

**AN ANALYSIS OF THE PREVALENCE OF DEFILEMENT CASES IN ZAMBIA**

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A dissertation submitted to the University of Zambia in partial fulfillment of the requirements for the award of Bachelor of Laws Degree (LLB)

# THE UNIVERSITY OF ZAMBIA

## SCHOOL OF LAW

### L410-DIRECTED RESEARCH

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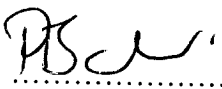
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**AN ANALYSIS OF THE PREVALENCE OF DEFILEMENT CASES IN ZAMBIA**

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## DECLARATION

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## **DEDICATION**

This paper is dedicated to Clementina Phiri Chiwaula, and Chitambeya Chiwaula, thank you for your selfless love and support and to my late father LT COL Harry Chiwaula, thank you for your guidance and wisdom.

## ABSTRACT

Defilement is highly prevalent in Zambia as evidenced by widespread reports on the vice in recent years. In view of this fact, the law on defilement seeks to protect the plight of young children in society to ensure they grow into responsible citizens and contribute meaningfully to national development.

This research analyses the cause of the high prevalence of defilement cases in Zambia. The research will analyse information collected from both primary and secondary sources. Primary sources comprise interviews with people from leading institutions involved in the fight against defilement such as Victim Support Unit (VSU) and Civil Society Organisations (CSOs) involved in the fight against defilement such as the Young Women Christian Association (YWCA) and the National Legal Aid Clinic for Women (NLACW). Secondary sources will include journals, books, statutes, newspaper articles and internet sources. The research will analyse section 138 of the Penal Code and show that the law on defilement in its current form is inadequate to address the high prevalence of defilement. The research will also demonstrate the complexity of the requirement of corroboration in defilement cases and the negative impact it has on the prevalence of defilement.

The research will also analyse the performance of the VSU and show that this institution can be effective in eradicating the high prevalence of defilement if the challenges the institution continues to face can be addressed. Further, the research will further show that the awareness campaign messages on defilement do not address the possible causes of defilement and this is partly responsible for the high prevalence of defilement cases in Zambia. The research recommended that the proviso in section 138 of the Penal Code which provides a defence for the accused if he or she had reasonable cause to believe and did in fact believe that the accused was of or above the age of sixteen years be removed as it has a negative bearing on the fight against defilement among others.

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# CHAPTER ONE

## GENERAL INTRODUCTION

### 1. Introduction

This research critically analyses the high prevalence of defilement cases in Zambia. Sexual offences have remained very controversial in all societies and Zambia is not an exception. In Zambia, sexual offences have raised a lot of concerns and have led in some cases to breakup of marriages and also death of victims. As such, sexual offences must be treated with sensitivity.<sup>1</sup>

Chapter one gives the general introduction to the research. Chapter two analyses section 138 of the Penal Code and its impact on the prevalence of defilement cases in Zambia. Chapter three discusses the role of the Victim Support Unit in the fight against defilement and gender based violence. Chapter four discusses the role of Society and Community based Non-Governmental Organisations involved in the fight against defilement. Chapter five provides the conclusion and recommendations.

### 2. Background

The Penal Code, Chapter 87 of the laws of Zambia (hereinafter referred to as the Penal Code) is the law aimed at curbing criminal offences of various kinds from murder to sexual offences such as rape, incest, indecent assault and defilement.<sup>2</sup> The Penal Code 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.”<sup>3</sup>

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<sup>1</sup>Simon Kulusika.,2012. “Will amending law on defilement serve victims”. *Times of Zambia* ,August 27.

<sup>2</sup>*The Penal Code Act*, Chapter 87 of the laws of Zambia, Ss 132, 159 and 161,137, and 138 respectively.

<sup>3</sup>*The Penal Code Act*, Chapter 87 of the laws of Zambia, s. 138

A child in Zambian law is defined as a person who is below the age of 16 years<sup>4</sup>. In defilement cases, consent is immaterial.<sup>5</sup> Whether the victim consented or not is not important due to the rationale for the law to protect the plight of young persons in society.<sup>6</sup> Sexual offences and defilement in particular, have devastating effects on the victim. These include psychological injury, lack of sleep, trauma, developed after the threatening event, recurring memories or dreams of the event.<sup>7</sup> Furthermore, the victim may display a sense of personal isolation and guilt depending on one's age. In fact, for young girls, the effects of defilement may last for a very long period of time.<sup>8</sup>

According to Ashworth, the 'after effects of sexual violence' can be described in the following terms:

...even where a sexual assault involves no significant physical force, it constitutes harm in the sense that it invades a deeply personal zone, gaining none consensually that which should be shared consensually. Values such as autonomy and privacy are bound up in all sexual cases, but ideas of sexuality bring in several other values and disvalues which find recognition neither in the substantive criminal law nor in any normative discussion of it. It is the threat to these values and effects of these harms which may cause real, deep and sometimes long lasting effects of sexual assaults.<sup>9</sup>

From the foregoing, it can be stated that defilement is certainly a grave social problem. It is therefore a concern not only to the institutions of government such as the Judiciary and law enforcement agencies, but society as a whole. This is because the victims of defilement are members of the Zambian society in general and as such society must take full responsibility for whatever happens to young children who are the future leaders of this country.

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<sup>4</sup>*Penal Code (Amendment) Act No.15 of 2005*

<sup>5</sup> Joseph Daka, *Sexual offences and how to deal with them*( Ndola: Mission Press,2005), 42.

<sup>6</sup>Daka, *Sexual offences and how to deal with them*, 42.

<sup>7</sup> Simon E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: The University of Zambia Press,2004)509

<sup>8</sup>Isaac Zulu .2013. "Traditional norms perpetuate GBV – UNICEF officer", *Post News Paper*, July, 12.

<sup>9</sup>SE.Kulusika, *Text Cases and Materials on Criminal Law in Zambia*.509

With the advent of HIV/AIDS, a disease which has no known cure and a consequence of defilement in some cases<sup>10</sup>, it is imperative that children are protected by all segments of society as they do not have independent and stable minds of their own to indulge in sexual activities. HIV/AIDS poses a serious danger to the human race with the threat of extinction therefore living no possibility of any future to talk about.<sup>11</sup> In 2011, 76.5 percent of children enrolled on anti-retroviral therapy survived for 12 months, 67.4 per cent for 24 months and 49.4 per cent for 60 months.<sup>12</sup> These figures suggest that there is a diminishing survival rate as the number of children who consequently die as a result of HIV-AIDS increases.

### **3. Objectives of the study**

The specific objectives of this research are:

- a) to analyse section 138 of the Penal Code and the impact of the amendments on the prevalence of defilement;
- b) to highlight institutions that deal with defilement cases and how they address the issue;
- c) to analyse the role of society in the fight against defilement.

### **4. Statement of the problem**

Defilement in Zambian law is prescribed to occur when any person unlawfully and carnally knows any child thereby committing 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.<sup>13</sup>

However, children continue to be defiled in our society. This is usually by people they should

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<sup>10</sup>Post News Paper,2013. "Man 45 in court for defiling 13 year old", *Post News Paper*, May, 20.

<sup>11</sup>Republic of Zambia, National Aids Council, *Zambia Country Report*. Lusaka:2012.XI

<sup>12</sup>*National Aids Council country report*,xi.

<sup>13</sup> Penal Code (*Amendment*) Act No. 15 of 2005

trust and seek solace from in time of need, for instance, biological fathers are among the major perpetrators of the offence and other sexual related offences.<sup>14</sup>

Over the years, several attempts have been made to amend section 138 of the Penal Code in order to make it more efficient in curbing the prevalence of defilement and other sexual offences. For example, Penal Code (*Amendment*) Act No.15 of 2005 removed the proviso from the law which provided that “it shall be a sufficient defence to any charge under section 138 if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe, and did in fact believe, that the girl was of or above the age of sixteen years”<sup>15</sup>.

More recently, in 2011 there was another amendment to section 138 of the Penal Code<sup>16</sup>. This was done by maintaining the minimum sentence of defilement at 15 years and the reintroduction into section 138 of the proviso to the effect 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 against whom the offence was committed was of, or above, the age of sixteen years”, and the removal of the word sufficient immediately before ‘defence’ as it existed in the previous legislation.

Despite these amendments, reports of defilement cases continue to rank highly in relation to other sexual offences. For instance, in 2011, there were a total of 1339 defilement cases reported to the police with a total of 511 convictions. However, this figure of convictions represents less than half the number of reported cases<sup>17</sup>.

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<sup>14</sup>KalalukaMwala, 2012 “Kabwe Police nab defiler dad”. *Times of Zambia*, September25.

<sup>15</sup> As amended by No.26 of 1933 and No.25 of 1941

<sup>16</sup> Penal Code (*Amendment*)No. 2 of 2011

<sup>17</sup>Zambia Police Victim Support Unit, *Divisional Gender Based Crime Statistics*, ( Lusaka :Police Headquarters, 2011)

In April, 2012, the Victim Support Unit (VSU)<sup>18</sup> National Coordinator Tresford Kasale said that:

about 90 defilement cases had been reported per month from January, 2012. 25 cases of defilement had been reported in North Western province for the first quarter of the year and that this figure could be tripled for Lusaka because we receive such kind of reports on a daily basis. In rural areas people still have difficulties reporting defilement cases and spouse battering. It is sad that the incidence of sexual and gender based violence is high in the country.<sup>19</sup>

Against this background, it can be seen that incidents of defilement and sexual violence are still prevalent in Zambia. This can partially be attributed to the amendments and re-introduction of the proviso in the Penal Code thus prompting segments of society to call for further amendments to the law on defilement in order to prosecute even those who encourage withdrawal of defilement cases from the police.<sup>20</sup>

## **5. Significance of the study**

This research is very important as it comes at a time when defilement and other sexually related offences are highly prevalent in Zambia despite several amendments to section 138 of the Penal Code to curb the scourge. Defilement is a serious offence which has devastating effects on the victims and society in general. As a result, a number of Civic Organisations such as Movement for Prevention of Sexual Offences (MPSO), Young Women Christian Association (YWCA) and National legal Aid Clinic for Women (NLACW) provide counseling to victims and families on the need to protect children and women against sexual violence and prosecute sexual offences including defilement in collaboration with Victim Support Unit of the Zambia Police Service.

