴

In Zambia, oftentimes defilement occurs where children are more vulnerable to the adults in a position of power and authority over them. Children's rights activism in the country eventually led to a sharp rise in the number of defilement cases which were reported and prosecuted. Due to the increase in the reported cases of defiled children, most of whom were girls, the law on defilement was enacted.

According to Munsaka and Matafwali, in African countries including Zambia, sexual abuse has been found to be exacerbated by social conditions that increase chances of children falling victim; that is, patriarchal system which promotes male dominance over the females. Due to the patriarchal system, many men feel they have the right to sexual dominance over women and girls.⁵

² Zambia Police Service, Gender Based Violence; Victim Support Unit Experience, Printed in 2014 with support from UNICEF, P. 101 - 109 / National Gender Based Crime Statistics for the year 1998 – 2011 by Zambia Police Service, Victim Support Unit.

³ Zambia Police Service, Gender Based Violence; Victim Support Unit Experience.

⁴ National Gender Based Crime Statistics for the year 2013 by Zambia Police Service, Victim Support Unit.

⁵ Ecloss Munsaka and Beatrice Matafwali, *Human Development from Conception to Adolescence: Typical and Atypical Trend* (Lusaka: UNZA Press, 2013), p. 151.

1.3 STATEMENT OF THE PROBLEM

Defilement is a specific violation of the child's right to be protected from sexual exploitation. To protect this right, the law creates the offence of defilement under the Penal Code.⁶ According to the Penal Code, defilement is committed when sexual intercourse takes place with a child below the age of 16 years. In upholding children's rights, the court has a mandate to ensure that perpetrators of defilement are incarcerated. To do so, the court has to apply the laws and procedures as provided in our statute books. However, the court's ability to perform this functions is hampered by the inadequacy of the law with regard to the following: Firstly, the law does not allow reception of unsworn testimony and forces a very young child to give sworn testimony. The child faces challenges in testifying due to incapacity to give coherent testimony to the court.

Secondly, the law does not appear to balance the rights of both victims and offenders in such cases with more protection being provided to the latter. Thirdly, the offence is not only proven by the victim's testimony but also by corroborative evidence. Fourthly, the law provides for a subjective test – it provides a defence to the perpetrator arising from his perception of the victim's age. Fifthly, the law does not provide a specific procedural and interpretational guide to be adopted by courts when handling defilement cases and/or victims. As a result of all these limitations, there are many acquittals in the courts.

Although the problems are interrelated, the focus of this research is on the law, the court and the child as a witness. The law is not alive to the child's mental, psychological and language development. There is a gap between law and reality due to the failure to problematise the issue

⁶ Section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia.

of child witnesses which is brought out by psycho-social approaches to the issue; hence prompting more useful interpretations of the law by the courts. This research is intended to fill this gap.

1.4 OBJECTIVES OF THE RESEARCH

The main objective of the research is to investigate how courts are handling the evidence of child victims in defilement cases in their mandate to protect the girl child from being defiled.

The Specific Objectives are:

1. To analyse the law on child witness testimony in cases of defilement in Zambia;
2. To analyse how Zambian courts are handling child witness' testimony in defilement cases; and
3. To analyse child witness testimony in defilement cases supported by psycho-social perspective on child development.

1.5 RESEARCH QUESTIONS

2. In what ways does the law on defilement fall short of providing an effective framework for child witness testimony in defilement cases?
3. What specific challenges do the courts face in convicting suspected perpetrators of defilement?
4. How can the child rights perspective equip the courts to better handle the testimony of the child witness?
5. What psycho-social perspectives of child development and scientific measures can enhance the content and application of the law to better protect girl children from defilement?

1.6 LITERATURE REVIEW

A number of articles have been written on children's rights at international level, regional level and domestic level. In a book chapter titled 'Developing Rights of the Girl Child in International Law' regarding the rights of a girl child and her position in international law, Cohen states that a child is not to be thought of as "pre-human."⁷ This would not be in keeping with evolving international child rights norms which assert that the child is not to be a "pre-human" being but rather that childhood is simply part of every human being's continuum of development.

In the book, Cohen examines the history of international recognition of the rights of the girl child as being linked to the developments recognising human rights in general including the notion that the child as a human being can also be a holder of rights. This however was a new perspective regarding children. Before this new perspective, 'the young child was a sort of pet, a little monkey without shame, to entertain people ... The general rule of that time must have been: "a child can do nothing and therefore is nothing."⁸ Cohen also looked at the Declaration of Geneva.⁹ The Declaration perpetuated the prevailing view at the time of the child as object, not person.

The Declaration of Geneva was eventually followed by the Convention on the Rights of the Child (CRC) passed by the United Nations General Assembly. Cohen observed that the CRC gives legally binding recognition to the child's human dignity by also recognising the child's rights of individual personality including such rights as the right to be heard. The CRC protects the child from discrimination as well as ensuring the child's survival and development and the

⁷ Cynthia, P. Cohen, *Women and International Human Rights Law (Vol. 3)* (Ardsey: Transnational Publishers, 1998), p. 200.

⁸ Cohen, *Women and International Human Rights Law*, p. 201.

⁹ Declaration of Geneva, Adopted by the League of Nations, March 1924.

child's best interest. It protects the child from neglect and abuse, from economic and sexual exploitation, from trafficking and drug abuse and provides for foster care and adoption.

Cohen's views are that children regardless of jurisdiction are like their adult counterparts, holders of human rights which require protection by State machinery. Therefore, to be able to protect the rights of children, States need to formulate laws and procedures that will ensure the protection of children's rights possible.

This dissertation is distinguishable from Cohen's views in that while Cohen looks at children's rights in general as provided in the CRC, this dissertation narrows down to the rights of the child in relation to defilement under domestic law. The book by Cohen is however, necessary to this dissertation in that it gives an insight to the developments that resulted in the recognition of children as holders of rights.

In a dissertation by Wilhelmsson, human rights were defined as universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. Some of the most important characteristics of human rights are that they are guaranteed by international standards, legally protected, focus on the dignity of the human being, oblige States and State actors, cannot be waived or taken away, are interdependent and interrelated, and universal. According to Wilhelmsson, all children and adolescents should have the means and the opportunity to develop to their full potential. Wilhelmsson states that life, survival, maximum development, access to health and access to health services are not just basic needs of children and adolescents but are also fundamental human rights. However, the protection and fulfilment of these fundamental rights depend on the realisation of other rights such as the right to non-discrimination; education and access to appropriate

information; privacy and confidentiality; protection from all forms of violence; rest, leisure and play; an adequate standard of living; freedom from all forms of exploitation and participation, including the right to be heard.¹⁰

Regarding defilement of the girl child, Wilhelmsson states that non-consensual sex has medical consequences such as injuries on the sexual organs, which can lead to a greater risk acquiring an STI or even HIV. And if the sexual intercourse should lead to a pregnancy for a girl means either giving birth to a baby or have an illegal abortion, which both can be life threatening for the young girl. In the final analysis non-consensual sex usually is a very traumatic experience for the girl and can do great harm to her physical health and sexual function.¹¹

Wilhelmsson also highlights psychosocial consequences for the girl when she is defiled. One of the most important reasons the girls do not tell anyone about the defilement is because she is afraid to be stigmatised. If the information comes out, she can unfortunately be suffering the consequences for the rest of her life. Other pupils at the school can torture her for what she has been through and if she gets pregnant, in most cases, she drops out of school or she might even be excluded from school. Many families try to solve this problem by letting their daughter change school, but sometimes the rumour reaches the new school before she gets there herself. There can be problems with getting married if the girl is not a virgin, which can make the parents to force their daughter into marriage with the man who defiled her. After being defiled the lust

¹⁰Tina Wilhelmsson, What about the Law? A case study of the protective structures concerning young girls sexual and reproductive health and rights in Mbarara, Uganda, 2004, <http://www.lup.lub.lu.se/student.papers/record>, Accessed on May 2, 2017.

¹¹ Tina Wilhelmsson, What about the Law, Accessed on May 2, 2017.

and the passion for sexual intercourse can be ruined and sexual dysfunction is a common issue for defiled girls.¹²

The work by Wilhelmsson is distinguishable from this dissertation in that Wilhelmsson looks at human rights in general as well as the physical, social and emotional effects of defilement on the girl child. This dissertation looks at defilement as a human rights violation and interventions put in place to curb the vice.

The Report by Save the Children,¹³ (hereinafter referred to as the Report) is mainly an analysis to gain a comprehensive understanding based on available data of the situation of children in Zambia, it focused on non-fulfilment and violation of children's rights as formulated in the CRC. Among the forms of child abuse identified in the Report, is the issue of child sexual abuse. In the Report interviews were conducted with people working on child sexual abuses such as Young Women Christian Association (YWCA) and the Victim Support Unit (VSU) confirmed that the majority of sexual abuse cases concern girls. Girls, particularly orphans, are more likely to be taken in by relatives than boys. In this environment girls are vulnerable to sexual abuse and incest.

The Report shows that an alarming and apparently increasing number of sexual abuses against children come from members of their own families, for example, abuse by uncles, stepfathers, cousins and brothers. However, these abuses are often hidden by the family. Orphans in particular, who are cared for by relatives, are aware of their dependency and fear the loss of support or rejection if they reveal that they are abused. Girls who try to tell other family

¹² Tina Wilhelmsson, What about the Law, Accessed on May 2, 2017.

¹³ Ward, P, Mutengo Consulting, Gwaba, R.G., *Children's Rights in Zambia (A Situation Analysis)*, Save the Children, June, 2006.

members about incest or defilement are often silenced and told not to bring shame on the family. Thus, shame and stigma are also serious constraints to reporting sexual abuse. The Report recognises that one of the key problems in this area is the failure of the criminal justice system to deal appropriately with complaints of child sexual abuse.

The Report referred to a study by the Human Rights Watch regarding sexual abuse of girls which revealed several barriers to effective reporting and prosecution of crimes of sexual assault. For orphaned girls abused by men who are meant to be their guardians, reporting abuse may mean risking abandonment or violent punishment. In other cases, victimised girls remain silent in the face of legal and social service systems that fail to act to protect girls' rights. To report a crime of sexual violence or abuse, a girl must face a police department that is rarely child or gender sensitive, health service providers that may scold the girl for being promiscuous, a court system with limited facilities for youth and a societal structure that teaches girls to be submissive to men. From the past incidents, it appears that even if the abuse is reported, official action against the abuser would be minimal, leaving the perpetrator free to abuse again.

It is stated in the Report that the obligation of all States around the world is to ensure that children's right to life free from violence is protected which also extends into the private life and home of the child. The Report shows that in Zambia, children are sexually abused with girls at greater risk. This Report however, does not discuss the girl victims as witnesses in the courts of law. As such, it does not bring out the difficulties child witnesses face in Zambian courts or the challenges the trial magistrates encounter as they hear defilement cases. This is the distinction between the Report and this dissertation.

Herring defines sexual offence and sexual violence. On one hand, sexual offence is defined as offences which appear to involve a sexual motivation against the victims.¹⁴ Sexual violence on the other hand is defined as the use of sexual contact by one person to another against his or her will and may include such acts as forced penetration of the vagina or anus or penis or other object to touch the perineum including the penis, vagina or anus or penis or oral sex (placing the mouth or tongue on a person's vagina, penis or anus), rubbing of a penis, hand or other object against another's perineum and performing sexual acts with an animal.¹⁵

In his work, Herring does not discuss defilement as envisaged in the *Zambian law*. Herring's work is however relevant to this dissertation considering that the focus of this dissertation is sexual assault against the girl child as a form of human rights violation.

Clarkson and Keating address various forms of sexual violence against women such as rape, indecent assault and defilement,¹⁶ the latter being the most relevant to this research. Defilement is defined as unlawful carnal knowledge of a child below the age of 16 years.¹⁷ The consent of the victim is immaterial.¹⁸ In other ways of defining defilement, Kulusika describes it as 'a deliberate, criminal and sexual assault violative of the victims' integrity who is under 16 years of age, thereby depriving her of her chastity, in cases involving virgins or otherwise self-esteem, and inflicting serious physical and psychological injuries on her.'¹⁹ Carnal Knowledge is defined by the Court in the case of *Papadimitropoulos v R*²⁰ as the physical act of penetration which is

¹⁴ Jonathan Herring, *Criminal Law* (New York: Palgrave Macmillan, 2005), p. 171.

¹⁵ Herring, *Criminal Law*, 2005, p.172.

¹⁶ Christopher M.V. Clarkson and Heather M. Keating, *Criminal Law, Text and Materials* (London: Sweet and Maxwell, 2003), p. 600.

¹⁷ Section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia.

¹⁸ Section 138 of the Penal Code, Chapter 87 of the laws of Zambia.

¹⁹ Simon E. Kulusika, *Text Cases and Materials in Criminal Law*, (Lusaka, UNZA Press, 2006), p. 34.

²⁰ (1957) 98 CLR 249.

the entry of the penis into the vagina and the slightest degree is enough and where the penetration is *per vaginam* the hymen need not be broken.

In other jurisdictions, defilement is known as statutory rape. The phrase statutory rape is a term used to describe sexual activity where one participant is below the age required to legally consent to the behaviour. The age of the young participant is generally from 12 to 18 years.²¹ According to the Black's Law Dictionary, statutory rape is defined as unlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person's will. Generally, only an adult may be convicted of this crime. A person under the age of consent cannot be convicted.²² Although it usually refers to adults engaging in sex with minors under the age of consent, it is a generic term, and very few jurisdictions use the actual term 'statutory rape' in the language of statutes. Different jurisdictions use many different terms for the crime, such as 'sexual assault,' 'rape of a child,' 'corruption of a minor,' 'carnal knowledge of a minor,' 'unlawful carnal knowledge,' or simply 'carnal knowledge.'²³

In jurisdictions such as California, Maryland, Missouri, Nevada, and New York in the United States of America, do not refer specifically to statutory rape; instead they use designations such as sexual assault and sexual abuse to identify prohibited activity. Regardless of the designation, these crimes are based on the premise that until a person reaches a certain age, she is legally incapable of consenting to sexual intercourse. Thus, instead of including force as a criminal element, these crimes make it illegal for anyone to engage in sexual intercourse with anyone

²¹ Sylvana Tomaselli, Statutory rape, <http://www.answers.com/topic/rape>, Accessed on September 17, 2014.

²² Bryan A. Garner, Black's Law Dictionary (9th Ed), West Publishing Co. Dallas, Texas, April 2009, p. 1374.

²³ Garner, Black's Law Dictionary, p.1375.

below a certain age, other than his spouse. The age of consent varies by State, with most States ranges from ages 14 to 18.²⁴

In her Obligatory Essay, Sithole addresses the issue of corroboration in defilement cases and states that corroboration is one of the key common law doctrines that govern the rules of evidence.²⁵ She describes corroboration as independent evidence to show that not only did the offence occur but that it was committed by the accused and she cited the case of *Emmanuel Phiri v The People*.²⁶ She states that the above case stresses the need for corroboration and that a medical report alone is not sufficient to amount to corroboration in that the doctor's medical report only proves occurrence of defilement but not the identity of the offender. The requirement for corroboration was espoused in the case of *Tembo v The People*²⁷ wherein the court stated that caution should be exercised in trying all charges involving sexual offences where the only evidence against the accused is the uncorroborated testimony of the complainant.

Despite corroboration being a requirement, Sithole notes that in Zambia there is currently no DNA testing of the offender. Moreover, there is no statutory provision to compel the offender to undergo DNA test for the purpose of linking him/her to the crime.²⁸ With regard to evidence required in a defilement case, Sithole observes that defilement cases by their very nature involve few witnesses, the child victim being the key witness. Therefore, the conviction does to a certain extent depend on the veracity of the evidence to be provided by the child witness.

²⁴ Sandra Norman, Statutory Rape Laws by State, OLR Research Report, <http://www.ageofconsent.net>, Accessed on May 2, 2017.

²⁵ Naomi Sithole, "An Analysis of the Trial and Procedure of Defilement cases in Zambia" (Undergraduate dissertation, University of Zambia, 2010), p. 24.

²⁶ (1982) Z.R. 77.

²⁷ (1966) Z.R. 126.

²⁸ Sithole, *An Analysis of the Trial Procedure*, p. 18.

Sithole further observes that in Zambia however, courts treat evidence of a child with caution, hence the need to establish whether the child witness understands the nature of an oath in order to adduce sworn testimony.²⁹ If the child does not understand the nature of an oath but possesses sufficient intelligence to give an unsworn testimony, then the child is not sworn but gives unsworn testimony.³⁰ Sithole observes that according to case law, this position was confirmed in the case of *Muwowo v The People*,³¹ wherein the Judges rejected the evidence of a 12 year old for failure by the trial magistrate to conduct a *voire dire* on the child.³² It has become settled practice that any child below the age of 14 years should go through a *voire dire* before giving evidence. The competence of a child witness and the requirement to examine a child witness through a *voire dire* is provided for under section 122(1) of the Juveniles Act. The proviso to Section 122(1) of the Juveniles Act provides 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.

According to Sithole the above approach would balance the interest of the child and indeed that of the accused. However, this emphasis on corroboration has seen some injustice being done where the testimony of two or more children is treated as suspect and rejected if uncorroborated.³³ Thus, in *R v J*,³⁴ it was alleged that the accused had indecently assaulted a four year old child. The child gave evidence. Her elder sister aged 8 also gave evidence that she

²⁹Sithole, *An Analysis of the Trial Procedure*, p. 21.

³⁰ The Magistrate hence must conduct a *voire dire* to determine whether the child should give sworn testimony or unsworn testimony.

³¹ (1969) Z.R. 67.

³² Sithole, *An Analysis of the Trial Procedure*, p. 22.

³³ Sithole, *An Analysis of the Trial Procedure*, p. 23.

³⁴ (1966) 1 SA 88 (SR).

looked through the window and witnessed the assault. The older sister's evidence supported that of the complainant's in all respects yet the Appeal Court found that the State's case depended primarily on the evidence of the two girls and since children are imaginative and suggestible the conviction could not stand without corroboration.

Sithole further observes that the image of children as witnesses must be reconstructed. There is need to remove the assumption that children are unreliable and suggestible. This is for the simple reason that much as children may allow imagination to take them to places they have never been before, they are likely to be accurate about crimes committed on their person. There is no fixed rule as to when children grow out of this category. The evidence of children is always subject of doubt.³⁵

The essay by Sithole is different from this dissertation in that it focusses on whether corroboration should be retained or done away with considering that it is one of the factors that lead to high acquittal rate. Sithole's work also looks at the need for the trial court to conduct a *vire dire* on the child witness before receiving evidence of the child. This dissertation however, goes a step further by looking at the challenges a child witness encounters during trial in a defilement case in view of the recent amendment to the Juveniles Act by Amendment Act No. 3 of 2011 which has taken away the right of a child to give unsworn testimony. It is either the child gives sworn testimony or no evidence should be received at all by the court if it is not sworn. Further, this dissertation considers the inconsistencies in the testimony of child witnesses and the effect on the case.

³⁵ Sithole, *An Analysis of the Trial Procedure*, p. 25.

With regard to the Zambian court system there has been work done in that regard except it was in relation to Gender Bias in the Zambian courts after observing that there are more men than women on the bench.³⁶ The report on Gender Bias in the Zambian courts (hereinafter called the Report) states that gender biasness in the court system or institutions as observed today derives its roots from the moment society started differentiating roles between women and men. Such roles were defined according to societal beliefs and customs, which were usages or practices of society which became compulsory by adoption and acquiescence, and by long and unvarying habits.³⁷

Discrimination on the basis of gender comes in different forms such as cumbersome court procedures, content and effect of the law, and the manner in which these laws are interpreted. In the Zambian court system the application of customary law to suit modern times has worsened the situation. On the whole, gender biasness in the court system increases with the decreasing hierarchy of the court structure.³⁸

The Report covers, among others, the issue of rape of a woman by showing how the court is biased towards men. The aspect of biasness on the basis of gender becomes apparent when the law depicts a female as the only possible victim of rape. It further observes that under the Zambian law as it is presently, a woman can be raped by any man other than her husband. In concluding the report observes that such biasness is injustice to women and recommends review of the law on rape.³⁹

³⁶ Sampa A. Machina, H. Mosho, L. Mushota, L. Sichilombe, J, Gender Bias in the Zambian Court System, 1994.

³⁷ Sampa, Machina, Gender Bias, 1994, p. 10.

³⁸ Sampa, Machina, Gender Bias, p. 15.

³⁹ Sampa, Machina, Gender Bias, p. 17.

The Report is different from the dissertation in that it looks at gender bias on the bench generally and that there is discrimination in the procedures adopted in the courts, discrimination against women and girls in the way the law is applied. It does not discuss the child witness in a defilement case, the challenges the child faces and challenges of the court in the dispensation of justice which are the focus of this dissertation.

In his Obligatory Essay, Daka observes that there is a high prevalence of sexual violence in Zambia and argues that the existing laws are not adequate to curb the vice.⁴⁰ The weaknesses in the law are identified as stemming from the Constitution of Zambia and the Penal Code. Other deficiencies in the law identified by the study relate to the various procedural requirements that tend to work against the victims of sexual violence. Therefore, Daka states that existing law governing sexual violence does not provide adequate protection to the victims of sexual violence.⁴¹

Daka observes that the Penal Code criminalises all abuses associated with sexual violence. However, the reality of enforcement is entirely different because of bias against the victims, endemic problems of the criminal justice system, discrimination and other shortcomings in the delivery of justice.⁴² These problems often lead to failure to investigate, prosecute and punish the offenders. As a result the victims have little recourse to the justice system, while the perpetrators face little disincentive not to abuse again.⁴³

⁴⁰ Timothy Daka, “*The prevalence of Sexual Violence: are existing laws adequate to curb the vice?*” (Undergraduate dissertation, University of Zambia, Lusaka, 2010).

⁴¹ Daka, *The Prevalence of Sexual Violence*, p. 16.

⁴² Daka, *Sexual Violence*, p. 15.

⁴³ Daka, *Sexual Violence*, p. 16.

Daka states that the inadequacy of the law as regards sexual violence in Zambia is evident from the few numbers of convictions that are secured against sexual violence offenders.⁴⁴ This situation arises from a range of factors such as bias against the victims, procedural requirements under the law, delays and inefficiencies in the justice delivery system. Procedural requirements under the law in sexual offences such as rape, defilement and indecent assault have in some cases tended to provide more protection to the perpetrators than to the victims.⁴⁵

In the essay, Daka observes that most female victims know the perpetrators of sexual violence committed on their person. For instance, a research conducted by Zambia HIV Research Group found that over half of perpetrators of sexual violence were relatives of the victim or known individuals.⁴⁶

The work by Daka discusses various forms of sexual violence in Zambia, among others, indecent assault, sexual cleansing and defilement and their causes. In his work, Daka does not look at the amendments to the Penal Code and the Juveniles Act which were effected in 2011 while Daka's work was completed in 2010. Furthermore, it does not discuss the child as a witness. The focus of this dissertation is on defilement of girl children and the intervention of the law and the court to curb the vice. This dissertation also addresses the effect of the amendments in the law on the child witness' testimony and the imbalance in rights as challenges courts are encountering as a result of the changes in the law.

The Human Rights Watch Global Report on women's human rights indicate that trafficking of women and girls into forced prostitution and coerced marriage, in any given year, many

⁴⁴ Daka, *Sexual Violence*, p. 15.

⁴⁵ Daka, *Sexual Violence*, p. 16.

⁴⁶ Daka, *Sexual Violence*, p. 22.

thousands of young women and girls around the world are lured, abducted or sold into forced prostitution and involuntary marriage. They are bartered at prices that vary depending on their age, beauty and virginity, and exploited under conditions that amount to a modern form of slavery. Women and girls who have been trafficked can rarely escape or negotiate the conditions of their employment or marriage.⁴⁷

In countries where Human Rights Watch has investigated the problem of trafficking, it was found that many police officers and other local government officials facilitate and profit from the trade in women and girls for a price. They ignore abuses that occur in their jurisdictions, protect the traffickers, brothel owners, pimps, clients and buyers from arrest; and serve as enforcers, drivers and recruiters.

The Human Rights Watch states that the burgeoning trade in women and girls is on the supply side linked to adverse socioeconomic conditions in many regions which increase the likelihood that women and girls will be lured into forced prostitution or involuntary marriage. On the demand side, the investigation revealed that local demand for prostitutes or wives is at least as important as tourism, if not more so.

Additionally in countries such as Thailand and India, which have a high prevalence rate of the human immunodeficiency virus (HIV), the clients' fear of infection has led traffickers to recruit younger women and girls, sometimes as young as 10, from remote areas perceived to be unaffected by the acquired immunodeficiency syndrome (AIDS) pandemic in order to ensure their purity or virginity.

⁴⁷ Human Rights Watch, The Human Rights Watch Global Report on Women's Human Rights, Washington, New York, August, 1995.

The Human Rights Watch observed that although trafficking in women and girls has become a lucrative and expanding cross-border trade, it routinely escapes effective national and international sanctions. Trafficking for the purposes of forced prostitution has frequently been mischaracterised by governments and human rights organisations alike as a voluntary act, presuming that the women consent even when ample evidence exists to the contrary. Both forced prostitution and coerced marriage have largely been dismissed as offences perpetrated by private individuals for which States have no responsibility under international human rights law. In fact, governments do have specific international legal duties to take steps to eradicate trafficking and related abuses.

Trafficking in persons and related abuses are prohibited under international human rights law. Governments are specifically obliged to take appropriate steps to eradicate forced trafficking in persons, exploitation of prostitution, slavery-like practices, forced labour and coerced marriage. Despite these obligations, governments have allowed the practice of forced prostitution of women and girls to flourish.

The report by the Human Rights Watch is distinguished from this dissertation in that it looks at trafficking of women and girls for purposes of forced prostitution abated by domestic governments or machinery that are supposed to protect them. This report is however, relevant to this dissertation in that it shows the vulnerability of the girl child who in the face of sexual abuse, there is little or no protection for her rights.

In Muller *et al*, it is argued that children can be very good witnesses. Under chapter five headed ‘The Child as a Witness,’⁴⁸ the authors state that in order to remember an event, it requires

⁴⁸ Muller and Hollely, *Introducing the Child Witness*, Printridge, Port Elizabeth, September 2000, p. 195.

acquisition, storage, retention and retrieval of information. The ability, therefore to remember depends on the skill with which a complex set of processes are executed, beginning with the event in question and ending with its retrieval at a later stage. Pery and Wrightsman⁴⁹ argue that children can be very effective witnesses because they tend to concentrate on observing rather than interpreting their observations as adults do. On the one hand, children sometimes fail to notice certain peripheral details because they lack significance but on the other hand some children may give peripheral details exaggerated importance. This depends on the circumstances of each particular case. For instance, a young child who is fascinated by cars may notice more details about cars involved in an event than would an adult.

Once a child has perceived an event, she must be able to remember and report the information. Children may be able to perceive an event accurately but have difficulty translating this perception into words. The event may be stored in the child's memory in some representational form but the child may not have the ability to communicate the content of the memory because he does not have the necessary vocabulary. In order to be effective witnesses, children must be able to demonstrate their retention of material in one of the three ways: recognition, reconstruction or recall.⁵⁰

Recognition memory is the simplest form of remembering, and entails only that an object be recognised as something that was perceived previously. Recognition is within the capacity of very young infants and improves rapidly as children mature. For instance, a study conducted by Myers and Perlmutter found that two year olds recognised 81 percent of the objects presented to

⁴⁹ Perry and Wrightsman, *The Child Witness: Legal Issues and Dilemmas*, 1991, p. 108.

