

**AN ANALYSIS OF THE TRIAL AND PROCEDURE OF DEFILEMENT CASES
IN ZAMBIA**



BY

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An Obligatory Essay submitted to the University of Zambia, Law Faculty, in partial fulfillment of the requirement of the Degree of Bachelor of Laws.

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April 2010

DECLARATION

I NAOMI SITHOLE solemnly declare that this work represents my own ideas and is not a production of any other work produced or submitted by any person to the University of Zambia or to any other institution.

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9th APRIL 2010

DATE

**AN ESSAY SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN PARTIAL
FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF A
BACHELLOR DEGREE IN LAW-LL.B
THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

I recommend that this Obligatory Essay prepared under my supervision

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Entitled

**AN ANALYSIS OF THE TRIAL AND PROCEDURE OF DEFILEMENT CASES
IN ZAMBIA**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to format as laid down in the regulations governing Obligatory Essays.

Supervisor: *M. Lwatula* **Date:** *45th May 2010*

Ms M. Lwatula

ABSTRACT

Defilement in Zambia has been increasing notwithstanding the heavy penalty imposed by Act No. 15 of 2005. Whilst a number of studies on defilement have focused on the substantive law, this study has taken a novel approach; it focuses on the procedure governing defilement cases from the pre-trial process to the court room.

Apart from a review of the various literatures on the subject, a number of interviews were conducted with personnel from the police, hospitals and organisations that provide social welfare to the victims. The study revealed that the pre-trial process needs to be more effective and responsive to the needs of the victim. This can be achieved by enhancing co-ordination between the key players that is, the victim support unit, medical personnel and the social welfare. The study further revealed that the courts in Zambia do not have special procedure governing defilement cases. For instance the trials are conducted in our usual open court; the child witness is not accorded formal protection during cross examination. In an adversarial system such as ours, a child witness ends up being subjected to further humiliation and trauma. The evidence of the child witness is subjected to the common law precautionary rule. Furthermore, defilement cases are subjected to the requirement of corroboration and yet it is a notorious fact that such cases are committed in privacy. This puts a heavy burden on the prosecution. The study revealed that defilement cases may take as long as 12 months before they are disposed of. This does not only perpetuate the trauma of the child victim but also affects the veritability of the evidence of the child witness due to lapse of time. The study contains recommendations which if implemented can enhance the protection of children that become victims of defilement.

ACKNOWLEDGEMENTS

I would like to thank the VSU of the Zambia police service. This gallant unit has clearly taken child protection as something more than its mere call of duty. The insight and practical knowledge of issues pertaining to defilement cases makes this study not only informative but also provides recommendations for valuable practical improvements in matters concerning defilement.

I would also like to thank the SGBV Co-ordinated Response Centre for availing me with valuable information on social welfare facilities available to victims of defilement. I also want to recognize the valuable input of the judiciary, particularly the staff at the Lusaka Magistrate Complex who provided valuable information on the court process. Let me take the privilege of mentioning that the ZNBC clip that featured the Principal Resident Magistrate Newa had a unique contribution to this research. The Magistrate's personal testimony on a defilement case in which conviction could not be secured due to lack of corroboration clearly brought to the fore the agony our judges go through in the course of fostering justice in the society. More importantly, the testimony gave me the impetus to re-examine this common law requirement of corroboration with regard to defilement cases.

Many thanks go to the various individuals I interviewed during the study. To you I say, you have demonstrated unparalleled patriotic devotion in the noble task of protecting our vulnerable children.

Finally, special thanks to my supervisor, Ms M. Lwatula for providing valuable guidance during my research.

TABLE OF STATUTES

1. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia, s. 7.
2. The Penal Code, Chapter 87 of the Laws of Zambia, s. 138(1)
3. Penal Code (Amendment) Act No. 15 of 2005
4. The Juveniles Act, Chapter 53 of the Laws of Zambia, ss. 119-122.
5. The Electoral Act of Zambia, Chapter 13 of the Laws of Zambia, s. 27

TABLE OF CASES

1. Muwowo v The People (1969) ZR 67.
2. Yacoob, (1981) 72 Cr App R 313
3. Klink v Regional Court Magistrate and Others, (3) BCLR, 402 (SF0 at 410A), 1996.
4. S v D (1995) (1) SARC, 259 (A).
5. S v Eli (1978) (1) SA 451 (E).
6. R v Bell (1929) CPD 478
7. R v Lillie and Reed (1994) Newcastle –upon-Tyne Crown Court, ref no. T931874
8. DPP v S (1999), A906198 (TPD)
9. Chisha v The People (1980) SCZ
10. R v Sideropoulos (1910) CPD 15
11. R v J (1966) (1) SA 88 (SR)
12. DPP v Kilbourne (1929) AC 729
13. Tembo v The People (1966) ZR 126 (HC)
14. Emmanuel Phiri v The People (1982) ZR 77 (SC).

TABLE OF CONTENTS

ABSTRACT	i
ACKNOWLEDGEMENTS	ii-iii
TABLE OF STATUTES	iv
TABLE OF CASES	v
LIST OF ABBREVIATIONS.....	vii
CHAPTER ONE: OVERVIEW OF THE STUDY	1
Statement of the problem.....	4
Purpose of the study.....	6
Significance of the study.....	7
Methodology.....	7
CHAPTER TWO: TREND IN DEFILEMENT IN ZAMBIA	9
Statistics on Defilement Cases.....	10
Substantive and Procedural Law on Defilement.....	11
Punishment as a Control against Defilement.....	12
CHAPTER THREE: PRE-TRIAL PROCESSES.....	14
The Zambia Police Service.....	14
Medical examination.....	15
The social welfare	17
CHAPTER FOUR: THE COURT PROCESS.....	20
Competency.....	21

Requirement for corroboration.....23
Cross examination.....29
Precautionary Rule.....34
Disposition of Defilement Cases.....36
Sentencing38

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

Conclusion.....37
Recommendations41

LIST OF ABBREVIATIONS

- CRC - Coordinated Response Centre
- VSU - Victim Support Unit
- HIV - Human Immunodeficiency Virus
- AIDS - Acquired Immune Deficiency Syndrome
- ZNBC - Zambia National Broadcasting Corporation
- SGBV - Sexual and Gender Based Violence

CHAPTER ONE

OVERVIEW OF THE STUDY

The past five to ten years have seen an increase in defilement cases in Zambia. There is debate that the increase can be directly linked to the increase in the number of offences being reported which reporting is in turn attributed to increased sensitization programmes. *Brenda Muntemba*, Police Spokesperson, as she then was, made similar remarks that “The increase in the number of defilement is not an indication that more children are being defiled now. It is an indication of both media and public awareness of the crime.”¹ Some sections of society have however argued that the offence has become rampant. The Victim Support Unit (VSU) has noted that though statistics on defilement give a representative figure, they are not a valid index of the actual prevalence because most defilement cases are not reported.

Despite the stiffer punishment imposed on perpetrators, defilement cases have continued to rise. National statistics on defilement obtained by *Simon Tembo*² during his study indicated that there were 366 cases of defilement in 2001. In 2002, the number rose to 856 and to 1233 in 2003. In 2004, there were 1612 reported cases of defilement. The year 2005 saw a decrease in the number which stood at 1375.

¹ Archive, News from Africa, December, 2003.

