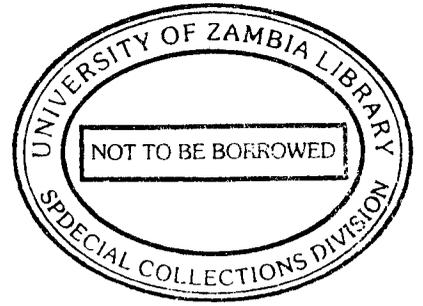


SEXUAL VIOLENCE IN ZAMBIA A SPECIFIC STUDY ON

RAPE

BY

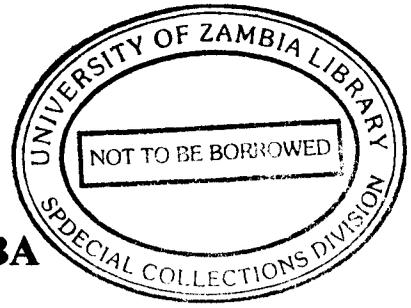
THOMAS THOLE



THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

2008



THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

OBLIGATORY ESSAY

On

SEXUAL VIOLENCE IN ZAMBIA A SPECIFIC STUDY ON

RAPE

By

THOLE THOMAS

COMPUTER No. 22081411.

**A dissertation submitted to the School of Law of the University of
Zambia in partial fulfillment of the requirements for the award of
the Bachelor of laws (LL.B.) degree.**

DECLARATION

I THOLE THOMAS of Computer Number 22081411 Do hereby declare that the contents of this research are based on my findings and that I have not used any person's work without duly acknowledging it.

SCHOOL OF LAW

I recommend that this Obligatory Essay prepared under my supervision by THOLE THOMAS entitled:

**SEXUAL VIOLENCE IN ZAMBIA A SPECIFIC STUDY ON
RAPE**

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



Miss Lwatula

DATE

SUPERVISOR

ABSTRACT

Legally the **Zambian constitution** ensures that men and women are equal under the law and have the same protection under the law. However, some customary law and some cultural notions of women's roles in society often undermine the human rights of women. The way the law views men and women is often different from the way communities and families view men and women. Therefore, although the law strives to ensure that men and women are treated equally, sexual and gender based violence has continued to manifest in most modern societies. Societal attitudes and traditional practices that have been passed from generation to generation enhance sex and gender based violence, for instance initiation ceremonies which teach women and girls that they should be submissive to men.

The dualistic nature of the **Zambian legal system** which recognizes the existence of both customary and statutory laws has contributed to sexual violence in Zambia. Customary law applicable in Zambia today is discriminatory. Legislative and regulatory gaps as well as lack of implementation and enforcement of legislation and regulations perpetrate sexual violence

DEDICATION

I dedicate this parents Mr. and Mrs. Thole for their love and support.

ABSTRACT

Legally the Zambian constitution ensures that men and women are equal under the law and have the same protection under the law. However, same customary law and some cultural notions of women's roles in society often undermine the human rights of women. The way the law views men and women is often different from the way communities and families view men and women. Therefore, although the law strives to ensure that men and women are treated equally .sexual and gender based violence has continued to manifests in most modern societies. Societal attitudes and traditional practices that have been passed from generation to generation enhance sex and gender based violence, for instance initiation ceremonies which teach women and girls that they should be submissive to men.

The dualistic nature of the Zambian legal system which recognizes the existence of both customary and statutory laws has contributed to sexual violence in Zambia. Customary law applicable in Zambia today is discriminatory. Legislative and regulatory gaps as well as lack of implementation and enforcement of legislation and regulations perpetrate sexual violence

ACKNOWLEDGEMENTS.

I thank God for making it all possible; to him I give the Glory. Special gratitude goes to Eustus, Patrick, Namatongo and the entire Law Fourth Year Class of 2007, Thank you for companionship and support.

Appreciation goes to my supervisor Miss Lwatula for her patience and guidance. Last but not the least; I thank my friend Patrick Nkhosi for standing by me.

TABLE OF LEGISLATION

The constitution of Malawi.

The Constitution of the Republic of Uganda.

The Constitution of the Republic of Zambia.

The Penal code Chapter 87 of the Laws of Zambia

The sexual Offences Act. (2003)

Juveniles Act Chapter 217

UNITED NATIONS DECLARATIONS AND OTHER DOCUMENTS

CEDAW.

DEVAW.