⁵⁰ Perry and Wrightsman, *The Child Witness*, 1991, p.108.

them correctly while four year olds were correct 92 percent of the time.⁵¹ Other researchers found that on photo recognition tasks, six year olds had higher average identification accuracy than three year olds and even adults.⁵² It is generally accepted that by the time children begin school, their recognition memory is very good for simple stimuli with five year olds being as accomplished as adults in recognising pictures of common objects. But children do not perform well with more complex stimuli and this limitation is important in the legal context.⁵³

Reconstruction memory is a specialised method of retrieving material from storage which involves reproducing the form of information that was seen in the past, as in reconstructing the scene of the crime. Piaget believed that children's reconstructive memory was superior to their free recall because children intentionally repeat the natural order of events when manipulating concrete objects. Myers refers to research studies conducted by Cohen and Perlmutter where two and three year olds demonstrated up to 75 percent accuracy on simple reconstructions.⁵⁴

Recall is the most complex form of memory requiring that previously observed events be retrieved from storage with few or no prompts. This is the form of retrieval most often required of witnesses, and is strongly age-related. Perry and Wrightsman refer to research studies where objects, ranging in age from five years to adulthood, observed an unexpected, staged event. The subjects were then asked to use recall memory to relate what they could remember about the incident. A number of the younger children did not volunteer any information. However, although the youngest group was able to recall less, what they did say tended to be correct (only three percent error) while the other age groups had error rates of between eight and ten percent.

⁵¹ Myers and Perlmutter, *Memory in the years two to five in Memory Development in Children*, 1978, p.218.

⁵² Myers, *Child Witness: Law and Practice*, 1987, p.489.

⁵³ Perry and Wrightsman, *The Child Witness*, 1991, p. 109-110.

⁵⁴ Myers, *Child Witness*, 1987, p.490.

The subjects were then asked twenty simple questions about the incident and asked to select the man they had seen from an array of photographs. The results indicated that children of all ages were as capable as adults of answering simple, direct questions, and the children were as adept as the adults at recognising the person they had seen from the photographs.⁵⁵ Perry and Teply interpreted the results of this research as follows:

In the context of a legal interview or examination, this research suggests that when children are simply asked to tell what they can remember about an event, the quality of the narrative of older children will be better than of the younger ones, but neither will give as full a narrative as an adult. It also suggests, however, that even young children (kindergarten – first grade) have sufficiently developed ability to remember past events and that simple, direct (non-leading) questions or recognition recall appear to be viable means of finding out factual information from them. Using those methods, their answers apparently are no less credible than those of an adult, absent other influences.⁵⁶

The above excerpt means that young children at kindergarten level are credible witnesses as they have the ability to remember past events if allowed to simply narrate an event. This is relevant to this dissertation in that the dissertation focuses on child victims who are mostly witnesses and it has been shown that when allowed to simply narrate an event, defilement victims are credible witnesses.

The book by Muller is distinguished from this dissertation in that it looks at psycho-social aspect of children and their ability to testify in court. The book shows that a child in kindergarten is able to recognise correctly objects such as pictures or a person seen in an event due to their egocentric ability. Muller's work is of significance to this dissertation as it shows that although children may recall very little, they are correct at identification of objects, persons and pictures. In defilement cases, the prosecution have to prove commission of the offence and the identity of

⁵⁵ Perry and Wrightsman, *The Child Witness*, 1991, p. 111-2.

⁵⁶ Perry and Teply, *Interviewing, Counselling, and in-Court Examination of Children: Practical Approaches for Attorneys*, 1984/5, p. 1389.

the accused as the offender. This is where the evidence of the child is crucial in that the child provides the evidence on the identity of the offender. Muller's work therefore shows that there is no reasonable justification in eliminating the evidence of the child on the basis of failure to show sufficient intelligence and/or failure to appreciate the nature of an oath as it will be demonstrated in detail in the subsequent chapters.

In yet another book by Fatuma, the issue of sexual harassment is addressed.⁵⁷ The author explains that sexual harassment is a form of gender violence emanating from gender discrimination but seldom receives serious attention in our society. Basically, sexual harassment denotes any overt act or word of a sexual nature (single or repeated) that demeans, humiliates and embarrasses the receiver, often causing psychological trauma. By implication then, it is arguable that sexual harassment is to a large extent subjective since it is from the victim's perspective that its offensive nature is often determined. Hence, the popular misconstrued notion, that sexual harassment is the "business" of the victim to sort out, prevails among many communities. Many times, the victims and spectators of acts of sexual harassment find themselves voiceless and powerless.

The above work by Fatuma is distinguishable from this dissertation as it looks at sexual assault or sexual harassment as arising from gender discrimination. However, it is of importance to this dissertation in that it shows that while sexual assault demeans, humiliates, embarrasses the victim and causes psychological trauma, the victims receive little or no attention on the infringement of their rights.

⁵⁷ Fatuma Chege, Women Educational Researches of Kenya, *With our Eyes, in our own Voices: Breaking down walls of Sexual Harassment*, Nairobi, 1997.

1.7 CONCEPTUAL FRAMEWORK

A number of terms used in this dissertation are normally a preserve of criminal law. However, in this dissertation, they are informed by the human rights perspective as presented here below. The author adopts the human rights perspective because defilement is done on the person of the child, thereby an infringement on the rights of the child. It is thus necessary to examine the rights of the child as they relate to defilement; the court processes that follow and personnel involved in as far as obtaining justice for the child is concerned. In dealing with matters affecting the child, the principle of the Best Interest of the Child as envisaged in the CRC provides a guide to personnel tasked with the duty to handle child victims. Flowing from the Best Interest of the Child principle are some specific rights. Below, the author discusses the Best Interest of the Child principle and child's rights as they relate to child victims of defilement.

1.7.1 Best Interest of the Child

According to the CRC, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.⁵⁸ However, in Zambia, the core principle in the CRC of the best interest of the child features in criminal law only in relation to the child perpetrators but does not cover child victims of sexual offences. For instance, in criminal matters, the relevant statutes such as the Penal Code, Criminal Procedure Code and the Juveniles Act do not have provisions on the best interest of the child. The best interest of the child manifests itself in civil matters under the Affiliation and Maintenance of Children Act. The Affiliation and Maintenance of Children Act provides that 'in making any order as to custody or

⁵⁸ Article 3(1) of the CRC.

access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa.⁵⁹ While the best interest of the child principle is prominent in civil matters, the lack of focus on the rights of child victims in criminal cases has side-lined the development of such jurisprudence in the treatment of child witnesses by the court in defilement cases. As a result, the best interest of the child principle has not played a central role in the way the courts are handling child witnesses or victims of defilement. For purposes of this dissertation, the research is not going to apply the best interest of the child principle in analysing the weaknesses of the law on defilement. The best interest of the child principle is not the analytical frame per se but provides the context and is the desired end. Rather, the focus of this dissertation is the psycho-social approach on the development of the child, as a means to assess the weaknesses of the law in defilement cases.

1.7.2 The Child's Rights with Regard to Defilement

The judiciary plays a crucial role in enforcing children's rights at domestic level. Even the most wonderful guarantees of children's rights will be of little effect or will be moribund in the absence of an independent and competent judiciary willing to enforce them.⁶⁰ The subordinate court in criminal trials is a court of first instance, on appeal matters reach as far as the Supreme Court of Zambia which is the highest court in the land.⁶¹ For instance, in the case of *Steven*

⁵⁹ Section 15(2) of the Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia.

⁶⁰ Alfred W. Chanda, The Role of Lower Courts in the Domestic Implementation of Human Rights, www.zamlji.com, Accessed on November 24, 2010.

⁶¹ Chanda, The Role of Lower Courts.

*Makayo v The People*⁶² which was a defilement case the magistrate convicted the accused and committed him to the High Court for sentence. In passing sentence, the Judge had this to say:

“I have considered the mitigation but this is yet another shocking set of facts that an old man decides to defile a 5 year old child. We can only ask God to save this country from this evil that has intoxicated so many men. The Courts shall not hesitate in its duty to protect its infant citizens. I sentence you to 40 years imprisonment with hard labour.”

As demonstrated in the case cited above, it is clear that in Zambia, young children are victims of defilement and many of them are at risk of being defiled. It has also been shown that the Zambian courts play a crucial role in as far as protecting the girl child’s rights from being defiled.

In a criminal trial there are two competing rights. The rights of the accused persons to a fair trial must be balanced against the protection of the right of the victims of defilement earlier explained. This does not mean, however, that the rights of either accused persons or victims who appear before the court can be violated, dismissed or subsumed by the rights of the other.⁶³

In relation to Defilement, the children’s rights needing protection are:

a. The Right to Equality and Non-Discrimination

Every child is entitled to equality before the law and to non-discrimination. Article 2(1) of the CRC states that ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ Further, the CRC states that ‘States Parties shall take all appropriate measures to

⁶² SCZ Appeal No. 584/2013.

⁶³ *Dagenais v. Canadian Broadcasting Corporation*, (1994) 3 S.C.R. 835, per Lamer C.J. at 87.

ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.⁶⁴ The right to equal treatment requires that all persons be treated equally before the law, without discrimination. The principle of equality and non-discrimination guarantees that those in equal circumstances are dealt with equally in law and practice.⁶⁵

However, it is important to stress that not every distinction or difference in treatment will amount to discrimination.⁶⁶ In general international law, a violation of the principle of non-discrimination arises if: (a) equal cases are treated in a different manner; (b) the difference in treatment does not have an objective and reasonable justification; or (c) if there is no proportionality between the aim sought and the means employed. The principle of equality can in certain circumstances require a State to take affirmative action in order to diminish or eliminate conditions that cause or help perpetuate discrimination.⁶⁷ In a defilement case, the accused and the victim are not on equal footing. The accused persons are mostly adults while the victims are children. Therefore, the victims are in a weak and vulnerable position. To ensure equality before the law, there is need for the courts to give the victims some kind of special treatment in order to bring them on some equal footing with the accused. According to (b) and (c) above, it is not equality before the law if children are left to be treated on the same footing with the accused disregarding the special needs and vulnerability of children against adults.

⁶⁴ Article 2(2) of the CRC.

⁶⁵ Icelandic Human Rights Centre, The Right to Equality and Non-Discrimination, <http://www.humanrights.is/en/>, Accessed on November 18, 2015.

⁶⁶ Iceland Human Rights Centre, Accessed on November 18, 2015.

⁶⁷ Iceland Human Rights Centre, Accessed on November 18, 2015.

b. The Right to Protection of the Law

The CRC places an obligation on States Parties to ensure children are protected by law. For instance, Article 4 of the CRC provides that ‘States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention...’ Further, it states that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.’⁶⁸ It is the mandate of the CRC to ensure that in the pursuit of protecting the rights of children, the interests of the child should always be put into consideration. The interests under consideration are holistic in nature. For instance, the CRC provides that ‘States Parties shall protect the child against all other forms of exploitation prejudicial to any aspect of the child’s welfare.’⁶⁹

c. The Rights to Life and Health

Every child in Zambia has the rights to life and health. The International Covenant on Civil and Political Rights (ICCPR) Article provides that ‘every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’⁷⁰ On the right to health, the CRC provides that ‘States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.’⁷¹ Therefore, Zambia as a State Party has an obligation to ensure that children have the right to life and receive the highest quality health care,

⁶⁸ Article 3 (1) of the CRC.

⁶⁹ Article 36 of the CRC.

⁷⁰ Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), 1966.

⁷¹ Article 24 (1) of the CRC.

more so, when faced with defilement which has long lasting if not lifetime consequences for the victims. Defilement exposes the victims to the risk of contracting HIV AIDS which is a life threatening condition. For instance, in the case of *Chrispin Mungaila v The People*,⁷² adjudicated in the Siavonga District of Zambia, the victim, a 15 year old child was defiled by the accused. At the time the accused defiled the victim, he was HIV positive and he was aware of his HIV status. There was evidence that he had been receiving medication from the hospital and the hospital authorities confirmed that the accused was HIV positive. The accused's medical record showing his HIV positive status was tendered into court as evidence. The victim was tested after three months, and her medical status which was initially HIV negative changed to HIV positive. The trial court convicted the accused on the charge of defilement and remitted the record to the High Court for sentence. The High Court confirmed the conviction and sentenced him to 27 years imprisonment with hard labour on the basis that the case had aggravating factors as he had infected the victim with HIV and the fact that he had prior knowledge of his HIV positive status. On appeal, the Supreme Court upheld both conviction and sentence.

Not only is the child's life threatened by defilement, its normal development is also affected. Munsaka and Matafwali state that studies around the world have consistently shown that child sexual assault has detrimental effects on the development of children.⁷³ According to the World Health Organisation (WHO) Child sexual assault which also tackled assault by way of defilement, found that it causes both short-term and long-term physical and psychological damage to children. Some longitudinal studies have revealed that women who experienced emotional, sexual, and/or physical abuse as children, had a higher chance of contracting Human

⁷² SCZ Appeal No. 385/2013.

⁷³ Ecloss Munsaka and Beatrice Matafwali, *Human Development from Conception to Adolescence: Typical and Atypical Trend* (Lusaka: UNZA Press, 2013), p. 151.

Immuno-deficiency Virus (HIV). Further, child sexual assault has been found to lead to depression, suicidal thoughts and/or attempts, drug abuse, risky sexual behaviours, and anxiety disorders.⁷⁴ This kind of abuse during childhood has also been found to have negative effects on cognitive, social, and emotional development of children.⁷⁵

d. The Right to Security of the Person

The CRC provides that ‘States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity.’⁷⁶ Once a child has been defiled, they develop fear of the attack happening again. Due to the defilement on her person, the child tends to fear that if any male folk comes close to her, she may be defiled again.⁷⁷ The fear does in turn affect the child’s self-confidence. Most people have low self-confidence because of past events in their lives which led to that state of mind. People with low self-confidence tend to repel people around them. Their limiting mindsets and behaviours make them feel ‘heavy’ and a ‘drag’ to be around. They usually have feelings of shame, guilt, apathy and fear.⁷⁸ According to Susanne, sexual abuse is particularly sinister type of trauma because of the shame it instils in the victim. With childhood sexual abuse, victims are often too young to know how to express what is happening and seek out help.

When not properly treated, this can result in a lifetime of post-traumatic stress disorder (PTSD),

⁷⁴ (2002).

⁷⁵ Munsaka and Matafwali, *Human Development*.

⁷⁶ Article 34 of the CRC.

⁷⁷ Susanne Babbel, Trauma: Childhood Sexual Abuse, <https://www.psychologytoday.com/blog>, Accessed on November 6, 2015.

⁷⁸ Samuel Johnson, How to be the most confident person in the world, <http://www.personalexcellence.co/blog/self-confidence>, Accessed on November 6, 2015.

depression and anxiety.⁷⁹ The net result is that the child victims usually find it difficult to trust people. Therefore, the CRC further provides that ‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.’⁸⁰

e. The Right to Protection from Inhuman or Degrading Treatment

When a child is defiled, defilement itself is degrading and inhuman. The CRC provides that ‘States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.’⁸¹ The CRC also states that ‘States Parties shall protect the child against all forms of exploitation prejudicial to any aspects of the child’s welfare.’⁸² According to Amnesty International Report, cruel, inhuman or degrading treatment or punishment is a “lesser” form or act of torture.⁸³ Acts of torture are defined as beatings, imposition of electric shocks, hanging by the arms or legs, rape, sexual assault, or the threat of rape or sexual assault, mock executions, etc.⁸⁴ According to Article 34 of the CRC, ‘States Parties undertake to protect the child from all forms of sexual

⁷⁹ Babbel, Childhood Sexual Abuse.

⁸⁰ Article 39 of the CRC.

⁸¹ Article 19 (1) of the CRC.

⁸² Article 36 of the CRC.

⁸³ Amnesty International and CODESRIA, Monitoring and Investigating Torture, Cruel, Inhuman or Degrading Treatment, and Prison Conditions, <https://www.amnesty.nl>, Accessed on November 6, 2015.

⁸⁴ Amnesty International and CODESRIA, Accessed on November 6, 2015.

exploitation and sexual abuse...’ Therefore, children need protection from sexual abuse which is a form of inhuman and degrading treatment.

f. The Right to Speech

Under the CRC, children have the right to express themselves. The CRC states that ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.’⁸⁵ The CRC also states that ‘for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, ...’⁸⁶ Further, the CRC states that ‘the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of the child’s choice.’⁸⁷ Free speech is defined as the right to seek, receive and impart information and ideas of all kinds, by any means.⁸⁸ Free speech and the right to freedom of expression applies to ideas of all kinds including those that may be deeply offensive. But it comes with responsibilities and it can be legitimately restricted. Restrictions such as those that prohibit hate speech and incitement as well as those that protect specific public interest or the rights and reputations of others. According to Amnesty International, restrictions that do not comply with all these conditions violate freedom of expression.⁸⁹

⁸⁵ Article 12 (1) of the CRC.

⁸⁶ Article 12 (2) of the CRC.

⁸⁷ Article 13 (1) of the CRC.

⁸⁸ Ana Matronic, Amnesty International, Free Speech, <http://www.amnesty.org.uk/what-free-speech>, , Accessed on November 6, 2015.

⁸⁹ Ana Matronic, Amnesty International, Free Speech.

g. The Right to Privacy

According to the ICCPR, on the one hand, it states that ‘no one should be subjected to arbitrary or unlawful interference with his/her privacy.’⁹⁰ The CRC on the other hand provides that ‘no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.’⁹¹ Defilement practically means that the child’s privacy and integrity is invaded by virtue of the offender undressing her and tampering with her private part. The reporting process and subsequent trial (where proceedings are not held in camera and when the name of the child is known to the public) the privacy of the child is interfered with further.

1.7.3 Defilement

According to the Penal Code defilement occurs when a man or woman has carnal knowledge of a child under the age of 16. The law in Zambia presumes children below the age of 16 and imbeciles incapable of consenting to a sexual act. It is important to mention that the recent proviso to Section 138 (1) of the Penal Code⁹² allows a defence of reasonable belief by the offender that the child was above the age of 16 years.

It is necessary to point out that one of the ingredients of the offence of defilement is that there should be penetration and the victim must be below the age of 16 years. Traditionally, the ingredient of penetration meant that only girls could be penetrated by male persons using the penis. This is why for defilement cases in Zambia, the victims are mostly young girls while the offenders are always men or boys. In addition, the doctor’s medical report on the findings of the

⁹⁰ Article 17 ICCPR, 1966.

⁹¹ Article 16 (1) of the CRC.

⁹² Penal Code (Amendment) Act No. 2 of 2011.

examination always relates to the appearance of the vagina following an allegation of defilement. The findings usually relate to any tears or cuts on the vagina or torn or absent hymen. The hymen is only found in females.

In defilement cases, the age of the victim is crucial. The law provides that the victim has to be below the age of 16 years and age must be specifically proved.⁹³ In the case of *Gift Mulonda v The People*⁹⁴ the Supreme Court held that:

And where age of a person is an essential ingredient of a charge, it is not acceptable simply for the prosecutrix to state her age as this can be no more than a statement as to her belief as to her age. The age should be proved by one of the parents or by whatever other best evidence is available such as birth records.

The case of *Gift Mulonda v. The People* cited above places an emphasis that only a child below the age of 16 years can be a victim of defilement. Also, the case shows that since age of the victim is a crucial ingredient, it must be proved at trial either by the parent stating the age of the child or through birth record that at the time the child was defilement, she was below the age of 16 years. The law in this regard deems a child above 16 to have reached the age of physical and psychological maturity and therefore responsible enough to give relevant consent to sexual intercourse with a man. If convicted the offender is liable to imprisonment for a term of not less than 15 years and may be imprisoned for life.

The rights discussed above have been identified by the author as the ones that are infringed when a child is defiled. Defilement is degrading and inhuman form of treatment on the victims as well as an invasion on the privacy of the victim as it involves the tempering of the victim's private

⁹³ The majority of the victims are very young girls. However, boys too may be victims of defilement. In Zambia, when sexual intercourse has been committed with a boy below the age of 16 years, the boy is said to have been defiled. For instance, in the case of *Charity Mulenga v The People* SCZ Appeal No. 41/2007 the Supreme Court confirmed the conviction but reduced the sentence on the grounds that defilement of the boy child is much less prevalent.

⁹⁴ (2004) Z.R. 135.

part. According to criminal law in Zambia, the victims are minors and mostly girls. Defilement exposes the child to HIV and other sexually transmitted diseases. These diseases threaten the life and health of the child thereby interfering with the right to life and health of the child. Also, when defiled a child feels a sense of loss of the attack happening again. This affects the emotional development of the child and more often than not leads to trauma and depression. This therefore, means that the child's sense of security is interfered with.

Once a child is defiled, criminal domestic law is set in motion and the child is expected to appear as a witness in accordance with the right to free speech as provided in the CRC. As has been earlier explained, according to the CRC, any child that is capable of forming his/her own views has the right to express those views freely in all matters affecting the child and accord the child's views due weight in accordance with the age and maturity of the child. In Zambia, however, the yardstick provided by the CRC is not applied. As it will be discussed in detail in the subsequent chapters, most victims' evidence is not received basing on the subjective test by a magistrate on the victim's failure to exhibit sufficient intelligence and/or ability to understand the nature of an oath. This takes away the victims right to free speech which is also discussed in detail in the subsequent chapters.

During trial, the child is expected to be treated fairly without any kind of discrimination as envisaged in the CRC. However, this is not so in Zambia. To start with, legislation in Zambia has provisions aimed at protecting the rights of juvenile offenders and adult offenders disregarding child victims. Even the juvenile programs developed and implemented in Zambia are aimed at protecting the rights of juvenile offenders and have no programs for the victim. Meanwhile, during trial, there are two competing rights; those for the offender and the victim.

The offender's right to a fair trial is enshrined in the Constitution of Zambia; not so for the victim.⁹⁵ Yet, as a victim and minor, the child is vulnerable and requires more protection as well as due consideration on the reception of the evidence of the child witness by the courts of law. However, such is not the case in Zambia. This is the more reason the focus of this dissertation is on the child victim. Subsequent chapters have discussed in detail the issues highlighted.

1.8 ZAMBIAN COURTS HANDLING OF CHILD VICTIM WITNESSES IN DEFILEMENT CASES

a. Requirement for Corroboration

The most important evidence in defilement cases comes from the child victim. However, children's evidence requires corroboration despite the nature of the offence which necessitates that the victim be secluded during the commission of the offence. In Zambia, corroboration is required as a matter of law.⁹⁶ In sexual cases including defilement, though not an ingredient of the offence, corroboration is a necessary factor in proving that an offence has been committed. Corroboration is any independent evidence that tends to implicate an accused to the commission of the offence. It relates to evidence showing that the offence was committed and that the accused is the person that committed it. The current law provides that without corroborative evidence, an accused should be acquitted.⁹⁷

⁹⁵ Article 18 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

⁹⁶ *Machipisha Kombe v The People* (2009) Z.R. 282.

⁹⁷ Section 122 of the Juveniles Act as Amended by Act No. 3 of 2011.

In the case of *Nsofu v The People*,⁹⁸ it was held that corroboration is independent evidence which tends to confirm that the witness is telling the truth when she says that the offence was committed and that it was the accused who committed it. The *Nsofu* case is still of authority in the Zambian courts. Further, the case of *Emmanuel Phiri v The People*⁹⁹ stressed the need for corroboration which is independent evidence as to the commission of the offence and the identity of the offender. It is that evidence that tends to incriminate the accused. In the case of *Emmanuel Phiri and Others v The People*¹⁰⁰ the Supreme Court seemed sceptical and adopted a less technical approach as to what constitutes corroboration as a matter of law. The court held that:

There is a distinction between the rule of practice, which now has the force of a rule of law, that a warning must be given of the dangers of convicting on uncorroborated accomplice evidence, and the law as to the circumstances in which, a proper warning having in fact been given, the dangers may safely be regarded as having been excluded. The rules concerning conviction in the absence of corroboration are rules of law as developed by the decisions of the court (*per curium*). The modern decisions appear to be adopting a less technical approach to what is corroboration as a matter of law, and to be recognising that identification cases are analogous to, if not virtually indistinguishable from, corroboration cases. The question in all cases is whether the suspect evidence, be it accomplice evidence, or evidence of a complainant in a sexual case, or evidence of identification, receives such support from the other evidence or circumstances of the case as to satisfy the court of the fact that the danger inherent in the particular case of relying on that suspect evidence has been excluded; only then can a conviction be said to be safe and satisfactory.

As there is no DNA evidence of the offender to be compared to that found on the victim, corroboration in Zambia is therefore limited to an eye witness to the commission of the offence and /or circumstantial evidence connecting the offender to the commission of the offence.

⁹⁸(1973) Z.R. 287.

⁹⁹ (1982) Z.R. 77.

¹⁰⁰ (1978) Z.R. 79.

At the subordinate court level, before the amendment to Section 122 of the Juveniles Act, a magistrate could convict an accused on uncorroborated evidence of the child provided he/she had warned himself/herself of the dangers of convicting an accused person on uncorroborated evidence. In the case of *Emmanuel Phiri and Others v The People*¹⁰¹ it was held, *inter alia*, that:

There is a distinction between the rule of practice, which now has the force of a rule of law, that a warning must be given of the dangers of convicting on uncorroborated accomplice evidence, and the law as to the circumstances in which, a proper warning having in fact been given, the dangers may safely be regarded as having been excluded. The rules concerning conviction in the absence of corroboration are rules of law as developed by the decisions of the courts.

However, the current legal position is that there can be no conviction in the absence of corroboration. This position was clearly enunciated in the latter case of *Machipisha Kombe v The People*¹⁰² where it was held, *inter alia*, that in criminal cases of a sexual nature, such as rape and defilement, corroboration is required as a matter of law before there can be a conviction.

1.9 RESEARCH METHODOLOGY

a. Desk Research / Secondary Data

Desk research was used in order to have an in-depth understanding of the available law and literature on the subject. The desk research also provided supportive information to this dissertation. Desk research was conducted in libraries for literature, statutes and law reports as well as available literature online.

¹⁰¹ (1978) Z.R. 79.

¹⁰² (2009) Z.R. 282.

b. Fieldwork Research / Primary Data

Field research was used to find out the problems on the ground encountered by the courts in Zambia in defilement cases. In this research, it is necessary to understand whether the law is adequate in resolving the challenges encountered by the courts in the justice dispensation. In field research, consideration was made to:

i. Questionnaires

Questionnaires, key informant interviews and court observation were employed as research instruments for collecting data from primary sources. Semi- structured questionnaires were the main instrument used in the collection of data from respondents and they included open ended and closed ended questions. Questionnaires had been preferred as research instruments for the collection of primary data due to several advantages. According to Kumar,¹⁰³ the advantages of questionnaires include: cost, the process is less expensive due to the fact that respondents are not interviewed, thus it is economical by saving time, human and financial resources.

ii. Types of Questionnaires and Target Groups

Questionnaires were administered to key stakeholders, that is, the guardians of defiled victims; prosecutors; and adjudicators which included magistrates, High Court and Supreme Court judges. Therefore, three different types of questionnaires were administered to suit the respective group as follows: Guardians, Prosecutors and Adjudicators.

With regard to the guardians of defiled victims, the data that was collected included their perception of the law on defilement as to whether it is adequate or not and whether the courts are

¹⁰³ Ranjit Kumar, *Research Methodology*, <https://m.bol.com/> ...research-methodology, Accessed on August 1, 2015.

protecting and upholding the rights of defiled victims. The questionnaires also show how known the perpetrator was to the victim and her family.