The study will therefore assess whether section 138 of the Penal Code is adequate to curb the high prevalence of defilement and shade light on what laws policy makers should put in place

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<sup>18</sup>This is a specialised unit within the Zambia Police Service and it is responsible for handling sexual offences including defilement.

<sup>19</sup>Fridah Nkonde.2012. "VSU Records 90 cases of defilement per month". *Post News Paper*, April 23.

<sup>20</sup>David Chongo.2012." Prosecute parents withdrawing defilement cases".*Post News Paper*, August 17.

to curb the prevalence of defilement in Zambia. The study advocates the enactment of laws that protect children in the Zambian society from life threatening consequences of defilement such as HIV/AIDS. In addition, it is anticipated that this study will help to renew society's views and its role in the fight against defilement.

## **6. Methodology**

This study will utilize both desk research and field investigation. Desk research will be done through collection of information from books, statutes, reports, journals, dissertations, newspaper articles and internet sources, whereas field investigation will require obtaining interview data from organizations and persons' involved in the fight against defilement and sexual abuse such as Young Women Christian Association, National Legal Aid Clinic for Women and the Victim Support Unit.

Interviews will be conducted particularly with personnel from Young Women Christian Association (YWCA) an organization carrying out awareness campaigns on sexual offences including defilement and the Zambia Police Service Victim Support Unit (VSU).

## **7. Conclusion**

This chapter has given the general introduction on sexual offences and defilement in particular and provided background information highlighting the Penal Code as the law aimed at curbing defilement. This chapter has also defined who a child is for purposes of defilement cases. In addition, the devastating effects of defilement have been outlined, so have the institutions of government which are charged with the responsibility of prosecuting defilement cases. These include the Zambia Police Service and the Courts of law. Further, the chapter has highlighted that HIV/AIDS, a disease with no known cure is a consequence of defilement. The chapter has also given the objectives of the study, statement of the problem significance of the study and the methodology to be applied.

## CHAPTER TWO

### ANALYSIS OF SECTION 138 OF THE PENAL CODE AND ITS IMPACT ON THE PREVALENCE OF DEFILEMENT IN ZAMBIA.

#### 1. Introduction

The aim of this chapter is to discuss the elements of the crime of defilement as well as to analyse section 138 of the Penal Code in its current form and the requirement of corroboration in defilement cases and the impact this has on the prevalence of defilement cases in Zambia.

The criminal law's main function is to protect individuals from intentional harm. By providing protection for the individual, the criminal law also secures the safety of society as a whole. Criminal law does not only provide protection to the victim, but to the offender as well. The requirement of proving the guilt of the accused beyond reasonable doubt is the protection guaranteed for an offender.<sup>21</sup>

#### 2. Definition of *mens rea* and *actus reus* and their constitutive elements

Before a person can be convicted of a crime, it is usually necessary for the prosecution to prove first of all, that a certain state of affairs which is not allowed by the criminal law, has been caused by his or her conduct and secondly that his or her conduct was accompanied by a prescribed state of mind. The event or state of affairs is usually called the *actus reus* and the state of mind or the mental element, the *mens rea* of the crime. Both these elements have to be proved beyond reasonable doubt by the prosecution before a conviction can be secured.<sup>22</sup> The *actus reus* amounts to a crime only when it is accompanied by the appropriate *mens rea*<sup>23</sup>.

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<sup>21</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462; [1935] All ER1 (H&N 7)

<sup>22</sup> B. Smith and J.C. Hogan. *Smith and Hogan's Criminal law*. 1965. 29

<sup>23</sup> B. Smith and J.C Hogan. *Smith and Hogan's Criminal Law*, 126.

To cause an *actus reus* without the requisite *mens rea* is not a crime and this may be an ordinary, innocent act. In order to establish criminal liability, certain elements of the crime alleged to have been committed must be identified. The first is the conduct which is prohibited. For instance, the act of having carnal knowledge of a child under the age of sixteen years. The second element is known as the *mens rea* which is the state of mind or fault which is required in the definition of the crime in question. *Mens rea* is simply defined as 'guilty mind<sup>24</sup>.' The third element which may not be necessary as a ground of liability is the absence of a defence. This will be assumed unless some credible factors suggest otherwise<sup>25</sup>.

Since the *actus reus* includes all the elements in the definition of a crime except the accused person's mental element, it follows that the *actus reus* is not merely an act.<sup>26</sup> Much more often, the *actus reus* requires proof of an act or omission (conduct) and usually it must be proved that the conduct had a particular result. The *actus reus* then is made up, generally but not invariably of conduct and sometimes its consequences and also of circumstances in which the conduct takes place (or which constitute the state of affairs) in so far as they are relevant.<sup>27</sup> Circumstances, like consequences are relevant in so far as they are included in the definition of the crime.<sup>28</sup>

It is this prohibited conduct which in criminal law is known as *actus reus*. It is defined as whatever act or commission or state of affairs as laid down in the definition of the particular crime charged. In addition to any surrounding circumstances and any consequences of the act

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<sup>24</sup> CM Clarkson and HM and SR Cunningham Keating *Criminal Law*, 128.

<sup>25</sup> S.E Kulusika. *Text Cases and Materials on criminal law in Zambia*, 33.

<sup>26</sup> BSmith and J.C Hogan. *Smith and Hogans Criminal law*, 159.

<sup>27</sup> B.Smith and J.C Hogan. *Smith and Hogan's Criminal law*, 32.

<sup>28</sup> C.M Clarkson and HM Keating and SR Cunningham Keating *Criminal law*, 127.

or omission as the definition of that particular crime requires.<sup>29</sup>The basic element of the *actus reus* is the accused person's conduct.<sup>30</sup>

Therefore, the *actus reus* of defilement requires that there must have taken place sexual intercourse, with a child and the child being under the age of sixteen years. This is a forbidden act in defilement cases. When this happens, charges of defilement will arise. *Mens rea* is whatever state of mind the accused person is required to have as needed by the definition of the crime charged.<sup>31</sup>It is also used to describe the fault elements such as negligence and objective recklessness which do not depend on the state of mind of X<sup>32</sup>.The fundamental principle of *mens rea* states that an accused person should be held criminally liable for events or consequences which he intended or knowingly risked.<sup>33</sup>He should also be criminally liable, if he was aware of the possible consequences of his conduct. The principle of *mens rea* also covers the belief principle where the defendant acts in a certain way with knowledge of certain facts.<sup>34</sup>As with *actus reus*, *mens rea* also differs from crime to crime.<sup>35</sup>

It can be argued that the *mens rea* of defilement lies in the accused risking the events or consequences to defile the victim knowingly well that his or her conduct is wrong but decides to act in a reckless manner. This is because most perpetrators of defilement are elderly people in some instances biological fathers or guardians who should know that defilement is wrong and cannot be accepted by any standards in any society.

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<sup>29</sup> S.E Kulusika. *Text Cases and Materials on Criminal Law in Zambia*, 34.

<sup>30</sup> S.E Kulusika. *Text cases and Materials on Criminal Law in Zambia*, 517.

<sup>31</sup> S.E Kulusika. *Text, Cases and Materials on Criminal Law in Zambia*, 52.

<sup>32</sup> S.E Kulusika. *Text Cases and Materials on Criminal law in Zambia*

<sup>33</sup> C.M Clarkson and H.M Keating and S.R Cunningham, *criminal law*, 158.

<sup>34</sup> B. Smith and J.C. Hogan. *Smith and Hogan's Criminal Law*, 53.

<sup>35</sup> C.M Clarkson and H.M Keating and S.R Cunningham, *criminal law*, 159.

### **3. Historical Context of Section 138(1) (a) and (b) of the Penal Code Chapter 87 of the laws of Zambia.**

Defilement as we know it today is not a new concept. It has been in existence for a long time and has continued to be a concern to many people including the law makers. This can be seen from the several amendments made to section 138 of the Penal Code which is the law providing for defilement.

According to the Penal Code amendment No.25 of 1941, Section 138 provided that:-

“(1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for life.(2) Provided that “it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen.”

However, the Penal Code (*amendment*) Act No.15 of 2005 provided that:-

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

It removed the proviso completely from the law. This was a core section in protection of children under the age of sixteen. The 2005 amendment introduced a mandatory minimum imprisonment period of fifteen years against an accused person convicted under the section.

Further, the Penal Code (*amendment*) Act No. 15 of 2005 broadened the definition of who could be defiled. It removed the word girl from the definition of defilement and replaced it with the word child. The word child includes both male and female children such that defilement could be committed in respect of boys and girls below the age of sixteen.

In 2011, there was another amendment to the Penal Code to the effect that the proviso was reintroduced into section 138 of the Penal Code. This was a complete variation to the Penal Code (*Amendment*) Act No.15 of 2005. The law still recognizes defilement as a felony just like in the past. Section 138(1) now provides 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; 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 against whom the offence was committed was of, or above, the age of sixteen.