TABLE OF CASES

- Jackson Zimba V The People (1980) Z.R 259
- Nsofu V The People (1973) Z.R 47
- R V R (1991) 4 All. E.R 481
- R V Chiyamba (1949) N.R.C.R 384.
- Emmanuel Phiri V The People (1982) Z.R.77
- Machalika V The People (1978) Z.R. 44
- Zulu V The People (1978) Z.R. 230
- R V Kaitamiki (1985) A.C. 147.
- R V Day (1841) 9.C and F 722
- Tembo v The People (1982) Z.R 77
- Butembo V The People (1976) Z.R.173
- DPP V Kilbourne (1973) A.C 729.
- R V Spencer (1987) A.C 128
- R V Baskerville (1916) 2. K.B 658
- R V Chauhan (1981) 73 Cr App.R.233.
- R V Red Path (1962) 46 Cr. App. R.319
- Inspector General of Police V Suara Sunmonu (1957) W.L.R 23
- Kalimukwa V The People (1971) Z.R. 121
- The People V Panel Lubembe 5. N.R.C.R 210,

Olugboja (1982)320 court of Appeal.

DPP V Morgan (1992), A.C 599.

Linekar (1995) Q.B. 250

R V Yohani Mporokoso (1939) 2 N.R.C.R 159

LIST ACRONYMS

CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
DEVAW	Declaration on the Elimination of Violence Against Women
UDHR	Universal Declaration of Human Rights.
UN	United Nations.
WILDAF	Women In Law and Development in Africa
WILSA	Women In Law in Southern Africa
SADC	Southern African Development Community
ACHPR	African Charter on Human and People's Rights
CRC	Convention on the Rights of the Child
GIDD	Gender in Development Division
ZWPC	Zambia Women's Parliamentary Caucus
PHRC	Permanent Human Rights Commission
VSU	Victim Support Unit
HIV	Human Immune Virus
AIDS	Acquired Immune Deficiency Syndrome

TABLE OF CONTENTS

Dedication	i
Abstract.....	ii
Acknowledgements.....	iii
Table of legislation.....	iv
Table of Cases.....	v
List of Acronyms.....	vi.

CHAPTER ONE

INTRODUCTION

1.0 Background.....	1
---------------------	---

CHAPTER TWO

2.0 FUNDAMENTAL PRINCIPLES PERTAINING TO THE LAW ON RAPE IN ZAMBIA.....	10
2.1 Introduction.....	10
2.2 Rape.....	10
2.3 Penalty for Rape.....	11
2.4 Attempted Rape.....	12
2.5 What is consent?.....	14
2.6 Importance of Corroboration.....	16
2.7 Necessary qualities of corroboration evidence.....	19

2.8	Attempted Rape.....	20
2.9	Mental and conduct Elements of the defendant required under the law.....	22

CHAPTER THREE

3.0	The Inadequacies of the Law on Rape and other forms of sexual violence.....	28
3.1	Introduction.....	28
3.2.	The patriarchal Ideology.....	28
3.3	Religious Beliefs.....	29
3.4	The Penal Code.....	29
3.5	The Dual Legal System.....	31
3.6	Legal Technicalities and procedural Requirements.....	33.
3.7	The Victim Support Unit.....	36
3.8	Corruption of The Court officials.....	36
3.9	Attitude and Ignorance of Victims.....	36
3.10	Lack of Equipment and Training of Police Officers.....	37

CHAPTER FOUR

4.0	How the Law on Sexual Violence can be reformed to meet the Standards of modern Law on sexual violence.....	40.
4.1	Introduction.....	4.0
4.2	Need for reform to meet the challenges of the 21 st Century.....	42

4.3 The Courts	44
4.4 The police.....	45
4.5 Rampant Sensitisation.....	46
4.6 legislation.....	46
4.7 Rules of Evidence.....	46
4.8 Rehabilitation.....	49
4.9 participation of women in legislation and policy.....	49.

CHAPTER FIVE

5.0 Conclusions and recommendations.....	50.
5.1 Conclusions.....	50.
5.2 Recommendations.....	53.
5.3 The Penal Code.....	58.
5.4 Customary Practices and Traditions.....	60.
5.5 Existing Support in place.....	61
5.6 Victim support Unit.....	61.
5.7 Hospitals	61
5.8 The Permanent Human Rights Commission.....	62
5.9 Orphanages	63
5.10 National Legal Aid Clinic for Women.....	63
5.11 Non-Governmental Organisations.....	64

5.12 Department of social welfare.....	64
5.13 Curriculum.....	65
Bibliography.....	66.

CHAPTER ONE.