Questionnaires for Prosecutors were administered to persons who prosecute matters in the Subordinate Court. The data collected from the respondents relate to challenges of prosecuting defilement cases in relation to the evidence to be presented before the court in order to secure a conviction. Further, the questionnaires relate to the adequacy or inadequacy of the law on defilement and whether courts are upholding the rights of defiled victims.

Questionnaires for Adjudicators were administered to magistrates, High Court and Supreme Court judges. In relation to magistrates, data collected was with regard to what it takes to attain a conviction of an accused in sexual offences particularly in defilement cases. For High Court judges, data relate to the factors taken into account to uphold a conviction of an accused on a charge of defilement following a conviction by the magistrate as well as factors considered in sentencing. For Supreme Court judges, data relate to factors considered on appeal, that is, when an accused has appealed against either conviction and sentence or both. However, all respondents also provided data regarding whether the law on defilement is adequate or inadequate as well as whether the Zambian courts are protecting and upholding the rights of defiled victims.

iii. Key Informant Interviews

Certain information was not collected using the methods stated above, therefore, in order to effectively fulfil all the objectives of the research study, key informant interviews were conducted with various respondents and the required information for the study was duly collected. For instance, information collected through interviews is regarding the

inconsistencies that arise from child witnesses when they are put on oath as well as the various methods the magistrates are using in trying to obtain evidence from child witnesses.

iv. Court Observation

This was done by the author being a participant or rather part of the court process in a court room setup when hearing and determining defilement cases. The author also observed court proceedings in the courtroom when other adjudicators were hearing and determining defilement cases.

1.10 SAMPLING METHOD: PURPOSIVE

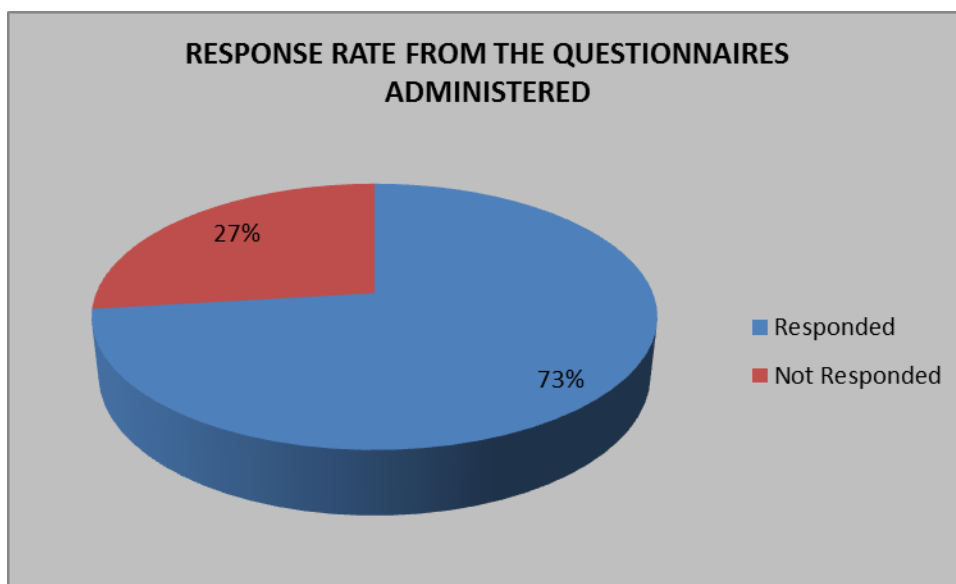
For the Sample – the purposive method was employed as the dissertation targeted particular groups of people such as judges, magistrates, prosecutors and guardians of defiled children who had experienced the trial process when the court was hearing a defilement case. Purposive sampling was preferred for this research in line with the objectives since most respondents were court adjudicators and prosecutors. From the sample identified, the sampling procedure consisted of simple random sampling from among the targeted groups.

1.11 SURVEY RESULTS AND DATA ANALYSIS

All the data collected from the respondents was analysed and interpreted qualitatively. As earlier stated, three sets of questionnaires were prepared and distributed to the sampled respondents under different categories that were targeted. The total number of the questionnaires administered and collected is as follows: Supreme Court judges – issued six collected three, High Court judges – issued eight collected five, magistrates – issued 11 collected eight, prosecutors – issued 16 collected 15, guardians – issued 11 collected seven.

From the field survey results, the total number of questionnaires administered when summed up is 52 and out of which 38 were collected representing a percentage of 73.1 response rate as shown in Figure 1 below. Scientifically, on a survey administered by way of mail (which category includes questionnaires) the response rate of 50 percent is adequate; 60 percent is good and 70 percent is very good.¹⁰⁴

Figure 1: Response Rate



The information from the questionnaires was analysed and interpreted as earlier explained. The analysis has been interpreted in different segments with particular headings below.

1.12 CATEGORIES OF RESPONDENTS

Parents/Guardians

There were questionnaires for parents/guardians whose child or children had been defiled. These guardians comprise those who ended at reporting the case to the police, those whose cases

¹⁰⁴ Surveymonkey, Response Rates and Surveying Techniques: Tips to Enhance Survey Respondent Participation, 2009, <http://s3.amazonaws.com/SurveyMonkeyFiles/Response-Rates.pdf>, Accessed on May 4, 2017.

were still in court and those in which the court had passed the verdict. Therefore, all the guardians had, at one time or another experienced or dealt with effects of defilement on their child. It is for this reason that their contribution is very relevant to this dissertation.

Respondents: Prosecutors

All the 15 respondents indicated that they had prosecuted a defilement case before. This therefore, indicates that defilement cases are quite a common feature in our courts.

Further, all the prosecutors indicated that they were trained in prosecution. This is an encouraging discovery in that as defilement involves children, the cases are delicate and need to be handled professionally by trained personnel. Furthermore, a child who has been defiled is traumatised and it is imperative that the prosecutor is alive to these facts and therefore, handles the case in a proficient way in order for the victim to receive the care and support required.

Respondents: Adjudicators

With regard to the adjudicator's experience in adjudication, 10 respondents indicated that they had been on the bench for a period of 1-10 years. Two of the respondents had been on the bench for a period of 11-29 years while 4 respondents had been longer on the bench for a period of 30-40 years. All of them indicated that they had adjudicated upon a lot of defilement cases. This indicates that defilement cases were handled in the three levels of the court system, that is, in the Subordinate Court, High Court and Supreme Court. Therefore, it is clear that all the adjudicators were key informants, looking at their massive experience in adjudication, especially in defilement cases.

1.13 SIGNIFICANCE OF THE STUDY

The research seeks to highlight the shortcomings in the law on defilement and the challenges a child witness in a defilement case encounters as well as the challenges of the court in its duty of justice dispensation. It also seeks to highlight the failures of the Zambian legal system in upholding the rights of the girl child victim. The recommendations made would assist the legal fraternity and government to put in place laws and procedures that will enable courts to fulfil their role of enforcing human rights for children in defilement cases. Further, this study can be used for academic purposes and as a bench mark in assessing the progression of the law on defilement in Zambia.

1.14 CONCLUSION

This chapter provides the background to the research, the statement of the problem, objectives of the research and methodological considerations. It also provides the conceptual framework which highlights the child rights approach to dealing with the testimony of child witnesses in defilement cases. The chapter also indicates that the core principle of the CRC of the best interest of the child in this dissertation is not the central issue.

CHAPTER TWO

DOMESTICATION AND IMPLEMENTATION OF INTERNATIONAL AND REGIONAL CHILDREN'S RIGHTS INSTRUMENTS

2.0 INTRODUCTION

Children's rights are enshrined in international instruments as well as in domestic law. This chapter will focus on the international and regional instruments with provisions relevant to the rights of the child under consideration in this dissertation as well as the relevant instruments Zambia has ratified. This chapter will highlight the extent to which Zambia has implemented and domesticated the CRC.

Therefore, this chapter provides the basis for recognising that children have rights that are codified at international level that need to be respected and protected by States Parties. The chapter also shows that where the law provides rights to an individual or a group of people, it equally places a duty on families, society, the government and relevant institutions to protect and uphold the rights guaranteed.

2.1 CONVENTION ON THE RIGHTS OF THE CHILD

In the CRC, a convention is defined as an international human rights treaty (agreement) which provides for universally accepted standards. Once a convention is signed and ratified by a country, it becomes legally binding on that country.¹⁰⁵

¹⁰⁵ The countries that ratify a convention are known as the States Parties to that Convention.

2.1.1 Obligations of States Parties

Articles 1 to 5 of the CRC contain the overall obligations. A child is defined as a person under the age of 18 years.¹⁰⁶ It is provided that the rights in the CRC should be enjoyed by all children without discrimination.¹⁰⁷ It thus follows that in the CRC all children are equal in rights and should be treated as such.

Every child has the right to be treated fairly and equally, free from all kinds of discrimination. The principle of non-discrimination underpins the development of justice for the child and support programmes for all children's access to justice.¹⁰⁸ Special attention needs to be given to the most vulnerable groups of children including – but not limited to – children associated with armed groups, children without parental care, children with disabilities, children belonging to minority groups, migrant children, children born as a result of war-time rape and children affected by HIV/AIDS. This also means that children deprived of liberty and children involved in war time atrocities – often perceived as 'less deserving' – have the same rights as other children. A gender sensitive approach should be taken in all interventions.¹⁰⁹

States Parties are obligated to ensure that all actions taken are in the best interest of the child.¹¹⁰

As has been stated in chapter one, the best interest of the child is not a central feature of this dissertation. According to the CRC, the best interest of the child is of paramount consideration in all matters relating to children. Every child has the right to have his or her best interest given primary consideration. In all actions concerning children, whether undertaken by courts of law,

¹⁰⁶ Article 1 of the CRC.

¹⁰⁷ Article 2 of the CRC.

¹⁰⁸ Article 2 (2) of the CRC, States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

¹⁰⁹ Children's rights in the CRC extracted from Child Justice in Zambia :Role Players Training Manual, 2005, p.15-19.

¹¹⁰ Article 3 of the CRC.

administrative or other authorities, including non-State, the best interest of the child must be a primary consideration. This principle should be applied both when taking decisions regarding an individual child or for children as a group; and should guide the whole process (judicial, administrative or other) but also be a primary consideration in determining in the first place whether the child should participate in the process or not. States Parties are obliged to undertake specific implementation measures, such as legislative, administrative or judicial measures.¹¹¹ It is important for member States to formulate legislation or review existing legislation so that it is child friendly.

The CRC further provides that States Parties must respect the responsibilities, rights and duties of a child's parents, extended family members, community or legal guardians.¹¹² Such a provision is necessary in the CRC considering that parents, legal guardians and extended family members have responsibilities towards the child's welfare.

2.1.2 Children's Explicit Rights in the CRC:

Firstly, children have the right to participate when decisions that affect them are made. Every child has the right to express his or her views freely and to be heard.¹¹³ Children have a particular right to be heard in any judicial and administrative proceedings, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.¹¹⁴ The right to participation implies, for example, that the child receives

¹¹¹ Article 4 of the CRC .

¹¹² Article 5 of the CRC.

¹¹³ Article 12 (1) of the CRC, States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

¹¹⁴ Article 12(2) of the CRC, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

adequate information about the process, the options and possible consequences of these options; and that the methodology used to question the child and the context (for instance, where the child is interviewed, by whom and how) be child-friendly and adapted to the particular child.¹¹⁵ In conflict and post-conflict contexts, it is also important to fully involve children in transitional justice processes. Children's meaningful participation in State-run and non-State justice proceedings often requires a significant change in law, legal practice and attitudes.¹¹⁶

Secondly, every child has the right to protection from abuse, exploitation and violence.¹¹⁷ Children in contact with the law should be protected from hardship while going through State-run and non-State justice proceedings, as well as after the process. Procedures have to be adapted and appropriate protective measures put in place, noting that the risks faced by boys and girls will differ. Torture or other cruel, inhuman or degrading treatment or punishment must be prohibited.¹¹⁸

Thirdly, every child has the right to be treated with dignity and compassion. Every child has to be treated as a unique and valuable human being and as such his or her individual dignity, special

¹¹⁵ Article 13(1) of the CRC, the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

¹¹⁶ Samuel Johnson, How to be the most confident person in the world, <http://www.personalexcellence.co/blog/self-confidence>, Accessed on November 6, 2015.

¹¹⁷ Articles 19 (1), 34 and 36 of the CRC provide that States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child; States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. Therefore, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity, (b) the exploitative use of children in prostitution or other unlawful sexual practices, (c) the exploitative use of children in pornographic performances and materials; States Parties shall protect the child against all other forms of exploitation prejudicial to any aspect of the child's welfare.

¹¹⁸ Article 19(1) of the CRC.

needs, interests and privacy should be respected and protected.¹¹⁹

Fourthly, there must be respect for legal guarantees and safeguards. Basic procedural safeguards as set out in relevant national and international standards and norms should be guaranteed at all stages of proceedings in both State-run and non-State systems, as well as in international justice. This includes, for example, the right to privacy, the right to legal aid and other types of assistance; and the right to challenge any decision through a higher judicial authority.¹²⁰

2.2 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child (hereinafter referred to as the Charter) is an African Convention which has direct links with the CRC and other universal standards. The Charter's preamble specifically states that it adheres to the principles of human and people's rights and freedoms contained in the declarations, conventions and other instruments adopted by various international organisations, among them, the United Nations. It follows therefore that the Charter recognises the CRC concerning the rights and welfare of the child contained in the CRC. The Zambian government signed the Charter on 17th January, 1983 and ratified it on 10th January, 1984.

The Charter requires that member States do recognise the rights and duties enshrined in the Charter. The Charter provides that 'the member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this

¹¹⁹ Article 16 (1) of the CRC stipulates that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

¹²⁰ Article 37 (d), every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.

Charter and shall undertake to adopt legislative or other measures to give effect to them.’¹²¹ This provision uses the word ‘shall’ which eliminates discretion on the part of a member State whether to adopt provisions or not. However, despite the use of the word ‘shall’ member States are not obliged to incorporate the provisions of the Charter into domestic law.¹²²

2.2.1 The Unique Position of the African Child in the Charter

The Charter explicitly recognises the unique position which an African child occupies in society and states that a child should grow up in a family environment for the full and harmonious development of his/her personality.¹²³ An African child usually occupies a position of great responsibility within the family. The child looks after younger siblings and performs essential chores such as fetching water, caring for elderly members of the family and herding livestock. It is important to realise that because the African child has such responsibilities, he/she should not be treated in a manner which renders the child helpless. The Charter recognises this unique aspect of the African society, in terms of which the child is not merely a passive recipient but an active participant. It also recognises the special needs of the child and states that a child requires particular care with regard to health, physical, mental, moral and social development, and a child requires legal protection in conditions of freedom, dignity and security.¹²⁴

¹²¹ Article 1 of the African Charter on the Rights and Welfare of the Child.

¹²² Community Law Centre, <http://www.peopletoparliament.org.za>, Accessed on November 18, 2015.

¹²³ The Charter Preamble which provides, RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding.

¹²⁴ The Charter Preamble which states, RECOGNIZING that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.

2.2.2 Rights and Duties of States Parties

The recognition of rights and duties is important since having a right necessarily means that someone else has an equivalent duty.¹²⁵ Article 2 of the Charter provides that ‘every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status’. The Charter also provides that ‘(1) every individual shall be equal before the law.’¹²⁶ Article 1(2) of the Charter states that, ‘every individual shall be entitled to equal protection of the law.’ Further, the Charter states that ‘human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.’¹²⁷

This shows that all children under the Charter require equal protection of the law and all should be accorded the same rights and freedoms without distinction of any kind. Children have the same integrity and rights that adults have, hence they are covered under the Charter. In the Charter, ‘every individual shall have the right to respect for the dignity inherent in a human being and to the recognition of his/her legal status. All forms of exploitation and degrading punishment and treatment shall be prohibited.’¹²⁸ Further, the Charter provides that ‘every individual shall have the right to enjoy the best attainable state of physical and mental health.’¹²⁹ By its nature, defilement is exploitative on the victim and brings mental instability.

¹²⁵ The Charter Preamble which states, CONSIDERING that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone.

¹²⁶ Article 3 of the Charter.

¹²⁷ Article 4 of the Charter.

¹²⁸ Article 5 of the Charter.

¹²⁹ Article 16 of the Charter.

The Charter defines child as every human being below the age of 18 years.¹³⁰ It embodies the philosophy of the CRC that in all actions concerning the child, the best interest of the child shall be a primary consideration.¹³¹ With regard to participation, as is the case with the CRC, the Charter also includes the right of participation by stipulating that ‘in all judicial or administrative proceedings affecting the child, an opportunity shall be provided for him or her to be heard and those views shall be taken into account by the relevant authority’¹³²

The Charter also prohibits any form of cruel, inhuman and degrading treatment or punishment of children. Like the CRC, the Charter recognises that in all matters relating to children, the best interest of the child is paramount consideration. Children are recognised as having special needs and that they must receive treatment which promotes their dignity and self-worth, and reinforces their respect for the human rights and fundamental freedoms of others.

2.3 THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly referred to as the Beijing Rules) were adopted by the UN in Beijing, China in 1985. This is the first set of international rules to comprehensively set standards for the administration of child justice. One of the most important aspects of the Beijing Rules is that they provide for the development of separate and specialised systems of child justice.

¹³⁰ Article 2 of the Charter.

¹³¹ Article 4(1) states that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

¹³² Article 4.2 of the Charter.

Although the Beijing Rules are not legally binding, certain principles have been incorporated into the CRC and are, therefore, binding. For instance, the commentary on Rule 2.1 the Beijing Rules states that, ‘rule 2.1 stresses the importance of the Rules always being applied impartially and without distinction of any kind. The rule follows the formulation of principle 2 of the Declaration of the Rights of the Child.’¹³³ The Committee on the Rights of the Child specifically recommended that the administration of juvenile justice in Zambia be guided by these Rules.¹³⁴ The Zambian legal system is therefore reminded that it is important to be aware of and uphold these provisions, especially those that refer to law enforcement officers.

In the Beijing Rules, there are some provisions which can be related to defilement of young children. In the Beijing Rules, a juvenile is defined as ‘a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult,’¹³⁵ and a juvenile offender is defined as ‘a child or young person who is alleged to have committed or who has been found to have committed an offence.’¹³⁶ Clearly, the definition of a juvenile is quite distinct from the definition of a juvenile offender. Therefore, the definition of juvenile could be applicable to juvenile victims coming into contact with the law by virtue of being witnesses and they require to be treated in a different way from the adult witnesses.

Also, Rule 7.1 of the Beijing Rules states that ‘basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages

¹³³ Commentary on Rule 2.1 of the Beijing Rules.

¹³⁴ Lukas Muntlgh, Evaluation Report on Child Justice in Zambia, UNICEF, 2007, p. 9.

¹³⁵ Rule 2.2(a) of the Beijing Rules.

¹³⁶ Rule 2.2(c) of the Beijing Rules.

of proceedings.’¹³⁷ According to the commentary on this Rule in the Beijing Rules, it is stated that Rule 7.1 emphasises some important points that represent essential elements for a fair and just trial that are internationally recognised in existing human rights instruments.¹³⁸ Rule 15.2 of the Beijing Rules states that the parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

Further, according to Rule 14.2 of the Beijing Rules, the proceedings shall be conducive to the best interest of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely. In the commentary on this Rule, it is stated that in accordance with due process, a ‘fair and just trial’ includes such basic safeguards as the presumption of innocence, the presentation and examination of witnesses, the common legal defences, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc.¹³⁹

Clearly, the Beijing Rules have progressive provisions regarding the handling of the juvenile offender. However, Rules such as Rule 7 and 14 are applicable to juvenile victims as the victims need the trial to be conducted in an atmosphere of understanding in which the juvenile is allowed to freely participate therein and to express herself or himself freely. Where applicable, to have the parents or guardians present to give general psychological and emotional assistance to the juvenile-a function extending throughout the procedure.¹⁴⁰

¹³⁷ Rule 7.1 of the Beijing Rules.

¹³⁸ Commentary on Rule 7.1 of the Beijing Rules.

¹³⁹ Commentary on Rule 14.2 of the Beijing Rules.

¹⁴⁰ Commentary to Rule 15.1 of the Beijing Rules.

2.4 IMPLEMENTATION OF INTERNATIONAL INSTRUMENTS

The implementation of international instruments by member States of particular organisations is dependent on individual member States. However, most international instruments have provisions with regard to States action in as far as implementing the provisions of relevant documents are concerned.

a. The Universal Declaration of Human Rights

The preamble to the Universal Declaration of Human Rights (UDHR) makes reference to the protection of human rights by the ‘rule of law.’ The UDHR gives every person the right to an effective remedy through a competent national tribunal for acts that violate the fundamental rights granted to him or her by the constitution or by the law.¹⁴¹

b. The International Covenant on Civil and Political Rights

The theme of State implementation also appears in the twin covenants one of which is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR obligates States ‘to take necessary steps in accordance with the constitutional process... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present covenants.’¹⁴²

c. The International Covenant on Economic, Social and Cultural Rights

The other twin covenant is the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR also places an obligation on States Parties to take steps to the

¹⁴¹ Article 8 of the UDHR.

¹⁴² Article 2(2) of the ICCPR.

maximum of their available resources with a view to achieving progressively the full realisation of the rights recognised in the covenant including the adoption of legislative measures.¹⁴³

d. The African Charter on the Rights and Welfare of the Child

Article 1 of the Charter provides that member States shall ‘... undertake to adopt legislative and other measures to give effect to the rights, duties and freedoms enshrined in the Charter.’¹⁴⁴

Zambia is a common law country and, therefore, must domesticate international instruments in order to make them enforceable in the courts of law.¹⁴⁵ However, as a party to the said international human rights instruments, it is placed under an obligation to report violations of children’s rights according to the requirements of the different treaties to which it is a party. Furthermore, by ratifying the different treaties and conventions, Zambia is morally bound to use the treaties and conventions in interpreting grey areas of its laws.¹⁴⁶ Another consequence of ratification is that the Zambian Parliament and Executive are presumed to want to act consistently with their international obligations.¹⁴⁷ If two or more interpretations of a situation are possible, Zambia is obliged to take the interpretation that is in accordance with its international obligations.¹⁴⁸

Treaties can only have legal effect to the extent that they are implemented by domestic law since courts will only apply domestic law. Treaty provisions are also often general in character and need to be implemented by specific detailed provisions in domestic law – such as in the

¹⁴³ Article 2(1) of the ICESCR.

¹⁴⁴ Article 1 of the African Charter on the Rights and Welfare of the Child.

¹⁴⁵ T.K. Mabula, Sara L. “The Enforcement of Human Rights of Zambian Women.” *Zambia Law Journal* Vol. 21-24, (1989-92): p. 45.

¹⁴⁶ Mabula, Longwe, “The Enforcement of Human Rights of Zambian Women,” p. 45.

¹⁴⁷ Mabula, Longwe, “Human Rights of Zambian Women,” p. 45.

¹⁴⁸ Mabula, Longwe, “Human Rights of Zambian Women,” p. 46.

Constitution, and with regard to children, in the Juveniles Act and the Penal Code. As Florence Butegwa appropriately pointed out, ‘the language of human rights carries great rhetorical force of uncertain practical significance.’¹⁴⁹ Therefore, specific human rights instruments need a certain degree of positivisation or particularisation. This is the very reason in most of the international instruments, it is provided that nations should take necessary steps in their national law to give effect to the provisions in international treaties. For instance, the CRC obligates States Parties to undertake specific implementation measures, such as legislative, administrative or judicial measures.¹⁵⁰ Only when this occurs can human rights become a basis for challenge to legislative or executive action which is violative of them.¹⁵¹

The CRC obligates States Parties to ensure that all actions taken are in the best interest of the child.¹⁵² It is clear that Zambia having ratified the CRC has an obligation to give effect to the provisions in the international treaties that she has ratified. However, has Zambia taken the necessary steps to give recognition to the international treaties she has ratified? This issue will be discussed by analysing the law on defilement and other relevant Zambian laws which directly or indirectly affect or are connected to the realisation of the rights of the child in Zambia.

¹⁴⁹ F. Butegwa, “Factors affecting the Legitimacy of Human Rights Principles in the Protection of Women” paper presented at the Workshop on Gender and Human Rights, UN Conference on Human Rights, June 16-17, 1993) (unpaginated).

¹⁵⁰ Article 4 of the CRC.

¹⁵¹ R. Lallah, “International Human Rights Norms, in Developing Human Rights Jurisprudence,” January 1, 1988, <https://books.the-commonwealth.org>, Accessed on August 3, 2015.

¹⁵² Article 3 of the CRC.

2.4.1 IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN ZAMBIA

Zambia ratified the CRC on the 6th December, 1991 whereupon it agreed to be bound by the provisions of the instrument.¹⁵³ The ratification opened doors for the government to work with donors and other cooperating partners regarding the welfare of the child. This led to a study being commissioned by the Ministry of Home Affairs with the support of SIDA, Department for International Development DFID, United Nations Children's Fund UNICEF and other donors such as Danish, Dutch and British on how children who came into conflict with the law (juvenile offenders) experienced the criminal justice system.¹⁵⁴ The focus was on three areas of the criminal justice system namely: arrest, detention pending trial and the trial itself.

Child-Friendly Courts (specialised courts) were introduced and established in 2001 to conduct trials of children in a manner that, *inter-alia*, reinforces their respect for human rights and fundamental freedoms of others.¹⁵⁵ Their aim was to provide guidance on the transformation of the child justice system by ensuring adherence to the standards set out in the CRC and other international instruments such the Beijing Rules; the UN Guidelines for the Prevention of Juvenile Delinquency (commonly referred to as the Riyadh Guidelines); and the UN Rules for the Protection of Juveniles Deprived of their Liberty (referred to as the JDLs).¹⁵⁶ The court is expected to take into account the child's age and provide for the reintegration and playing of a meaningful role in the community.¹⁵⁷ The study on the implementation of the CRC in Zambia

¹⁵³ Zambia popularized version of the State Party Report on the Convention on the Rights of the Child (2001). p.3 (Unpublished).

¹⁵⁴ Lukas Muntlgh, "Evaluation Report on Child Justice in Zambia," (Lusaka: UNICEF, 2007), p. 10.

¹⁵⁵ Muntlgh, Evaluation Report, p. 10.

¹⁵⁶ Muntlgh, Evaluation Report, p. 10.

¹⁵⁷ Muntlgh, Evaluation Report, p. 41.

however, focussed on child offenders than on child victims who come into contact with the law.

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Due to the findings regarding child offenders, it was recommended that a forum be established which was subsequently formed and named ‘the Child Justice Forum (CJF) hereinafter referred to as the Forum.’¹⁵⁹ The Forum was established in Lusaka at the then Chikwa Magistrates Court to implement the recommendations of the study. The Forum was initiated by UNICEF and established in 2001 in Lusaka and operates as an open-ended group of role players and stakeholders. Its aim is to provide guidelines on the transformation of the child justice system by ensuring adherence to the standards set out in the CRC and other international instruments such as the Beijing Rules; the Riyadh Guidelines; and the JDLs.¹⁶⁰

The other stakeholders of the Forum include but are not limited to the Judiciary, Social Welfare, Police, Correctional Service, quasi government organisations such as the Drug Enforcement Commission, Human Rights Commission; and Non-Governmental Organisations such as Young Women’s Christian Association (YWCA), Jesus Cares Ministries, Rural Youth and Children in Need RYOCHIN, and Zambia Civic Education. The forum also draws membership from cooperating partners such as Access to Justice under Ministry of Justice, UNICEF, and Save the Children Sweden.¹⁶¹

¹⁵⁸ The focus was on three areas of the criminal justice system relating to the offender namely arrest, detention pending trial and the trial itself. With regard to arrests, Arrest Reception and Referral Service (ARRS) were formed to centralise the arrest of all children coming into conflict with the law and treat them in accordance with international standards. In this vein three police stations (Central, Kabwata and Matero were designated to operate as Arrest, Reception and Referral Services (ARRS).