² S. M. Tembo, ‘The evaluation of the Penal Code (Amendment) Act No. 15 of 2005, Chapter 87 of the Laws of Zambia’. 2008, Obligatory Essay, School of Law, University of Zambia.

A number of studies have been carried out to try and answer questions as to why there is an increase in these offences. A research carried out by *Nchimunya Munkombwe*³ found out that one contributing factor to the increase of defilement cases is cultural beliefs where some traditional healers have been known to prescribe having sex with a minor or infant as curative of HIV/AIDS and other sexually transmitted infections (STIs). Cultural beliefs was also found out to be a contributing factor in the increase of defilement cases in yet another study carried out by *Andrew Chakanika*.⁴

With much that has been said and done regarding the root cause of defilement cases, little if not nothing at all has been said or done about the effect of the procedural laws on the victim. This paper is concerned about the protection to the victims of defilement. Owing to the nature of this offence, the sooner the trial is concluded, the sooner the victim can recover from the trauma inherently associated with such cases. It is a wonder whether the current rules governing the conduct of the sexual offence trials assist or hinder the truth-seeking process. Due to the strict rules of evidence, procedure and other complexities, it is difficult to secure a conviction.

This study will therefore, analyse the process of the justice system with regards to defilement cases, from the report stage to prosecution and sentencing. The report will further evaluate to what extent the justice system protects victims of defilement, *viz*, the reporting procedure and indeed the court proceedings. In this regard, the paper will

³ N. Munkombwe, 'Defilement cases in Zambia: Is the law adequate to end the scourge?' 2009, Obligatory Essay, School of Law, University of Zambia.

⁴ A. Chakanika, 'Increase in reporting of sexual offences in Zambia'. 2008, Obligatory Essay, School of Law, University of Zambia.

discuss the various agencies or service providers responsible for dealing with the victims of defilement and the procedures for reporting, investigation, the court hearing, rules of evidence and sentencing.

Chapter One is an introductory chapter while Chapter Two will look at the trend in defilement cases. The substantive provisions governing defilement will be given. The Chapter will further consider if the definition of defilement covers all scenarios that may amount to defilement. The author argues that the inclusion of defilement of boys has created a nuisance of the whole crime as penetration of the vagina is required for there to be defilement.

Chapter Three looks at the reporting procedure. It will ascertain if the reporting procedures and mechanisms offer protection to the victim. An analysis of the procedure will then be given.

Trial will be covered in Chapter Four. In looking at trial, the author will aim at ascertaining how friendly the trial process is to the victim. This will encompass the conduct of court personnel and the court environment.

Chapter Five is a concluding chapter and will summarise the findings from the study. It will conclude by giving recommendations as to the procedural framework for the successful management of defilement cases in Zambia.

STATEMENT OF THE PROBLEM

Defilement cases inherently traumatize the victim. Meanwhile the victim has to go through the process of reporting the matter to the police and stand as a witness in the Courts of Law. The questions that arise are, considering the trauma on the victim, following the violation, is the Zambian Justice System sensitive to this reality? Does it provide safeguards aimed at protecting the victim? Indeed the inherent difficulty of prosecuting sexual offences was recognized long ago by Lord Chief Justice Sir Matthew Hale who said that: “rape is an accusation easily to be made and hard to be proved, and harder to be defended, though never so innocent.”⁵

Effects of defilement include ‘guilt and self-blame, flashbacks, nightmares, insomnia, fear of things associated with the abuse, self-esteem issues, sexual dysfunction, chronic pain, addiction, self-injury, suicidal ideation, somatic complaints, depression, post-traumatic stress disorder, anxiety, other mental illnesses (including borderline personality disorder and dissociative identity disorder), propensity to re-victimization in adulthood, and physical injury to the child. Sexual abuse by a family member can result in more serious and long term psychological trauma.’⁶

Following from the above exposition, what immediately comes to mind are aspects such as the requirement for corroboration and *voire dire*. Do these requirements protect the

⁵ Quoted by Professor LaFave in his book entitled ‘Rape – Overview; act and Mental State’, 3rd edition, 752-756, (2000).

⁶ http://en.wikipedia.org/wiki/Sexual_abuse. 24/09/09, 1:30pm.

victim or do they indeed give the perpetrator an advantage over the traumatized victim and at the same time, act as a recipe to humiliate the victim?

Zambia practices the adversarial type of criminal procedure which relies on the contest of the parties' advocates. In the adversarial system, rules of evidence are very strict. In addition, the accused has a right to silence, which shields them from examination or cross-examination. In essence, the victim is left to prove all facts while the accused listens in and hence the assertion by Lord Hale that in sexual offences "it is the victim, not the defendant who is on trial".⁷

In terms of medical examination, it is currently only the report of doctors which is admissible as evidence and not that of other medical practitioners. It is not uncommon to find that some parts of the country do not have doctors at the hospital to certify the findings or there may be no hospital altogether equipped with the necessary equipment to carryout a full medical investigation.

Despite the ever rising numbers of reported cases of defilement, there is no guarantee that a victim who enters the criminal justice system will be protected in terms of acceptable laid down procedures. Of course the Criminal Procedure Code has laid down procedure for criminal offences but it is important to realize that defilement is a peculiar offence in that it affects the child's emotional, spiritual and social being and therefore, there is need to deal with these cases in a prompt, sensitive, effective and dependable manner to avoid secondary victimization. Furthermore, persons charged with the day-to-day handling of

⁷ LaFave, Rape – Overview; act and Mental State, 752 -756.

these cases have criticized the delays in the present criminal justice system. Indeed the Victim Support Unit National Co-ordinator, as he then was, *Mr. Peter Kanunka* attested to the difficulty that the unit faces in convicting offenders in the following words: “One of the biggest problems faced is the length of time it takes for the wheels of justice to turn, so victims are not willing to go down that long road and because of our dual legal system they may just go to a local court instead. It is sad but many families opt for compensation at the expense of the victim.”⁸

A look at the *Zambian Penal Code* and *Criminal Procedure Code* brings to the fore the lack of a blueprint procedural law in defilement cases. This has the potential of creating uncertainties with the resultant that similar cases are tried differently, resulting in different conclusions being arrived at.

PURPOSE OF THE STUDY

The study will evaluate the process and procedure in defilement cases, from the time of disclosure to the conclusion of the case by the court. The study will further evaluate if the *Zambian legal framework* has in place trained personnel to skillfully handle cases of defilement. In this regard, the study will focus on the following questions: (1) Does the *Zambian justice system* provide a friendly environment for reporting defilement cases? (2) Does the trial procedure provide a friendly environment by taking into consideration the peculiarity of defilement cases?

⁸ H. Zain, ‘The rights of a child! Defilement in Zambia’. 2005, Obligatory Essay, School of Law, University of Zambia.

SIGNIFICANCE OF THE STUDY

Most of the studies done hitherto do not specifically address the issue of reporting and trial for defilement cases. This study will focus on analysing the reporting procedure as well as trial. The study will ascertain whether the reporting procedure and trial take into account the peculiarity of the offence particularly its inherently traumatic nature. The significance of the study is that it will evaluate if the existing procedural laws on defilement offer protection to the victim. The study will further highlight the hurdles that victims of defilement have to overcome before they can secure a conviction. In so doing, problem areas at the reporting stage as well as during trial will be identified. The identification of such problem areas will act as a yardstick upon which new laws can be enacted or indeed make amendments to the existing laws to make the trial victim-friendly.