Zambia has reverted to the old law on defilement as it existed in 1941 with slight modification whilst retaining the proviso.

#### **4. Analysis of section 138 of the Penal Code in its current form**

In a number of countries, such as the United Kingdom, New Zealand, sexual offences fall within the categories of offences that are treated as strict liability criminal offences<sup>36</sup>. In these cases, the common law presumption of *mens rea* (criminal intent) is not treated as critical in the sense that the prosecution needs only to establish beyond reasonable doubt that the accused's person's conduct was intentional or reckless, or that there was a state of negligence.

In Zambia, the old sexual offences were partially based on strict liability principles. This was in offences where the victim was under 16 years. Kulusika,<sup>37</sup> argues that the Penal Code (*Amendment*) No.15 of 2005 brought the offences under section 138 of the Penal Code under strict liability offences. This meant that there was no need for the prosecution to prove *mens rea* thereby making prosecution much easier. To confirm this, the consent of the child who was a victim of sexual assault was made irrelevant.

It can be argued that the removal of the requirement for proof of *mens rea* can enhance the courts ability to deliver judgments more swiftly because the technical aspects of *mens rea* would have been removed. The 2005 amendment to the Penal Code as far as sexual offences were concerned was much more an improvement over provisions of the law on sexual offences and defilement which was in existence as far back as 1941.

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<sup>36</sup> SE Kulusika.2012. " Will amending the law on defilement serve victims". *Times of Zambia*, August 27.

<sup>37</sup> S.E Kulusika. 2012."Will amending the law on defilement serve victims". *Times of Zambia*, August 27.

Kulusika,<sup>38</sup> further contends that the Penal Code (*Amendment*) Act No.15 of 2005 sent a clear deterrent message to would be defilers be they persons who are over 18 years or persons under 18 years. This prohibition is strengthened by the prescription of the minimum mandatory sentence of fifteen years for those convicted of defilement.

Kulusika<sup>39</sup> also contends that the Penal Code (*Amendment*) Act No.2 of 2011 raises a number of legal issues relevant to the rising cases of defilement in Zambia. The legislature has adopted an amendment which provides a defence to an accused person. Section 138( b) of the Penal Code states 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, that the child against whom the offence was committed was of, or above, the age of sixteen. This is a dilution on the guarantees provided by the Penal Code (*Amendment*) Act No.5 of 2005.

In 1941, section 138 (2) provided that it shall be a sufficient defence to any charge under this section. If it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen.

A comparison of section 138 (b) of the Penal Code, current law on defilement with section 138 (2) of the Penal Code as at 1941 reveals that the expression “sufficient defence” as it existed in 1941 has been dropped and replaced by the word “a defence” in the current law and that can be construed as even to include a trivial defence<sup>40</sup>.

Furthermore, Kulusika,<sup>41</sup> contends that the phrase in the law as it existed in 1941 “shall be made to appear,” has been replaced by the phrase “to show that” in the current law on defilement. The two phrases are different and the latter phrase makes things easier for the

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<sup>38</sup> S.E Kulusika 2012. “Will amending the law on defilement serve victims” *Times of Zambia*, August 27.

<sup>39</sup> S.E Kulusika 2012. “Will amending the law on defilement serve victims” *Times of Zambia*, August 27.

<sup>40</sup> SE Kulusika “will amending the law on defilement serve victims” *Times of Zambia*, August 27.

<sup>41</sup> SE Kulusika “will amending the law on defilement serve victims” *Times of Zambia*, August 27.

defence. That is offering defence for the accused person at the expense of the victim of sexual assault. In addition, the prosecution will have to adduce sufficient evidence, including corroborative evidence to secure a conviction in addition to proving *mens rea*. This is likely to lead to the increase in defilement cases

With the law in its current form, it can be argued that the state's obligation to provide protection for vulnerable members of society who cannot protect themselves will be lost. To confirm this for example, the VSU recorded a total of 1339 reports of defilement with 511 convictions in the year 2011.<sup>42</sup> However, the 2012 report indicates that there were a total of 2791 cases of defilement reported with a total of 192 convictions.<sup>43</sup> This can be attributed to the weaknesses in the law alluded to above.

The VSU contends that there is need to put in place new conditions for implementing the law on defilement with regard to the proviso with emphasis on the courts to apply an objective test in which a reasonable man is not expected to have sex with a child. This suggests a change in the law on defilement which would include the removal of the proviso from the law.

Furthermore, Nsinje<sup>44</sup> also contends that the law in its current form is adequate to curb the prevalence of defilement. All that is needed to be done is to address the possible causes and effects of defilement on society. In the event that this is not done, law reform is an alternative which is the view shared by this research.

Njobvu<sup>45</sup> contends that the proviso in the law on defilement should be removed as the perpetrators of the vice will pretend that they didn't know the age of the victim and thought

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<sup>42</sup> VSU Gender based violence crime statistics, Police service Headquarters, 2011.

<sup>43</sup> VSU Gender based Violence crime statistics, Police Service Headquarters, 2012.

<sup>44</sup> Interview with Mr. NsinjeMundia, Peer Educator and Trainer, YWCA, 27/06/ 2013.

<sup>45</sup> Interview with ChilesheChisalaNdhlovu, Counsellor, National legal Aid Clinic For Women, 05/06/2013.

that she was above sixteen depending on her physical appearance. This in itself may be a drawback especially were the victim may exhibit features of an adult person to conform with the provision. This raises a possibility of an accused person being acquitted in such circumstances. This will result in injustice on the victim and will demoralize members of the public from reporting defilement cases to the relevant authorities.

The danger of the defence under section 138 (1) of the Penal Code (amendment) Act No.2 of 2011 can be illustrated by an English case *Corran and Others*<sup>46</sup>. The brief facts are that X, a 20 year old man was deceived by Z, a girl aged 12 years. She told the accused she was 16 and in year 11 at school and that she would be soon leaving school. The two started a relationship and had sex on one of their encounters after Z enticed the accused. The victim later told her mother what had happened and her mother reported the matter to the police. X told the police he had sex with Z but he would never have done that if he had known her true age. He was convicted of raping a girl under 13, in accordance with the provisions of the Sexual Offences Act 2003 of the United Kingdom.

The court held that both the girl's consent as to intercourse and the accused's belief, which was honest, in her age were both irrelevant. The court of appeal upheld the conviction. If this case were to be tried in Zambia, the accused would have been acquitted on grounds that he had reasonable cause to believe and did in fact believe that the girl was 16 years or above.

In *Ndalama v The People*<sup>47</sup>, the appellant was convicted of defilement of three girls, two of them aged 15 and one aged 14 years. He denied the charges, but admitted having had sexual intercourse with the girls but said that they looked mature and that he had paid them money. The court did not explain to the appellant the proviso to section 138 of the Penal Code, namely that if he had reasonable grounds to believe and in fact believed that the girls were

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<sup>46</sup>(2005) EWACA CRIM 192

<sup>47</sup>(1976) Z.R 220 (SC)

over the age of 16 it would have been sufficient defence to the charges. The court held that failure to explain the proviso to section 138 of the Penal Code is an irregularity and the appeal was allowed. This case illustrates some of the technicalities that the proviso introduces in the law on defilement<sup>48</sup> which is detrimental to the fight against defilement.

## 5. Corroboration

In Zambia it is a requirement in most sexual offences, including defilement and rape that the evidence adduced be corroborated<sup>48</sup>. This is because it is easy for anyone to bring a charge on a person but difficult to prove that the accused person is the one who actually committed the offence. At times out of revenge, some women have been known to lie that they were raped. In the case of *DPP v Hester*,<sup>49</sup> this view was amplified as follows :

But common sense, the mother of the common law, suggests that there are certain categories of witnesses whose testimony as to particular matters may well be unreliable either because they may have some interest of their own to serve by telling a false story, or through defect of intellect, or understanding, or as in the case those alleging sexual acts committed on them by others, because experience shows the danger that fantasy may supplant, or supplement genuine recollection.

Therefore, a complainant's evidence shall not be conclusive evidence, instead it shall need to be corroborated.

Corroboration in the seminal case of *Emmanuel Phiri and Others v The People*<sup>50</sup> was defined as the evidence of 'something more' which must be circumstances which though not corroboration as a matter of strict law, satisfy the Court that the danger that the accused is being falsely implicated has been excluded, and that it is safe to rely on the evidence of the accomplice implicating the accused. The nature and sufficiency of the evidence in question will depend on the nature of the facts of a particular case, but as a principle, the evidence will depend in the nature of corroboration in that it must of necessity support or confirm.

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<sup>48</sup> *Kombe v The People* (2009) Z.R. 282

<sup>49</sup> *Director of Public Prosecutions v Hester* [1972] 3 ALL E.R. 1056

<sup>50</sup> (1978) Z.R. 79

Manda<sup>51</sup>, argues that the requirement to corroborate the evidence of young children is very challenging especially in cases of defilement as the victims are usually very young and sometimes, the evidence of “something more” is difficult to prove. This is a draw back in the fight against defilement.

In The Phiri case, the Court also held that the modern decision appear to be adopting a less technical approach to what is corroboration as a matter of law and to be recognizing that identification cases are analogous to if not virtually indistinguishable from corroboration cases. The question in all cases is whatever the suspect evidence of a complainant in a sexual case or evidence of identification receives such support from the other evidence or circumstances of the case to satisfy the Court of 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. Failure to warn itself is misdirection by the court.

In *Nsofu v The People*,<sup>52</sup> the appellant defiled three girls aged nine years, seven years and nine years respectively. The medical evidence indicated that each girl’s hymen, was ruptured and that in each case the vagina was inflamed. The medical evidence further indicated that the condition in each case was consistent with the insertion into the vagina of a rough object but that would only be done by an abnormal girl.