¹⁵⁹ Muntlgh, Evaluation Report, p. 40.

¹⁶⁰ Muntlgh, Evaluation Report, p. 41.

¹⁶¹ Muntlgh, Evaluation Report, p. 10.

The Forum is chaired by the Judiciary, with a magistrate being the chairperson. There are currently 38 branches in the country. The objectives of the Forum are, among others, to provide guidance on the transformation of the child justice system by ensuring that there is adherence to the standards set out in international instruments; and to prevent juveniles from unnecessarily moving further into the criminal justice system.¹⁶²

As it has been rightly observed, in all the aims of the Forum, there is nothing that shows that the forum has any programmes or measures set out for the child victims. The specialised courts are trained in such a way that their focus is on the child offender as opposed to the victim. Meanwhile, it is a known fact that children who are victims, such as defilement victims, do come into contact with the law when they come into contact with law enforcement agencies and subsequently appear before the courts of law as witnesses. The Forum can therefore be said to have turned a blind eye to the child victims. This therefore means that the rights of the child victim are not adequately considered and protected by the courts as well as by law enforcement agencies. By this, the Forum is not upholding the spirit of Article 2¹⁶³ which states that the rights in the CRC should be enjoyed by all children without discrimination.

It is very strange to note that with regard to child offenders, Zambian courts and law enforcement agencies are expected to treat the children in accordance with the provisions in international instruments yet no equivalent treatment is done to the child victim. It therefore shows how the law is being applied in a discriminating style. So much concern is shown on the child offender yet no equal concern is exhibited for the child victim. Therefore, in accordance with the provisions of the CRC, it can be safely stated that the rights of a child victim in Zambia are

¹⁶² MuntIngh, Evaluation Report, p. 62.

¹⁶³ Article 2 of the CRC.

violated within the very institutions meant to protect her. Discussion of the law that follows further illustrates this point.

2.6 CONCLUSION

The international instruments that have been discussed in this chapter have demonstrated that children are holders of rights that require protection. With reference to the Beijing Rules and the CRC, it has been demonstrated that both have progressive provisions on the protection of the rights of the child. Also, that State Parties have an obligation to domesticate the provisions of the CRC and other international instruments. It has also been shown that Zambia ratified the CRC and she is under an obligation to domesticate the rights contained in it. However, in its implementation and domestication into domestic law, Zambia has introduced various programs aimed at protecting the rights of children who come into conflict with the law and has given a blind eye to the rights of the victims of defilement who come into contact with the law. By focussing on the child offender without offering equal attention on the child victims, the implementation of the CRC in Zambia has discriminated against the defilement victims. As a result, the laws and procedures applicable in defilement cases are unfair on the victims and are not sensitive to the plight of the defilement victims thereby depriving the victims the justice they rightly deserve.

CHAPTER THREE

THE LAW ON DEFILEMENT IN ZAMBIA

3.0 INTRODUCTION

This chapter assesses the weakness of the law on defilement in Zambia in as far as upholding the rights of the victim is concerned. In so doing, the chapter analyses the current Zambian law on defilement in the Penal Code, Chapter 87 of the Laws of Zambia in relation to other relevant Zambian Statutes such as the Constitution of Zambia, Chapter 1 of the Laws of Zambia and the Juveniles Act, Chapter 53 of the Laws of Zambia. The analysis of the law on defilement is based on the preceding chapter to highlight the shortcoming in the domestication of the CRC with regard to child victims.

The aim of this chapter is to show that due to the neglect on the victim in implementing and domesticating the CRC, the laws that have been developed and applicable in criminal matters are unfair on child victims as they tend to take away the rights of child victims provided in the CRC. An example of the right which is taken away by the Zambian criminal law is freedom of speech when the victim is not allowed to testify in their own case. This chapter begins with analysing the Constitution being the grund norm, and thereafter discusses statutes such as the Penal Code and the Juveniles Act.

3.1 THE CONSTITUTION OF ZAMBIA

Article 1(1) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 provides that ‘this Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. Under the preamble

in the Constitution, it is provided that ‘we the people of Zambia pledge to ourselves that we shall ensure that the State shall respect the rights and dignity of the human family, uphold the laws of the State and conduct the affairs of the State in such manner as to preserve, develop, and utilise its resources for this and future generations.’ The human family in this regard, refers to all persons regardless of their age, acknowledging that they have rights which deserve to be respected and protected.

3.1.1 The Bill of Rights in the Zambian Constitution

In the Zambian Constitution, there is a Bill of Rights which guarantees and protects the rights of citizens. Article 11 of the Constitution of Zambia provides that ‘it is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status...’ This Article aims at guaranteeing the pledge in the preamble by going a step further to entitle all persons in Zambia regardless of their race, sex or whether citizen of the land or not, as long as one is a human being, fundamental rights and freedoms of the individual. The phrase in Article 11, ‘every person in Zambia’ in its literal sense, simply means ‘everyone’ or ‘every human being.’ This therefore means that regardless of the age of the individual whether a child or adult, all are entitled to fundamental rights and freedoms of the individual.

There is however, another Article in the Constitution that narrows down to children and it provides that ‘all young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation.’¹⁶⁴ As defilement physically and emotionally affects

the victims, it is a form of cruelty or exploitation on a child. Therefore, this Article can be said to include protection from defilement. It is the intention of the Constitution of Zambia to protect children against defilement. The Constitution does define “young persons” as ‘any person under the age of 15 years.’¹⁶⁵

Thus, under the Constitution, the age under consideration is 15 years. A young person is one who is under the age of 15; thus children under the age of 15 are covered in the definition of a young person. However, in the Penal Code, in terms of defilement, a child is defined as someone below the age of 16 years. It is important to note that both the Constitution and the Penal Code have provisions that relate to children who have not yet reached the age of majority. It is therefore possible to argue that defilement is covered under Article 24(4) of the Constitution. The Constitution thus can be said to guarantee the protection of children from being defiled.

Furthermore, the Constitution has exceptions in its applicability to children below the age of 15 years. This is with regard to personal law. Discrimination on grounds of personal law is permitted under the Constitution.¹⁶⁶ For instance, the Constitution provides that:

- (1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.
- (3) In this Article 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 to or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Clause (1) shall not apply to any law so far as that law makes provision-
- (c) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

¹⁶⁵ Article 24(4) of the Constitution of Zambia.

¹⁶⁶ Article 23 of the Constitution of Zambia.

This means that where there is already law on matters such as adoption, marriage, divorce, burial, devolution of property on death or on matters of personal law, whether that law is discriminatory either of itself or in its application, that law is enforceable and is not subject to the direction in the Constitution. With regard to Article 23(4)(c) of the Constitution cited above, personal law encompasses customary law. Under customary law, as long as a girl reaches puberty, she is ready for marriage. Usually at 15 years, a girl would have already reached puberty. Therefore, if the custom or law of the girl allows marriage upon reaching puberty, even if the Constitution seeks to protect a child below the age of 15 years from any kind of exploitation, this would be an exception or rather permissible discrimination as defined above. In the case of *Sibande v The People*¹⁶⁷ which has not been overturned, the appellant was charged with defilement of a girl aged 12 years. In answer to the charge he said "I admit the charge. It was an arrangement for marriage. She told me that she was 15 years . . ." A plea of not guilty was entered and trial proceeded. The girl was the first prosecution witness. On appeal, the Supreme Court held that:

- (i) The court cannot be called upon to consider, as being possibly the customary law on a particular issue, a purely speculative suggestion completely unsupported by evidence.
- (ii) If there is evidence fit to be left to a jury that the parties were married according to customary law the onus would be on the prosecution to negative that suggestion. But it is not enough for an accused simply to say "we are married" or even "we are married according to customary law;" he must at least say "we are married according to customary law because we did this and this," and it would then be for the prosecution to show that the events alleged (assuming they were accepted) did not constitute a valid marriage according to customary law.

¹⁶⁷ (1975) Z.R. 101.

Further, in the case of *R. v Chinjamba*¹⁶⁸ which has also not been overturned, the Supreme Court found that the 60 year old man did not defile the 12 year old girl because they were married under customary law. This clearly shows that currently in Zambia, under customary law, once there is proof of a valid customary marriage, whether the girl is under the age of 16 years or not, the accused cannot be convicted of defilement.

3.2 DEFINITION OF A CHILD IN THE CONSTITUTION VIS-`A-VIS OTHER DOMESTIC STATUTES AND INTERNATIONAL INSTRUMENTS

In the Constitution a “child” is anyone below the age of 15 years. The Penal Code¹⁶⁹ and the Juveniles Act¹⁷⁰ both define “child” as anyone below the age of 16 years. The Affiliation and Maintenance of Children Act defines “child” as anyone below the age of 18 years. It is clear that various pieces of legislation define “child” at varying ages. However, for purposes of this dissertation, the applicable definition of child is as provided in the Penal Code being an Act that provides for the offence of defilement.

At International level, for instance, in the CRC a “child” is defined as every human being below the age of 18 unless, under the law applicable to the child, majority is attained earlier.¹⁷¹ In the Charter a “child” is defined as every human being below the age of 18 years.¹⁷²

It must be noted here that the issue of age differentiation which arises in the aforementioned statutes has been problematic in the sense that discrimination in the treatment of children has been on the basis of such age differentiation. For instance, as far as the Constitution is

¹⁶⁸ (1949) 5 N.R.L.R. 384.

¹⁶⁹ Section 131A of the Penal Code.

¹⁷⁰ Section 2(1) of the Juveniles Act.

¹⁷¹ Article 1 of the CRC.

¹⁷² Article 2 of the African Charter on the Rights and Welfare of the Child.

concerned, anyone above the age of 15 years is an adult whereas anyone below the age of 15 years is a child. Meanwhile, in the Penal Code and Juveniles Act, anyone below the age of 16 years is a child while in the Affiliation and Maintenance of Children Act, anyone below the age of 18 years is considered a child.

Currently research is being conducted by the Zambia Law Development Commission (ZLDC) to harmonise the various laws in order to come up with a widely acceptable standard age for the definition of a “child” in view of the various statutes defining or attaching different ages for a child. With regard to the definition of “child” the research is also meant to try and domesticate the CRC in order for the definition of a child in the domestic statutes to be in conformity with the provision in the CRC. During the interview with a research officer at the ZLDC,¹⁷³ it was stated that there were concerns regarding the definition of child, because Zambia had not domesticated the CRC, which is premised on the principle of the best interest of the child. Arising from this concern, the Commission came up with a project called ‘Review of Child Related Legislation Project,’ which is in two phases.

The first Phase is meant to review existing legislation to take into account the changing needs of society relating to children. The legislation being looked at includes the Juveniles Act, Adoption Act, Affiliation and Maintenance of Children Act, the Penal Code, Intestate Succession Act and the Education Act.¹⁷⁴ All these Acts have provisions relating to children. After reviewing them, the intention is to pass legislation on definition of the child, the social needs of the child,

¹⁷³ Interview: Maxwell Mainsa, 26/01/2011.

¹⁷⁴ Interview: Maxwell Mainsa, 26/01/2011.

children in need of care, children in conflict with the law and how they should be treated in accordance with the new ways of handling children who are in conflict with the law.¹⁷⁵

According to the interviewee, the focus of the second phase is to make the law more accessible by having all matters relating to children in one piece of legislation, that is, all the pieces of legislation under review in phase one would have to be incorporated into one piece of legislation to be called the ‘Children’s Act.’

The interviewee said the research has faced challenges in harmonising all these pieces of legislation. The biggest challenge relates to reaching a consensus on the appropriate definition of the “child.” Also, the statutes under review in phase one address different issues relating to children and there is a justification for that.¹⁷⁶ For instance, the Penal Code has set ages for different categories of children on presumption of capacity to commit an offence e.g. Section 14 provides for criminal responsibility and it states that at the age of eight, it is accepted that a child is incapable of committing a criminal offence, and therefore cannot be held criminally responsible. The Penal Code also provides that a child below 12 years is not criminally responsible for an act or omission unless it is proved that at the time of committing the act or omission he had capacity to know that he ought not to do the act or make the omission. Also a person under the age of 12 years is presumed to be incapable of having carnal knowledge.

The other challenge is likely to be in implementation; for instance, with regard to which institution would be the lead institution in implementing the Children’s Act under consideration. In the Penal Code, the lead implementing institution is the Ministry of Home Affairs; with the

¹⁷⁵ This is basically trying to incorporate diversion as an alternative to imprisonment or have institutions of care for children. Different proposals are yet to be made to amend the listed pieces of legislation.

¹⁷⁶ Interview: Maxwell Mainsa, 26/01/2011.

Juveniles Act, it is both the Ministry of Home affairs through the Zambia Correctional Service and Ministry of Community Development, Mother and Child Health with regard to provision of social welfare reports, approved schools and other related activities. For the Adoption Act, the lead institution is the Ministry of Community Development Mother and Child Health.¹⁷⁷

The interviewee further mentioned that the ZLDC undertook a study of the South African Children's Act.¹⁷⁸ The findings were that South Africa does have a Children's Act but according to the South African Law Reform Commission, implementation of the Act has been problematic as they have failed to come up with the lead institution to oversee its implementation. Current proposals suggest disintegrating the Act into smaller components that would address specific issues.

Due to all the varying definitions of "child" in the local statutes as well as challenges relating to the would be lead implementing institution and having taken a leaf from the challenges faced by the South African Law Reform Commission in the implementation of the Children's Act, the focus of the ZLDC is to review the existing pieces of legislation separately. However, despite the impending challenges, further studies are being conducted on the possibilities of having a Zambian Children's Act. According to the interviewee, proposals before the ZLDC are that for all intents and purpose, a child must be defined as a person below the age of 18.¹⁷⁹

¹⁷⁷ Interview: Maxwell Mainsa, 26/01/2011.

¹⁷⁸ Interview: Maxwell Mainsa, 26/01/2011.

¹⁷⁹ In trying to domesticate the provision relating to age under the CRC into the Penal Code, it would mean that all the provisions under section 14 and 138 of the Penal Code would be affected as well. To adopt the CRC definition of child would mean a person under 18 is presumed incapable of having carnal knowledge.

3.2.1 DEFILEMENT AS DEFINED IN THE PENAL CODE

The Penal Code, Chapter 87 of the Laws of Zambia is an Act that stipulates various offences and punishments accorded to each offence. It is in the Penal Code where defilement of children is particularly provided for and the punishment set out.¹⁸⁰ With regard to defilement, the Penal Code is read together with Amendment Act No. 15 of 2005. Section 138(1) of the Penal Code provides that ‘any person who unlawfully and carnally knows any child under the age of 16 years commits a felony and is liable, upon conviction, to a term of imprisonment of not less than 15 years and may be liable to imprisonment for life.’ The law presumes that a child below the age of 16 years is incapable of consenting to a sexual act. Section 138 (2) of the Penal Code provides that ‘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 14 years and not exceeding 20 years. Section 138 (3) provides that ‘any person who prescribes the defilement of a child as cure for an ailment commits a felony and is liable, upon conviction, to imprisonment for a term of not less than 15 years and may be liable to imprisonment for life.’ As can be seen from the phrasing of subsections (2) and (3) of Section 138, the term “child” is used without any indication of age under consideration. The age referred to can be derived from the context of the age stated in the whole section as being one below the age of 16 years.

The amendment to the Penal Code which was made on 12th April, 2011 was by virtue of Amendment Act No. 3 of 2011 in relation to Section 138. Section 138 of the Penal Code is amended in subsection (1) by the insertion immediately after subsection (1) of the proviso that ‘provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did in fact believe, that the child

¹⁸⁰ Section 138 of the Penal Code.

against whom the offence was committed was of, or above the age of 16.’ This proviso in fact was earlier repealed by the Amendment Act No. 15 of 2005 but has been reintroduced by Amendment Act number 3 of 2011.

Although defilement usually refers to adults engaging in sex with minors under the age of consent, as stated earlier, different jurisdictions use many different terms for the crime, such as ‘sexual assault,’ ‘rape of a child,’ ‘corruption of a minor,’ ‘carnal knowledge of a minor,’ ‘unlawful carnal knowledge,’ or simply ‘carnal knowledge.’¹⁸¹ In Zambian statutes, the term ‘defilement’ is used. For the offence of defilement, overt force or threat need not be present. The offender may be convicted even if the complainant explicitly consented to the sexual contact and no force was used by the actor. The law presumes coercion, because a minor is legally incapable of giving consent to the act.¹⁸²

Recapping the provisions of the Constitution guaranteeing the rights of the child without discrimination against mental anguish, cruelty and exploitation, the law under the Penal Code indicates the commitment to realise the rights of every child as set out in the Constitution. However, the most recent amendment to the Penal Code providing for a defence of honest belief by an accused that the child is above the age of 16 years is hindering the attainment of the protection of the rights of the child as set out in the Constitution. It is a defence to an accused who defiles a child who in stature appears like someone who is above the age of 16 years to advance the defence that he honestly believed that the child was above the age of 16 years. Therefore, in border line cases of children who are 14 or 15 years and who appear to be 16 years and above, the accused has a defence under the proviso to Section 138 of the Penal Code. Once

¹⁸¹ Garner A. Bryan, trans., *Black's Law Dictionary (9th Ed)*. (Dallas Texas: West Publishing Co, 2009), p. 1374 to 1375.

¹⁸² Tomaselli, Sylvana, Statutory rape, <http://www.answers.com/topic/rape>, Accessed on September 20, 2011.

the defence succeeds, the accused would be acquitted. Thus, this defence operates to the advantage of the offender but negatively affects the realisation of the rights of the victim.

In ensuring that the defence under the proviso is used by the accused, the law places a duty on the court to explain to the accused at the earliest time possible of the existence of the proviso. In the case of *Nsofu v The People*,¹⁸³ it was held, *inter alia*, that:

(iii) Even where an accused pleads not guilty it is desirable that the proviso be explained before plea, but certainly at some early stage in the proceedings, so that he may have the opportunity to direct his cross-examination of the prosecution witnesses to the question of the girls' age.

In the event that the court omits to explain the proviso to the accused, it is fatal to the prosecution's case especially in cases where the accused is prejudiced. This was the position in the case of *Gift Mulonda v The People*¹⁸⁴ in which it was held, *inter alia*, that:

1. It is a rule of practice that the proviso to section 138 of the Penal Code should be explained to an accused person. Failure to explain the provision is fatal.
2. The age of the victim in defilement cases is crucial and a very essential ingredient of the charge.

In the *Gift Mulonda* case, on appeal to the Supreme Court against the sentence of 15 years slapped on him, the accused who had made an unequivocal plea of guilty in the Subordinate Court was acquitted on the basis that the proviso was not explained to the accused and so, he was prejudiced. In obiter, the Supreme Court said:

“We have perused the record of the record of the trial Magistrate. It is very clear to us that the proviso to section 138 of Cap 87 was not put to the Appellant at the time he was initially called upon to plead. Nor was it put to him after the facts were read. Having regard to the circumstances under which the offence was committed, as revealed by the facts in court, this was not a borderline case, in terms of age. The facts revealed that the Appellant had a meritorious statutory defence which was not explained as required by the rule of practice in such offences. Failure to explain the proviso on the facts of this case was fatal that we did not even consider to order a retrial.”

¹⁸³ (1973) Z.R. 287.

¹⁸⁴ (2004) Z.R. 135.

The *Gift Mulonda* case is just one of the many cases in which the accused are acquitted on the basis of the failure to explain the proviso to the accused or due a to successful defence of the proviso.

3.2.2 THE JUVENILES ACT

The Juveniles Act¹⁸⁵ deals with children below the age of 16 years and Juveniles below the age of 19 years and is read together with the Penal Code in matters relating to children as the case may be. Under the Act, the term “child” means a person who has not attained the age of 16 years while a “juvenile” is a person who has not attained the age of 19 years; and includes a child and a young person.¹⁸⁶ Therefore, according to the Juveniles Act, a child is also a juvenile. A “young person” means a person who has attained the age of 16 years, but has not attained the age of nineteen years.¹⁸⁷ The Juveniles Act clearly is not helpful in the manner it defines a child, juvenile and young person as the three categories in certain instances appear to be put in one group or category. The dilemma is compounded by the other age definitions as stated in the Penal Code discussed earlier.

With regard to child witnesses, the Act has set out the law that regulates the reception of such evidence. In defilement cases, child victims are witnesses hence it is important to assess how Zambian law treats the evidence of child witnesses. However, just as the Penal Code has been recently amended, the Juveniles Act has not been spared. The Juveniles Act was amended on the 12th April, 2011 by virtue of Amendment Act No. 3 of 2011. Consequently, Section 122 of the Juveniles Act was amended and it provides that:

¹⁸⁵ Chapter 53 of the Laws of Zambia.

¹⁸⁶ Section 2 (1) Chapter 53 of the Laws of Zambia.

¹⁸⁷ Section 2 (1), Chapter 53 of the Laws of Zambia.

Where in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth:

Provided that-

- (a) If, in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and does not understand the duty of speaking the truth, the court shall not receive the evidence; and
- (b) 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 the accused.

Prior to the amendment to Section 122 of the Juveniles Act, the trial court was required to conduct a *voire dire* on the child to ascertain whether the child understood the nature of an oath in order for the evidence to be received on oath. Thereafter, the child would be subjected to cross examination. In the event that the child did not understand the nature of an oath, the trial court was required to ascertain whether the child was possessed of sufficient intelligence and understood the duty of speaking the truth in order to give unsworn testimony. The unsworn evidence of the child was deemed as good evidence or a deposition at law. The Act in the relevant section used the word 'shall' meaning that unsworn evidence of a child was deemed to be a deposition within the meaning of the law. Clearly, it was the intention of the legislators to allow children of tender age whose rights have been infringed to be heard by law enforcement agencies including the courts of law. It was recognised that children of tender age have the right to be heard in matters affecting them as guaranteed in the Zambian Constitution and in international instruments earlier discussed in this dissertation. In fact, there were a number of convictions secured in the courts based on the uncorroborated evidence of the child coupled with

any other independent evidence in the matter provided the trial court warned itself of the dangers of doing so.

In the new provision, however, the requirement that the child understands the nature of an oath before sworn testimony could be received was removed. Instead, the trial court's duty is to ascertain whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth in order for the court to receive that child's evidence on oath. The significant change in the new provision is in the fact that now there is no provision for the court to receive unsworn evidence of the child. Once the child does not satisfy the court on the above two tests, that child's testimony shall not be received altogether. The discretion courts had to examine the child witnesses as to their capacity to give sworn or unsworn evidence has been removed by the recent amendment.¹⁸⁸

Generally, the test to adduce sworn testimony has been lowered. Despite this being the case, many child witnesses fail the test to adduce sworn testimony. Also, due to the lowering of the test for sworn testimony and in an effort to receive sworn testimony of child witnesses, courts place on oath child witnesses which has posed new challenges on the child witnesses who under cross examination, become inconsistent as has been demonstrated in subsequent chapters. It is worth noting that such assessment of deciding to receive sworn testimony or discard with it for failure to meet the test is subjective considering that magistrates are lay persons as far as depicting the psychological status of a witness' ability to testify is concerned. Therefore, the assessment is different from one trial court to another. However, the standard is that, as long as the victim does not qualify to give sworn evidence, her right to be heard regarding what transpired is taken away despite the right being guaranteed in the Constitution.

¹⁸⁸ Author's observation of the practice at Lusaka Magistrates Court.

Also, with the new amendment, courts are not given the discretion to determine whether a child can give sworn evidence or unsworn evidence. This is because the law no longer allows courts to take unsworn evidence except evidence given on oath which has been disastrous on the child witness. The Act makes it clear by stating that, ‘... the court shall not receive the evidence.’¹⁸⁹ The effect of this is that a child of very tender age who does not possess sufficient intelligence and does not appreciate the duty of speaking the truth cannot be heard in court.

Meanwhile, as earlier discussed, the Constitution guarantees freedom of expression without the limitation imposed by the Juveniles Act. Article 20 of the Constitution of Zambia provides that:

Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedoms to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

Clearly, the Constitution of Zambia envisages that all persons regardless of age have freedom of expression to communicate ideas and information without interference. Therefore, the Constitution guarantees children’s freedom to express themselves in court on issues that affect them. Freedom of expression is not limited to adults only but is open to all people by virtue of being human.

By the limitation imposed by the Juveniles Act, it is safe to state that a child witness who fails the test is discriminated against in the enjoyment of the freedom to express oneself despite the right being guaranteed in the Constitution. Article 23(1) provides that ‘... a law shall not make

¹⁸⁹ Section 122 of the Juveniles Act.

any provision that is discriminatory either of itself or in its effect.’¹⁹⁰ Sub Article (2) of Article 23 further provides that ‘... a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.’ From the Articles cited above, it follows that any law that is calculated to limit freedom of expression of particular groups in this case, children, on whatever basis is inconsistent with the Constitution. The amendment to the Juveniles Act can, in that sense, therefore be considered unconstitutional.

Further, the provision in the Juveniles Act barring children from testifying if they fail the test to give sworn testimony is contrary to Zambia’s obligations at international level. For instance, the CRC has provisions to the effect that children have the right to participate when decisions that affect them are made, and have the right to express their views freely and to be heard.¹⁹¹ It is further provided in the CRC that children have the right to be heard in any judicial and administrative proceedings.¹⁹² By ratifying the CRC, Zambia pledged to ensure that Zambian children are heard in matters affecting them. Certainly, the provision in the Juveniles Act cannot be said to be in the best interest of the child.

Cases of defilement involving very tender age children that have reached the courts of law range from a few months old to about ten years. While some in this age group possess sufficient intelligence and understand the duty to tell the truth in order to adduce sworn testimony, most of them usually do not. One such case was a matter before the Subordinate Court under cause number SP2/677/2008, a Moslem girl child victim aged five years did affirm following an assessment by the court that she possessed sufficient intelligence and understood the duty to tell

¹⁹⁰ Chapter 1 of the Laws of Zambia.

¹⁹¹ Article 12(1) of the CRC.

¹⁹² Article 12(2) of the CRC.

the truth, and did accordingly give sworn evidence.¹⁹³ However, there have been cases where children, for instance, at the age of three or four years have given unsworn evidence before the courts of law pursuant to the old provisions of the Juveniles Act as the law was then. For instance, under cause numbers 2SP/E/159/2000 and SP2/718/2008, the victims both girls, were aged four years old and they were able to give unsworn evidence and the court received their evidence as good evidence.¹⁹⁴ Furthermore, under cause numbers SP2/884/2008 and SP2/601/2008, the victims were aged five and 11 years old respectively and both gave unsworn evidence which was received by the court.

Also, there have been certain cases involving mentally challenged victims. The law on this class of victims is particularly provided for under the Penal Code.¹⁹⁵ The section provides that any person who, knowing a child or other person to be of down syndrome or person with mental illness, has or attempts to have unlawful carnal knowledge of that child or other person in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the child or other person was of down syndrome commits a felony and is liable, upon conviction, to imprisonment for a term of not less than 14 years and may be liable to imprisonment for life. In most cases, mentally challenged victims are witnesses before the courts of law and most of them do have the intelligence to give unsworn evidence but fail to meet the test to adduce sworn evidence. For instance, in a case in the Subordinate Court under cause number SP1/65/2007 a 15 year old mentally challenged victim gave unsworn evidence as she had failed the test to give sworn evidence.¹⁹⁶ It is therefore proper to assert that the law on defilement is likely to deny the rights of imbecile victims who in most cases fail the

¹⁹³ Magistrate Ruth Chilembo's court, Lusaka Magistrates Court.