METHODOLOGY

The basic research tool will be structured interviews with personnel that are in charge of receiving and recording reports on defilement. This will be augmented by observation of proceedings of court sessions of defilement cases. The author will also refer to the various laws and documents on defilement.

ETHICAL CONSIDERATIONS

There are no ethical considerations in the study. The research will take a general overview of the procedure as opposed to studying specific cases of defilement.

CHAPTER TWO

TREND IN DEFILEMENT IN ZAMBIA

Countless children have been defiled and sometimes died at the hands of the perpetrators. Defilement statistics from the Police Victim Support Unit (VSU) give a frightening picture. Defilement cases have more than doubled from what the statistics were ten years ago. As a result of this situation, many people around the country called for stiffer punishment of the offenders. The demands have come from both the civil society and the law enforcement agencies.

This Chapter will discuss the general trend in defilement cases in Zambia. The development of the substantive law will be charted and statistics on defilement cases over a period of ten years will be outlined. The Chapter also discusses how society may have influenced the development of the substantive law with regard to defilement cases. Further, the Chapter will briefly discuss punishment as a technique of control and also consider if punishment does really deter would be offenders.

Recognising that the substantive law offers stiff penalties to deter would be offenders; and recognizing that the stiff penalties have not deterred would be offenders, as can be seen from the national statistics from the Police Victim Support Unit over a ten year period, it is the objective of this research to analyse the trial and procedure of defilement cases and recommend ways of helping victims live past their ordeal. The paper also

recommends a shift from sensitization campaigns on reporting these cases to one of educating the public on ways to protect their children from being victims of defilement.

Statistics on defilement cases

Zambia has in the past ten years witnessed an upsurge of sexual offences committed against children. Statistics from the Victim Support Unit⁹ (VSU) of the Zambia Police Service Headquarters reveal that there were zero defilement cases in 1998, 263 cases in 1999 and 306 in 2000. The number rose to 366 in 2001, 865 in 2002. The number of cases almost doubled in 2003 and stood at 1233 and increased by more than 100 cases to be at 1375 in 2004. The year 2005 saw a sharp decrease of defilement cases from 1375 to 132. The number then sharply rose to a colossal 2668 in 2006. It then went down to 852 in 2007 then up again to 1224 in 2008. Of the 1224 defilement cases reported in 2008, 516 cases were taken to court. Of these 516 cases, there were only 150 convictions, 7 acquittals and zero withdraws. 359 cases were pending. A total number of 406 cases were not taken to court of which 91 were withdraws¹⁰.

The sharp decrease of sexual offences committed on children in 2005 could be directly attributed to the penal amendment through Act No. 15 of 2005. This was as a result of the calls for stiffer penalties against sexual offenders following the increase in the number of reported defilement cases.

⁹ Victim Support Unit (VSU) of the Zambia Police Service Headquarters

¹⁰ 2008 cases dealt with by the Zambia Police VSU nation wide

Substantive and procedural law on defilement

Much of the substantive law on defilement is found in the Penal Code¹¹ which has remained the prime source of law in criminal matters.

Generally, there have been few changes of substance to the criminal law in Zambia. Hence it remains pretty much the same now as it was in colonial times. With regards to offences against morality, there have been relatively little alterations. The latest amendment was in 2005 when Parliament enacted Act¹² No. 15 to amend provisions of defilement. Currently, it is section 138 of the Penal Code and Act No. 15 of 2005 that provide for defilement. Section 138(1) of the Act states that “Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life”

The change of the phrase ‘unlawfully and carnally knows any girl’ to ‘unlawfully and carnally knows any child’ by Act No. 15 of 2005 suggests that defilement can now occur even to boys as opposed to girls only prior to the amendment. However, the English common law defined carnal knowledge as the ‘penetration of the female sex organ by the male sex organ’. And since the Zambian Penal Code definition has the word carnal in it, it therefore means that defilement is on girls only and not on boys. This creates a nuisance between defilement on boys and the need for penetration to occur for the act to amount to defilement. There is therefore need to strike out the word ‘carnal’ from the definition of defilement if it is to be applicable to boys as well.

¹¹ Chapter 87 of the Laws of Zambia

¹² Penal Code (Amendment) Act No. 15 of 2005

From the foregoing, it is important here to note that while most jurisdictions define child sexual abuse as undesired sexual behaviour to a child, the Zambian Penal Code qualifies it by adding the word 'unlawful'. As already alluded to in the preceding paragraphs, this essentially means that an adult can have sexual intercourse with a person below the age of consent as long as the intercourse is lawful; Lawful in the sense that the man will have obtained consent from the girl's parents. In addition, the definition of defilement as being 'unlawful carnal knowledge' confines defilement to penetration of the sexual organs only. It is noteworthy that the definition of 'undesired sexual behaviour' given in other jurisdictions is all encompassing. The Zambian definition of defilement is confined in that child sexual abuse also occurs when an adult indecently exposes their genitalia to a child, asks or pressures a child to engage in sexual activities, etcetera.

With regard to procedural law, Zambia has no legislation that provides for specific procedure for defilement cases. Defilement cases have been subjected to the same procedure as other criminal matters despite its peculiarity.

Punishment as a control for defilement

Theories of punishment include the deterrent theory, the reformatory theory and the retribution theory. The reformatory theory suggests that criminals are mentally ill patients who need to be psychologically treated as opposed to punishing them. The retribution theory on the other hand suggests an eye for an eye treatment towards the offender. This implies meting out punishment on the offender equal to the degree of the offense. The

deterrent theory operates on the premise that criminals should be treated in such a way as to warn would be offenders against committing similar offence.

The question that begs an answer is: does punishment deter? In Zambia, there has been a resounding cry from the general populace for stiffer punishment against defilers. This culminated in the enactment of the Penal Code (Amendment) Act No. 15 of 2005 which set a minimum sentence for defilers to imprisonment for fifteen years. However, the steep upsurge of defilement cases from 132 cases in 2005 to 2668 in 2006 suggests that punishment does not deter. Indeed Professor *Ndulo* could not make it clearer that punishment does not deter when he said the following:

“It is here suggested that the emphasis should be on reforming rather than on deterring. The argument being simply that history has proved that deterrent sentences do not deter that many people. People who commit crimes do not necessarily do so because the punishment is not severe. They do so knowing the consequences full well, but hope that they will not be caught”¹³

One may rightly conclude from the statistical figures that wide and persistent sensitization campaigns led to the drastic decrease of defilement cases in 2005 as opposed to the stiffer penalties imposed by Act No. 15 of 2005.

¹³ J Hatchard & M Ndulo, Readings in Criminal Law and Criminology in Zambia, (London 1994), 167-169

CHAPTER THREE

PRE-TRIAL PROCESSES

Chapter Three will concentrate on procedure in defilement cases. Though the focus will be on procedure in reporting, some aspects of the substantive law provisions will be included. Thus, the chapter will discuss the various agencies responsible for dealing with the victims of defilement and the procedure for reporting and investigation. Each agency will then be analysed and recommendations made wherever necessary.

There are three main agencies dealing with cases of defilement at the pre-trial stage. These are the Zambia Police Service, the hospital (medical examination) and the social welfare providers.