This corroborative evidence indicated that the girls were defiled. However, it never indicated the perpetrator. The court found that whether evidence of opportunity is sufficient to amount to corroboration must depend upon all circumstances of the particular case. Mere opportunity alone does not amount to corroboration but the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the

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<sup>51</sup> Mandy Manda. Problematic enforcement of the Anti Gender – based violence Act, 2011. *News letter*. Issue No.010 .NLACW, 9.

<sup>52</sup> (1973) ZR 287 (SC)

opportunity may be such as in themselves to amount to corroboration. The court in dismissing the appeal in the Nsofu case held that there was opportunity to commit the offence and the circumstances and the locality amounted to corroboration of the commission of the offences.

## 6. Voire dire

In adducing evidence of minors in courts of law, the courts are called upon to determine the competence of the child witness to testify. Thus children will be asked questions by the court to see if they understand the reason of telling the truth or taking oath. This is important because minors may be victims or witnesses in sexual offences such as defilement and their evidence will need to be corroborated. A *voire dire* is important because it is the basis on which the court will determine the competence of the child witness to testify or dispense with child testimony if he or she is incompetent to testify. The *voire dire* will also help the court to determine whether the witness will give sworn or unsworn testimony<sup>53</sup>.

Failure to conduct a *voire dire* where one is indicated, or conducting an inadequate *voire dire*, will result in the evidence of the child being disregarded on appeal and consequently, where that evidence is vital to the case any conviction being overturned<sup>54</sup>.

In *Chisha v The people*,<sup>55</sup> the Supreme court observed that, as a matter of law, the sworn evidence of a child in criminal cases does not require corroboration. However, the court should warn itself of the risk of acting on the uncorroborated evidence of young boys and girls. Since it is necessary to heed the warning, corroboration of the sworn evidence of a child in practice is usually sought. It can be argued that the observation by the chief justice sets a standard where the law which states that the sworn evidence of a child in criminal cases does

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<sup>53</sup> *Zulu v The People* 1973 (ZR)326 (SC); see also *Goba v The People* (1966) ZR 113

<sup>54</sup> *Magistrate Handbook*, 159.

<sup>55</sup> (1980) Z.R. 36 (SC)

not require corroboration will be subjected to the personal determination of the court as to who should testify or not. This is likely to lead to inconsistencies in the manner evidence of minors is adduced and is detrimental to fight against defilement.



In *The People v Thomas Manroe*,<sup>56</sup> the accused was charged with two counts of defilement after it was alleged that the accused had defiled two children under the age of sixteen. A *voire dire* was conducted by the court to determine the competence of the two children to testify. In the determination of the court, one of the children was competent to testify as she understood the importance of telling the truth although she did not understand the importance of taking oath, she thus gave unsworn evidence. The other child did not understand the purpose of taking oath or telling the truth and the court held that the child was not competent to give evidence as a result her evidence was not adduced.

It can be argued that, the fact that a minor fails to appreciate the importance of taking oath, does not mean she is incompetent per se. This can be due to the effects of trauma the child goes through after seeing the person who inflicted injuries on her. It is important that the court takes into consideration such matters even before a child is subjected to a *voire dire*.<sup>57</sup>

It can be stated that the requirement of corroboration is another technicality in the law which is contributing to the rise in defilement cases and other sexual offences where the witness is required to corroborate his or her own evidence. This coupled with the many rules the Court is supposed to observe in adducing evidence of minors and discretion placed on the courts to make determinations even where the law is clear about the fact that it is not a requirement in criminal matters that the evidence of minors should be corroborated. The courts have placed a

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<sup>56</sup> 2011 (HC)

<sup>57</sup> Ndhlovu argues that it is unfair to ask children to testify in the presence of the aggressor. No matter how much counseling they may go through, they may exhibit signs of trauma when they see the aggressor.

standard of the risk involved in adducing uncorroborated evidence<sup>58</sup>. This makes the burden of the prosecution to prove beyond reasonable doubt higher. This has contributed to lower convictions in defilement and other sexual offences such as rape<sup>59</sup>.



## 7. Conclusion

This chapter has discussed the *actus reus* and *men rea* of defilement and shows that *actus reus* only amounts to a crime when it accompanied by the appropriate *mens rea* in defilement cases. *Actus reus* must be proved and it must be shown that the conduct of the accused had a particular result. In addition, *mens rea* of the accused must also be proved for the offence of defilement to apply. The chapter has also given a historical context of section 138 of the Penal Code and analysed the provision in its current form. This was done by comparing the law on defilement as it existed in 1941 and at present in light of the amendments made thereto. The research has shown that the Penal Code (*Amendment*) Act No. 2 of 2011 is a drawback in the fight against defilement and can be argued that it is responsible for the high prevalence of defilement cases in Zambia. The chapter also analysed the need for corroboration evidence in defilement cases and the importance of a *voire dire* in ascertaining the competence of a child witness to testify. The chapter has shown that the requirement for corroboration in defilement cases has a negative impact in the fight against defilement and is likely to lead to the increase in the prevalence of defilement cases in Zambia.

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<sup>58</sup> J. Hatchard and M. Ndulo, *The law of evidence in Zambia: cases and Materials*. Lusaka; Multimedia Publications, 149.

<sup>59</sup> S.E Kulusika. 2012. " Will amending law on defilement serve victims?" , *Times of Zambia* , August 27.

## CHAPTER THREE

### THE ROLE OF THE VICTIM SUPPORT UNIT (VSU) IN THE FIGHT AGAINST DEFILEMENT AND GENDER BASED VIOLENCE.

#### 1. Introduction

The aim of this chapter is to discuss how the VSU handles reports of defilement and how it promotes public awareness on defilement cases and gender based violence. The chapter also aims at highlighting the challenges the VSU faces in its operations and their impact on the prevalence of defilement cases in Zambia.

The VSU was formed in 1994 following the numerous complaints against police unprofessionalism in handling reports of defilement and general treatment of both the victims of sexual offences and the people reporting such offences<sup>60</sup>. It was common for police officers to make fun of the victims and sometimes put the blame on them without having regard to the possible effects that would have on the victims and society as a whole<sup>61</sup>. This was a problem of lack of specialization<sup>62</sup>. This contributed to the negative image the public had regarding the Zambia Police Force which it is still fighting to change to date.<sup>63</sup>

In order to have a more specialised fight against defilement and gender based violence, the Zambia Police established the Sex Crimes Unit. The Sex Crimes Unit is a desk within the VSU whose mandate is to handle sexual related cases reported to the police including rape, incest and indecent assault<sup>64</sup>.

However, the VSU is found in all police stations and posts country wide. The VSU is a department which supports victims of sexual crimes, property grabbing, spouse battering and

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<sup>60</sup> J Daka, *Sexual offences and how to deal with them*,120.

<sup>61</sup> J Daka, *Sexual offences and how to deal with them*,121.

<sup>62</sup> J Daka, *Sexual offences and how to deal with them*,121.

<sup>63</sup> J.Daka *Sexual offences and how to deal with them*. 120.

<sup>64</sup> Judith, Palan, and Mariana *Human Rights Violations in Zambia Shadow Report*. UN Human Rights Committee. Lusaka and Geneva, 2007.

victimization of the elderly people in our society<sup>65</sup>. It is operated and run by officers with special training in gender based violence, related issues such as rape, incest and defilement. The officers who are both male and female continue to receive training in these areas in order to address gender based violence issues with professionalism thus promoting confidence in members of the public in reporting such cases and ensuring the cases reach a logical conclusion<sup>66</sup>.

## **2. How does VSU handle reports of defilement?**

The VSU is the major institution created by the government through the Zambia Police to fight GBV. The VSU therefore, strives to prevent gender based violence of all forms including defilement<sup>67</sup>.

When a report of defilement or other form of gender based violence is received at the inquiries office at a police station, it is referred to the VSU which is situated in different office space and this is in common knowledge of every police officer country wide.<sup>68</sup> This is so because of the realisation of the need to handle such cases with the strictest confidentiality they deserve. Officers at the VSU enter the report in the Occurrence book specifically meant for such offences in order to create a record which will form part of their criminal record in the docket. The report will have a unique serial number for reference and court proceedings<sup>69</sup>. This also helps the Unit to generate statistics and keep track of the number of reports and determine at the end of each year how many reports have been received<sup>70</sup>.

If the victim is in the company of the people reporting, he or she is inspected by the officer of the same sex to determine the injuries and generate a medical report describing the injuries

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<sup>65</sup> Interview with MrTresphord Kasale National Coordinator VSU.12/06/2013.

<sup>66</sup> Interview with Mr. Treshord Ksale National Coordinator VSU.12/06/2013.

<sup>67</sup> Interview with MrTresphord Kasale National Coordinator VSU.12/06/2013.

<sup>68</sup> Interview with MrTresphord Kasale. National Coordinator, VSU. 12/06/2013.

<sup>69</sup> Interview with MrTresphord Kasale.National Coordinator VSU.12/06/2013.

<sup>70</sup> Interview with Mrs. Chilembo, Consellor VSU, Police Headquarters, Lusaka 12/06/2013.

and is accompanied by the respective officer to the hospital where the victim is examined by a medical doctor to enable him or her receive the right treatment.<sup>71</sup>

The doctor must sign the medical report confirming the injuries and any other related issues such as whether the perpetrator was known or can be identified by the victim or any person reporting on his or her behalf.<sup>72</sup> This forms part of the evidence for the prosecution team and will have to be corroborated by other witnesses who were present or witnessed the incident<sup>73</sup>.