¹⁹⁴ Magistrate Ruth Chilembo's court, Lusaka Subordinate Court.

¹⁹⁵ Section 139 of Chapter 87 of the Laws of Zambia.

¹⁹⁶ Magistrate Ruth Chilembo's court, Lusaka Subordinate Court.

test to adduce sworn testimony. This is because even when a mentally challenged victim can give unsworn evidence, the law prohibits the court from receiving such evidence.

The significance of the above highlighted cases is that despite being young, some children pass the test to give sworn testimony. Also, by the lowering of the test to adduce sworn testimony, that is, from understanding the nature of an oath to merely having sufficient intelligence and demonstrating the ability to understand the duty to tell the truth, it is possible that many children will now pass the test thereby giving sworn testimony. However, challenges would arise during cross examination of child witnesses when they become inconsistent in their testimony. The above cases also seek to show that there were some victims who despite failing the test to adduce sworn testimony, their evidence was received unsworn considering that the law as it was then, provided such an alternative. By so doing, child witnesses enjoyed their freedom of expression.

Currently as the law is, mentally challenged victims and children of very tender age are not allowed to give evidence in court as long as they do not possess sufficient intelligence and do not understand the duty to tell the truth in order for them to give sworn testimony. As a result of the new legislation, the likelihood of defilement cases being frustrated at the police level is high since the police are now aware of the limitation on the reception of unsworn testimony of the victim in instances where the victim is too young or is an imbecile most likely not able to pass the oath test. Or in the event that a child witness passes the test, challenges arise when such a witness is being cross examined.

Further, the effect of the recent amendment to the Juveniles Act is contrary to the spirit of the Constitution. The restriction against allowing unsworn evidence of child witnesses denies the victims their right to freedom of expression as guaranteed in the Constitution.¹⁹⁷

While there is a restriction on the reception of unsworn testimony of the child, the accused is still at liberty to either elect to give sworn testimony, or give unsworn testimony, or elect to remain silent. The accused persons are in most cases sane adults who have sufficient intelligence, understand the duty to tell the truth and understand the nature of an oath. In cases where an accused person is insane or cannot for some reason take oath or give unsworn testimony, the Criminal Procedure Code has specific provisions to deal with the accused.¹⁹⁸ From the author's experience on the bench, the accused persons are not subjected to the oath test because as adults, the law presumes that they understand the nature of an oath and possess sufficient intelligence. Therefore, if the restriction to give unsworn testimony was on the accused, it is certain that none of them would be prejudiced by this law. However, this is not the case for the child witness. There is no distinction whatsoever. All children regardless of their age or their mental condition, they are subjected to the same procedural requirements. The restriction affects children who in most cases do not qualify to give sworn testimony. Clearly, this law is unreasonable, is not in the best interest of the child and is inconsistent with the Constitution of Zambia.

It is the author's view that issues of a witness' intelligence are irrelevant considerations as the basis to allow a witness to testify. When crime is committed against a person, it is just and fair to allow the victim to narrate to the court what transpired. It is the duty of the court to analyse the credibility of a witness and assess the totality of the evidence received.

¹⁹⁷ Article 20 of the Constitution of Zambia.

¹⁹⁸ Section 160 to 167 of Chapter 88 of the Laws of Zambia.

According to the Constitution, the rights of all the citizens should balance subject to lawful limitations. In a criminal trial, there are two competing rights; for the offender and for the victim. However, in the Zambian criminal justice system, there is more attention on the protection of the offender's rights overriding the victim's rights. Therefore, it is safe to state that the protection of the offender's rights is not equivalent to the protection of the rights of the child victim in that the protection of the offender's rights is even enshrined in the Constitution without any claw backs in any other written law or otherwise. Article 18 (1) of the Constitution provides that if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.¹⁹⁹ Sub Article (2) (a) of the same Article provides that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty. Meanwhile, the Constitution does not provide an equivalent right to a fair trial process for the victim.

Further, while the Constitution of Zambia guarantees freedom of expression to all its citizens, the Juveniles Act precludes young citizens from enjoying their freedom of expression when they fail to pass the test to adduce sworn testimony. Furthermore, girls of border line age fail to receive justice when a successful defence under the Penal Code is advanced by the offender that he reasonably believed the girl to be above the age of 16 years. This is discrimination on the basis of physical appearance or stature contrary to the spirit of the Constitution which seeks to protect the rights of all its citizenry without discrimination.

¹⁹⁹ Chapter 1 of the Laws of Zambia.

3.3 CONCLUSION

It has been demonstrated that the Constitution guarantees freedom of expression to all people without discrimination and protection from being defiled. However, statutes such as the Penal Code and the Juveniles Act take away the rights of the child witness. The rights are denied to the children by virtue of the restrictions stemming from the insistence on sworn evidence which takes away the right to be heard of tender children who do not possess sufficient intelligence and do not appreciate the duty to tell the truth. In addition, the availability of a defence based on the physical appearance of the victim has exposed the girl child to defilement and the failure to uphold her right from being defiled when the defence leads to an acquittal of the offender. The amended provisions in the Penal Code and Juveniles Act have exposed the weaknesses embedded in the criminal law on sexual offences in Zambia which encompass the offence of defilement.

CHAPTER FOUR

PERCEPTIONS OF ADJUDICATORS, PROSECUTORS AND GUARDIANS ON THE LAW ON DEFILEMENT

4.0 INTRODUCTION

In this chapter it will be shown that defilement is quite a common feature in the Zambian courts. It is the aim of this chapter to discuss the current law on defilement by examining the court trial process by way of questionnaires and interviews from key respondents to ascertain the adequacy or inadequacy of the law on defilement. The chapter will also discuss the perception of guardians who had dealt with defilement when their child was defiled on the role of Zambian courts in defilement cases.

4.1 ADJUDICATORS' VIEW ON CASES OF DEFLEMENT

All the adjudicators spoken to stated that they had handled a lot of defilement cases with an indication that cases of defilement of girls are very common. It is therefore clear that defilement is a problem in our Zambian courts from the Magistrate Courts right up to the Supreme Court, the highest court of the land. For instance, one of the High Court judges in an open ended questionnaire stated that defilement is very common especially in the rural setting. The observation of this respondent was the same as the rest of the High Court judges' respondents.

To buttress the issue of commonality of defilement cases, it is necessary to state that, for instance, during the November, 2013 Supreme Court session held in Kabwe, out of 30 criminal appeal cases scheduled to be heard, 26 of them were defilement cases. This is quite alarming and shows just how defilement has become a crisis in Zambia.

Further, to confirm the gravity of the problem, the civil society has observed the growing cases of defilement in Zambia. As such, there are efforts to fight the vice. In Chipata, Eastern province, the Young Women Christian Association (YWCA) the Association director Dorothy Njobvu was reported in The Post Newspaper²⁰⁰ stating that the YWCA has trained 20 men and boys as “good husbands” to help fight sexual abuse and gender violence in the province. In the said article in the newspaper, in an interview conducted by Peter Sukwa of the Post Newspaper in Chipata, Njobvu said that:

The 20 men would spearhead the campaign in identified areas of Chipata district.

She also said that:

“Luangeni and Kasenengwa constituencies were the two areas with the highest number of sexual and gender based violence, child marriages and defilement cases.”

The intervention by the YWCA clearly shows that defilement is one of the major problems affecting society. Further, the intervention by YWCA supports the adjudicators’ views when they indicated that defilement of girls is quite common in the Zambian courts. While defilement is one of the major challenges the Zambian society is battling with, the concern is whether the law is adequate or not in combating the vice. The key respondents’ views are therefore necessary in scrutinising the adequacy or inadequacy of the law on defilement.

As earlier stated, defilement is a criminal offence and once a child is defiled, prosecution of the accused must follow in accordance with the processes prescribed in the criminal justice system. These processes are: reporting the offence to the police, the victim examined at the hospital and the trial itself. The discussion below depicts the prosecution of the accused and the procedures involved from the time the offence is reported at the police.

²⁰⁰ Wednesday 5th February, 2014, on page 9.

The table below shows that while a lot of defilement cases are reported at the police, not all cases are taken to court for the prosecution of the accused.

Figure 2: Respondents perception on reported cases that reach at Court

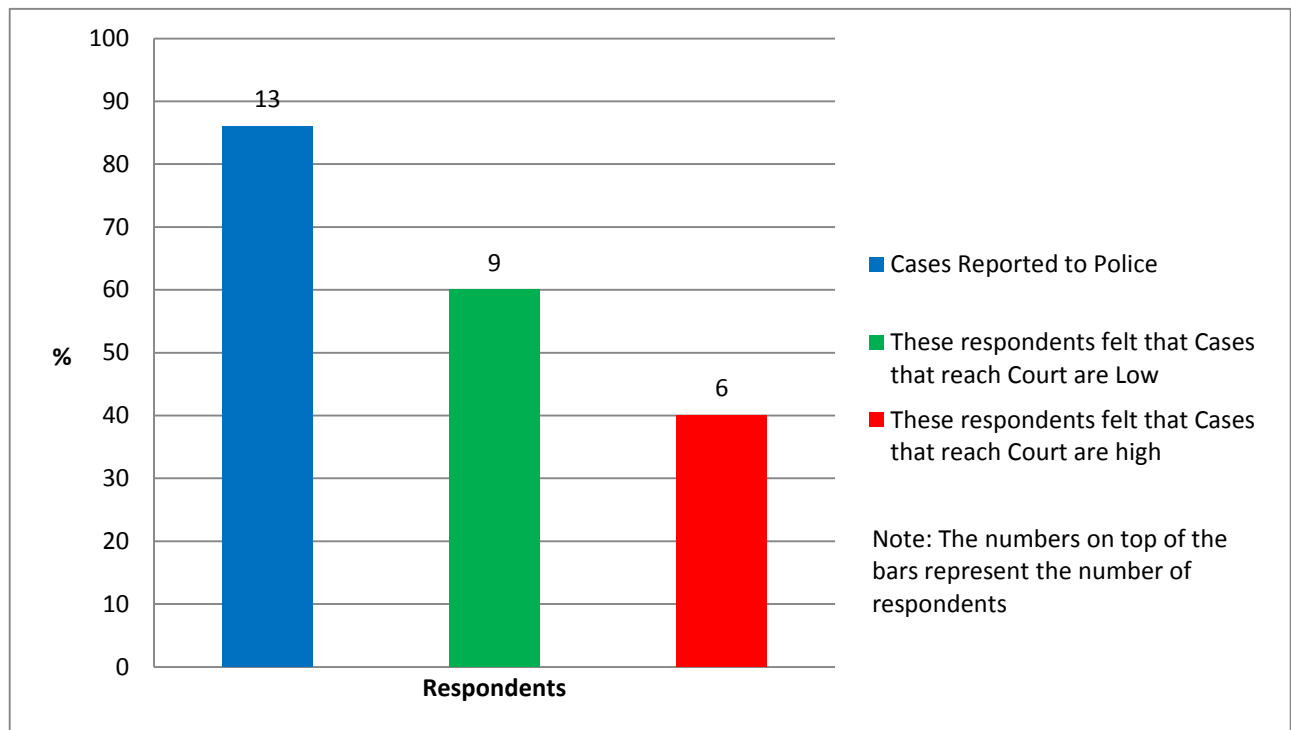


Figure 2 represents the views of some of the respondents, that is, adjudicators in this case being, High Court judges and magistrates, prosecutors and guardians. The guardians explained that they would first report the matter to the police rather than go straight to the hospital because they require the medical report to take to the hospital so that the victim can be medically examined. The Medical Report Form is where the doctor enters his findings following examination of the defilement victim. The medical report is subsequently tendered in evidence for the prosecution so that it corroborates the commission of the offence.

4.2 EXPERIENCE OF PARENTS AND GUARDIANS AT COURT

All the respondents stated that they felt bad and were disturbed when they learnt that their child was defiled. With regard to the identity of the offender, all the respondents indicated that the offender was a well-known person to the child and her family. For instance, three of the respondents indicated that the offender was related to the family while four respondents indicated that the offender was a neighbour. The respondents further indicated that the police took the reported cases to court as per their expectation and the police handled the case professionally.

Another respondent stated that his experience at the police station was that he was informed of the negative effects of defilement on the child and that there was no attempt to settle the matter at the police station. With regard to the service received at police level, all the seven respondents said they were satisfied.

From the results, four respondents were of the view that their cases were fairly handled by the court, while three of the respondents felt that their cases were not fairly handled. The four indicated that justice prevailed because the offenders were convicted. Of the four respondents, one of them indicated that justice was done for the child because the child was not put in police cells. The remaining three respondents stated that the offenders were acquitted and as such, they felt that there was no justice for the child. However, all the seven respondents indicated that they expected the court to dispense justice by convicting the offenders in their respective cases. Therefore, in the cases where there were acquittals, the guardians felt that the courts failed to uphold the rights of the victim.

From these results, it can be stated that from the guardians' point of view, justice is only achieved when the courts convict the alleged offender. It is however, important to note that from the results above, the difference between the four respondents in whose cases the offenders were convicted and the three in which the offenders were acquitted is quite minimal which indicates that the acquittal rate is relatively high in defilement cases. The high acquittal rate indicated by the guardians is in agreement with the statistics at VSU with regard to the acquittal rate coupled with cases that are withdrawn, abandoned or lost in the criminal justice system as earlier indicated in chapter one.

Of those who felt that justice was not done in their child's case, one respondent, in particular, stated that corroboration became an issue. As a result, the court did not meet his expectations when the offender was acquitted on the basis of lack of corroboration thereby denying justice for the victim. When asked what should be done to ensure justice for the victim in defilement cases, this respondent stated that the law under Section 138(1) of the Penal Code should be revised with regard to corroboration. The respondent went on to say that the testimony of the victim, the identification of the suspect by the victim and the positiveness of the medical evidence should be enough to secure a conviction so that defilers are not "let scot free." This respondent lamented that the acquittal rate was against the weight of the evidence adduced in court. Another respondent whose case was still in court, indicated that he expected the court to convict the offender. He was of the view that to ensure justice in a defilement case which is a felony, the police should be taking all necessary measures to make sure they have all the required evidence, such as corroborative evidence that connects the accused to the offence.

Another guardian who felt a lack of justice in their child's case stated that the acquittal of the accused was based on the fact that there was no direct witness who saw the offender defiling the victim. On what should be done to ensure justice for the victim, this guardian indicated that all sexual offences are committed in secret and it is difficult to have witnesses to testify as having found the offender in *flagrante delicto*, hence there is injustice in most sexual offences because of lack of corroboration. He was of the view that to ensure justice in defilement cases, corroboration should not be restricted to people adducing direct evidence but also consider circumstances surrounding the event in question. The respondent added that in as much as there is a danger of false implication in defilement cases, courts should not do away with evidence from the relatives of the victim. The respondent noted that although the evidence from the relatives to the victim may have some room for false implication, it is incumbent upon the courts to consider the evidence.

The respondent lamented that even worse, the 2011 amendment to the Juveniles Act which bars courts from admitting unsworn evidence of a minor is serious miscarriage of justice. This is because most victims of sexual offences are minors who themselves have to give direct evidence in relation to the offence and to the identity of the offender. In concluding, this respondent stated that there was need to have these laws revisited because they greatly disadvantage the child victims.

From the responses of the respondents, it is clear that for some respondents, while understanding what justice for the child is, do not understand that the child as a victim is not supposed to be put in police cells. There appears to be a lack of understanding that the cells are meant for suspected wrong doers and not for the victims. It must be understood that the victims require

protection and support as opposed to being incarcerated. Further, it has been shown that the evidence of the victim is crucial in defilement cases. The victim is a key witness in identifying the offender especially that all the respondents indicated that the offender was a known person to the victim and her family. Further, the evidence of the victim forms the basis which other witnesses tend to support from various angles. It has also been noted how the guardians lamented on the law on corroboration and how its absence was the reason for the high acquittal rate.

4.3 EVIDENTIAL CHALLENGES IN A DEFILMENT CASE

a. Lack of Evidential Corroboration: The following were the views of the adjudicators on corroboration.

Respondents: High Court Judges and Magistrates

With regard to corroboration, all the respondents in the High Court and Subordinate Court indicated that corroboration is a must in every defilement case and that its absence is fatal to the prosecution's case as it can lead to the acquittal of the accused person. The High Court judges explained corroboration as being "something more." So, even evidence that appears unconnected to the evidence given by the witness can amount to corroboration. In sum, the views of the High Court judges were that corroborative evidence is usually difficult to adduce with regard to the identity of the offender especially where the victim is of tender age. The judges further stated that the requirement for corroboration in defilement cases is too stringent for the delivery of justice considering that when there is no corroboration, the accused is acquitted. Therefore, the judges stated that the absence of corroborative evidence benefits the accused. However, it was felt that corroborative evidence though not available in all defilement cases is available in most of the defilement cases, therefore, corroboration should not be

compulsory in defilement cases. It was noted that where corroborative evidence was available, it was usually missed by the trial magistrates. It was further observed that while corroboration is a must in every case, the trial courts tend to think that corroboration is repeating the evidence given by another witness. The respondents were of the view that while corroboration is necessary, courts should be given the liberty or discretion to convict in its absence after assessing the weight of the victim's evidence based on demeanour.

Some judges also took time to point out the different elements to a defilement case as being: age of the victim, medical report, corroborative evidence and *voire dire*. It was indicated that when a defilement case is received by the judge in the High Court for sentence, the judge must ensure that all the ingredients of the offence of defilement are proved and also whether evidence was corroborated or not. It was also pointed out that the child has the right to legal representation, to medical attention, to hide their identity (by not indicating the child's name on the indictment and holding trial in camera) and is entitled to presence of a guardian during the proceedings.

For the magistrate respondents, some were of the view that corroboration is important and is also a good requirement as it rules out the dangers of false implication. The rest of the magistrate respondents felt that it is important for corroborative evidence to be present considering the seriousness of the sentence in defilement cases, such that convictions are based on cogent and relevant evidence. Corroboration thus helps in discharging the burden of proof.

However, it was felt that the requirement for corroboration is discriminatory because it is only a requirement on child witnesses yet both children and adults do lie. The magistrates added that in fact, adults lie more than children. The magistrates were also of the view that while corroborative evidence is necessary, it must not be stringent at the expense of upholding the

rights of the victims. It was indicated that this is because corroborative evidence is very difficult and average/rare to find in a defilement case. It was however pointed out that corroborative evidence is often available but that the court needs to know what it is looking for. The magistrates also stated that in the absence of corroborative evidence, the court concludes that the prosecution has not proved their case beyond all reasonable doubt thereby leading to the acquittal of the accused. Therefore, in the interest of justice, magistrates felt that when facts are notoriously pointing to the accused, the court should have the discretion to convict on the uncorroborated evidence and that there is no need to worry or fear passing a wrong verdict.

The magistrates also took time to state the elements of a defilement case which the prosecution are required to prove as being: age of the victim to be below the age of 16 years, sexual intercourse or carnal knowledge (proof of penetration) to be corroborated and identity of the offender.

From the above results, all the adjudicators acknowledged the lack of corroborative evidence in defilement cases. Lack of corroboration as pointed out by some adjudicators is necessitated by the fact that defilement is committed in secret or in private. An adult is unlikely to defile a child in a public place. What was clear from the adjudicators is that corroboration must somehow be present, but that there must be a flexible approach to what constitutes corroboration. It was observed that the current approach on corroboration is too stringent for the delivery of justice. This is because, in the absence of corroborative evidence, the court usually makes a finding that the prosecution has failed to prove the case beyond reasonable doubt as per the required burden of proof in criminal cases.²⁰¹

²⁰¹ *Woolmington v. Director of Public Prosecution* [1935] A.C. 462.

However, what was common from most of the adjudicators was that corroborative evidence need not be corroborative in the strict sense, but that it must be “something more” which tends to connect the accused person to the charge. This is a relaxed approach as to what constitutes corroboration.²⁰²

As has already been shown, while the judiciary has relaxed guidelines as to what constitutes corroboration in a bid to rise to the challenge of upholding the rights of the child by securing high conviction rate, this has not been realised as the acquittal rate is still high. It was acknowledged by all adjudicators that corroboration even in the relaxed sense is rare and difficult to adduce especially in cases involving tender aged victims. The requirement for corroboration is still making the courts fail to uphold the rights of child victims. Despite this difficulty, most adjudicators maintained their position that corroboration is important to ensure that convictions are based on strong evidence, considering the seriousness of the sentence. Further, it was felt that the requirement for corroboration is discriminatory in that it only applies to victims when both children and adults do lie, and that adults lie more than children. Therefore, the argument by some adjudicators that the requirement for corroboration is discriminatory does have basis.

From the responses, some adjudicators were of the view that courts need to have the discretion to assess the weight of the evidence based on demeanour. Further, that when facts are notoriously pointing to the accused, corroboration should not be required in order to enter a conviction. This is a call to have the law as it was then when courts had the discretion to convict the accused

²⁰² *Machipisha Kombe v The People* (2009) Z.R. 282.

person on the uncorroborated evidence provided they warned themselves of the danger of doing so as was held in the case of *Katebe v The People*.²⁰³

The prosecutors also expressed their views on corroboration. Their views were however, expressed more in terms of the challenges they experience in prosecuting defilement cases. The following were their responses:

Respondents: Prosecutors

As noted above, there were 15 prosecutors who answered the questionnaires. On the issue of corroboration, the prosecutors' views were that in most cases, it is very difficult to find corroborative evidence. It was stated that corroborative evidence was either rare or lacking in defilement cases. The prosecutors pointed out that due to lack of corroborative evidence, they rely on the evidence of the victim. Therefore, if the victim cannot testify, it becomes difficult to prosecute. It was also stated that corroboration is extremely important because the offence itself is very serious and it involves the life of someone, the accused person. Therefore, in view of heavy (long sentences) it was felt that corroboration should be a must in defilement cases so that real or correct persons/offenders are convicted. On the one hand, it was stated further that corroboration is morally and legally important because defilement cases can easily be invented in order to secure certain ends. On the other hand, some good cases are lost due to lack of corroborative evidence. Therefore, it was felt that courts should not be so strict with regard to the rule of evidence on corroboration.

The prosecutors indicated that the challenges of prosecuting a defilement case are: lack of corroboration; the victims are too young to explain what transpired while some victims keep on

²⁰³ (1975) Z.R. 13.

crying without saying anything, and that sometimes the child refuses to talk and even fails to identify the offender. The victim has difficulties to talk in court due to the fact that she is traumatised, is shy and afraid to recount the story in the way it happened. Where a defiler is a relative, it becomes even more difficult to extract evidence from the victims.

The respondents stated that sometimes the victims are not consistent in their testimony hence fail to give proper evidence. It was pointed out that because of the trauma as a result of the defilement, the victims have fear and are shy thereby fail to explain what transpired. As a result, some vital information which is necessary to arrive at a conviction is left out and the prosecution of such cases is mostly unsuccessful and the prosecution only leave it to the court to make its own independent decision. Therefore, because child victims aged between one to four years fail to talk in court, it is very difficult for the prosecution to prosecute such cases. The prosecutors also pointed out that the poor environment in the courtroom is not conducive for the child witness and the lack of training for prosecutors specifically on how to handle child victims is a challenge in prosecuting defilement cases. As a result, defilement cases are handled like any other cases.

Some prosecutors expressed the view that the challenge of prosecuting a defilement case relates to the unwillingness of parents of defiled girls to attend court either as a witness or merely to accompany the child. The other challenge was attributed to the fact that medical examination does not state whether the hymen was broken as a result of defilement or as a result of other factors. It was added that at times, gathering evidence from victims is difficult because by the time the case is in court, the victim would have been compromised. Further, the prosecutors

indicated that the challenges of prosecuting defilement cases were that normally such cases are poorly investigated and that sometimes witnesses do not turn up in court.

It was the prosecutors' view that the challenges identified are so fatal such that the case can be quashed leading to the acquittal of the offender. Some prosecutor respondents were of the view that corroboration should not always be a requirement because other than the evidence of the victim who could have been alone at the time, medical evidence also may not be conclusive as there are no proper 'machines' for such examination. The prosecutors explained that considering that corroborative evidence is not "easy" in defilement cases to ensure justice in these cases, there is need to have "machines" that can examine both the victim and the accused person's spermatozoa or any other samples found in the victim's private part as a way of ascertaining the identity of the defiler. Therefore, it would not be a matter of ascertaining whether or not the victim's testimony is truthful or not.

Other prosecutors were of the view that even without corroboration, as long as the medical report confirms that defilement was committed and the victim is able to identify the offender, then the court ought to go ahead and convict. The respondents were quick to note that prior to the amendment of the Juveniles Act, courts were able to convict in the absence of corroboration. The respondents added that corroboration should not be mandatory but be left to the court to determine whether it is necessary or not. It was pointed out that the rights of the victim are violated by the strict requirement on corroborative evidence.²⁰⁴

Analysing the responses from the prosecutors, it is apparent that the challenges faced by the prosecutors in prosecuting defilement cases are that the victims are too young to explain what

²⁰⁴ As for the other prosecutor respondents, their views were not any different from the views already reproduced. As such, the researcher saw no need to reproduce their responses on the issues already dealt with.

transpired, some victims keep on crying without saying anything, inconsistencies in the victim's testimony hence fail to give cogent evidence and also a lack of corroborative evidence. It was brought out that victims felt shy to recount the event to the court, and also that failure to speak was due to trauma.

On corroboration, almost all the prosecutors indicated that corroboration is necessary. However, most of them were of the view that there should be no strict or rigid approach to corroboration as not all cases have corroborative evidence even when the accused committed the offence. It was stated that the rigid approach to corroboration results in many acquittals thereby not upholding the rights of the victim. It was felt that courts should have the discretion to convict on uncorroborated evidence provided the court was satisfied that defilement was committed and that it was the accused who committed it.

There were also other prosecutors who felt that corroboration is necessary because of the length of punishment a convict is subjected to.²⁰⁵ As such, it was imperative that only guilty people are sent to prison. From this reasoning by some prosecutors, it is safe to deduce that the concern is mainly on the length of the prison sentence for the offender and not on ensuring that the challenges noted in prosecuting defilement cases are removed to ensure justice for the victims.

The views of the prosecutors are in tandem with those of the adjudicators who felt that a court should have the discretion to convict on uncorroborated evidence provided it was satisfied that the accused committed the offence. Clearly, both adjudicators and prosecutors were of the view that more needs to be done to the law to allow flexibility in the requirement for corroboration.