Zambia Police Service

According to *Joseph Daka*¹⁴ the first point of contact for a victim of defilement is the police. The existing practice is that the officer in charge will conduct their own physical examination of the victim. This is done by a female police officer otherwise the victim must immediately be issued with a medical report form and referred to a government hospital for examination by a medical doctor. The police officer issuing the report should indicate whether actual or constructive force was used. It is a requirement that the victim is escorted by the police officer who received the complaint to the hospital. However, this is not the case as there is lack of transport at police stations. This has resulted in the victim returning home at the police station because they do not have money to either

¹⁴ Daka, 'Sexual Offences and how to deal with them', Mission Press, 2005, 66-67

catch a bus or a taxi to the hospital. This in turn results in the evidence being destroyed as the medical examination must be done at least within 24 hours.

In the event that a physical examination is done at the police station, the officer is supposed to record their findings. While one officer escorts the victim to the hospital, other officers should visit the crime scene for investigations and if possible, apprehend the suspect.

The VSU is a specialized police department for reporting sexual and gender based violence, defilement included. Confidentiality is one of its cornerstones. The study found out that the VSU faces a number of problems. Firstly, the complainant in a defilement case is supposed to be escorted by the VSU officer to the hospital. However this is not the case as there is lack of transporting vehicles. Secondly, the principle of confidentiality is not being upheld as there is lack of office space. At most police stations, the VSU is a one room office where there will be found a number of officers when the report is being made. At yet some other police stations, the VSU is a shared room. The two scenarios clearly do not promote the principle for confidentiality.

Medical Examination

In an interview with Sub-inspector *Nyirongo*¹⁵, it was revealed that the medical report can only be obtained from a government hospital and not any other clinic. In addition, it is only a medical doctor who qualifies as an expert to do the examination. The examining doctor will record their findings and the victim will return the report to the officer in

¹⁵ Interview; Nyirongo, VSU Police Service Headquarters, 27/01/2010, 9am

charge. A full statement is then recorded from the victim after which the officer in charge issues a call out to the accused who also gives their side of the story. A docket is then compiled with all statements taken from the victim and the accused and their witnesses. It is then taken to court where an appropriate charge is made and summons issued to the accused. Investigations should then be commenced immediately.

The interview revealed that the requirement that medical examination should be conducted by a qualified medical doctor and at a government hospital is a drawback. In rural areas for instance, there may not be a hospital at which the examination can be done. In yet other rural areas, there may be a hospital quite alright but only one doctor who takes shifts from one clinic to another and at times may take a whole week or two before they can return to a given clinic. And since medical examination should be done within 24 hours, it follows that the evidence will have been destroyed by the time the doctor returns to a certain clinic.

It has however become common practice that a clinical officer will carry out an examination on the victim and record the findings but cannot sign against them as doing so will make the evidence inadmissible before the courts of law. And therefore, the medical doctor has to sign for an examination that he/she did not do. This has instilled fear in some doctors who subsequently refuse to give expert evidence in court.

The Social Welfare

The social welfare provides an avenue for counseling and shelter whilst the victim awaits trial. The social welfare officer will provide on-going follow up visits to the family, links survivors to safe houses and shelters and assist in meeting hospital and clinic costs through medical schemes.

One of the biggest challenges faced at the pre-trial stage is the fact that the three major players, the police, medical personnel and social welfare officers are located in different locations so said *Mrs. Chima*¹⁶. The problem was identified and this saw the birth of the Co-ordinated Response Centre that provides under one roof the psychosocial counselor, social welfare personnel, police victim support unit and the paralegal. This is a positive development as it does not just reduce the movements victims have to undertake but also reduces the stress of the victim as he/she is able to obtain requisite services within one location. Mr. *Hamaslu*¹⁷ however proposed that the centre should extend the available personnel to doctors so that medical examination is done at the same location thereby avoiding the current trend where the victim has to go the hospital. A simplified reporting process will encourage reporting of defilement cases.

Findings on the pre-trial stage

The research revealed that doctors are not specifically trained in forensic evidence. The result is that medical evidence does not follow certain guidelines and formalities and end up bringing about acquittals. There is therefore, need to have specifically trained medical

¹⁶ Interview: Chima, SGBV National Coordinator, 25/02/2010, 11:30am

¹⁷ Interview: Hamasalu, CRC VSU officer, 26/02/2010, 2:30pm

doctors for the purpose of conducting medical examination bearing in mind that the medical report will be used as documentary evidence at court. In addition, there is need to train police officers in forensic evidence. Not only should the police be trained in forensic investigation but also there should be put in place forensic laboratories that should be equipped with DNA testing facilities. Furthermore, there should be a statutory provision to compel the accused to undergo DNA test unlike the current situation where the accused may opt not to be subjected to DNA test and the police does not have any means of compelling such accused to submit to the DNA test.

It is apparent that the government hospitals are overstretched meanwhile according to the procedure a medical examination is supposed to be taken at a government hospital. There is need to extend the hospitals at which these examinations can be undertaken to recognized reputable private hospitals. There is also need to extend the category of medical personnel who can undertake these medical examinations. Currently only qualified medical doctors are allowed to undertake medical examination and yet it is a notorious fact that the country has a shortfall of doctors and in some locations it is impossible to find one.

The pre-trial process is an important part in defilement cases. It provides an avenue to address the trauma suffered by the victim through welfare facilities. It also provides valuable expert evidence that may be used during trial. It also provides an opportunity to acquaint the prosecutor with details pertaining to the case. In the event that the pre-trial stage is not handled properly, it may lead to an acquittal even in a case where a

conviction could have been secured. The importance of the pre-trial was summarized in South African Law Commission Executive Summary as follows: “The unfolding of the course of events prior to the commencement of the trial will in effect mark the sequence and subsequent success of the trial. The pre-trial processes are centred around and in fact predetermined by the amount of planning undertaken by the prosecutor prior to, during and following the prosecutor exercising his/her discretion to prosecute.”¹⁸ It is important that prior to the commencement of the trial, the key players should meet and discuss their notes on the matter.

The next chapter will discuss the court process.

¹⁸ South African Law Commission (Project Paper 107): ‘Sexual Offences: Process and Procedure’, 2005

CHAPTER FOUR

THE COURT PROCESS

The court is admittedly one of the most important institutions in the protection of individual rights in any given society. It is the final arbiter and cradle of justice. The role of the court becomes even more critical to the vulnerable in society such as children, who by virtue of their age are not in a position to use other avenues to protect themselves. The court therefore, provides a key destination for their protection particularly in cases of defilement where in certain instances an influential member of the family could be the perpetrator and the family that is supposed to protect the child, is compromised or worse still plays the role of an accomplice in the whole episode.

This chapter will discuss court process with regard cases of defilement. The discussion will focus on the role the child plays in the trial as a key witness. In this regard, the chapter will evaluate the extent to which the court process takes into account the unique aspect of defilement cases and particularly how the child is protected from further trauma during trial.

THE TRIAL

Defilement cases by their very nature involve few witnesses. More often than not, the victim is the only witness to provide evidence during trial. This entails that the defiled child has to play the role of a key witness in the trial. Indeed, the conviction of the

accused does to a certain extent depend on the veracity of the evidence to be provided by the child witness. This section will look at the various rules of evidence that govern criminal cases such as competency, requirement for corroboration, cross-examination and the precautionary rule.