When this is done, an investigation into the matter is instituted and this requires officers to visit the scene of the crime<sup>74</sup>. Scene visit must be done quickly to avoid evidence begin lost as such cases are highly sensitive<sup>75</sup>.

Once the perpetrator is arrested and charged for defilement and the statements are recorded from the witnesses, the matter is taken to court for prosecution. But before the matter can be taken to court, the victim is counseled so that he or she can cope up with the trauma and the perpetrator. The perpetrator is also counseled so that he can understand that defilement is a crime and he should not commit such crimes again.<sup>76</sup>

Further, before court proceedings, a pre- trial is conducted to orient and prepare witnesses to the court environment and what they are expected to say in court.

### **3. Promoting Public awareness on defilement**

It is important to note that the VSU does not wait for an opportunity to counsel victims of gender based violence and defilement at the police station. The VSU carries out community based awareness programmes by going round the communities' country wide and holding talk shows thereby sending awareness campaign messages to the wider society and reaching

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<sup>71</sup>Interview with MrsChilembo, Counsellor VSU, 12/06/2013.

<sup>72</sup>Interview with Mr. KasaleTresphord,National coordinator,VSU.12/06/2013.

<sup>73</sup> Interview with Mr.Kasale, National coordinator,VSU.12/06/2013.

<sup>74</sup> Interview with Mr. Kasale, National coordinator, VSU.12/06/2013.

<sup>75</sup> Interview with Mrs. Chilembo ,Consellor VSU,12/06/2013.

<sup>76</sup>Interview with Mrs. Chilembo, counselor VSU.12/06/2013.

out to school going children and teaching them on the dangers of defilement and the need to report such cases to the police,<sup>77</sup>. The VSU also holds television and radio programmes where they disseminate information on defilement and other forms of gender based violence to the wider society through the media<sup>78</sup>.

It is important to note that the VSU partners with other NGOs such as YWCA National legal Aid Clinic for Women in carrying out these awareness campaigns. This is because of the fight against defilement and gender based violence is too big to be left to a single institution especially considering how rampant such reports are in Zambia<sup>79</sup>.

#### **4. Challenges faced by VSU**

##### **4.1 Transport**

The victim support unit has continued to face a number of challenges in its operations. Transport is one of the major challenges. Lack of transport has made people not to report cases of defilement and gender based violence. This has made other members of the public to complain against VSU officers' performance. However, it is common for VSU officers to use their own money to take victims to the hospital. This is quite common especially here in Lusaka where the University teaching Hospital is relied upon as the major health center to handle rape and defilement cases<sup>80</sup>.

However, the VSU partners with other NGOs to assist them ferry victims to the hospital. This is despite the efforts by government to procure and deliver motor vehicles and motor bikes to all provincial headquarters and districts. The problem of transport is even more critical in the

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<sup>77</sup> Interview with Mr. Kasale, Tresphord, National coordinator, VSU.12/06/2013.

<sup>78</sup> Interview with Mr. Kasale, National coordinator, VSU.12/06/2013.

<sup>79</sup> Interview with Mr. Kasale, National Coordinator, VSU.12/06/2013.

<sup>80</sup> Interview with Mr. Kasale, National Coordinator, VSU. 12/06/2013.

rural parts of Zambia which may be located hundreds of kilometers from the nearest police station<sup>81</sup>.

#### **4.2. Inadequate office accommodation**

Office accommodation is another challenge the VSU continues to face. One of the functions of the VSU is to counsel the victim, family members and the perpetrator of the crime of defilement and other gender based violence offences. However, lack of office space has denied the victims both adults and children the necessary privacy they deserve when being counseled. It is not uncommon for people reporting other cases to the VSU to over -hear the counseling sessions going on<sup>82</sup>.

A visit to Police Service Headquarters here in Lusaka revealed that the VSU is situated in a small one roomed office at the ground floor right next to other offices performing different tasks all together. This is the scenario in most police stations visited such as Emmasdale and Woodlands. An analysis of the structures housing these police stations shows that they were meant to accommodate a limited number of officers and departments than at present where the functions of the police have increased to include the VSU.

It can be argued that creation of the VSU was not adequately planned for as evidenced from the lack of office space, despite the institution being in existence for over 14 years now.

#### **4.3 Lack of shelters for victims of defilement and gender based violence**

Gender based violence has adverse effects on the victims and defilement is a form of gender based violence.<sup>83</sup> Therefore, the victims of gender based violence may have to be isolated from the perpetrators and environment exposing them to the crime. However, the VSU country wide lacks shelter to accommodate the victims of gender based violence so that they

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<sup>81</sup> Daka *Sexual offences and how to deal with them*.76.

<sup>82</sup> Interview with Mr. KasaleTresphord, National Coordinator VSU.12/06/2013.

<sup>83</sup> Anti-Gender Based Violence Act No. 1 of 2011.

can counsel them and monitor their progress after the ordeal and as such protect them. This is a drawback on their effort to curb defilement and gender based violence as the victims may find themselves going back to the same place where the crime was committed and as such they feel they are not safe all.<sup>84</sup>

To mitigate the problem of shelter, in Lusaka, the VSU works in conjunction with the YWCA which accommodates victims upon police request.<sup>85</sup> This signifies the partnership and concerted effort by the Police and NGOs in the fight against defilement and other forms of gender based violence.

#### **4.4 Crime detection fund**

Crime detection fund was an allocation of monetary resources from the government to the Zambia Police specifically meant for detection of crime in the communities around Zambia. The fund was previously used by Police Service's Criminal Investigation Department to train officers, provide refresher courses at station, district, provincial and national level in the area of crime prevention, detection and educating members of the public on aspects of police work. This fund is no longer available as government funding is not only erratic but is not enough to carter for such activities<sup>86</sup>.

This fund would have helped to double the efforts of the VSU in fighting gender based violence by educating other police officers on defilement instead of leaving such matters exclusively to officers from VSU<sup>87</sup>. This is because defilement and gender based violence is on an increase in Zambia as such it should not be a preserve of a few officers with specialized knowledge on the matter. It is better officers with specialized knowledge are left to handle

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<sup>84</sup>Interview with Mr. TresphordKasale National Coordinator, VSU.

<sup>85</sup>Interview with MrTresphordKasale National Coordinator VSU.12/06/2013.

<sup>86</sup>Interview with MrTreshordKasale National Coordinator VSU.12/06/2013.

<sup>87</sup>Interview with MrKasale National Coordinator, VSU.12/06/2013.

more complex cases for the fight against gender based violence to be won<sup>88</sup>. This idea however does not imply that specialization is not needed. The fund would also have helped the VSU run awareness programmes on defilement issues on a continuous basis thereby giving members of society an opportunity to learn about defilement and what they should do when faced with such a case on a continuous basis<sup>89</sup>.

#### **4.5 Distances between hospitals and police stations**

It is the desire of the police VSU that all crimes of gender based violence such as defilement are reported, investigated and prosecuted to ensure they are concluded following due process of law. However, the problem of distance between police stations and hospitals continues to hamper people from reporting cases of defilement. People especially in remote parts of Zambia have to walk long distances to access police services later on to access medical services. This is further compounded by the lack of transport at police stations to transport the victims to hospital or the nearest health center. This has also resulted in police officers failure to investigate reports of defilement on time. This is demoralising to police officers as well as members of the public<sup>90</sup>.

Lack of transport at police stations has tended to discourage people from reporting cases of gender based violence and defilement from the police<sup>91</sup>. Furthermore, it is a requirement that victims of defilement undergo clinical tests conducted by a medical officer or clinical officer or any health personnel competent to carry out the tests<sup>92</sup>. This is important because it helps to determine whether defilement or any other form of violence has been inflicted on the victim and as such render appropriate medical treatment to the victim and will form part of the evidence upon which the charge is laid.

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<sup>88</sup>Interview with MrKasale National Coordinator, VSU.12/06/2013.

<sup>89</sup>Interview with Mr. Kasale, National Coordinator, VSU.12/06/2013.

<sup>90</sup>Interview with Mr. Kasale, National Coordinator, VSU.12/06/2013.

<sup>91</sup>Interview with Mr. Kasale, National Coordinator, VSU.12/06/2013.

<sup>92</sup>Interview with MrTresphordKasale.NationalCoordinatr VSU.12/06/2013.

#### **4.6 Concealment of defilement cases involving family members**

It is common in Zambia for family members not to report cases of defilement involving fellow family members. The VSU contends that the Zambian communities are good at harbouring criminals and it is from this background that they do not report crimes committed including defilement<sup>93</sup>. This can be attributed to the negative perceptions members of the public have about the Police in general and fear of embarrassment of the victims and family concerned.<sup>94</sup> However, the VSU is working hard at bridging the gap between the Police and the public by encouraging members of the public to report defilement cases regardless of who was involved.

Therefore, much as a good number of people are reporting cases of defilement, some are still not reporting such cases to the police. It is important for members of the public to know that a crime is a wrong regardless of who has done it. This makes it important to report the matter so that both the victim and perpetrator are helped through counseling and this will help to curb the prevalence of defilement.<sup>95</sup>

#### **5. Assessment of effectiveness of VSU**

It can be argued that for the fight against defilement to be won, it is important that the VSU is equipped with the necessary materials in their operations. However, the VSU continues to face a number of challenges in its operations and these have a negative impact on the operations of the institution. For example, lack of transport by the VSU entails that scene visit of place of commission of the crime of defilement and other forms of gender based violence will not be done in the shortest possible time which may lead to loss of necessary evidence in the matter. This also entails that in some cases scene visit will not be done at all due to long distances officers may have to cover.