1.0 BACKGROUND UNDERLINING SEXUAL VIOLENCE.

1.1 Introduction.

The scope of sexual offences is always controversial. It seeks to protect sexual choice, that is to say the protection of a woman's right to whether, when and with whom to have sexual intercourse.

Sexual contact can be used as the highest form of intimacy and the ultimate expression of love. Misuse of such acts is a uniquely harmful invasion of privacy and damage to the person's identity.¹ This is in addition to the infringement of the victim's sexual autonomy. Being able to choose with whom to have sexual relations is regarded by many as a fundamental freedom.² Sexual violence covers a wide range of sexual assaults for women and girls.³

Violence against women and girls is a serious problem and the scope of sexual offences is controversial and presents special problems of proof connected with the inevitable conflict of interest between the victim and the accused⁴

Violence against women cuts across all cultures and people of all ethnicities world wide. The lack of knowledge and access to help makes women and girls vulnerable to sexual

¹ J Herring (2005) Criminal Law. . P 171.

² Ibid

³ Ibid.

⁴ Ibid.

violence.⁵ It is defined in psychological, sexual, physical and economic terms⁶ Although there are exceptions, it is generally perpetrated by men against women⁷.

The modern law on sexual offences is protective in purpose. Subject to this the general age of legal consent to sexual activity in most jurisdictions is 16⁸. Arguments in favour of this position centre round the need to protect the under16 years old against coercion, exploitation, abuse and sexual harassment.⁹

At both the global and domestic levels there are laws in place to combat sexual violence¹⁰. Feminist jurisprudence notes that the perception of women under the law is largely responsible for the way in which they are treated as victims of sexual violence.¹¹

The modern law on sexual offences is protective in purpose. Subject to this the general age of legal consent to sexual activity in most jurisdictions is 16¹². Arguments in favour of this position centre round the need to protect the under16 years old against coercion, exploitation, abuse and sexual harassment.¹³

The Declaration on the Elimination of Violence Against Women defines violence against women as

⁵ Legal resources Foundation (LRF) News Number 33; Lusaka Zambia, 2001.p.6.

⁶ Article 1 of the Declaration on The Elimination of All Forms Of Violence Against Women.

⁷ Ibid

⁸ Card, Cross and Jones (2004) Criminal Law (16th Ed.) p.315.

⁹ Ibid

¹⁰ Ibid

¹¹ C.Anyangwe (2004) Introduction to Human Rights And Humanitarian Law.p.8.

¹² Card, Cross and Jones (2004) Criminal Law (16th Ed.),p311.

¹³ Ibid

“Any act of gender based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.¹⁴

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to the elimination of violence against women¹⁵.

The Zambian law as contained in the penal code,¹⁶ Considers all offences relating to sexual violence as offences against morality. Each offence carries its own sentences and requires different sorts of proof for a successful conviction. Offences against morality in the penal code are designed to cover situations where the defendant forces the victim to perform a sexual act against their wishes. Thus a person who is asleep or otherwise unconscious at the time of the relevant sexual act will be protected by the law because there was no consent with regard to the sexual act.¹⁷”

Some studies on sexual violence show that sexual violence against women is occasioned as a result of men’s misconception that women are there for their sexual gratification.¹⁸ in most Jurisdictions the most common type of sexual violence is rape followed by indecent assault and sexual harassment¹⁹.According to statistics available in Zambia at the Police

¹⁴ Article 1 of the Declaration on the Elimination of Violence against women

¹⁵ Article 4 of the Declaration on the Elimination of Violence against women

¹⁶ Chapter 87 Of The Laws of Zambia

¹⁷ Card, cross and Jones (2001) Criminal Law (16th Ed). P.314.

¹⁸ Siame, Mercy et al (2004) Beyond Inequalities: Women in Zambia.p.35.