Competency

The general rule is that all persons who are capable of understanding the nature of an oath are competent witnesses. According to *Yacoub*¹⁹, the onus of proving the competency of a prosecution witness rests on the prosecution. Competency of a child witness relates to the child's ability to understand the duty to tell the truth and the consequences of not doing so. It has now become settled that the competency of a child does not depend on the age of the child as different children have different intellectual capacities. As such, it is in the discretion of the magistrate to decide whether the child must be sworn or not. That, notwithstanding, the court still treats the sworn evidence of very young children as suspect. Thus, in *R v Bell*²⁰ Gardiner stated as follows: "Whilst the law may allow the testimony of a child of four and a half years to be taken if the magistrate is satisfied that she is competent to tell the truth, it is exceedingly dangerous to convict on such evidence unless strong corroboration is supplied."

On other hand, if the child is not competent and cannot be sworn, it implies that they will not be able to give evidence or if they do give evidence, the court should not rely on such evidence to convict the accused. As stated above, in cases of defilement, the child is very

¹⁹ (1981) 72 Cr App R 313

²⁰ 1929 CPD,478

often the only witness to the incident and a finding on non-competency will, in effect, amount to an acquittal. Considering the nature of the crime, the law should deem every child victim a competent witness unless the court using its discretion determines that the child is not competent. This could be the case for instance where the victim is less than two years old. On the other hand, in order to protect the rights of the accused, particularly to safeguard against fabrication, victims 12 years and below should be subjected to competency test before they are deemed to be competent witnesses.

In Zambia, following the ruling in *Muwowo v The People*²¹, wherein the judges rejected the evidence of a 12 year old for failure to conduct a *voire dire* on him, it has become settled practice that any child aged 16 and below should go through a *voire dire* before giving evidence. The competency of a child witness and the requirement to examine a child witness through a *voire dire* is provided for in section 122 of the Juveniles Act²² which states as follows:

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

²¹ (1969) ZR 67

²² Chapter 53 of the Laws of Zambia

deposition within the meaning of any law so in force: Evidence of a child of tender years

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

It is submitted that the above approach would balance the interest of the child and indeed that of the accused. As stated by Muller Karen²³ “If a child is offered an environment which is non-threatening in which to tell the story; if a child is questioned in a developmentally appropriate manner using proven scientific methods (that is avoiding repeated and leading questioning to minimize suggestion); and if a child is questioned using linguistically appropriate language, then a child will be a competent and as accurate, if not more so than an adult.”

Requirement for corroboration

Corroborative evidence is independent evidence to show that not only did the offence occur but that it was committed by the accused. The corroborative evidence should be independent in that it should not be part of the complainant’s statement but it should not be different. In defilement cases, a good medical report amounts to good corroborative evidence. However, a doctor’s medical report only amounts to expert evidence and that the crime was committed but not the person who committed it. This principle was ably

²³ K Muller, *The Judicial Officer and the Child Witness*, (2002), 243

illustrated in the case of *Emmanuel Phiri v The People*²⁴. Though the case was that of rape case, the principles on corroboration are the same even for defilement. The brief facts of the case are that the victim was eight months pregnant and a man had sexual intercourse with her against her will. The medical report showed that the victim had had sex but the second element of corroboration, that is, identity of the accused was in issue. The victim managed to identify the accused that was then convicted and sentenced. However, the court hastened to state that if the victim did not manage to identify the accused, the medical report alone would not have been sufficient corroboration as the semen found in the victim's vagina could not be proved to have been that of the accused especially that the woman was married. It was further held that the identity of the accused may not be necessary if it can be shown that there can be no motive for falsely implicating the accused. This is in situations where the victim had never seen the accused before.

Corroboration is one of the key common law doctrines that govern the rules of evidence. It is aimed at ensuring that any conviction is based on well grounded evidence and therefore attempts to forestall a situation where an accused is convicted even when he/she actually did not commit the crime. The need for corroboration is particularly emphasised in cases such as defilement where the witness is a child. This is based on the assumption that children tend to fantasise a lot. However, this emphasis has seen some injustice being done where the testimony of two or more children is treated as suspect and rejected if uncorroborated. Thus in *R v J*²⁵, it was alleged that the accused had indecently assaulted a

²⁴ (1982) ZR 77 (SC)

²⁵ (1966) (1) SA 88 (SR)

four year old child. The child gave evidence. Her elder sister aged eight also gave evidence that she looked through the window and witnessed the assault. The older sister's evidence supported that of the complainant's in all respect yet the Appeal Court found that the state case depended primarily on the evidence of the two girls and since children are imaginative and suggestible the conviction could not stand without corroboration.

This position was reinforced in *R v Sideropoulos*²⁶ where Laurence J stated thus: "It would be unsafe to convict upon the evidence of a five year old unless the evidence was corroborated."

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 their imaginations to take them to places they have never been before, they are likely to be accurate about crimes committed on their persons. This position was made reference to in the case of *Chisha v The people*, supra, from the case of *DPP v Kilbourne*²⁷ thus: "The sworn evidence of a young child, whether accomplice or not, requires corroboration in practice; and the judge should warn the jury of acting on the uncorroborated evidence of such children. There is no fixed rule as to when children grow out of this category. The evidence of children is always subject to doubt. Very young children live largely in a world of imagination, and their powers of observation, understanding, memory and expressions are rudimentary. Most children are influenced by what they hear from adults, not necessarily by way of deliberate suggestion or

²⁶ (1910) CPD 15

²⁷ (1973) AC 729

instruction. Yet the evidence of children may be ... accurate, particularly with regard to offences committed against themselves.”

In Zambia, it is well established that the sworn evidence of a child in criminal cases does not require corroboration but that the court must warn itself of the danger of convicting on such uncorroborated evidence. Therefore, a *voire dire* must be conducted to ascertain if the child appreciates the gravity of taking an oath. This principle was stated in the case of *Chisha v The People*²⁸. The requirement for corroboration was espoused in the case of *Tembo v The People*²⁹ wherein the court stated thus: “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.” The brief facts of the case are that the complainant gave evidence that in the forenoon of the day in question she had gone with her small boy to look for firewood. She met the accused, who greeted her. She replied and continued on her way. He then came from behind, grabbed her with his arms and pushed her to the ground. She fell on her back. He separated her legs. She shouted for help, but the accused had connection with her, there being penetration but no ejaculation. Her friends came in answer to her shouts, and when he heard them coming he got off and ran away. One of these friends testified that she heard the cries and that when she arrived the complainant complained to her that she had been slept with by a person. She saw the accused walking away. They shouted to him to stop. He did so, and they took him to an office where he was locked up. She noticed that the complainant had dust on the left side of her body, and that the baby also had dust on it.