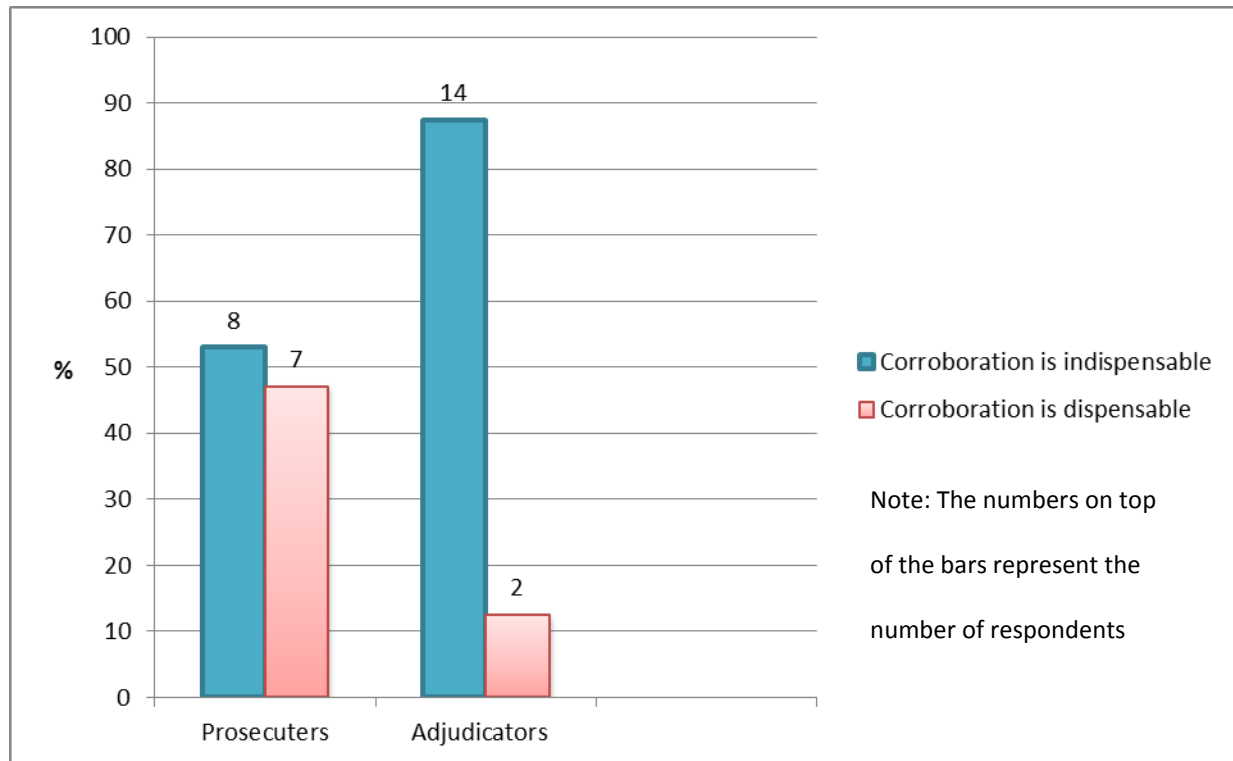
²⁰⁵ According to section 138(1) of the Penal Code, a convict of defilement is subject to a minimum mandatory sentence of imprisonment of 15 years and a maximum of life imprisonment.

Analysing the reproduced responses from the prosecutors and adjudicators, it is clear that all indicated that while corroborative evidence is necessary, it was lacking in most defilement cases. However, most respondents as demonstrated from the bar chart below felt that corroboration should remain a requirement while a few felt that its requirement should be abolished. However, should corroboration remain a requirement as it currently is, the law is clear that in its absence, the accused should be acquitted.²⁰⁶ Therefore, the high acquittal rate in defilement cases will possibly remain relatively high.

The bar chart below seeks to show the responses by adjudicators and prosecutors on the requirement for corroboration. The blue colour represents the views of the respondents who felt that corroboration is indispensable while the colour pink represents those who felt corroboration is dispensable. The figure shows that a lot of the key respondent adjudicators were of the view that corroboration is indispensable in defilement cases while a few felt the requirement of corroboration in defilement cases should be done away with. For the prosecutor key respondents, there was a small difference between those who felt corroboration is indispensable and those who felt it is dispensable.

²⁰⁶ Section 122 of the Juveniles Act as amended by Act No. 3 of 2011.

Figure 3 - Corroboration



b. Lack of or Insufficient Medical Corroboration

Corroboration as earlier explained in this dissertation refers to evidence which tends to confirm that defilement was committed and that it was the accused who committed it. Currently, whenever there is an allegation that the child has been defiled, she is referred to the clinic or hospital, as the case may be, for examination to ascertain whether the child has indeed been defiled. Once the child has been examined, the doctor fills in a medical form which is ZP Form 32 for rape and defilement cases on which the doctor indicates whether the findings are consistent with the allegation of defilement or not.²⁰⁷ The form is then produced in court by

²⁰⁷ The letters ZP stand for Zambia Police.

the prosecution as proof that the child was defiled. Therefore, with regard to proof of the commission of the offence, the medical report plays that role of corroboration.

However, the challenge comes in with regard to corroborating the identity of the offender. This is mostly the reason for most acquittals. While there may be corroboration as to the commission of the offence, there is little or no corroborative evidence as to the identity of the offender. When the adjudicators were asked on the necessity to compulsory test the DNA of the semen found on the victim and comparing it to the DNA compulsorily obtained from the suspect, the following were their responses:

Respondents: Magistrates

The magistrates stated that if cases were reported immediately after they occurred, it would be of great help to have compulsory DNA testing for the victim and the suspect as it would help secure more convictions, as the DNA would corroborate the allegations. It was indicated that this is because DNA testing for the victim and the suspect is very accurate thereby improving conviction levels. It was noted further that since Section 122 of the Juveniles Act has retained the requirement for corroboration without which the accused should be acquitted, DNA testing for the victim and offender is necessary as it would be conclusive evidence and would be highly corroborative. It was also stated that DNA evidence of the victim and accused would be of great help as it would even eliminate the need for other corroborative evidence. However, some magistrates were of the view that compelling the accused to provide DNA evidence would violate his rights as the law presumes him innocent until proven guilty.

Respondents: Prosecutors

The prosecutors also expressed their views on the compulsory DNA testing of the victim and the suspect to ascertain the identity of the offender. However, due to the high number of the respondents in this category, the researcher endeavoured to bring out the common answers and the divergent views.

The common views of the prosecutors in support of DNA testing were that compulsory testing of DNA samples found on the child and that of the suspect in cases where a condom was not used is necessary to clear doubts as to the identity of the offender. Also, that DNA testing is necessary considering that not every accused before court is guilty of the offence of defilement as some suspects are victims of circumstances. It was indicated that DNA testing would be a sure way of conclusively corroborating the evidence of the victim and providing more evidence against the accused thereby eliminating the danger of false implication. It was further indicated that compulsory DNA testing is necessary as the prosecution would not have to labour much to adduce evidence because DNA evidence would be exact and accurate.

Among the divergent views, some prosecutors stated that compulsory DNA testing should only be resorted to when there is a demanding legal necessity so as to protect the rights of accused persons, otherwise compulsory DNA testing for the victim and offender is not necessary. Should it be, the State needs to meet the bill as it would be too costly for the victim and the suspect due to high poverty levels. It was noted that currently, there is so much legislation on sexual offences and it was felt that if well enforced, the culprits can be successfully prosecuted without the need for DNA evidence. The respondents placed emphasis on the investigating wings in such matters to ensure they do a thorough job. The respondents lamented that

sometimes, the investigations are done in a hurry because of pressure. It was therefore concluded that if a case is poorly investigated, there is no need to take it to court.

From the responses of the magistrates and prosecutors, it can be appreciated that most adjudicators and prosecutors were of the view that compulsory DNA testing of samples found on the victim and the suspect would be of great help in defilement cases as more convictions would be made possible than the current status quo. Also, it would entail less work for the prosecution. It is the author's view that it would therefore be prudent to introduce DNA testing of the offender and the semen deposited in the victim to provide corroboration on the identity of the offender. According to some adjudicators, this is because investigations do not usually connect the accused to the offence. This would resolve the challenges of the trial courts and would lead to a higher conviction rate in defilement cases, and as such, the court will be living up to its duty of protecting the girl child from defilement.

However, as was demonstrated, some adjudicators and prosecutors were alive to a possible infringement on the rights of the accused, that is, his right to presumption of innocence. It is the author's view that despite the possible infringement on the rights of the accused, it is important to note that while DNA testing would be beneficial to the child, it would also be beneficial to suspects who are victims of circumstances, thereby helping to eliminate false implication. This is because DNA evidence would point to the innocence of the offender.

It appears the law in our Constitution is meant to protect those who would have committed the offence. To such persons, the law presumes them innocent until proven guilty.²⁰⁸ Therefore, to have compulsory DNA testing would amount to taking away that presumption of innocence as

²⁰⁸ Article 18 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

prior to the trial, the DNA report would point to the suspect as the one who defiled the child. It is the author's view that compulsory DNA evidence is in the same bracket as an accused compulsorily providing his fingerprints in cases where finger prints are lifted from the scene of crime. The practice of compulsorily providing finger prints by the accused is practiced worldwide and no illegality has been raised to that effect. It is from this background that the author is of the view that providing fingerprints would not amount to an infringement on the rights of the accused. Article 18 of the Constitution on the presumption of innocence is meant to ensure that proceedings during trial are conducted fairly in line with the rules of natural justice as opposed to the manner in which cases are investigated or how evidence is collected.

From the construction of Article 18, the presumption of innocence relates to the time the accused is being tried before the courts of law. It does not apply to the manner in which investigations are carried out. In any case, if compulsory collection of DNA of an accused was illegal, currently in Zambia, the law provides that illegally obtained evidence is admissible whether or not it violates a provision of the Constitution (or some other law). This was the holding in the case of *Liswaniso v The People*²⁰⁹ which has not been overturned.

4.4 THE WEIGHT ATTACHED TO THE UNSWORN TESTIMONY OF THE CHILD WITNESS

The adjudicators from the High Court and Supreme Court expressed their views on the weight that was attached to the unsworn testimony of the child witness. The following were their responses: The High Court judges indicated that unsworn testimony was less reliable and that

²⁰⁹ (1976) Z.R. 277.

the weight attached to it was lowered but judges still attached importance to it. On this point, some magistrates indicated that the court could not convict on unsworn testimony of the child unless it was corroborated while others indicated that unsworn testimony had no weight. The responses of the three Supreme Court judges regarding reception of unsworn testimony was similar to those expressed by the High Court judges to the effect that it was immaterial whether the evidence of the child was on oath or not.²¹⁰

From the above responses, it is clear that while unsworn testimony was received by the courts as evidence, it had less weight and yet it was an important piece of evidence. This is confirmed by the case of *George Chipaso v The People*²¹¹ cited above. An analysis of the responses from the High Court judges, makes it clear that they did not put much weight to the manner in which the testimony of the child was received by the magistrate, considering that whether evidence was on oath or not was not fatal to the case. Therefore, it was of no relevance whether the evidence was given on oath or not as the majority of the respondents reported that they did consider the unsworn testimony of the child victim who failed to meet the test of adducing sworn testimony. This shows that as far as courts were concerned, it is immaterial in what form the evidence of the child witness was received. The court looked at the totality of the evidence adduced.

This clearly shows that the evidence of the child witness was taken into account whether sworn or not thereby contributing to the evidence as a whole before the court. This was necessary for a just decision. Where there was a conviction or acquittal, it is safe to state that the evidence of the child also played a crucial role in the decision arrived at by the court. It follows therefore that with the amendment to the Juveniles Act which disallows the reception of unsworn

²¹⁰ It must be stated here that the rest of the adjudicators on this issue indicated the views of the respondents whose views this researcher has already reproduced.

²¹¹ SCZ Appeal No. 171/2009.

testimony, there will be a lack of vital evidence from the key witness who is the victim, and thus, the court will lack some of the necessary evidence to arrive at a just decision.

Considering that courts do not have a problem with the form of the testimony of the child witness whether on oath or not, it can be concluded that there was no mischief the law intended to cure by the amendment to Section 122 of the Juveniles Act. The reasonable inference to be drawn from this law is that it was purely meant to bar tender age victims of defilement from testifying, and as a result, the law is beneficial to the accused person but detrimental to the victim's rights.

In an instance where a child gave unsworn testimony, it meant that justice was at play and at least the child had the opportunity to tell the court about the offence committed against her person as guaranteed in the Constitution and in accordance with the rights set out in the CRC. Also, despite the lesser weight attached to the child's evidence, at least the law was alive to the limitations and abilities of the child. In the form it was the law was alive to the rights of the child with regard to her freedom of expression in the courts of law. In any case, there could be no conviction on the unsworn testimony of the child in the absence of corroboration. As such, no prejudice was occasioned to the accused in the event that the court received the unsworn testimony of the child.

4.5 WHETHER SECTION 122 OF THE JUVENILES ACT AND PROVISIO TO SECTION 138 OF THE PENAL CODE UPHOLD THE RIGHTS OF THE VICTIM

As already discussed above, Section 122 of the Juveniles Act deals with non-reception of unsworn testimony of the child by the court and the requirement for an acquittal in the absence

of corroboration. Thus, the question is whether in its amended form it upholds the rights of the victim in view of the issues it seeks to address.

According to the respondent High Court judges, their views were that the section will not alleviate the challenges regarding the victim's evidence in that most children are not possessed of sufficient intelligence to justify the reception on oath of the child's evidence. Therefore, the said section is not fair on tender aged victims, more so, as the victims range from three to 10 years. It was also stated that the said section is bad law because the necessity of testifying on oath is restricted to 14 years and older while children below 14 years are subjected to a *voire dire* with a view to receive sworn testimony or dispense with its reception. And in any event, sworn evidence does not eliminate the propensity of telling lies. The law is perceived as being more protective of the accused than the victim which should not be the case. It was also stated that the law and procedure in defilement cases is adequate, but that the law relating to reception of the evidence of the child and the weight to be attached to it is of concern going by the current amendment to Section 122 of the Juveniles Act.

The other views of the High Court judges on section 122 were that the amendment has failed to address the mischief that it intended to address. The real mischief that brings difficulty to defilement cases is with regard to corroboration as a matter of law and not whether a child witness gives sworn evidence or not. It was stated that the law in its current form is not upholding the rights of the victims because the court environment is not conducive for the victim. Also, that there are no proper facilities such as receiving rooms for counselling services and that the victim is not shielded from facing the perpetrator. However, some High Court

judges stated that the rights of the victim are protected by the courts through the liberty to testify freely.

The judges observed that with regard to corroboration, before the recent amendment to the Juveniles Act, the court had the discretion to convict an accused in the absence of any corroborative evidence. The trial court was only required to warn himself or herself of the dangers of convicting an accused on uncorroborated evidence of the child. With the new amendment already cited above, courts are obliged by law not to convict the accused in the absence of corroboration.

The magistrates also expressed their views on the amendment to the Juveniles Act. For instance, it was stated that the amendment to the Juveniles Act is a great development as age has been specified. It is now clear when a magistrate can conduct a *voire dire* and it is good that the strict requirement to understand the nature of an oath has been removed in that even when the child does not understand the nature of an oath but exhibits sufficient intelligence, her evidence is received on oath. This is because the amendment has lowered the standard for a child to testify on oath and has done away with unsworn testimony which was not regarded as evidence at all. Some of the views by the magistrates were that reception of only sworn evidence is okay as most children while knowing the duty to tell the truth, did not know the nature of an oath and could not be sworn. Others were of the view that Section 122 of the Juveniles Act is fair on children in that it gives the court discretion to decide whether to receive evidence on oath or not receive it at all.

However, some magistrates lamented that it was unfortunate that the child's unsworn evidence cannot be received. It was noted that the new amendment takes away unsworn evidence, and

yet most victims are very young and don't qualify to give sworn evidence. Some magistrate respondents stated that the amendment to the Juveniles Act is not clear as it seems to suggest that the court cannot receive unsworn evidence of the victim.

It was also felt by the magistrates that the law in its current form is not upholding the rights of the victim as not all victims qualify to give sworn evidence under the new amendment to Section 122 of the Juveniles Act. Therefore, it violates their right to freedom of expression. It was also explained that the rights of the victim are not upheld if justice is eroded as a result of the strict requirement for corroboration and also due to the new amendment to the Juveniles Act which does not allow reception of unsworn evidence. The magistrates were of the view that the provision is a violation of the child's right to choose to testify whether on oath or not and that the requirement for corroboration in all cases is a hindrance to justice. It was also felt that the current law is not upholding the rights of the victim considering that once the accused person is convicted and sentenced, that is the end, there is no psycho-social counseling for the victim. Some magistrates further stated that the harsh penalty has led to the majority of the cases being compromised. In this way very few cases actually see justice in the courts of law.

However, some of the magistrates were of the view that the law is sufficient. The reason for this was that section 122 of the Juveniles Act enables more children to testify on oath as the threshold of passing the test has been lowered. It was indicated that this is good for a child witness. It was however stated that the issue is not about a child qualifying to adduce sworn testimony but that what must be of concern are the consequences of putting on oath young witnesses.

It was pointed out that Section 122 of the Juveniles Act does not necessarily alleviate the challenges victims face as it opens them to attacks by the accused person in cross examination.

It was explained that previously, no cross examination was required if the victim was of tender age who gave unsworn testimony because she did not understand the nature of an oath. It was added that the section however still requires corroboration. Others felt that the law in its current form is not upholding the rights of the victim as it does not provide for medical examination of the suspects. The respondents lamented that unfortunately, the requirement for mandatory corroboration has put victims at a disadvantage.

4.6 WHETHER THE COURTS ARE UPHOLDING THE RIGHTS OF VICTIMS

In the questionnaires, the magistrates and prosecutor respondents were requested to state whether in their view, the courts are upholding the rights of defiled victims. Some magistrates were of the view that courts are upholding the rights of the victims as most of them are trained in child psychological development and witnessing, and as such, are sensitive to the plight of children. It was explained that the victim has the right to speedy trial and a fair hearing and added that the courts are trying their best to uphold the rights of the victim by ensuring speedy trials. It was also indicated that the courts are upholding the rights of the victims as sometimes the testimony of the victim is received in camera to protect their identity. Still on this point, some magistrates indicated that courts are upholding the rights of the child as they are aware of the fact that girls are at risk at the hands of men. But it was also quickly pointed out that justice demands that only those who are guilty must be punished. It was stated that due process must not be blinded by the victim's condition.

On the contrary, other magistrates were of the view that courts are not doing enough to uphold the rights of the victim because at no time is the victim given a chance to explain how he/she felt about the offence. However, it was stated that prior to the amendment, courts did receive the

unsworn testimony of the child although the weight attached to it was less. It was thus indicated that in order for the courts to uphold the rights of the victims, children should be allowed to make unsworn statements. It was added that the child's rights are much more than mere testimony, consequently, there is need to find other methods of getting evidence from the child away from the courtroom setup.

Regarding the courts, some prosecutors were of the view that the courts are doing enough in upholding the rights of the victims because the victims are usually given a chance to tell the court how the incident occurred. It was indicated that this is regardless of the restriction on the court to receive sworn testimony only. Also that somehow, the rights of the victims are upheld in cases where they are allowed to testify in secluded courtrooms attended only by close family members.

4.7 WHETHER THE LAW IS UPHOLDING THE RIGHTS OF VICTIMS

On the adequacy of the law on defilement with regard to the rights of the victim, some prosecutors on one hand stated that the rights of the victims are not upheld in view of the amendment to Section 122 of the Juveniles Act. For instance, the prosecutors observed that the law in its current form does not uphold the rights of the victim thereby violates their rights in the event that unsworn evidence of the victim is not received by the court. The respondents observed that most victims fail to meet the test to adduce sworn testimony

On the other hand, some prosecutors were of the view that the law in its current form is adequate and upholds the rights of the victim in the sense that the punishment is 'okay,' that is, the law has provided adequate or harsh punishment for the offenders. By this, it is sending a deterrent message. Others felt that the law is sufficient because the victims receive free medical attention

and counselling as well as the fact that court proceedings are held in camera. It was also noted that as girls can lose their hymen by other activities other than through penetration during sexual intercourse, in view of the harsh punishment, it is important that offenders who are really guilty are sent to prison. The prosecutors observed that in this way, the victim's rights as provided in the law are upheld whilst taking note of the suspect's rights as well.

However, it was indicated that on the law, the proviso in the Penal Code on reasonable belief that the child was above 16 years should be removed. It was also stated that the law in its current form is not doing enough to uphold the rights of the victim in that even though the accused can be convicted, the victim does not benefit in any way to help her in life following the trauma she had gone through, more especially where she contracts HIV.

Analysing the views of the adjudicators and prosecutors, there were mixed feelings regarding adequacy of the law in relation to the rights of the victims. However, it is worth noting that there was agreement that the amendment to the Juveniles Act was done in bad faith as it disregards the rights of the victim. The amendment can be said to be one of the reasons some respondents were of the view that courts are failing to uphold the rights of defiled victims in cases where victims are prevented from testifying. And because the victim cannot testify, vital evidence is prevented from being received by the court thereby resulting in an acquittal of the accused. Therefore, it is quite clear that the law needs to be re-amended to make it alive to the rights of the child. The strict requirement for corroboration and the non-reception of unsworn testimony is problematic for the child. This is the more reason the amendment to Section 122 of the Juveniles Act needs to be revisited. Its existence in its current form will continue to result in

more acquittals even where there was supposed to be convictions due to the absence of the child's testimony and also due to the rigid requirement for corroboration.

In addition to the responses by the respondent adjudicators, the Judiciary of Zambia in their News Magazine,²¹² which featured a workshop for Zambia Association of Women Judges held in Livingstone, quoted the then Chief Justice of Zambia²¹³ who stated that very little progress had been made in curbing defilement cases despite the deterrent sentences handed out. The participants were concerned over rigidity of existing corroboration rules and expressed the need to reform the law. They further noted that some defilement cases had been thrown out partly because the police and other officers handling the matter did not have adequate information on the case.

In agreeing with the Chief Justice, the Zambia Association of Women Judges President,²¹⁴ who was a participant at the workshop, noted that issues of gender and children's rights abuse had remained topical in the Zambian Judiciary. Another participant at the workshop, a High Court judge²¹⁵ also agreed with the observations by the Chief Justice. The judge noted that the judiciary was dealing with a very complex problem of defilement which could not be resolved simply by looking at sentencing. The judge stated that time had come for the judiciary to commission a comprehensive study on the problem of defilement. He suggested that a taskforce be established to try and deal with the defilement problem from a practical point of view to highlight the gravity of the problem of defilement.

²¹² The first for the year 2011, p. 22.

²¹³ Justice Ernest Sakala.

²¹⁴ Justice Ireen Mambilima, former Deputy Chief Justice of Zambia.

²¹⁵ Mr. Justice Dr. Patrick Matibini, High Court Judge then, now Speaker of the National Assembly.

The judge observed that there was need for a multi-sectoral approach to the problem of defilement. He noted that the judiciary had failed to adopt and implement a multi-disciplinary approach to the problem. The judge observed further that according to statistics, the majority of the victims are under the age of 10. The implication is that the courts have a legal impediment in ensuring successful and massive prosecutions. The judge was of the view that the legal impediment lay in the Juveniles Act's proviso to Section 122 cited above. The judge lamented that there were many cases of defilement that had trickled through the police and some had resulted into prosecutions. Yet, the conviction rates are extremely low.

He noted that concerning sexual offences affecting the juveniles, the legal position is that it is a requirement of the law that evidence of children in itself, cannot as a matter of law secure a conviction. It needs to be confirmed by independent evidence or what is referred to as corroboration. The judge argued that a conundrum of the said legal provision was that most defilement offences were largely committed in private hence they were rarely witnessed by third parties. Yet the law insists that for a conviction to stand, the evidence of victims or affected children must be supported by independent evidence. The judge noted that time had come to seriously reflect on the necessity for the retention of the said proviso to Section 122 of the Juveniles Act. The judge further observed that should the above stated law be in the process of reformation as has happened in other countries, Zambia will have taken a major stride in addressing the problem. Another issue which emerged at the workshop was the need to re-think the question of forensic investigations.

4.8 FACTORS TAKEN INTO ACCOUNT BY THE HIGH COURT WHEN DEFILEMENT CASES ARE SENT FOR SENTENCE

When a magistrate convicts an accused person of defilement, the case is sent to the High Court for sentence. Before passing sentence, the judge has a duty to ascertain whether the conviction was proper taking into account the ingredients of the offence. The respondent High Court judges indicated that when cases are sent for sentence, the age of the victim is taken into account. It was indicated that the reason for doing so is that when the child is aged 14 or 15, a judge will consider the fact that there may have been consent to have sex as teenagers start engaging in sex at an early age. Also, in border line cases where the victim is about 14 or 15 years old, the High Court has to ensure that the trial magistrate informed the accused about his available defence that he honestly believed that the girl was above the age of 16 years.²¹⁶

It was also indicated that the age of the victim versus that of the offender is vital to determine the severity of the sentence to be imposed. It was stated that during sentence, if the evidence of the child is not on oath, reliance on it would be reduced and if there is corroboration, then that is the best evidence. The judges further pointed out that the absence of the victim's evidence, whether sworn or not and absence of corroboration is fatal to a case and calls for a review of the decision. Also, that the absence of specific evidence of the age of the child may be fatal although such age can also be derived from the general evidence.

4.9 FACTORS CONSIDERED BY THE SUPREME COURT IN DEFILEMENT CASES

During the Wrap Up Consultative Meeting of the Justice, Jurisprudence, Access and Accountability in Zambia (JJA AZ) hosted by the Zambia Association of Women Judges (ZAWJ)

²¹⁶ *Gift Mulonda v The People* (2005) Z.R. 135.

and the International Association of Women Judges (IAWJ)²¹⁷ a Supreme Court judge informed the meeting that the Supreme Court bench in addition to the entire evidence on record considers the age of the victim when determining the sentence to be imposed.²¹⁸ She recounted two separate cases where the victims were months old babies but defiled by adults one of whom was HIV positive. The respective High Court judges sentenced both convicts to life imprisonment and the Supreme Court upheld both sentences

4.10 CONCLUSION

From the questionnaires presented in this chapter, it is clear that cases of defilement are very common in Zambia with every prosecutor and all adjudicators acknowledging having handled numerous cases of that nature. It has also been shown that where there is no corroboration, the perpetrators are acquitted by the courts. However, most adjudicator respondents were of the view that corroboration should remain a requirement in defilement cases. The adjudicators observed that the form of the child's evidence received by the courts is immaterial. Considering that sworn testimony of child witnesses and corroboration are issues covered under section 122 of the Juveniles Act, most respondents perceived the law to be unfair on child victims and were of the view that it be amended in that regard.

With regard to the parents and guardians of defiled children, the majority said they were satisfied with the services received at the police station, stating that their expectations were met. However, a good number of them felt they were let down by the court during trial of the accused. This failure by the court to meet the expectations of the family of the defiled victim arose from the acquittal of the accused. Many of the parent and guardian respondents felt that there was no

²¹⁷ Supreme Court Conference room, 11/06/12 at 14:30 hours in which meeting this author was present.

²¹⁸ Justice Elizabeth Chona Muyovwe.

justice in the cases involving child victims that the courts handled. Therefore, a good number perceive the courts to be unfair and not upholding the rights of child victims.

CHAPTER FIVE

CHILD WITNESS PSYCHOLOGY AND THE COURT'S INTERPRETATION OF THE EVIDENCE OF THE CHILD

5.0 INTRODUCTION

This chapter shows that psycho-social approaches are necessary if the law and procedures are to address the challenges the child victim witnesses face during trial. The preceding chapters analysed criminal law on defilement and found the weaknesses imbedded in the law with regard to the restriction on the reception of unsworn testimony by the law and the requirement for an acquittal in the absence of corroboration. The restriction as was shown is a departure from the rights guaranteed to children in the Constitution of Zambia and in the CRC. It has been found that the weaknesses in the law and the challenges courts encounter are due to the lack of understanding the child as a witness. The hypothesis is that there is a gap between the law and child development. The gap can be answered by examining the child's psychology as provided by psycho-social approaches on the development of the child.