¹⁹ Simon E (2006), Kulusika. Text cases and materials on Criminal Law In Zambia. Press p.508

Victim Support Unit for the year 2002 about 198 cases were reported, where as in 1999 313 cases of rape were reported . The reduction in 2002 was due to outcry demanding more preventive measures to deal with sexual violence.²⁰

On the other hand the few number of rape cases reported in 2002 (193) might have been due to lack of attention by the police and ignorance of victims to report their cases to the Police, especially for the reason that most rape victims are raped in their homes. However the fact that there are statistics on which evaluation may be based shows that actions are being initiated to combat sexual violence in whatever guise it is perpetrated.²¹

Laws currently in force in Zambia on sexual violence are sufficient, but a number of disparities and procedural rules, such as corroboration have been observed. Implementation of the standards in local legislation and domesticated International instruments has also proved to be a problem.

One area where a disparity is manifest is in the sections of the penal code which deals with offences against morality.²² Procedural requirements for instance the need for corroboration as to the identity of the accused and commission of the crime to remove possibilities of false implications and fabrications of the story by the complainant has in some cases have provided more protection to the perpetrators of sexual violence than the victim²³. The implication of this is that a lot of offenders who have genuinely committed

²⁰ Ibid

²¹ Ibid

²² Chapter xv of the penal code cap 87

²³ Jackson Zimba V The people (1980)Z.R 259 (S.C)

crimes are not convicted because of legal technicalities. It has been observed that in circumstances where some form of corroboration is provided the court may use its discretion and refuses to admit the evidence as corroborating the commission of the crime.²⁴

Another legal technicality in offences of sexual violence is in cases of defilement accused persons have been acquitted on legal technicalities. There is need for a *voire dire*²⁵ this is because in order to convict someone for the offence of defilement the court must satisfy itself that the child is competent to give evidence, if the court is not satisfied the child's evidence may not be received at all²⁶. This presents obstacles to prosecuting perpetrators of child abuse. The judge can use his or her discretion to determine whether child's evidence is admissible²⁷. Although evaluating the competency of a child witness is a standard part of common law doctrine this tends to work to the disadvantage of the child when she is the victim of sexual violence.

STATEMENT OF RESEARCH PROBLEM

Legally the constitution of the republic of Zambia²⁸ ensures that men and women are equal under the law and have the same protection. However the way the law views men and women is often different from the way communities and families view men and women, As a result sexual violence has continued to manifest in most modern societies.

²⁴ Ibid.

²⁵ This question and answer exercise to ascertain if the child of tender age is competent to give evidence and if he/she understands the nature of an oath and importance of speaking the truth.

²⁶ *Nsofu V The People*.(1973)Z.R. 287.

²⁷ Ibid.

²⁸ Chapter 1 of the laws of Zambia.

OBJECTIVE OF THE STUDY

The main objective of this research was to examine whether Zambian law, as it currently stands, is sufficient on sexual violence with a specific emphasis on rape. The specific research questions were:

1. To explain what is sexual violence.
2. Identify some forms of sexual violence.
3. To identify, examine and analyse the existing law in Zambia that governs sexual violence, particularly rape.
4. To identify and discuss specific problems and the inadequacies of the law on sexual violence, particularly on rape.
5. To provide suggestions on how the existing law governing sexual can be reformed to meet the challenges of the 21st Century.

DEFINITION OF CONCEPTS

Violence against women.

This is any act of gender based violence that results in, or is likely to result in, physical,, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

Violence against women encompasses, but not limited to the following, physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of

female children in the household, dowry related violence, marital rape and other tradition practices harmful to women, on spousal violence and violence related to exploitation.²⁹

Sexual violence.

This is an act between two persons that is unwanted by one person. This includes fondling, touching, penetration, incest, rape, sodomy, sexual exploitation. This form of violence includes forcing someone to have sex when she does not want or forcing someone to engage in sexual acts she does not like or finds unpleasant, frightening or violent.³⁰

Rape.

This is unlawful carnal knowledge of a woman or girl without her consent³¹.

Attempted Rape

This is unlawful carnal knowledge of a woman or girl without her consent though not successful.³²

Defilement.

This is Carnal or unlawful knowledge of a child less than Sixteen years of age.³³

Abduction

²⁹ Article 2 (a) of the Declaration on The Elimination of Violence Against Women.

³⁰ Dawn B. Berry (1998), Domestic Violence sourcebook, P.1.

³¹ S.132 of chapter 87 of the laws of Zambia

³² S. 134 of chapter 87 of the laws of Zambia.

³³ S. 138 of chapter 87 of the laws of Zambia.

This taking away a woman with intent to marry or carnally know her of any age or to cause her to be married or carnally known by any other person, takes her away, or detains her against her will.³⁴

Corroboration

This is evidence which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only that the crime has been committed, but also that the Prisoner committed it.³⁵

Actus reus.