²⁸ *Chisha v The People* (1980) SCZ

²⁹ (1966) ZR 126 (HC)

From the case of *Tembo* above the position in Zambia is therefore that corroboration is required before convicting the accused. This position was further stated by the Principal Resident Magistrate *Newa*³⁰ in her passionate testimony in which she recalled acquitting the accused of a defilement case merely because there was no corroboration. Meanwhile, it should be recognized that cases involving defilement are unique in a number of ways. Firstly, there are more often but not committed in private places where the victim inherently becomes the only witness. Secondly, the crime is committed against the vulnerable, the children. Thirdly, medical reports may not be readily available in some locations due to various reasons outlined in the previous chapter. Fourthly, by its nature disclosure of defilement cases does not necessarily take place immediately the offence is committed. For instance, disclosure may only take place after days or even years from the time the incidence took place. Due to time period, it becomes difficult to construct any evidence that can be used as corroborative evidence. In Zambia for instance where poverty levels are high, parents or guardians of the defiled child would rather get some monetary compensation than bringing the culprit to face the wrath of the law for his crime. And as such, parents will first attempt to sort the defilement outside the court and when they fail to agree that is when they report to the police. At this point, there is nothing much that the police can do as all the evidence would have been destroyed especially that the police service does not have proper forensic or DNA equipment. As stated by Muller³¹ “One of the myths of sexual abuse is that children will immediately disclose incidences of abuse. The reality in fact is that children rarely report sexual

³⁰ Zambia National Broadcasting Corporation news on 6th March 2010

³¹ K Muller, *The Judicial Officer and the Child Witness*, (2002), 193

abuses straight after the event. In a study conducted by Berliner L³², of 583 sexually abused children it was found that only 16% of them disclosed the incident within 48 hours of its occurrence.”

Fifthly, in Zambia, there is currently no DNA testing. Moreover, there is no statutory provision to compel the accused to undergo certain tests for the purpose of linking him/her to the crime.

In view of the above, there is need to re-examine the requirement for corroboration in defilement cases in Zambia. Whilst it is admittedly paramount to safeguard against the danger of unsafe convictions due to lack of corroboration, it is equally paramount to ensure that perpetrators of hideous crime against our very vulnerable society do not callously exploit this just requirement and evade justice. There should be statutory provision that gives judges power to use their discretion in determining whether corroboration should be required before any conviction. It should therefore, be on a case by case basis. And some of the factors the judges may take into account are the age of the child witness and veritability of the evidence given by the victim. It is instructive to note that countries such as South Africa are re-examining the requirement in sexual offences generally. This is aptly espoused in the SA Law Commission thus “The application of the corroboration warning rule for child victims generally makes successful prosecution a difficult task and its retention must be questioned.”³³ The requirement for corroboration was also questioned by the Parliamentary Committee on the Penal Code (Amendment)

³² L Berliner, ‘The testimony of the child victim of sexual assault’ *Journal of Social Issues*, 40(2): 125

³³ South African Law Commission (Project Paper 107) : Sexual Offences: Process and Procedure

Bill No. 14 of 2005.³⁴ Some stakeholders expressed concern about the requirement for corroborative evidence and the Committee recommended that corroborative evidence should not be required in defilement cases as it is one of the factors contributing to the difficulty in securing convictions.

It is the author's submission that the requirement for corroboration should be removed for children aged 12 years and below but maintained for children 13 to 16 years. This submission is based on the presumption that children aged 12 and below are not sexually active and would therefore not have any ulterior motives for pointing at a certain individual as having violated their bodies. This presumption holds true especially for younger children who are still in their infancy and cannot even talk.

Children aged 13 to 16 years are presumed to be sexually active and may cry defilement when they want to revenge on the accused for whatever reason and therefore corroboration in such cases must be maintained.

Cross Examination

Cross-examination in this section will be looked at in the context of a child witness who happens to be the victim of the defilement. To a child who happens to be the victim of defilement, cross-examination is not only traumatic but can also result in inaccurate evidence. As rightly stated in the case of *Klink v Regional Court Magistrate and Others*³⁵ "It is sufficient to say that I am quite convinced that a child witness may often find it

³⁴ Parliamentary Committee Report on the Penal Code (Amendment) Bill No. 15 of 2005

³⁵ 1996 (3) BCLR, 402 (SF0 at 410A)

traumatic and stressful to give evidence in the adversarial atmosphere of the court room and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than reveal the truth.”

The complex language inherent in a court room surpasses anything children hear at home or school. Legal terms that are second nature to attorneys are completely beyond children. Considering children’s relatively unpolished language skills, opportunities for miscommunication are abound and the court is a very good position to ensure that attorneys ask comprehensible questions.

The underlying purpose of cross-examination is to seek to elicit information that is favourable to the party conducting the cross-examination, and it attempts to cast doubt upon the accuracy of the evidence given by the opposing party’s witness. Myers³⁶ states that “Cross-examination is lauded as being the best available safeguard against the risks of ambiguity, lack of memory and misperception.” He further explains that cross-examination is designed to reveal any “deficiencies in the witness’s ability to observe, remember and relate, and disclose lack of sincerity or outright fabrication.” According to *Wigmore*³⁷, it is “the greatest legal engine ever invented for the discovery of the truth” and leaves not a moment’s doubt in the mind of any lawyer as to its effectiveness.

However, for a child witness, this greatest legal engine can be a source of trauma and indeed instead of facilitating the discovery of the truth, can be used by the skillful and

³⁶ J.E.B Myers, ‘Child witness: Law and Practice’ (John Wiley & Sons: United States, 1987), 23

³⁷ J Wigmore, ‘Wigmore on Evidence’, (Chadbourn Revised Edition). (Little, Brown & Co.; Boston, 1974), 159

experienced adults to subvert the truth. As aptly stated by Dr. J Hammond³⁸, “In the course of justice, he is being completely broken down again and again by the court procedure which is not only permitted, but by our judicial system.”

In defilement cases, the child is at the centre of the court process. The child has to play two critical but emotional stressful roles of a complainant and a witness. Since child abuse cases are committed in privacy the victim is the key witness in the matter and any conviction is heavily depended on the veracity of his/her testimony meanwhile the accused is alive to the fact that the child witness holds the key to his conviction. He will therefore, take advantage of his age and experience in life to discredit the evidence of the child. The court should therefore, be alive to these unique circumstances surrounding defilement cases. In particular the court should provide an environment where the child is free to give their testimony and is not unduly intimidated to give evidence.

In order to avoid a situation where cross-examination becomes a tool for intimidation and unnecessary attacks on the child witness, the court should play a pivotal role in moderating the cross-examination. The adversarial nature of the proceedings is left to take its course with the attendant effect of bringing more trauma to a victim who is already going through untold stress. The courts have a duty to create an environment that foster bringing out the truth. It should therefore not shy away from introducing procedures and approaches that would assist children in their task of testifying. The basis of the proceedings is the ascertainment of the truth, and any procedure that impedes this purpose should be modified where possible.

³⁸ J Hammond, ‘Justice and the child witness’, SACC/SASK, (1987), 11: 3-20

An examination of the process of cross-examination of child witnesses in the Zambian courts revealed that the child witness is not accorded any meaningful protection and the cross-examination is allowed to proceed in a manner that clearly disregards the developmental stage of a child. Of particular importance is the language used when putting questions across to the child witness. The research revealed that the problem of using language appropriate to the child witness starts right at the point of reporting the matter at the police. Whereas the child will use words such as 'willy' to refer to the penis, the police officer will record penis. When the child goes to court, they will be expected to use the word which is on record. This puts the child in a very awkward situation and some children have shied away from giving evidence in such circumstances. The author submits that the police officers should record the exact words used by the child as opposed to substituting their own words for those of the child as this catches the child off guard when testifying in court.

There is urgent need to reveal the process of cross-examination of children. There is need to develop guidelines and procedures that will take into account the unique nature of not only the child but also the case of defilement. Such a procedure should have an ultimate objective of ensuring that the child is availed an environment where he/she can freely account the event without undue intimidation. It should seek to ensure that questions given during cross-examination take into account the developmental nature of the child. It should also seek to ensure that the cross-examination is not used as yet another vehicle to perpetuate the trauma the child witness is going through. It should seek to ensure that

the truth is obtained from the child victim and therefore help the court in the final determination of the case.