As courts have been put on the spotlight, this chapter also seeks to discuss the psych-social effect of putting on oath very young witnesses and how courts interpret the evidence of the children which has inconsistencies when arriving at a decision. Regarding inconsistencies in the testimony, it will be shown that there is no distinction in the way evidence given by adults and children is interpreted. The net result is that it shall be demonstrated that such a general interpretation of the evidence disadvantages children considering that for children, inconsistencies in their testimony is not an indicator of lies but of truth while for adults, inconsistencies are an indicator of lies.

Therefore this chapter discusses child witnesses with a view to understanding their abilities and limitations in terms of cognitive development, language development and memory. These abilities are critical for a witness in court. Cognitive ability in children is of importance to this dissertation as this is one of the tools that victim child witnesses require to effectively give their testimonies in the courts of law for crimes committed against their person. It is important to understand child witnesses if they are to be good witnesses. It will also be shown that when simply allowed to narrate the event to the court, children can be good witnesses.

5.1 UNDERSTANDING THE CHILD WITNESS

A child victim of sexual abuse is ordinarily expected to testify as a witness in a courtroom. However, children were traditionally perceived as unreliable witnesses and the veracity of their allegations was routinely disputed. In more contemporary times, child sexual abuse has received much media attention, resulting in a swing to the opposite end of the spectrum. A child, even a very young child, who gives an account of sexual abuse, is often believed without question, and this has given rise to such broad generalisation as “children never lie about sexual abuse” or “the younger the child, the less likely it will be a lie.” The media focus on child sexual abuse led to a renewed interest in the child witness by researchers, and studies subsequently published, accusing children of having poor cognitive abilities and of being highly susceptible to suggestion. The pendulum has thus moved backwards and forwards, creating much uncertainty about the reliability of children testifying in court.²¹⁹

²¹⁹ Karen Muller, *Prosecuting the Child Sex Offender* (Port Elizabeth: Printridge, 2001), p. 298.

The child victim is a witness in the courtroom as she is privy to certain information required by the court to arrive at a just decision. This is in light of the fact that sexual offences are committed in secrete. Thus, a child witness provides important evidence or the piece of the puzzle that tends to connect the accused to the offence. For instance, the evidence of the victim usually places the accused at the scene which may enable the court to make a finding of odd coincidence or make a finding that the accused had an opportunity to commit the crime in question. Through the evidence of the child witness, the court is likely to find corroborative evidence though not corroborative as a matter of strict law.

The quality of the child's evidence is dependent on a number of interacting factors, namely the child's age, competency, educational and family background, cognitive ability and perceptions of the court process. Other factors include the setting in which evidence is given being (open court, videotaped evidence or closed-circuit television); and the personnel involved in the court process.²²⁰

In accessing evidence from the child witness, an understanding of the child's developmental, cognitive and language abilities is of paramount importance. Children change physically, emotionally and intellectually as they progress through different stages of development. Child development is viewed as a progression through generally accepted milestones.²²¹ It is important to appreciate the developmental milestones and understand the general characteristics of each age period in order to determine the child's ability to supply information about events witnessed or experienced.²²² Therefore, in this chapter the child's development, that is,

²²⁰ Karen Muller and Karen Hollely, *Introducing the Child Witness* (Port Elizabeth: Printrite, 2000), p. 167.

²²¹ Muller and Holley, *The Child Witness*, p. 168.

²²² Muller and Holley, *The Child Witness*, p. 168.

cognitive development, memory, language abilities and suggestibility are discussed to gain an understanding of children as witnesses and the veracity of their evidence.

5.2 COGNITIVE DEVELOPMENT

According to Munsaka and Matafwali, different scholars define cognitive development using a variety of words however, these definitions boil down to Woolfolk's definition that cognitive development refers to changes in thinking. In other words, cognitive development involves understanding how human beings use their minds to effectively deal with their environment.²²³

Cognitive development in children is important as it helps explain and clarify the inconsistencies and confusions that arise in a child's testimony. For example, children do not understand kinship relationships. Where a crime has been committed in a four year old child's presence, the child would be able to identify those present, such as (sister, mother, grandmother, grandmother's sister etc) only by name and not by relationship. Therefore, the credibility of such a child witness would be compromised by developmentally inappropriate questioning.²²⁴

Jean Piaget, a Swiss Psychologist is one of the most renowned cognitive development theorists. Jean Piaget (1896-1980) studied the way children reasoned. He noticed that children of a younger age answered questions qualitatively differently from those of an older age. This suggested to him that younger children were not less knowledgeable, but gave different answers because they thought differently.²²⁵ Piaget proposed that development proceeded through four stages: sensorimotor, pre-operational, concrete, and formal. Each stage is a progression defined by the emergence of a different level of thinking, that is, an increasingly sophisticated form of

²²³ Munsaka and Matafwali, *Human Development*, p. 60.

²²⁴ Muller and Holley, *The Child Witness*, p. 175.

²²⁵ Samuel Eddy, Theories of Cognitive Development: Jean Piaget, <http://www.phychohawks.wordpress.com>, Accessed on December 19, 2012.

knowledge. Each stage develops into the next, involving the integration and incorporation of earlier ways of thinking.²²⁶

According to Piaget, all children pass through the stages of cognitive development in the same order, without any stage being skipped. Piaget observed that some children may reach a particular stage more quickly or more slowly, depending on the child's environmental experiences.²²⁷

5.3 LANGUAGE DEVELOPMENT

The legal process involves the ability to communicate in accordance with particular and specific requirements. A child witness, thus, needs to communicate in a manner that is understood by the adult listeners. To give evidence successfully, a child must have reached a certain level of intelligence, vocabulary and conversational skill.

Children from the age of two years begin to produce sentences which at least contain two words mainly a combination of nouns, verbs and adjectives without any conjunctions. For instance, sentences such as “mummy sleep,” “mummy eat,” “mummy sit.” At age two and a half years, sentences exceed two words and include more connective words, adjectives and pronouns. At age between three and five years, grammatical structures in a child's speech become more sophisticated and use is made of different tenses, singular and plurals as well as the inclusion of more articles and conjunctions. Negatives, questions and passives are also gradually introduced.²²⁸

²²⁶ Muller and Holley, *Introducing the Child Witness*, p. 175.

²²⁷ S. Eddy, Theories of Cognitive Development, <http://www.phychohawks.wordpress.com>, Accessed on December 19, 2012.

²²⁸ Muller and Holley, *The Child Witness*, p. 186.

However, a child may understand certain words differently from an adult. Research has shown that even when a child thinks he/she understands a particular word it may not have the same meaning as understood by adults. For instance, the word “minor” to a child means someone who digs coal while “parties” are where one gets presents. If an adult misjudges the child’s level of knowledge, this can create a great deal of confusion in communication.²²⁹

A Zambian expert on this subject of language development explained that for most children at three years, language is not developed and is not coherent.²³⁰ However, at three years, girls can say something (though not in great detail) as girl children develop language faster than boys. At three years, it might be too early for the child to give their testimony but they can use telegraphic language.²³¹

Therefore, in a courtroom set up, it is important to know that children have difficulties answering questions such as when, who, what, why and how. Initially children can only answer what, who, and where questions, because these questions require concrete information they can understand – agents, objects and locations. However, with regard to when-questions, a child under the age of eight will have difficulty providing accurate information. Though the understanding of time and date is very limited in young children, they are however, able to say if an event took place during the day or at night or if it is related to an important event such as a birthday or Christmas.²³²

²²⁹ Muller and Holley, *The Child Witness*, p. 187.

²³⁰ Beatrice Matafwali, lecturer in the Department of Educational Psychology, Sociology, and Special Education at the University of Zambia. She has conducted extensive research in early Childhood and conducted child assessment.

²³¹ Interview: Beatrice Matafwali, January 15, 2014.

²³² Muller and Holley, *The Child Witness*, p. 190.

Before the age of eight or 10, children are unable to answer the why questions as children have difficulties understanding evaluative questions, that is, those which require the child to think and interpret facts. Due to this difficulty in evaluating the data, this may, in fact, result in younger children being better witnesses, since they report details of what they witnessed without evaluating them, while adolescents and adults may commit errors because they think about the details.²³³

Lawyers' verbal skills are very well developed and therefore, this skill sometimes creates a significant barrier to effective communication with children. Lawyers need to be aware of children's limited language abilities and to choose their words with great care when interviewing children. For effective communication with children, it is imperative that interviewers such as lawyers and prosecutors are knowledgeable about the stages of language development and of common errors in language usage.²³⁴ In this vein, simple language of child appropriate age should be used to communicate with child witnesses.²³⁵

It is important to note that children also use emotion to communicate. Munsaka and Matafwali have explained that anger is an emotion that children use to express themselves. They observed that during infancy, anger or aggression is expressed through displays of tantrums while children in early childhood are able to express their anger more explicitly. This is mainly as a result of the children's ability to use language to express their feelings. A child can, for instance, verbally

²³³ Muller and Holley, *The Child Witness*, p. 191.

²³⁴ Karen. Muller and Karen Holley, *The Judicial Officer and the Child Witness* (Port Elizabeth: Carl and Emily Fuchs Foundation, 2002), p. 178.

²³⁵ Muller and Holley, *The Child Witness*, p. 191.

express a threat to another child who has made him/her angry. Through the words that are used and the body language thereof, the anger of the child will be clearly expressed.²³⁶

Another emotion that is commonly expressed by children in early childhood is fear. Common fears at this stage include fear of being left alone, fear of loud banging sounds, fear of dark places, fear of unfamiliar people, and so on, and the children will explicitly make the fears known.²³⁷ Therefore, a child victim is able to exhibit fear of the accused person in the courtroom. It is imperative for the court to note and record the kind of emotion expressed by the child victim in the courtroom.

Therefore, as children develop language, they also use it to express emotions. It can then be appreciated that children have emotions such as anger and fear. As these are imbedded in children, the anger and fear in a child could become pronounced when defiled. The child becomes angry with herself and the people around her and also becomes very scared of people around her especially fear of the accused person. These emotions affect the children's well-being and development for the rest of their lives.

Therefore, it is quite clear that children can be good witnesses provided they are asked age appropriate questions which they understand well. This is because when questions are not age appropriate, it is a source of confusion and children tend to appear as though they are unreliable witnesses. Therefore, the court players being the adjudicators, lawyers and prosecutors need to appreciate the type of questions appropriate for child witnesses in order to avoid confusion or failure by a child witness to correctly answer questions during cross examination.

²³⁶ Munsaka and Matafwali, *Human Development*, p. 39.

²³⁷ Munsaka and Matafwali, *Human Development*, p. 39.

5.4 MEMORY

Most scientists agree that it is very useful to describe human memory as a set of stores which are ‘places’ to put information, plus a set of ‘processes’ that act on the stores.²³⁸ Children do have memory that is not yet developed and have difficulties in communicating with adults due to their stage of language development as earlier discussed. Despite the limitations in language development in children, for purposes of the legal process, once a child has perceived an event, he/she must be able to remember and report the information. While children may be able to perceive an event accurately, they have difficulties translating this perception into words. This is because the event may be stored in the child’s memory in some representational form but the child may not have the ability to communicate the content of the memory because the child does not have the necessary vocabulary. In order to be effective witnesses, children must be able to demonstrate their retention of material in one of the three ways: recognition, reconstruction and recall.²³⁹

5.5 WHETHER CHILDREN’S MEMORY IS AFFECTED BY SUGGESTIONS IMPLANTED BY ADULT INTERVIEWERS

Suggestions implanted by adult interviewers into children’s memory which is also known as children’s suggestibility has been a focus of research since the turn of the Twentieth Century. Suggestibility relates to young children’s memories and the degree to which their memory and reports can be modelled by suggestions implanted by adult interviewers. This brings into play the encoding, storage and retrieval which can be influenced by a range of external factors

²³⁸ R.C. Atkinson, R.M. Shiffrin, Human Memory: A Proposed System and its Control Processes, <http://www.Sciencedirect.com>, Accessed on August 25, 2014.

²³⁹ Muller and Holley, *The Child Witness*, p. 195.

unwittingly incorporated into memory, such as subtle suggestions, expectations, stereotypes, leading questions as well as explicit bribes, threats and other forms of social inducement.²⁴⁰

There have been many studies that examine the influence of a single misleading suggestion on children's recall of an event; generally, these studies indicate that in a variety of conditions, young children are more suggestible than adults with pre-schoolers being more vulnerable than any other age group. Researchers have developed paradigms to examine children's reports of salient and personally-experienced events that involve their own bodies. No longer do older maxims hold that when children are inaccurate in their reporting about such events it is because they make errors of omission (i.e. they fail to report important events) rather than errors of commission (i.e. they insert inaccurate details). Rather the newer research indicates that under certain conditions, young children also make errors of commission about personally experienced events involving their own bodies.²⁴¹ There has also been a number of studies which have shown that children as young as five can answer objective questions about simple events just like the adults and that psychological research has shown that children are not as suggestible as many adults would believe them to be.²⁴² Some factors affecting suggestibility relevant to this dissertation are: the questioner's status and repeated questions.

5.5.1. The Questioner's Status

The interviewers are supposed to be neutral and not engage in "interviewer bias." This is because when an interviewer is biased due to previously decided beliefs about past events in eliciting certain information without paying attention to other possible outcomes, the interviewer

²⁴⁰ Barbara C. Johnson, *The Suggestibility of Children: Evaluation by Social Scientists*, <http://www.law2.umkc.edu/faculty>, Accessed on December 19, 2012.

²⁴¹ B.C. Johnson, <http://www.law2.umkc.edu>, *The Suggestibility of Children*, Accessed on December 19, 2012.

²⁴² Muller and Holley, *The Child Witness*, p. 203.

will proceed to mould the interview to elicit statements from the child that are consistent with these prior beliefs. The interviewer's bias would then affect the child's entire evidence which would then not be accurate.

This is very important in the Zambian courtroom. Although the court players, that is, the lawyers and prosecutors are officers of the court with a duty to assist the court arrive at a just decision, the reality is that the lawyer and prosecutors have a role of their own. While the prosecutor's role is to prove that the accused is guilty beyond all reasonable doubt, the defence lawyer has a duty to show the innocence of the accused by discrediting the evidence for the prosecution. As a result, when a child witness is being interviewed by a prosecutor or cross examined by a lawyer during trial, there is a tendency to ask questions that are biased towards the outcome either party seeks to achieve. Effectively, this means that in cross examination a child is pitted against an expert trial lawyer.

5.5.2. Repeated Questions

The repeated questioning of a witness on the same facts makes the witness feel intimidated thereby projecting answers in the manner desired by the interviewer. This is because repeated questioning can amount to suggestion especially where the interviewer has misleading information. However, repeated questioning can amount to rehearsal which can help in recall of the evidence.²⁴³

Basing on the theory on degree of suggestion as earlier discussed, it is quite clear that children are credible witnesses whose evidence is reliable. Psychological research has shown that

²⁴³ B.C. Johnson, The Suggestibility of Children, <http://www.law2.umkc.edu>, Accessed on December 19, 2012.

children as young as five years of age can answer objective questions about simple events just like adults and that children, are not as suggestible as adults would believe them to be. As can be seen from the studies conducted on the degree of suggestibility, when children are left to narrate the events as perceived, there is no reason for apprehension as the evidence which is free from interference is accurate.

In view of these studies, there is no justification for preventing young witnesses from testifying in court simply because they have failed the test required for them to give sworn testimony. As has been shown, evidence free from interference is accurate.

The danger comes in when a lawyer for an accused puts leading questions to the child which are a distortion of the facts that may result in distortions in the child's testimony. It is therefore, important that adjudicators in the Zambian courts ensure that they take control of their courtroom to prevent the distortion of the child's evidence through cross examination even though under the common law system, the function is an umpire rather than an inquirer. In the Zambian court system, defence lawyers are at liberty to ask any questions whether leading or not, provided they are relevant; more especially where the lawyer has misleading information as narrated to him by his client, the accused person.²⁴⁴ In the courtroom, lawyers being interviewing persons and officers of the court need to be neutral as they undertake cross examination of a child witness to ensure that the testimony of the child witnesses is accurate.

²⁴⁴ The rules of cross examination according to section 157(V) of the Criminal Procedure Code, Chapter 88 of the laws of Zambia states that: a person charged and being a witness in pursuance of this section may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged. This provision also applies to witnesses for the prosecution.

5.6 EFFECT OF CROSS EXAMINATION ON THE CHILD'S TESTIMONY

As earlier discussed, most defilement victims are of tender age, that is, the majority being aged between zero and 10 years. As such, it is important to note that young children usually do not possess sufficient intelligence and do not appreciate the nature of an oath to enable them give sworn testimony. However, in the quest to receive evidence from the child victims, trial courts do receive sworn testimony of the children. It is therefore necessary to ascertain the effect of cross examining child witnesses in order to understand whether child witnesses are able to handle the pressure that comes with putting them on oath. For instance, in the case of *Akatama Wamunyima v The People*²⁴⁵ the child was aged three years old and she gave sworn testimony. This was after the court made a finding that the child had sufficient intelligence to give sworn testimony.

Also, in the case of *Teddy Shikabita v The People*,²⁴⁶ the child was aged four years and she was put on oath. Trial courts are aware of the importance and need for the child victim to testify. This is because it is indisputable that the evidence of a defilement victim is crucial to assist the court arrive at a just decision. Magistrates must accommodate this. Therefore, in an effort to ensure that justice is upheld for the victims through convictions of the offenders, the practice now as demonstrated above is that magistrates tend to put on oath very young victims of defilement such as those ranging between three to nine years. Meanwhile Beatrice Matafwali, a psychological child expert said at three years, language is not developed and is not coherent. Also, that at three years, it is too early for a child to testify in a trial.²⁴⁷

²⁴⁵ SCZ Appeal No. 583/2013.

²⁴⁶ SCZ Appeal No. 543/2013.

²⁴⁷ Interview: Beatrice Matafwali, January 15, 2014.

Further, this position was confirmed when the author interviewed one of the magistrates at Lusaka Subordinate Court. In the interview, the magistrate stated that with the amendment to Section 122 of the Juveniles Act, the magistrate admitted putting on oath young witnesses ranging between four and seven years as long as he was satisfied that the child understood the duty to speak the truth and possessed sufficient intelligence to adduce sworn testimony. The magistrate further stated that many children had language limitation or had limited vocabulary hence tended to use short phrases and short sentences.

The position as explained by the magistrate is in accordance with Section 122 of the Juveniles Act²⁴⁸ cited earlier in this dissertation. As earlier discussed, Zambian courts have no discretion to receive unsworn testimony of the child witness who does not meet the test of adducing sworn testimony. Therefore, the challenge by the courts in upholding the rights of the child emanate from Section 122 of the Juveniles Act as regards the restriction on the non-reception of unsworn testimony of child witnesses so that courts can only receive sworn testimony.

Having given sworn testimony, the young witnesses are later cross examined either by the accused or by defence Counsel. During the interview, the magistrate stated that due to the age of the child coupled with limited understanding and language limitation, during cross examination child witnesses tend to get mixed up or confused. He noted that children usually become inconsistent in their testimony and tend to give inconsistent answers as they tend to answer questions just for the sake of it while at times answer just to avoid further questions. He observed that at times the evidence even gets distorted.

²⁴⁸ The Juveniles (Amendment) Act No. 3 of 2011.

It must be noted that while most adults do get confused during cross examination, it becomes worse for the child thereby making the case disastrous for the prosecution. Meanwhile, it is important for the child witness to be consistent in her testimony. This is crucial for the interpretation of the evidence by the court. When interviewed, Matafwali opined that a child should not be made to take oath as they are too young to understand it.²⁴⁹

In the *Akatama Wamunyima case*, due to the tender age of the victim, it is quite common to have inconsistencies in the child's evidence during cross examination. The inconsistencies in the child's evidence mostly tend to go in favour of the accused in which case the accused is acquitted even when it should have been a conviction. However, in the *Akatama Wamunyima case*, the appellant was convicted and sentenced to 15 years imprisonment with hard labour by the High Court. The appellant appealed to the Supreme Court against both conviction and sentence. When the matter came up for hearing of the appeal, the appellant withdrew the appeal which meant that he was to serve the sentence imposed on him by the High Court.²⁵⁰

According to Muller, cross-examination is not only traumatic for children, but also results in inaccurate evidence.²⁵¹ The child is questioned in a hostile environment, often about very intimate and emotionally laden events. Cross examination, according to Davies, is the strategy of words and actions which the advocate employs during the presentation of evidence by the opposition that serves to cast doubt upon the opposing party's case.²⁵² Brennan and Brennango further and argue that cross-examination is "geared tactically to upset the credibility of a

²⁴⁹ Interview: Beatrice Matafwali, January 15, 2014.

²⁵⁰ In July, 2014 during Supreme Court Session held in Lusaka.

²⁵¹ K. Muller, *Prosecuting the Child Sex Offender*, p. 172.

²⁵² D. Leonard E, *Anatomy of Cross-examination*, 1993, <http://www.abebooks.com/book>, Accessed on August 4, 2015.

witness.”²⁵³ In the case of *Shawaza Fawaz and Prosper Chelelwa v The People*²⁵⁴ the Supreme Court held, *inter alia*, that:

- (i) Cross-examination cannot always shake the evidence of untruthful witnesses in every respect; it is sufficient to show the unreliability of a witness if he is shown to have told an untruth about an important part of his evidence.

The *Shawaza Fawaz case* shows that once cross examination has shaken a witness to an extent that the witness’ evidence is rendered unreliable, the evidence of such a witness is interpreted by the court as being untruthful. The *Shawaza Fawaz case* cited above also applies to child witnesses. Therefore, cross examination has the potential of confusing very young defilement victims into contradicting themselves thereby raising doubt in the mind of the court on the veracity of their testimony which doubt then operates in favour of the accused person.

Meanwhile, the child’s testimony is an important piece of evidence in a defilement case. This is because the evidence of the child tends to bring out an important piece of evidence that tends to connect the accused to the offence. Muller observed that in cases of abuse, the child is very often the only witness to the incident, and a finding of non-competence will, in effect, amount to an acquittal.²⁵⁵ For instance, in the *Akatama Wamunyima case* cited earlier, in her evidence in chief, the child testified that the appellant did bad manners to her on her private part using an ‘insect’ which he removed from his trousers. In cross examination, the child testified that the appellant made her lie down on the bed in a cabin and that he was standing when doing bad manners to her. She later changed and said the appellant got on top of her when doing bad manners.

²⁵³ Strange Language – *Child Victims under Cross-examination*, 1988, p. 3.

²⁵⁴ (1995) S.J. (S.C.).

²⁵⁵ Muller and Holley, *The Judicial Officer*, p. 135.

Further, in the case of *Teddy Shikabita v The People*,²⁵⁶ the child was four years old. She gave sworn testimony and was later cross examined. In the child's evidence in chief at page 15 of the judgment, this is what she said:

“Chi Teddy got a knife from his trousers and he cut me using it. He cut me in the house on the bed. He cut me on my private part. I did not feel good when he cut me. When cutting me he was standing. I was sitting on the bed after cutting me. I did nothing and I then told my grandmother that Chi Teddy had cut me. Thereafter we went to the hospital. I was given medicine at the hospital. The doctor checked on my private part.”

In cross examination, at page 16 of the Judgment, the child said:

“You slept with me.”

Looking at the evidence in chief and cross examination, there is a visible shift from the accused cutting her while he was standing and while she was seated. In cross examination, the child does not refer to her earlier testimony but said something that appears to be totally different from her earlier statement that the accused slept with her.

5.7 INCONSISTENCIES IN THE CHILD'S TESTIMONY AND THE COURT'S EVALUATION

It is believed that cases of sexual abuse are usually difficult to adjudicate especially when the victim is of very tender age. This is because by its very nature, sexual abuse is committed in secrete with the child in most cases being the only eye witness. The younger the victim, the more limited the vocabulary or verbal competence of the child witness. Therefore, adjudicating a case of child sexual abuse very often comes down to a decision by the presiding officer as to which party, between the accused and the child witness, is telling the truth.²⁵⁷

²⁵⁶ SCZ Appeal No. 543/2013.

²⁵⁷ Karen Muller, *Prosecuting the Child Sex Offender*, p. 298.

Evaluation of credibility can be done in one of two ways, either through psychological lay persons or through a psychological expert. Of importance to this dissertation is the evaluation by psychological lay persons. The psychological lay persons are judges, magistrates and prosecutors. This evaluation is done by observing the child while the child is being questioned, and piecing together any additional information relating to the child's personality, cognitive abilities and reputation in order to form a composite approach to credibility. This is known as a social judgment or impression formation task.²⁵⁸

In its evaluation of the evidence, the court does evaluate the inconsistencies in the child's testimony which usually arise during cross examination as earlier discussed. Inconsistencies have an effect on the credibility judgment of the witness. With this inconsistency in the child's testimony, doubt is cast in the mind of the court as to the veracity of the child's testimony. The law provides that any doubt in the mind of the court should be resolved in the favour of the accused. In certain instances, the inconsistencies in the child's testimony may lead the court to conclude and record that the demeanour of the child is of a witness not telling the truth. In the case of *Machobane v The People*²⁵⁹ it was held, *inter alia*, that:

Demeanour of a witness is an item of evidence which must be included in the record or at least the judgment of the trial court and the absence of any evidence to support an adverse finding on demeanour in the record or judgment is a serious irregularity.

The *Machobane case* shows that demeanour of a witness is a serious consideration in a trial. Once the court forms the view that the witness' demeanour is of one not telling the truth, such a view is supposed to be recorded on the court record. Such a record is quite fatal to the case as such a finding is a finding of fact which the appellate court cannot upset. In the case of *Eddie*

²⁵⁸ Muller and Hollely, *The Judicial Officer*, p. 207.

²⁵⁹ (1972) Z.R. 101.

Christopher Musonda v. Lawrence Zimba,²⁶⁰ where at page J28 the Acting Chief Justice Lombe Chibesakunda said:

“Also it is well established principle that the learned trial Judge is a trier of facts, he has the advantage of observing the demeanour of witnesses to determine as to who was telling the truth in the trial. Bearing that in mind, we cannot upset his findings...”

The *Christopher Musaonda case* relates to trial courts. In defilement cases, the trial court is the magistrate who has the advantage of observing the demeanour of the witness. When the magistrate records the demeanour of the witness, the High Court and the Supreme cannot upset such a finding.

Further in the case of *Shawaza Fawaz and Prosper Chelelwa v The People*²⁶¹ the Supreme Court held, *inter alia*, that:

(iii) Not sufficient for trial court to find that prosecution witness probably spoke the truth. The evidence of the witness must be accepted beyond reasonable doubt.

In the *Shawaza Fawaz case*, the court is precluded from speculating as to the veracity of the witness’ testimony but accept it when the court must be satisfied that the witness spoke the truth beyond reasonable doubt. When the court finds that the witness was not telling the truth, the court is then obliged to record the demeanour of the witness as being untruthful as held in the *Machobane case*.²⁶² Therefore, the inconsistencies in the child’s testimony are fatal to the case especially where the court records the demeanour that the child is not a truthful witness. Therefore, the inconsistencies have the potential to lead to an acquittal based on a technicality and not on the innocence of the offender. As a result, justice for the child victim is eroded. This

²⁶⁰ SCZ Appeal No. 41/2012.

²⁶¹ (1995) S.J. (S.C.).

²⁶² (1972) Z.R. 101.

is the more reason children should simply be allowed to give unsworn testimony in order to avoid inconsistencies that arise in cross examination.

On this issue the researcher interviewed one magistrate who handles child witnesses in defilement cases and other cases and is at the same time a Juvenile Court.²⁶³ The magistrate was called upon to shed more light on the practice adopted by Magistrates with regard to the reception of the evidence of child witnesses. The magistrate observed that the practice of receiving unsworn testimony of child witnesses was useful and posed no challenges or difficulties; neither to the accused nor the child witness. Therefore, before the amendment to the Juveniles Act, children were allowed to simply narrate a short story to the court unhampered by the dangers that arise as a result of cross examination as is currently the position.