This is the prohibited or harmful³⁶, conduct or omission which is considered to be criminal.

Mens rea

This a Latin phrase, meaning the mental element in a crime. it can also mean the blame state of mind³⁷. It differs from crime to crime. The fundamental principle of Mens rea states that a defendant should be held criminally liable for events or consequences which he or she intended or knowingly risked³⁸.

Defendant.

³⁴ Section 135 of Chapter 87 of The Laws of Zambia.

³⁵ R V Baskerville (1916) 2 K.B 658 at 667.

³⁶ Simon E.Kulusika. Text,Cases and Materials in Criminal Law.p.34.

³⁷ Ibid.p.52.

³⁸ Ibid.

This is an accused person. Article 18(2) (a) of the Constitution provides that any person charged with a criminal offence is presumed innocent until proven guilty by a court of competent jurisdiction.³⁹

Human Rights

Literally, human rights mean the rights of humans or rights of man .All human beings have the same basic nature and have it equally, the rights based on this nature (i.e., human nature rights) are necessarily universal and held equally.⁴⁰

RESEARCH METHODOLOGY

The major method of data collection that was deployed in carrying out this study was desk research. The findings of this research were thus based on information from books on the subjects, enacted legislation, draft legislation and judicial decisions. Articles from journals and newspapers as well as student dissertations were also referred to. In addition interviews with officers concerned with sexual violence at the Victim Support Unit.

ORGANISATION OF THE STUDY

The rest of this dissertation is structured as follows: Chapter two discusses fundamental principles pertaining to the law on rape in the Zambian legal system .Chapter three analyses the law that protects complainants of sexual violence; particular concern being

³⁹ Chapter 1 of the Laws of Zambia.

⁴⁰ C.Anyangwe (2004) Introduction To Human Rights And International Humanitarian Law.p.1

with problems relating to rape. Chapter four reviews and discusses the inadequacies of the law regulating sexual, particularly rape. The fourth chapter gives suggestions on how the law on sexual can be reformed in Zambia to conform to the standards of modern law on sexual violence. Finally chapter five presents both the conclusions drawn from the findings of the study and a comparative study of legislation in foreign jurisdictions. Recommendations are thereafter made.

The concern throughout the study has been with Zambian and English law though, where necessary, ideas from other jurisdictions have been drawn.

CHAPTER TWO

2.0 FUNDAMENTAL PRINCIPLES PERTAINING TO THE LAW ON RAPE IN THE ZAMBIAN LEGAL SYSTEM

2.1 INTRODUCTION

This Chapter discusses fundamental principles pertaining to the law on rape in the Zambian legal system Rape and other forms of sexual violence. Sexual violence does not only cause physical and psychological sufferings, but also threaten and destroy individual and collective interests⁴¹.

even if it involves no significant physical force, it constitutes harm in the sense that it invades a deeply personal zone, gaining non-consensually that which should only be shared consensually.

2.2 Rape

Rape is when a man has unlawful sexual intercourse with a woman without her consent.

The definition section of rape under the Zambian legal system provides that;

“ any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm or by means of false representation as to the nature of the act or the case of a married woman, by personating her husband is guilty of the felony termed rape.”⁴²

2.3 Penalty for Rape

⁴¹ S.E. Kulusika (2006) Text Cases and Materials on Criminal law in Zambia. p509

⁴² S. 132 of chapter 87 of the Laws of Zambia

Any person who commits the offence of rape is liable to imprisonment for life⁴³

Any person who attempts to commit rape is guilty of a felony and is liable to imprisonment for life⁴⁴

2.4 Attempted rape

Attempted rape includes any unsuccessful, attempt to rape someone.⁴⁵ Those who succeed in even the slightest penetration will be charged with rape. Those who attempt but do not succeed will be charged with attempted rape.⁴⁶

Medical evidence can strongly corroborate an attempt of rape even though evidence of penetration may be minimal⁴⁷. A medical report should include bruises and cuts the woman received during the attack that could prove that the woman did not consent.

In Kalimukwa V The people.⁴⁸, the complainant was caught by the appellant who twisted her arms backwards, pressed her against the wall, pulled up her skirt and attempted in vein to pull down her knickers. Having failed to pull down the knickers, he pushed his penis between the thighs of the complainant and ejaculated there. The appellant was convicted of attempted rape and his appeal dismissed.