Judicial officers have the responsibility to protect vulnerable witnesses including children from unnecessary stress and trauma. They can accommodate child witnesses in the court room without compromising their judicial neutrality and without undermining the rights of the accused. This will also increase the accuracy and completeness of the testimony of the child witness. It should be stated here that the power to control the proceedings is an inherent judicial authority unless otherwise specifically excluded.

Indeed as aptly stated by Muller³⁹ thus “It is universally accepted that children who testify are generally nervous, upset and unsure of themselves in an adult dominated environment in which they are forced to share intimate details about their lives. This feeling of stress and inadequacy are further exacerbated by the use of language which only serves to reduce clarity and reinforce their role as victim. Although the accused has a right to cross-examination and it is necessary that this right must be protected, this right should be balanced against the child’s right to be protected from abuse or degradation.”

The need to create an appropriate environment for a child witness is further aptly summed up by Muller⁴⁰ in the following words: “In order to elevate the credibility of children in the court room it is necessary to appreciate the main stages of child

³⁹ K. Muller, ‘The Judicial Officer and the Child Witness’, 2002. p235

⁴⁰ K. Muller, p237

development. A child's developing understanding of language must be respected so that they can play the effective role in the so-called search for truth. In reality, however, the child's limited abilities in this regard are used to confuse him and destroy his credibility so that he is reduced, once again, to a victim."

In *S v D*⁴¹ it was stated thus: "Children are vulnerable to abuse, and the younger they are the more vulnerable they are. They are usually abused by those who think they can get away with it, and all often do. Even where the offence is brought to light our adversarial system often results in the court failing the victim." Today, it is generally accepted that the legal system should play a central role in society's effort to protect children and reduce child abuse.

The precautionary rule

The evidence of children has always been viewed with suspicion. The courts have frequently emphasized that the evidence of children should be scrutinized with great care. In *S v Eli*⁴², the court remarked as follows: "Evidence of such young children, it has pointed out, must be accepted with great caution and must be scrutinized with great care amounting, perhaps, to suspicion." This view was reechoed in *R v Bell*⁴³ where Gardner JP explained the rationale behind the cautionary rule as follows: "One knows from experience that children of that age are to be imaginative and apt to be persuaded by people and apt to give answers to persons sometimes on the lines to which questions are put."

⁴¹ 1995 (1) SACR 259 (A)

⁴² 1978 (1) SA 451 (E)

⁴³ 1929 CPD 478

It is argued that the purpose of applying the cautionary rule in cases involving young children is to guard against the danger of invention. This position, it is submitted, is not entirely correct as adults are equally if not more capable of invention. However, in *R v Lillie and Reed*⁴⁴, the court highlighted the precautionary rule as follows: “I have already pointed out that I had an opportunity seeing C on video over three hours. May I be allowed to pay warm tribute to her and those responsible for her upbringing. I was truly struck by her nature, truly struck by her personality. But at the end of the day, what I have to remember is that I was watching a four year old, she is now five and there is little to the contribution that a person of that age can possibly make to a fair trial.” This realization that even a child can provide such remarkable evidence, to a large extent marked the beginning of the paradigm shift from generally hitherto stereotype concerning a child witness. It brought an important realization that a child notwithstanding the age was capable of providing veritable evidence before the court. Hence in the later case of *DPP v S*⁴⁵ the court held that “Although a rational distinction should be made between the evidence of the adults and the evidence of children, the latter does not necessarily require a cautionary approach. In each case, common sense will dictate whether caution is necessary. A cautionary approach should therefore not be applied automatically simply because the witness is a child.”

The *DPP v S* case *supra* therefore provides a landmark case in the cautionary approach. It provides a significant paradigm shift. The question then is: what is the position of

⁴⁴ 13 July 1994, Newcastle/ upon-Tyne Crown Court, ref No. T931874

⁴⁵ 30 August 1999, A906/98 (TPD)

Zambian judiciary on this principle? As espoused in the case of *Chisha v The People*⁴⁶ the Zambian courts embrace the principle that the evidence of the child witness should be subjected to the principle of the precautionary rule. The import of this position is that the child takes up a heavy burden to ensure that the court finds his/her evidence credible. It is submitted that the court in Zambia should review this traditional position with regard to the child witness and be in consonance with the position of the court in *DPP v S supra*. In other words, Zambian courts should not apply the precautionary rule automatically to child witnesses but as held in *DPP v S* “in each case common sense should dictate whether caution is necessary.”

Disposition of defilement cases

The effect of delays in the disposition of sexual offences generally is aptly stated by Muller⁴⁷ in the following words: “Delays in the processing of sexual offence cases may delay the healing process of the victim, prolong trauma and anxiety associated with court appearance and may erode the memory of the victim and other significant witnesses.” It is a notorious fact that the Zambian judicial system is characterised by delays in the disposition of cases. For example, this study revealed that some defilement cases take as long as 12 months before they can be disposed. There is therefore, need to develop specific guidelines or statutory provisions that will govern defilement cases. In particular, such statutory provisions should include time frame within which such cases should be disposed of. It is noteworthy that section 27 of the Electoral Act⁴⁸, provides a time frame

⁴⁶ SCZ 1980

⁴⁷ K. Muller, 248

⁴⁸ Chapter 13 of the Laws of Zambia

within which parliamentary petitions should be disposed of by the High Court. This approach should be emulated in defilement cases.

Sentencing

There are a number of factors that are taken into consideration when sentencing. These include age of the offender, the type of offence committed and whether the offender is a first offender or has been in conflict with the law before. With regards defilement, the Penal Code (Amendment) Act No. 15 of 2005 provides for a minimum of 15 years. Section 138 (1) of the Amendment Act reads as follows:

“Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.”

The minimum sentence of 15 years is a mandatory one. Since 15 years is above the sentencing powers of Magistrates, cases are committed to the high court for sentencing as imposing a sentence beyond what they are legally authorized to do would be acting *ultra vires*. Section 7 of the Criminal Procedure Code⁴⁹ provides for powers of magistrates; it states as follows:

7. Subject to the other provisions of this Code, a subordinate court of the first, second or third class may try any offence under the Penal Code or any other written law, and

⁴⁹ Chapter 88 of the Laws of Zambia

may pass any sentence or make any other order authorised by the Penal Code or any other written law: Powers of subordinate courts

Provided that-

- (i) a subordinate court presided over by a senior resident magistrate shall not impose any sentence of imprisonment exceeding a term of nine years;
- (ii) a subordinate court presided over by a resident magistrate shall not impose any sentence of imprisonment exceeding a term of seven years;
- (iii) a subordinate court presided over by a magistrate of the first class shall not impose any sentence of imprisonment exceeding a term of five years;
- (iv) a subordinate court other than a court presided over by a senior resident magistrate, a resident magistrate or a magistrate of the first class, shall not impose any sentence of imprisonment exceeding a term of three years.

(As amended by No. 23 of 1939, No. 26 of 1956, No. 28 of 1965 and No. 6 of 1972)

As a result of the provisions of section 7 above, the current practice is that Magistrates commit matters to the high court for sentencing. This practice has its own drawbacks. Firstly, cases may get delayed in being conveyed to the high court. Secondly, according to *Ngosa Kaloto-Lesa*⁵⁰, the documents at times go missing in transit to the high court. Thirdly, this has created unnecessary backlogs of cases at the high court.