5.8 POSSIBLE EFFECTS OF THE INCONSISTENCIES ON THE CASE

With the background that Zambian courts are permitted to only receive sworn testimony of child witnesses, it should be appreciated that when young children are cross examined, they become inconsistent in their testimony as has earlier been shown. Such inconsistencies in a child's testimony are quite common and the magistrate would have to make sense of what the child is saying which goes to the credibility of the child as a witness. The court then has a duty to consider such inconsistencies when evaluating the evidence received in totality. In the *Teddy Shikabita case*²⁶⁴ cited earlier, the child witness was four years old at the material time and she was inconsistent in her testimony as highlighted above. The court opted to make sense of what the child said as elaborated below. This practice however, has no legal backing. The court's duty is to interpret the evidence as it is as opposed to deciphering what the witness was trying to

²⁶³ Interview: Lameck Ng'ambi, July 4, 2012.

²⁶⁴ SCZ Appeal No. 543/2013.

say. Hence in the *Teddy Shikabita* case, the court determined what the child was trying to say by restricting itself to evidence given in chief as opposed to the evidence of the child as a whole, a procedure which has no legal backing. At page 24 of the Judgment, the trial court had this to say:

“The child identified the accused and said he got a knife from his trousers and cut her private part. She said that this happened in the house and on a bed.”

The magistrate convicted the accused on the totality of the evidence before it and committed the accused to the High Court for sentence. In the High Court the accused who appeared under cause No. HPS/65/2013 was sentenced to 35 years imprisonment with hard labour.²⁶⁵ The convict appealed to the Supreme Court against conviction and sentence. When the matter came up for hearing, the appellant withdrew the appeal. The Supreme Court dismissed the case and the 35 years imprisonment with hard labour imposed by the High Court judge was not disturbed.

Other than the approach adopted by the court in the *Teddy Shikabita* case, the magistrate explained during the interview that on his part, due to the inconsistencies, he considers the demeanour or credibility of the child witness and if he finds that the child is lying, the finding operates in favour of the accused, hence results in an acquittal. However, the magistrate noted that at times despite the inconsistencies, he considers all the evidence before him and the demeanour of the child witness and if he finds that the child is telling the truth, he then takes the evidence of the child into account despite the inconsistencies.

The magistrate however, observed that due to the inconsistencies that arise as a result of cross examination of child witnesses, there is a likelihood or danger of having more acquittals at magistrate’s level as courts would find the evidence of a child witness in question unreliable.

²⁶⁵ By Hon. Mr. Justice Justin Chashi at Lusaka.

This would be as a result of lack of a standard procedure with regard to how courts should interpret inconsistent evidence of child witnesses.

It was his observation that due to absence of the standard or special procedures with regard to interpretation and consideration of a child's testimony, courts have a duty to treat the evidence of a child witness on oath in the ambit of the ordinary or general rule regarding evidence of witnesses. This poses more danger as all inconsistent evidence of child witnesses will be discounted and not relied upon. In discounting inconsistent testimony of a child witness, the magistrates are backed by law. In the case of *Sipali Chibozu and Chobu v The People*²⁶⁶ it was held that:

The failure by the learned judge to notice or explore the inconsistency in the prosecution evidence constitutes a serious misdirection.

The *Sipali Chibozu case* entails that trial courts are under obligation to notice or explore the inconsistencies in the evidence of the witnesses for the prosecution. This case also applies to inconsistencies in the accused's evidence. Failure by the trial court to notice the inconsistency is a misdirection which could be fatal to the prosecution case.

Further, where the inconsistencies reveal evidence which tends or seems to support the accused person, courts are called upon to resolve such doubts or inconsistencies in favour of the accused.

In the case of *Mutale and Phiri v The People*,²⁶⁷ it was held that:

Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one that is more favourable to an accused if there is nothing to exclude that inference. Where there are lingering doubts, the court is required to resolve such doubts in favour of the accused.

²⁶⁶ (1981) Z.R. 28.

²⁶⁷ (1995-97) Z.R. 227.

According to the Mutale and Phiri case, where there is more than one inference with nothing to exclude such inference and there are lingering doubts on material facts, the accused is entitled to an acquittal. This is because where there are lingering doubts, trial courts usually make a finding that the prosecution has failed to prove their case against the accused beyond all reasonable doubt. In the case of *Mwewa Muroño v The People*²⁶⁸ the Supreme Court held, *inter alia*, that:

1. In criminal cases the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused, lies from beginning to end, on the prosecution.
2. The standard of proof must be beyond all reasonable doubt.

The *Mwewa Muroño case* entails that it is the duty of the prosecution to prove the case against the accused beyond all reasonable doubt. Proving a case beyond reasonable doubt means the prosecution should prove each and every element of the charge. In the *Mwewa Muroño case* cited above, the Supreme Court was of the view that the case had not been proved beyond all reasonable doubt and therefore, the conviction and sentence were quashed. The above cited cases also apply in defilement cases. Thus, inconsistencies in the testimony of a witness have a negative effect on the credibility of a witness. And as earlier observed, where credibility of a witness is in question, it has the potential of raising doubt in the mind of the court. Therefore, the court would be entitled to conclude that the prosecution has failed to prove the case beyond all reasonable doubt thereby acquitting the offender.

Looking at the inconsistencies in the children's testimonies and the manner in which the trial courts are salvaging the inconsistent evidence of child witnesses, it is clear that placing on oath very young witnesses has posed new challenges. However, the law is very clear that where a witness is inconsistent, it negatively affects the demeanour of a witness and as provided by law,

²⁶⁸ (2004) Z.R. 207.

courts are called upon to record the demeanour of the witness which may be detrimental to the case.²⁶⁹ The demeanour of a witness is very cardinal and once the court takes note especially where the witness is inconsistent, the demeanour usually arrived at is of a witness who is not telling the truth. In the case of *Haonga v The People*,²⁷⁰ the Supreme Court held, *inter alia*, that:

(iv) Where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful in relation to the accused.

The *Haonga case* shows that when a witness has been found to be untruthful by the trial court, there must be very good reasons for accepting the truthful portions of the evidence of such a witness. Otherwise, the evidence of such a witness is discounted in its entirety. Further, in the event that such a witness' testimony is found to be untruthful on material evidence, the weight attached to the rest of the evidence is reduced.

Muller explains that adjudicators have consciously or unconsciously devised various criteria that are perceived as indicative of truth or lies in distinguishing between truthful and false statements. Facial expressions or demeanour are believed to be indicators of deception. This is the basis of confrontation in the criminal justice system, that is, a witness must testify in the presence of the accused, so that the latter can observe the witness' demeanour. The demeanour of a witness is the main emphasis in the courtroom. The face and eyes and certain facial expressions are

²⁶⁹ Section 196 of the Criminal Procedure Code, CPC.

²⁷⁰ (1976) Z.R. 200.

perceived as indicative of deception. The tone of the witness' voice is believed to reveal truth.²⁷¹

The issue of concern relates to the accuracy of this method of evaluating truthfulness and lies. Although there is almost no experimental evidence available on the ability to discriminate between truthful and false witness statements in a court setting, there is a considerable amount of empirical finding on this ability in laboratory settings. Some experiments were conducted in which the subjects were asked to relate some personal event either truthfully or deceptively. The results of more than 40 experimental studies have shown that the proportion of correct decisions falls in the range between 45% and 60%, where 50% of the correct decisions are based on chance, i.e. guessing. The shocking discovery in these studies is that the mean detection accuracy across all studies is only slightly above 50% chance level, with hit rates above 60% being very rare.²⁷²

Borrowing from the data in chapter four, most of the magistrate respondents who are trial courts in defilement cases stated that the acquittal rate was high in defilement cases. For instance, six of the magistrates indicated that the acquittal rate was high while two indicated that the acquittal rate was low. The high acquittal rate could be attributed to cases where an acquittal was as a result of technicalities such as the inconsistencies in the child's testimony in cross examination as opposed to acquittals based on the innocence of the accused.

On the part of superior courts, their decisions or judicial precedents bind the lower courts. Thus, in order to reduce the high acquittal rate in defilement case, it is important for the superior courts and trial courts to understand that child witness' testimony cannot be placed at the same footing

²⁷¹ Muller, *Prosecuting the Child sex Offender*, p. 300 - 305.

²⁷² Muller, *Child Sex Offender*, p. 305.

with adult witnesses. This is because as has been demonstrated earlier in this dissertation, the ability of a child witness to testify is closely associated with the developmental stage or age at the material time. Usually, due to their tender age, children do not give their testimony in a coherent manner like the adults. Their evidence is mostly illogical and inconsistent. However, this is not an indication of false testimony on their part as may be the case for an adult witness. The inconsistencies and illogical manner in which children give their evidence is an indicator of truth as explained below.

As demonstrated above, children are credible witnesses as the basis for casting doubt on their evidence is not supported by research but merely based on erroneous assumptions. In judicial proceedings the credibility of a witness has always depended on evidence of specific instances of conduct which are assumed to be probative of the truthfulness or otherwise of the witness. These assumptions, according to Undeutsch, have their roots in public opinion and, therefore, cannot form a reliable basis for the assessment of the truthfulness of a particular statement.²⁷³

5.9 TRUTHFUL EVENTS VIS-À-VIS INVENTED EVENTS

It is a fact that there are real or truthful occurrences and invented or false events. There has been research conducted in this area. One such notable researcher is Undeutsch.²⁷⁴ According to him, since truth exists and falsehood has to be invented, the reasonable deduction is made that truthful accounts of events experienced by the witness differ in certain characteristics from those that are entirely or partially invented. This has been referred to as the Undeutsch hypothesis.²⁷⁵ The characteristics which assist in distinguishing between truth and falsehood are known as

²⁷³ Muller, *Child Sex Offender*, p. 344.

²⁷⁴ Muller, *Child Sex Offender*, p. 344.

²⁷⁵ Muller, *Child Sex Offender*, p. 344.

‘criteria of reality’ or ‘reality criteria’ and have been developed to form a key for determining the veracity of statements.

The evaluation of statement credibility, known as Statement Validity Analysis (SVA) requires the expert to approach the assessment of the child’s credibility as a scientific problem in the course of the interview. Forensic research has shown that truthful accounts of self-experienced, real occurrences display certain fundamental criteria. There are 19 different criteria, known as reality criteria, which are organised into five categories. Karen Muller in her book titled ‘Prosecuting the Child Sex Offender’²⁷⁶ has listed the five categories, into which the reality criteria are organised, that is:

5.9.1 General Characteristics

a. Logical Consistency or Structure: The criterion of logical consistency or structure requires that the statement as a whole must make sense, and involves a search for any contradictions or inconsistencies. It does not however, mean that the events in the statement should follow a logical sequence. It is usually false statements that are presented in a continuous, chronological order. She observed that unusual details, peculiar content and unexpected events do not diminish this criterion as long as the statement is coherent.²⁷⁷

b. Unstructured Production: The criterion of unstructured production requires that the statement should be somewhat disorganised, is not straight forward or rather is not direct and is unconfined. This characteristic may be an indicator of credibility. She stated that

²⁷⁶ 2001, from p. 332 - 339.

²⁷⁷ Muller, *Child Sex Offender*, p. 332 – 333.

“fabricated testimonies and fantasies are usually characterised by a structured, generally chronological manner of presentation with clear attempts by the witness to demonstrate casual connections.” Basing on the work of Kohnken, she explained that witnesses, especially children, will rarely have the cognitive capacity to report an invented story in a disorganised way with fragments of the events scattered throughout the statement.²⁷⁸

- c. Quality of Detail:** This criterion relates to the quality of detail supplied by the witness, such as description of the times, places, persons and events. These are assumed to be an indicator of reliability, since it is impossible for most children to make up a statement with a lot of detail.²⁷⁹

5.9.2 Specific Content

This criterion relates to the specific content of the statement or refers to the quality of detail supplied by the witness. For instance, specific content would be descriptions of times, places, persons and events. It is based on the assumption that a child would not be able to invent stories containing quality of criteria referred to here, and once a child’s statement has these characteristics, they are perceived to be indicators of credibility.²⁸⁰

- a. Contextual Embeddings:** Contextual embedding is perceived as an important indicator of truthfulness. Events are almost always embedded in large social and physical situations and are related to particular time circumstances. The more complex these interrelationships between everyday occurrences, schedules and habits, the less likely it is

²⁷⁸ Muller, *Child Sex Offender*, p. 333.

²⁷⁹ Muller, *Child Sex Offender*, p. 333 -334.

²⁸⁰ Muller, *Child Sex Offender*, p. 334.

that the statement is fabricated, because it is very difficult for a lying witness to fit a complex event into a complex environment.²⁸¹

b. Description of Interactions: The description of interactions explains the fact that naturally occurring events are usually characterised by a sequence of actions and reactions, explained as consequences of previous stimuli. Children do not have the ability to construct such stimulus-response. Therefore, their presence can be perceived as an indicator of credibility.²⁸²

c. Reproduction of Conversations/Speech: This criterion relates to the witness reporting conversations that take place between different persons. This involves the use of the same speech behaviour, vocabulary and formulations of the particular person. Terms or quotes used which are not familiar to the witness are deemed to be especially strong indicators.²⁸³

d. Unexpected Complications: Real events are often interrupted by unexpected complications and obstacles. These are however, very rarely mentioned by lying witnesses since this would create difficulties in maintaining the lies, especially when questioned more than once. Therefore, the presence of unexpected interruptions is a strong indicator of credibility.²⁸⁴

²⁸¹ Muller, *Child Sex Offender*, p. 334.

²⁸² Muller, *Child Sex Offender*, p. 334 -335.

²⁸³ Muller, *Child Sex Offender*, p. 335.

²⁸⁴ Muller, *Child Sex Offender*, p. 335.

5.9.3 Peculiarities of Content

This category focuses on the peculiarities of the statement's content. It is viewed on a qualitative basis and relates to the concreteness and vividness of the statement. These characteristics are indicators of credibility.²⁸⁵ This criterion is explained further in the following sub headings which are:

- a. Unusual Details:** Where a statement contains details which are unpredicted, unexpected or and surprising the witness is probably telling the truth, as lies very rarely contain unusual details.²⁸⁶
- b. Superfluous Details:** This relates to details which are not strictly necessary for describing the event. A person, who was lying, would probably not think about inventing irrelevant, superfluous details.²⁸⁷
- c. Accurately Reported Details Misunderstood:** This criterion is particularly important when evaluating the truthfulness of a child's statement. These are details reported by the child but misunderstood in their particular context. This sometimes manifests in erroneous interpretations of correctly described observations. For instance, descriptions of semen or the act of ejaculation given by very young children are often erroneously interpreted as they do not understand the significance of what they are saying.²⁸⁸
- d. Related External Associations:** This refers to the situation where a witness describes conversations with the perpetrator which refer to earlier events that are in some way

²⁸⁵ Muller, *Child Sex Offender*, p. 335.

²⁸⁶ Muller, *Child Sex Offender*, p. 336.

²⁸⁷ Muller, *Child Sex Offender*, p. 336.

²⁸⁸ Muller, *Child Sex Offender*, p. 336.

related to the incriminating event. For instance, in the context of an incestuous relationship where the witness (daughter) mentions a conversation she had with the accused (father) in which they discussed the daughter's sexual experiences with other men. Where these are reported, they are also indicators of credibility.²⁸⁹

e. Accounts of Subjective Mental State: The criterion of accounts of the subjective mental state relates to instances where a child describes feelings or thoughts experienced at the time of the incident. For instance, they could be descriptions of feelings of pain, fear or disgust.²⁹⁰

f. Attribution of Perpetrator's Mental State: Refers to the alleged perpetrator's emotions and thoughts during the incident.²⁹¹

5.9.4 Motivation-Related Contents

This relates to the child's motivation to make a statement. The deception here is perceived as motivated, goal-directed behaviour. The lying witness tries to construct a report and behave in a way in which he believes a credible person would behave. Therefore, if a child witness: spontaneously corrects his own testimony; admits lack of memory; raises doubts about his own report; exhibits self-deprecation; and pardoning the perpetrator are behaviours understood as indicators of credibility.²⁹²

²⁸⁹ Muller, *Child Sex Offender*, p. 337.

²⁹⁰ Muller, *Child Sex Offender*, p. 337.

²⁹¹ Muller, *Child Sex Offender*, p. 337.

²⁹² Muller, *Child Sex Offender*, p. 337.

5.9.5 Offence-Specific Elements

Details Characteristic of the Offence: This final category relates to the specific elements of the offence and emphasis is placed on details characteristic of the offence. Elements of a statement which are discrepant in terms of everyday knowledge or stereotypes but which are consistent with criminological research findings will also be indicators of truthfulness.²⁹³

The analysis of truthful/false statements neatly depicts the manner in which child witnesses present their evidence. However, from the Zambian authorities cited on the interpretation of inconsistent testimony, it is clear that children's inconsistent testimony is interpreted in the same manner as adults' testimony is. This is a clear manifestation of a lack of understanding of the cognitive, language, memory abilities and limitations of child witnesses which has led to misconstrued interpretation of child witness' testimony. As a result, the misconstrued interpretation of the child's testimony disadvantages the child victim in instances where the accused is acquitted when in fact, it should have been a conviction.

5.10 CONCLUSION

Child witnesses are very key witnesses in cases of defilement. Once a child has perceived an event and encoded it in his/her memory, the child is able to recall and state what he/she perceived provided the questioner is not biased and questions are not repeated deliberately in order to confuse the child witness. Further, although it is commonly believed that children are more suggestible than adults, psychological research has shown that children are not as suggestible as many adults would believe them to be.

²⁹³ Muller, *Child Sex Offender*, p. 338.

In Zambia, however, despite the abilities of the child witness discussed above, the practice is that courts do not receive the evidence of children who according to the court, do not appreciate the duty to speak the truth and fail to show that they have sufficient intelligence to give sworn testimony. As there is no scientific explanation or research findings to support such practice, it is erroneous and a lack of understanding of children and their ability to testify. It has also been shown that child witnesses have difficulties in expressing themselves and are usually inconsistent in their testimony due to their tender age. If the inconsistencies go to the root of the case, doubt is cast in the mind of the court which operates in favour of the accused. Doubt on the veracity of a child's testimony is based on the fact that the testimony of children is not presented in a logical and coherent manner. However, forensic research has shown that truthful accounts of self-experienced, real occurrences while making sense have unexpected complications, unstructured production and are somewhat disorganised, unlinear and unconstrained which are indicators of credibility.²⁹⁴ Kohnken explains that witnesses, especially children, will rarely have the cognitive capacity to report an invented story in a disorganised way with fragments of the events scattered throughout the statement. Further, it has been shown that when a child victim, in her testimony, spontaneously corrects her own testimony; or admits lack of memory; or raises doubts about her own report; self-deprecation of the witness; and pardoning the perpetrator are behaviours understood as indicators of credibility. It is imperative for adjudicators to understand the nature of the evidence of child witnesses and appreciate the indicators of credibility.

²⁹⁴ Muller, *Child Sex Offender*, p. 333.

Therefore, in view of the current law, it is important to find ways of limiting the inconsistencies by allowing children to simply narrate what transpired without the need for them to undergo cross examination. This is because current law and judicial precedent have shown that in relation to inconsistencies in the testimony of witnesses, whether children or adults, the interpretation or analysis is the same that the witness is probably lying without necessary distinction for children. Considering that the interpretation of the child's testimony with regard to inconsistencies is placed on the same footing as adult witnesses and is certainly not in the best interest of the child as envisaged in the CRC.

CHAPTER SIX

SUMMARY OF THE DISSERTATION

6.0 CONCLUSION

This study sought to determine whether the rights of girls who are defiled are protected by the courts. The question that was being determined was whether the law and the courts are upholding the rights of defilement victims. In so doing, existing legislation on criminal law, procedural requirements and the courts were examined with a view to ascertain whether the rights of the victims are upheld and protected. Therefore, the rights of a child with regard to defilement were highlighted with reference to provisions as contained in international instruments and domestic legislation. Further, the dissertation sought to determine the challenges courts face, if any, in its duty to protect the rights of defilement victims.

In this dissertation, it has been demonstrated that in theory international instruments such as the CRC has progressive provisions on the protection of children's rights. It was the intention of the formulators of international instruments for State Parties to use the law in the home countries by taking necessary steps for the law to be part of domestic legislation. Therefore, State Parties who ratified the CRC have an obligation to implement and domesticate its provisions by bringing domestic legislation in conformity with the provisions of the CRC. Zambia ratified the CRC as was shown earlier in this dissertation and by ratifying she has an obligation to domesticate the rights provided in the CRC into its domestic law for it to be of relevance to Zambian children. Until this is done, Zambian children will be subjected to laws which are in effect inconsistent with provisions of the CRC thereby depriving the rights of defiled children.

It has been demonstrated that Zambia has made strides in domesticating and implementing the provisions of the CRC. However, in its implementation, Zambia has focussed on the child offenders without considering or including the child victims in its programmes and in the formulation of the law. This has left the victims vulnerable and discriminated against by virtue of the laws being introduced and through judicial interpretation of the law as well as through trial procedures in the courts. According to the spirit of the CRC, the law ought to be fair to all children in its application and in its effect without any trace of discrimination.

Also, having analysed domestic legislation relating to criminal law and procedural requirements during trial, it was evident that while the CRC and the Constitution of Zambia provide for freedom of expression to all persons without limitation or discrimination other than for purposes of public security, the Juveniles Act has however, taken away this rights from children who do not pass the test to adduce sworn testimony. It has been concluded that the restriction on free speech emanating from the procedural requirements for testifying or giving evidence in court for children is a violation of the child's rights as provided in the CRC and as guaranteed in the Constitution of Zambia. Further, looking at the provisions in the Penal Code and Juveniles Act which have a negative bearing on children, it is clear that they are a departure from the mandate Zambia undertook of domesticating the CRC.

The Juveniles Act's provision for an acquittal of the offender in the absence of corroboration has been found to be a challenge for the courts in its quest to provide justice in defilement cases as corroborative evidence is usually not available. It has been concluded that the requirement for corroboration prevented convictions in many defilement cases thereby eroding justice for the victims.

The Juveniles Act and the Penal Code are therefore inconsistent with the provisions of the Constitution guaranteeing children's rights. Until the said provisions in the two said statutes are nullified to the extent of their inconsistency with the Constitution, the statutes in question will remain law in Zambia and applied by Zambian courts. Because the law in the Penal Code relating to defilement and the law in the Juveniles Act relating to the reception of sworn evidence of child witnesses by the court has not been challenged in the courts of law by relevant authorities, the rights of children guaranteed in the Constitution continue to be denied by the courts.

It has been shown that most children fail to meet the test of giving sworn testimony as provided in the Juveniles Act. However, due to the restriction on the reception of unsworn testimony of child witnesses, many magistrates are putting on oath very young witnesses in a quest to receive their testimony. As a result, during cross examination, many child witnesses become inconsistent in their testimony. This is because cross examination has an effect of confusing child witnesses thereby making them become inconsistent. Also, that once a child gives inconsistent testimony, it has a negative bearing on the credibility of the child as a witness as the court is required to record the demeanour. According to Zambian law, once the credibility of a witness is questioned, doubt is cast in the mind of the court. When this happens, the law provides that any lingering doubt in the mind of the court operates in favour of the accused which usually leads to an acquittal.

With regard to the analysis and interpretation of the inconsistencies and demeanour of a witness by the court, there is no distinction between a child and an adult witness. For an adult, inconsistencies are deemed as an indicator of lies. However, this dissertation has demonstrated

that for a child witness, psycho-social approaches have shown that inconsistencies in a child's testimony are an indicator of truth. Therefore, the courts are incorrectly interpreting the demeanour of child witnesses thereby erroneously acquitting perpetrators of defilement. This is another avenue of the many acquittals in defilement cases thereby making the courts fail in their core duty of protecting the rights of defilement victims.

It has also been demonstrated that children are good and credible witnesses. Psycho-social approaches have shown that children do not have the ability to analyse an event but simply report it the way it was perceived. Also, that in the absence of suggestibility, when children are simply allowed to narrate an incident, they are as credible as adult witnesses. Therefore, in view of the findings by psycho-social approaches on the credibility of child witnesses, it has been concluded that there is no justification for restricting child witnesses from giving unsworn testimony and also, that there is no justification for cross examining child witnesses. While cross examination is meant to test the veracity of a witness' testimony, in children, the opposite is the outcome as even when a child witness is credible, cross examination confuses the child hence making the child give inconsistent testimony thereby leading the court to conclude that the child is not a credible witness.

It has been concluded that with regard to defilement victims, the law, the procedures employed in criminal matters and the courts' interpretation of the inconsistencies in the testimony of child witnesses are a hindrance to the realisation of the rights of children. Also, that the law and the procedures applied during trial are not sensitive to the rights of the victims and give a blind eye to the interest of the child contrary to Zambia's obligations in the CRC and the rights guaranteed in the Constitution of Zambia.

6.1 RECOMMENDATIONS

1. In view of lifetime consequences for the victims which vary from one case to another, it is fairer if the rights of children in defilement cases are also accorded the same importance as those of the accused. There is no justification for the law to claim to have the interests of defilement victims when in fact not, as the accused rights are glorified in view of the safeguards put in place for the accused at the expense of the victim. Justice not only ought to be done but must be seen to be done for the defilement victims as well. Therefore, all provisions of the law which impede or inhibit children from freely testifying in cases in which they have an interest must be done away with for the children's rights to be fully realised.
2. Section 122 of the Juveniles Act needs to be amended once again to allow the reception of unsworn testimony of witnesses of tender age. For the court to be able to receive the evidence of a child witness, the child must take oath and give sworn testimony. Sworn testimony is tested by way of cross examination. However, it has been shown that magistrates have challenges in as far as receiving sworn testimony from tender children is concerned. During cross examination, most if not all the children become inconsistent in their evidence. Amending section 122 of the Juveniles Act will allow the re-introduction of the reception of unsworn testimony of the child witness during trial.
3. As long as corroboration remains a requirement, then the State has the responsibility to find the resources to support the process of obtaining full proof evidence such as DNA. This is because corroboration is not readily available in defilement cases as the offence itself is committed by secluding the victim. Thus, corroboration is limited to

circumstantial evidence while in rare circumstances by an eye witness to the offence and by the medical report which only shows that defilement was committed but does not state the identity of the offender. DNA evidence of the offender and the semen found on the victim can provide corroboration on the identity of the offender. Therefore, to reduce pressure on the child in terms of corroboration, effective corroboration such as DNA is needed. When DNA testing is introduced, it would also reduce the challenges on the prosecution of proving the identity of the offender as DNA evidence would conclusively show who the offender or defiler is thereby attaining justice in defilement cases.

4. There is need for innovative ways of receiving children's testimony, for instance, the use of dolls during trial. This would enable tender age witnesses to demonstrate on the doll the similar part on the accused's body which was used to defile her. The child would also demonstrate using the doll to show which part of her own body was touched by the accused.
5. In order to ensure that point number 3 is implemented, there would be need to amend the law to allow for compulsory DNA testing of an accused. Currently, in sexual offences there is no law compelling an accused to be tested for DNA. This is the more reason it is only the child who is examined. In cases where an accused has also been tested in a sexual offence, it means the accused volunteered to be examined or tested. However, considering that defilement is a serious offence with serious repercussions on the victim, there is no justification for the accused to have the discretion whether to be examined or not.

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