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<sup>93</sup> Interview with Mrs. Chilembo, counselor, VSU.12/06/2013.

<sup>94</sup> Interview with MrTreshordKasale.National Coordinator VSU.12/06/2013.

<sup>95</sup> Interview with Mrs. Chilembo, counselor, VSU,12/06/2013.

With presence in all provinces in Zambia, it can be argued that the VSU has an effective network to disseminate information on defilement and other forms of gender based violence. This can be seen from the fact that the number of people reporting cases of defilement to the VSU has increased. This can also be attributed to the community awareness programmes the institution runs in conjunction with other NGOs and the specialization the officers have in handling sexual offences.

Further, it can be argued that the VSU has an effective procedure for handling reports of defilement which is in the knowledge of all officers in this unit. The officers strive hard to accord the necessary treatment to the victims of defilement and treat them with the respect and sensitivity they deserve. This is important because the victims of defilement and other sexual offences need to be cared for especially after infliction of unwanted sexual attack.

However, the VSU continues to record low number of convictions in defilement cases. In 2011, 1339 cases of defilement were reported with only 511 convictions. This can be attributed to the many challenges the institution continues to face which also include withdrawal of such cases from the Police. Therefore, the VSU can be effective in its operations all that is needed is to address the challenges the institution faces leading to the high prevalence of defilement cases and gender based violence.

## **6. Conclusion**

This chapter has shown the role of the VSU in the fight against defilement. This was done by looking at how the VSU handles reports of defilement and assessment of the community awareness programmes the institution runs in order to curb the prevalence of defilement. The chapter has also shown the various challenges the VSU faces in its operations and the negative impact these have on the operations of the institution and the prevalence of defilement in Zambia. Finally, the chapter has given an assessment of the effectiveness of the VSU and

reveals that the VSU is ineffective in its operations and that there is need to address the challenges faced by the institution for the fight against defilement to be won.

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## CHAPTER FOUR

### THE ROLE OF SOCIETY AND CIVIL SOCIETY ORGANISATIONS INVOLVED IN THE FIGHT AGAINST DEFILEMENT

#### 1. Introduction

This chapter is aimed at highlighting the role of society in the fight against defilement and some of the possible causes of defilement. The Chapter will also look at the NGOs involved in the fight against defilement and gender based violence. Particular focus will be on The YWCA as this is the major leading NGO carrying out such work and the NLACW which is also carrying out similar works. Methods used to promote community awareness on defilement and other forms of GBV will be stated and how these are impacting society in light of the high prevalence of defilement cases in Zambia.

Defilement has long been recognized as a problem that needs to be dealt with in Zambia. It has been viewed as a hindrance to the attainment of gender equality and the realisation of social and economic goals of its victims<sup>96</sup>. In the Zambian context, violence against women and children has been seen in acts that are physical, sexual, Psychological, causational and economic<sup>97</sup>. However, the most common forms of gender based violence reported include spousal abuse and defilement. Every woman and girl of whatever age deserves to feel valued respected and safe to enable them participate in national development<sup>98</sup>. It is therefore important that Violence against women and children in any form is dealt with<sup>99</sup>.

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<sup>96</sup> Grace Manyonga .2013. "Sexual violence causing girls to drop out of school- ZANEC" .*Post News Paper*, January, 18.

<sup>97</sup> Isaac Zulu .2013."Sikazwe decries Kapiri GBV Cases" *Post News Paper*, July 8.

<sup>98</sup> National Legal Aid Clinic for Women *Newsletter* Issue No.010, September, 2012, 7.

<sup>99</sup> National Legal Aid Clinic for Women *Newsletter* Issue No.010, September,2012, 6.

## 2. Role of society in the fight against defilement

A successful fight against defilement must begin with the media. A well informed public is partly a result of the role the media plays in disseminating information<sup>100</sup>. The media play a strategic role in raising public awareness and promoting reporting of defilement cases. An analysis of the leading newspapers in Zambia namely The Post, Zambia Daily Mail and Times of Zambia reveals that there is a report of defilement almost on a daily basis. This means that the news articles on defilement give the public and society in general the necessary information for them to know and act responsibly for their own and children's safety<sup>101</sup>.

It must be noted that the role of society in the fight against defilement includes reporting of such matters to the police. According to Ndhlovu<sup>102</sup>, there is an increase in the number of reports on defilement cases from the members of society. This is can be attributed to the concerted efforts by various institutions and members of society to eradicate defilement since it is now in their knowledge that the vice is not only detrimental to the victim and his or her family but society as a whole. According to Ndhlovu,<sup>103</sup> a 7 year old child by the name of S was defiled by her own biological father after her mother died until she was 14 years old. The father taught her to take family planning pills and how to wear pads. This only came to the attention of the public when the victim told one of her friends how much her father loved her and that they shared the same bed. This shocked the victim's friend who narrated the story to her mother who questioned the victim and later alerted the VSU Officers who apprehended the man. The man was charged with defilement and is currently serving a jail term. In view of

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<sup>100</sup> Steriah Monica Simooya The Role of the Zambian Media in Public Environmental Awareness and Education, 43.

<sup>101</sup> The Journal of Law and Social Sciences Vol. 1 Number 1, 2012.

<sup>102</sup> Interview with ChilesheChisalaNdhlovuConsellor National Legal Aid Clinic on 05/06/2013.

<sup>103</sup> Interview with ChilesheChisalaNdhlovuConsellor National Legal Aid Clinic on 05/06/2013.

this, Ndhlovu contends that such action from members of society should be encouraged at all costs if defilement is to be eradicated.

In addition, members of society must report cases of defilement regardless of who is involved. Ndhlovu further contends that there is a tendency to hide reports of defilement involving relatives because of shame for both victims and perpetrators<sup>104</sup>. This must not be allowed at all. Members of the public have continued to report defilement cases to the point of inflicting mob justice on the perpetrators of the offence<sup>105</sup>. However, Society should not be allowed to take the law in their own hands and should apprehend and handover the suspects to the relevant authorities. Allowing members of society to inflict mob justice on suspected perpetrators of defilement would be in conflict with one of the functions of law in society which is maintaining law and order.<sup>106</sup>

According to Munthali, apart from reporting cases of defilement, society must place a duty on every adult member of society to educate and protect children from all forms of violence including defilement.<sup>107</sup> Where a case of defilement is reported, members of society must take it upon themselves to educate the family of the victims and the perpetrators that the law does not allow for settlement between concerned persons through payment of money as compensation by the defiler to the parents or guardians of the victim. It is an offence for any parent or guardian to do this as it constitutes an obstruction to justice at the expense of the victim and the state<sup>108</sup>.

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<sup>104</sup>Jeremy Munthali.2013."2 jailed 30 years for defilement, Indecent assault". *Zambia Daily Mail*, August 14.

<sup>105</sup>KalalukaMwala. 2012. "Man admits defiling 6- year old, pleads not guilty to 3 other counts". *Post News Paper*, October 9.

<sup>106</sup>*Constitution of the Republic of Zambia*, Article 104

<sup>107</sup>Jeremy Munthali, . 2013. "2 jailed 30 years for defilement, indecent assault". *Zambia Daily Mail*, August 14.

<sup>108</sup>National Legal Aid Clinic for Women *Defilement and Incest*, 4.

### 3. Possible causes of defilement

**3.1. Anxiety about what sex is**<sup>109</sup> which results in a few girls demanding for it. Sometimes, a girl may be under sixteen years but has a body so well developed as to attract older men. When proposed to, she may feel lucky and accept the proposal. Some are unlucky and they end up being defiled.

**3.2. Selfish love by men**<sup>110</sup>; a man may know the law on defilement but will not bother to explain to a girl. Some men say, “if I cannot have sex with her now, when will I do it? ”Many under 16 year olds girls hide their sexual relationships from guardians and parents. This has resulted in some men taking advantage of these girls and hoping to escape liability after a sexual encounter<sup>111</sup>.

**3.3. Lack of respect for virginity**<sup>112</sup>; society has lost respect for virginity. Many girls have sex in the early days of their youth. If virginity was respected, girls would keep it for a longer time. In countries like Swaziland for example virginity is highly valued such that before one gets married, virginity tests are conducted by the elderly women in the villages. Traditionally, in Zambia if a man has sex with a virgin who has become of age, for the first time who is under sixteen, it is called violation of virginity and attracts damages as a remedy and society will not care much about the sexual encounters the child engages into afterwards<sup>113</sup>.

**3.4. Alcohol and drug abuse**<sup>114</sup>, the effects of alcohol consumption are many and diverse. What is common is that excessive alcohol consumption results in loss of control of one’s mental faculties. When a person is drunk, he or she cannot reason properly. This has in some

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<sup>109</sup> J Daka. *Sexual offences and how to deal with them*, 58.

<sup>110</sup> Daka. *Sexual offences and how to deal with them*, 59.

<sup>111</sup> Daka. *Sexual offences and how to deal with them*, 57.

<sup>112</sup> Daka. *Sexual offences and how to deal with them*, 58.

<sup>113</sup> Daka, *Sexual offences and how to deal with them*, 41.

<sup>114</sup> Interview with Chileshe Chisala Ndhlovu Counsellor National Legal Aid Clinic 5<sup>th</sup> June, 2013.

cases contributed to the prevalence of defilement cases in Zambia.<sup>115</sup> This is because people fail to appreciate the negative effects of their sexual attitude when in a drunken state and may see nothing wrong in their acts at the time of committing sexual offences including other offences.