⁵⁰ Interview: Child Protection Specialist, unicef Lusaka, 26/02/2010, 10:30am

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

This Chapter will contain the conclusions and recommendations from the research.

CONCLUSIONS

The study revealed that the number of defilement cases have continued to rise over time. This is notwithstanding the heavy penalty imposed on perpetrators of defilement contained in Act No 15 of 2005.

Five⁵¹ court sessions were attended. It was observed that the court is cleared before hearing cases of defilement in accordance with section 121 of the Juveniles Act which reads as follows:

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

However, it was noticed that the timing and method of clearing the court has flaws. First, it is the same magistrate that deals with all types of criminal matters that also deals with

⁵¹ 14th, 15th, 19th, 20th and 21st January, 2010, Magistrates Complex

defilement cases. This entails that the child victim comes into the court room at the opening of the court with everybody else. This practice is contrary to section 120 of the Juveniles Act. Section 120 states that:

120. No child (other than an infant in arms) shall be permitted to be present in court during the trial of any other person charged with an offence, or during any proceedings preliminary thereto, except during such time as his presence is required as a witness or otherwise for the purposes of justice; and any child present in court when under this section he is not permitted to be so shall be ordered to be removed. Children not allowed in court

The child is meant to sit and listen in to other cases involving adults until their case is called upon at which point, the court is cleared of all those who are not family to the child. This system exposes the child to inappropriate testimonies by the adults. It also has the potential of influencing how the child will behave when they are called to speak as children can easily copy manners, good or bad. It also instills fear in the child as they sit and watch the goings on of the court. At the same time the child will have been tired and hungry at the time their case is called upon. This will impact the accuracy of their testimony. Most importantly, the child is exposed to the public and may suffer stigmatization.

Further on this point, the wording of section 121 of the Juveniles Act which states that the "court may direct that all or any persons... not concerned in the case, be excluded

from the court during the taking of the evidence of the juvenile” gives discretion to the magistrate to either clear the court room or not. This has seen some magistrates not clearing the court. The author recommends that the wording should be changed to make clearing of the court mandatory.

Much as it is desired that cases be heard in open court, the adversarial trial procedure practiced in Zambia with its emphasis on cross examination is insensitive to the child witness. The author recommends the introduction of closed circuit television where the child witness will give evidence in another room and not in the same room as the accused. In addition, it is recommended that there should be established a court for sexual offences and specially trained court officials to handle especially defilement cases. Furthermore, there is need to legislate law that will govern the process and procedure in defilement cases.

The pre-trial processes require more coordination. Currently the major players involved in the pre-trial processes work in isolation and in different locations. There is in existence a co-ordinated response centre. However, this centre does not accommodate the medical personnel. Furthermore, the location does not have adequate accommodation for all the actors. Moreover, the doctors are currently not specialized in forensic evidence that is vital in defilement cases. While such examinations can only be conducted by doctors, there are few doctors in the country and in some cases there is none. This provides a challenge in securing convictions as such expert evidence may not be available during trial.

The trial stage is characterized by the battles inherent of an adversarial system. Cross examination of a child is not guided by any special rules, the child witness is therefore subjected to a vigorous and fierce cross examination which invariably contributes to more trauma and makes the child witness less likely to provide veritable evidence to the court. This in turn reduces chances of convictions.

The traditional precautionary rule is still being selectively applied in our courts. Whilst an adult person's evidence is presumed to be reliable, the evidence of a child witness is subjected to the precautionary rule.

This puts the victim at a disadvantage. Our courts also apply the principle of corroboration. The courts cannot convict based on the uncorroborated evidence of a child. This puts a higher burden on the prosecutor as by its nature defilement cases are committed in privacy and therefore, obtaining corroborative evidence may not be easy particularly where medical reports are not available.

Defilement cases take long to be disposed. This invariably reduces chances of convictions as the memory of the child witness fades over a long period of time.

With regards to sentencing, the presiding magistrate has to commit the convict to high court for sentencing. This has seen some documents go missing while in transit. At times, *it takes unnecessarily long before the documents can get to high court for sentencing. It is submitted that the jurisdiction of the magistrates should be enhanced so that they can preside as well as sentence the convicts.*

The Zambian courts are not sensitive to the peculiarity of defilement cases as they are handled like any other criminal case. The Zambia Police service' VSU has taken positive steps in addressing issues pertaining to defilement. Their efforts are reflected in the number of cases that the unit has handled since its establishment in 1994. The unit has also taken measures aimed at enhancing its effectiveness by providing training to some police officers on how to handle matters concerning the vulnerable, children inclusive.

RECOMMENDATIONS

In view of the above conclusions, the following are recommended:

1. The newly established sexual and gender based violence co-ordinated response centre should include specialized medical personnel so that all the actors in the pre-trial process are in one location and therefore making the process more effective as they will exchange notes.
2. Police officers should be specifically trained in forensic evidence as opposed to the current situation where it is the medical doctors who carryout these examinations. It is important to recognize that doctors are trained to cure diseases and their mind is set towards curative measures and therefore, they do not attach much importance to prosecution in comparison to a prosecutor whose mind is set towards prosecuting and possibly convict the accused.
3. The VSU should be availed with adequate office space if the principle of confidentiality is to be upheld. Equally, there is need to avail vehicles to the VSU to aid transportation to the hospital for medical examination.

4. The police officers should try by all means to maintain and record as reported by the child rather than substituting with their words. This will help the child to be stable during cross examination as they will not be hearing a word that is strange or too heavy for them to pronounce in an open court.

The trial stage

1. The child witness should not be subjected to the precautionary rule. The rule should be applied to evidence given by both adult and child victims as long as the court has cause to suspect such evidence. In other words, the precautionary rule should not automatically apply to the child witness but to both the adult and child witness on an individual basis. There should be a statutory provision to this requirement.
2. The requirement for corroboration should not be applied to defilement cases as by their very nature such cases are committed in privacy.
3. Defilement cases should be disposed off within a given timeframe say, within six months. In furtherance of this, a special court for defilement cases should be established. It is instructive to note that a similar provision on time frame is contained in section 27 of the Electoral Act for Parliamentary petitions, Chapter 13 of the Laws of Zambia.
4. There should be guidelines on cross examination aimed at protecting the child witness in defilement cases. The guidelines should ensure that the developmental processes of a child is taken into consideration during cross examination by avoiding repetitive, intimidating, unnecessary and complex questions.

5. With regards to sentencing, it is recommended that the jurisdiction of the Magistrates should be extended so that they can do the sentencing as opposed to the current obtaining practice where they have to commit the convict for sentencing to the high court.

Once implemented, the above recommendations will provide more protection to victims of defilement during the pre-trial processes as well as the court. It will reduce the trauma associated with defilement and indeed increase the rate of convictions and probably create a safer environment for our vulnerable children.

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INTERVIEWS

Chima, SGBV National Coordinator, CRC, Lusaka, 25.02.2010, 11:30am

Hamasalu, CRC VSU officer, Lusaka, 26.02.2010, 14:30pm

Ngosa, Child Protection Specialist, unicef Lusaka, 26/02/2010, 10:30am

Nyirongo, VSU Police Service Headquarters, Lusaka, 27.01.2010, 9am