**3.5. Peer pressure among girls<sup>116</sup>**; majority of the girls may know that legally they are protected and the law sounds a warning to them that legally they are considered incapable of making a sound decision on sexual matters. However, and unfortunately, girls say, “everyone is doing it”. “Alice has a boyfriend and she is having sex, why shouldn’t I do it?”<sup>117</sup> This results in a number of children being defiled. This is also compounded by the fact that children may grow up knowing that sex is something men do to women and as such may easily give in.

**3.6 .Cultural beliefs and child sexual abuse<sup>118</sup>**, one of the major cultural contribution to the prevalence of defilement is the belief that having sexual intercourse with a child can cure HIV and AIDS. In addition, it is common practice for men especially to defile children in the quest for riches, business success and wealth. There is a cultural belief that men could not do without sex for over a period of seven days and more. In instances where the wives of these men are away, these men tend to pounce on children for sexual gratification. This mostly happens in female headed homes which amount to 566,267 or 22%<sup>119</sup> of the total households in Zambia where the female head is always away<sup>120</sup> trying to make ends meet and as such leaving the children to take care of the home. These children are usually left with their fathers, cousins and uncles who take advantage of the situation.

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<sup>115</sup>Kalaluka, Mwala.2012.”Man admits defiling 6- year old, pleads not guilty to 3 other counts”. Post News paper, October 9.

<sup>116</sup> Interview with Mr. Tresphord Kasale National Coordinator Victim Support Unit 12<sup>th</sup> June, 2013

<sup>117</sup> S.E Kulusika2012, “ Will amending law on defilement serve victims?”

<sup>118</sup> National Legal Aid Clinic for Women *Defilement and incest*, 2.

<sup>119</sup> *Zambia 2010 census of population and housing*. (Lusaka, Central Statistical office,2012.)7

<sup>120</sup> Nancy, Siame.2013 “Step child defiler jailed” Zambia Daily Mail, August 6.

It must be noted that there is no scientific proof that sexual intercourse with a child can cure any ailment, or make someone rich, a view supported by the Traditional Health Practitioners Association of Zambia.<sup>121</sup> Defilement is an offence and cannot be justified on account of the perpetrator's unfounded beliefs. In addition conduct of any harmful cultural practices upon a child including sexual cleansing, female genital mutilation or an initiation ceremony that results in injury or transmission of an infection to the child should not be encouraged as they are not in the best interest of the child.

**3.7. Ignorance of law concerning defilement**<sup>122</sup>, many people lack knowledge on defilement. Some young men even go to an extent of claiming the girl is their girlfriend. Some men arrested for defilement have claimed they did not know that having sex with a girl below 16 years was an offence. Section 7 of the Penal Code provides that "ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence". In accordance with this section, ignorance of law cannot be used as a defence in a court of law. One cannot claim that I didn't know that having sex with a girl below 16 years was an offence. However, increased public awareness on this matter can help to address the problem.

**3.8. Lack of knowledge of the law by girls**<sup>123</sup>, many girls below 16 years do not know that the law protects them from sexual abuse and therefore, should not entertain any form of sexual intercourse or advances. This leaves most children vulnerable to defilement especially in this male dominated society. Even in instances where girls are aware that defilement is an offence, they have failed to appreciate the nature and importance of the protection accorded to them by the law, owing invariably to immaturity of mind or mental faculties.

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<sup>121</sup><http://www.unaids.org/en/media/unaids/...irc../jc299-tradheal.enpdf> . (Accessed on 4th August 2013).

<sup>122</sup>Interview with Mr. Tresphord Kasale. National Coordinator VSU. 12/06/ 2013.

<sup>123</sup>Daka. *Sexual offences and how to deal with them*, 59.

**3.9 Pedophiles**<sup>124</sup>, these are people who are sick in the minds and will manipulate their victims and rape or defile them. These may also be difficult to spot or pin point as they may be experts in carrying out such activities.

#### **4. Community Based NGOs fighting Defilement**

Defilement is a serious offence.<sup>125</sup> Having realized the increase in the reports of defilement and the importance of children and women's rights, a number of NGO's have come up to help fight the vice. One such organization is YWCA. YWCA plays an important role in the fight against defilement. It operates a drop in center where counseling is offered to victims of child sexual abuse, educate family members and members of the Zambian society on defilement cases.<sup>126</sup> YWCA Drop in centers also offer legal counseling to women and children. The main role of the organization according to Nsinje<sup>127</sup> is to prepare the victim of defilement for court sessions. The victims are kept at the drop in center and stay there until the case is disposed of. This is so because some victims are afraid of stigma or are unwilling to share their story with anyone else. Therefore, they are kept at these centers until they are ready to come out with their experience after counseling.

The YWCA can institute criminal proceedings against the perpetrators by taking the matter to the police and following it up until it goes to court. In this way, the organisation helps to protect victims of defilement. With branches in rural Zambia, the organization has provided support to victims of gender based violence in rural Zambia. In fact, it the one of the leading NGOs handling over 500 cases of defilement country wide in a year, with major focus on empowering young women and protecting children from defilement among its objectives. It

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<sup>124</sup>National legal Aid Clinic for Women *Incest and Defilement*, 2.

<sup>125</sup>Kalaluka, Mwala.2012. "Defilers get 15 years". *Post News Paper*, October, 15.

<sup>126</sup>Interview Mr. NsinjeMundia, Peer Educator and Trainer. YWCA,27/06/2013.

<sup>127</sup>Interview with MrNsinjeMundia. Peer Educator and Trainer.YWCA.27/06/2013.

has pioneered work in relation to defilement in Zambia through supporting individuals and groups to take positive changes in their lives for a better Society<sup>128</sup>.

In achieving its objectives, the YWCA<sup>129</sup> works with other NGO's such as NLACW an organization which was formed in 1990 as a project under the Women's Rights Committee (WRC) of the Law Association of Zambia. NLACW aims at empowering underprivileged women and children, to know, realise, and protect their human rights through the provision of appropriate and timely litigation, legal education and counseling of women and children including victims of defilement. The NLACW provides affordable legal services, which include, legal advice, education and counseling to women and children from marginalized sects of society who cannot afford legal fees charged by private lawyers. The organization also works in conjunction with the Victim Support Unit and the office of the Director of Public Prosecutions in order to ensure successful prosecution of perpetrators of gender based violence and defilement.<sup>130</sup>

Other notable NGO's forming part of the network of YWCA include, Churches Health Association of Zambia which helps to fund civil society and faith based organizations who are involved in running programs that promote the plight of women and children's rights including the fight against HIV/AIDS which is a consequence of defilement in some cases. ASAZA is a consortium of government and Nongovernmental Organisations that seeks to address sexual and gender based violence in Zambia. It also seeks to improve peoples' attitudes, behavior and practices towards women. It trains paralegals and police officers mainly on laws of sexual violence thus contributing to the fight against defilement.<sup>131</sup>

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<sup>128</sup> Ibid. interview with MrNsinjeMunsia. Peer Educator and Trainer. YWCA 27/06/2013.

<sup>129</sup> Ibid. Interview with MrNsinjeMundia. Peer Educator and Trainer YWCA. 27/06/2013.

<sup>130</sup> Interview with ChilesheChisalaNdhlovu, NLACW, 5/06/2013 2013.

<sup>131</sup> Interview with Mr. NsinjeMundia, YWCA, 27/06/2013

## **5. Methods used to promote community Awareness on gender based violence and defilement**

Community awareness on gender based violence and defilement is cardinal to the fight against defilement. Sensitisation and prevention campaigns must be taken up by the Police and NGOS. These campaigns help to disseminate information to the public in general on the dangers of gender based violence such as defilement and how it affects society as a whole and how it can be avoided. The VSU and other interested organizations are carrying out various prevention and sensitization methods to educate the public on the dangers of defilement and the negative impact it has on the victim and society in general. The VSU and other NGOS hold meetings with Civic leaders and community members to talk about the offence of defilement. They distribute brochures which are given free of charge to members of the public.<sup>132</sup>

NGOs such as YWCA hold workshops in the community and engage churches from time to time encourage church members to seek justice when need arises. They work in communities within Lusaka and other provinces where they are found. They have a men's network which is used to reach out to fellow men and talk about gender based violence since men are the major perpetrators of the vice.

The NLACW also holds workshops in the community and schools. It also runs Radio and television programs and publications and trains paralegals in various communities who act as a link between the Clinic and the communities by providing localized legal services.<sup>133</sup>

According to Ndhlovu,<sup>134</sup> defilement is rampant in Zambia despite the robust NGOs and effort in addressing defilement because, people in some cases opt to handle defilement cases at family level and do not report to the police despite being aware that defilement is an offence.

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<sup>132</sup> National Legal Aid Clinic For women, *Newsletter issue* No.010, September, 2012.17

<sup>133</sup> National Legal Aid Clinic for Women, *Newsletter issue* No.010, September, 2012. 19

<sup>134</sup> Interview with Ndhlovu Chief Research and Planning Officer Human Rights Commission Zambia.5/08/2013.

Ndhlovu also contends that defilement is more of a social problem, as such, there should be more focus by the NGOs involved in the fight against defilement on the need to identify and address the real social causes of defilement. This will enable the establishment of a legal framework tailored in such a manner as to address the identified social causes of the vice.

Ndhlovu<sup>135</sup> further contends that the awareness campaign messages appear to go only as far as enlighten members of the community on the nature of defilement as opposed to the underlying causes of the vice in society.

## **6 Conclusion**

This chapter has highlighted the role of society in the fight against defilement which is positive and can be attributed to the collective effort by the various NGOS engaged in the fight against gender based violence and defilement. The chapter has also shown that there is an increase in the levels of public awareness on defilement and GBV evidenced by increased number of reports of defilement cases by members of the public even involving non family members. The chapter has also highlighted the possible causes of defilement and the various methods used by civil society organizations to promote awareness on gender based violence which has had a positive impact on the communities and the Zambian society in general.

In addition, it appears that the awareness campaign messages and efforts by the various NGOs have only gone so far as to enlighten members of the community on the nature of defilement and not so much as to enlighten them of the underlying causes of defilement hence the high prevalence of the vice. It would follow that, if the underlying causes of the vice are identified, then a legal framework capable of addressing the identified causes can then be enacted thereby eradicating the vice from society.

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<sup>135</sup>Interview with Ndhlovu Chief Research and planning Officer Human Rights Commission Zambia.5/08/2013.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 1. Introduction

This chapter provides the conclusions aimed at proving conclusions and recommendations arising from this research. The increasing complexity of our society, with its urbanization, industrialization, technological improvement and mobility has brought greater need for laws and efficient protection and investigations. In Zambia, there has long been a crisis of confidence on the part of the public as to the ability of state institutions such as the police and courts to deal effectively with crime. Some members of the public view the Police VSU with suspicion and others treat them with contempt. Therefore, there is an urgent need to change this perception and for the police to address the challenges they have been facing for a long time now. The law also has to be changed if the fight against defilement is to be realized.

This research has highlighted the general nature of sexual offences and defilement in particular. It further highlighted provisions of the Penal Code aimed at curbing defilement and also defined who a child is for purposes of the offence of defilement. In addition, the research has highlighted the fact that HIV/AIDS is at times a consequence of defilement. Given the potential HIV/ AIDS has to wipe out the entire human race, this research argues that there is need for concerted efforts from all sectors of society to curb the prevalence of defilement which has a potential of increasing HIV/AIDS infections.

Further, this research has discussed the *actus reus* and *mens rea* of defilement. This research has established the importance of proving the existence of these two elements for a charge of defilement to be sustained. In addition, the research has gone further to give the historical context of section 138 of the Penal Code which provides for the offence of defilement. Further, the subsequent amendments to the section have also been discussed with particular reference to the proviso of section 138 of the Penal Code and reveals that the proviso to

section 138 is a drawback to the fight against defilement as it has the potential of increasing the prevalence of defilement cases.

The role of the VSU in the fight against defilement has also been discussed together with challenges faced by the institution and the negative impact these have on the operations of the VSU. The research reveals that the VSU can be more effective in its operations if the challenges faced by the institution are addressed.

The role of society in the fight against defilement has been highlighted by the research and the finding is that the fight against defilement is attributed to the collective efforts by NGOs and the VSU in promoting awareness among members of the public on the prevalence of defilement. The research reveals that the NGOs collective efforts and awareness campaign messages have only gone as far as to enlighten the general populace on the nature of defilement as opposed to increased awareness of the underlying causes of the vice in society. The research has further revealed that once the underlying causes of defilement and its prevalence are identified, then it will be possible to formulate legislation capable of addressing the causes and thereby eradicating the vice from society.

## **2. Recommendations**

With the high prevalence of defilement cases in Zambia, it is important that a number of interventions are put in place to address the problem of defilement and GBV. This is important because the high prevalence of defilement cannot be addressed by the law alone.

### **2.1. Adequate Training of all Police officers**

With the current high prevalence rate of defilement cases in Zambia, it is important that all police officers are adequately trained to handle reports of defilement cases instead of leaving this task to the VSU officers alone. Further, there is need to institute programmes for sensitizing police officers on their duties and responsibilities in relation to the critical role

they play in society. In addition, there is need to redress the institutional and infrastructural constraints faced by the police by providing adequate financial and material support that should prioritise increased budgetary allocation to the VSU to ensure adequate logistical support and improved working conditions if the fight against defilement is to be won.

## **2.2. Removal of the Proviso from section 138 of the Penal Code**

Kulusika argues that, the proviso to the law on defilement has contributed to the increase in reports of defilement cases<sup>136</sup>. To affirm this assertion, a comparison of the statistics on defilement was made for the year 2011 the year in which the proviso was reintroduced and 2012 when the proviso was actively at play and the statistics reveal an increase in reports of defilement cases with little convictions. It can be argued that the proviso is the major contributing factor to the increase in reports of defilement a view shared by this author. Therefore, the proviso should be removed from the law if the law is to have a positive impact on reducing the prevalence of defilement.

## **2.3. Making Defilement a Strict Liability offence**

Kulusika further contends that, there is need to make the offence of defilement a strict liability offence which will entail the removal of the need to prove *mens rea* which can be technical sometimes for the prosecution to prove the matter beyond reasonable doubt. It can also be argued that the requirement of proof of *mens rea* is also responsible for the low conviction in sexual offences and defilement. Therefore, the removal of *mens rea* would entail the prosecution would only have to prove the *actus reus* thus making the task of the prosecution much easier. This is the view shared by this author. This in my view will help to protect children in society from harmful acts such as defilement.

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<sup>136</sup> S.E Kulusika. 2012. " will amending the law on defilement serve Victims"? *Times of Zambia* August 27.

## **2.4 Need to consult stakeholders widely before making amendments to the law on sexual offences**

In Zambia, Parliament is the body charged with law making in the country.<sup>137</sup> However, Parliament should consult various stakeholders through their constituencies and civil society before amendments are made to the law. This should be a requirement and an open process must be embarked on to consult stakeholders widely and individual experts and authors such as Kulusika and NGOs such as YWCA, NLACW dealing with sexual offences so that they can advise from an expert and experience point of view thus encouraging debate from stakeholders thus acquiring more knowledge and information on the matter. If such a process was embarked on by Parliament, it is doubtful the proviso on defilement in section 137 (b) which states 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 against whom the offence was committed was of or above the age of sixteen would have been reintroduced in the law on defilement.

## **2.5 Need for more collaboration between NGOs and VSU**

An analysis of the operations of the VSU and NGOs such as YWCA, NLACW reveals that the institutions are carrying out similar works and do work together from time to time and will normally assist the VSU when called upon for transport and shelter for victims of sexual offences for example. Nsinje<sup>138</sup> on one hand contended that the fight against defilement can only be effectively won if NGOs such as YWCA are given powers of prosecute sexual offences.

On the other hand, Daka<sup>139</sup> contends that, in defilement cases like most sexual offences, the state is the complainant and as such it is important that such powers are left to state institutions.

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<sup>137</sup> *Constitution of the Republic of Zambia*, Article 62.

<sup>138</sup> Interview with Mr Mundia Nsinje. 27/06/2013.

<sup>139</sup> Daka, *Sexual offences and how to deal with them*, 122.

In my View, all that is needed is to promote more collaboration between the NGOs and VSU in their operations and advocate for more public awareness on defilement and the dangers it poses on society so that reports of defilement are brought to the attention of the relevant authorities such as VSU for quick action.

This research advocates the development of broad based public awareness campaigns concerning defilement and gender based violence in conjunction with local communities and other community based organisations advocating human rights. This will enlighten most people as to what constitutes defilement and gender based violence. The message to the people should be that people are at liberty to report defilement cases to the police without restrictions.

## **2.6 Removal of the requirement for corroboration in evidence of minors**

The requirement for corroboration in sexual offences especially defilement should be removed completely from the law. This is because of the many technicalities it imposes especially on the prosecution who have to prove the matter beyond reasonable doubt. Depending on how quick one reports the offence, the possibility of losing the evidence is very high in such cases. Even where one has committed the offence but the evidence is not available especially where the victim takes a bath after the ordeal, the evidence will be lost. This is likely to result in the accused person being acquitted thereby doing injustice to victim of the offence.

Defilement attracts a minimum sentence of fifteen years and a maximum sentence of life imprisonment. Kulusika<sup>140</sup> contends that, the sentence for defilement should differ based on the age of the victim and the perpetrator. He states that, for defilement of a child aged six months to thirteen years, a mandatory minimum sentence of thirty five years for accused

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<sup>140</sup> S.E Kulusika, 2012. "Will amending the law on defilement serve victims?" *Times of Zambia*, August 27.

persons aged eighteen and above. For accused person aged thirteen to eighteen years a minimum of twenty five years. For those below thirteen years, order for community service in the interest of both children.



Kulusika also asserts that the message from the state to defilers and would be defilers should be strong and clear in order to show that acts of defilement will be severely punished. Although retributive punishment may not be in fashion in Zambia, the purpose of the criminal law must be made clear to all members of the society in the interest of development and protection of children. This is in support of the assertion that punishment should not be too light, or the law is brought into contempt. The reformation of the criminal is a principal penal aim, being of benefit to the community and in the interest of the offender; but the community is entitled to look to its courts for protection by means of such sentences as will deter potential delinquents from misbehavior<sup>141</sup>.

## **2.7 Defilement resulting in HIV infection in the Victim**

HIV /AIDS is a disease with no cure and it is sometimes a consequence of defilement. AIDS has the potential to wipe out the entire human race if not well managed. Therefore, it is important that people who deliberately infect children through acts of defilement are dealt with severely so that the future of young children is safeguarded in society.

In *Sikaonga v The People*<sup>142</sup> the Supreme Court gave guidelines on steps to be taken when imposing sentences in defilement cases where a sexually transmitted disease arises. Such a case attracts a severe sentence above the minimum sentence of 15 years. Masempela<sup>143</sup> argues that sometimes it is difficult to detect the virus before the window period of three months, and therefore defilement cases should attract a custodial sentence.

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<sup>141</sup> *Magistrates Handbook* (Lusaka: National Institute of Public Administration, 1991), 78

<sup>142</sup> SCZ No. 20 of 2009.

<sup>143</sup> *Sikaonga v The People* SCZ No.20 of 2009.

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