⁴³ S.133 of the penal code(as Amended by No.26 of 1933.133 of the penal code(as Amended by No.26 of 1933 and No.20 of 1964)

⁴⁴ S .134 of the penal code(as Amended by No.26 of 1933

⁴⁵ J Herring (2005) criminal Law, p 173

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ (1971) Z.R 111

Similarly in the case of The People V Daniel Lubembe,⁴⁹ the accused was employed by the complainant. One day in particular the accused told the complainant that he wished to leave her service; the complainant told the accused to report the following day for his wages. The accused leapt at her throat, pushed her to the floor and astride her thighs, unbuttoned his trousers and tried to pull up the complainants dress but was unable. The accused was consequently charged with attempted rape.

Attempted rape is committed, when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his attention by some overt act, but does not fulfill his intention to such an extent as to commit the offence.⁵⁰

It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.⁵¹ It is immaterial in law that by reason of circumstances unknown to the offender it is impossible to commit rape.⁵²

⁴⁹ 5 N. R.L.R. 210

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

Under S. 132 of the penal code, sexual intercourse must be unlawful. This has been interpreted as meaning that sexual intercourse would be unlawful if it took place outside marriage.⁵³ The same word would be interpreted as to mean that a man cannot rape his wife even if at the time of the intercourse she expressed her wishes not to have sexual intercourse because she was not feeling well.⁵⁴

However, in England it has been decided to do away with the exemption of husbands from criminal liability for raping their wives. This was the decision of the House of Lords in the case of Morgan⁵⁵ in which the appellant was convicted of aiding and abetting the rape of his wife.

2.5 What is Consent?

Consent is when a woman who is of sound mind says “yes” to have sexual intercourse. Consent cannot be given after sexual intercourse has taken place. Silence does not mean consent.⁵⁶ If a man was to coerce a woman to have sexual intercourse, it would constitute the offence of rape.⁵⁷

At times in rape cases force is used. In this respect force has two meanings. Actual force is the use of human physical strength to overpower a woman or girl.⁵⁸ A man who slips a

⁵³ Simon E Kulusika. Text cases and materials on criminal law. . p 512

⁵⁴ Ibid.

⁵⁵ (1992) 1 A.C 599

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ A.S Walker and Semler (1998) Rights of women: a guide to the most important united nations, treaties on Human Rights, p. 23.

drug into a woman's drink or gets a woman very drunk in order to have sexual intercourse her is using constructive force.⁵⁹

False representation as to the nature of the act

False representation occurs were a man lies to a woman or a girl about the action he is about to do, for instance a man who tells a woman he is going to perform surgery on her and she consents. He then proceeds to have sex with her. She does not resist because she believes it is part of the surgical process. This is rape because the man has obtained consent through lies.⁶⁰

In the case of **R V Day**⁶¹, It was held that moral or economic pressure or even blackmail causing a woman to submit to sexual intercourse would amount to rape.

A man who induces a woman to have sexual intercourse by telling her that if she did not he would tell her fiancée that she had been a prostitute would be guilty of rape.⁶²

The judge in rape cases should concentrate on the state of the mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances and in particular the events leading up to the act and her reaction to them

⁵⁹ Ibid

⁶⁰ RV Kaitamaki(1985) (A.C 147

⁶¹ (1841) 9C & p 722

⁶² Ibid

drug into a woman's drink or gets a woman very drunk in order to have sexual intercourse her is using constructive force.⁵⁹

False representation as to the nature of the act

False representation occurs were a man lies to a woman or a girl about the action he is about to do, for instance a man who tells a woman he is going to perform surgery on her and she consents. He then proceeds to have sex with her. She does not resist because she believes it is part of the surgical process. This is rape because the man has obtained consent through lies.⁶⁰

In the case of R V Day⁶¹, It was held that moral or economic pressure or even blackmail causing a woman to submit to sexual intercourse would amount to rape.

A man who induces a woman to have sexual intercourse by telling her that if she did not he would tell her fiancée that she had been a prostitute would be guilty of rape.⁶²

The judge in rape cases should concentrate on the state of the mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances and in particular the events leading up to the act and her reaction to them

⁵⁹ Ibid

⁶⁰ RV Kaitamaki(1985) (A.C 147

⁶¹ (1841) 9C & p 722

⁶² Ibid

showing their impact on her mind⁶³ Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place.⁶⁴

At times the dividing line between real consent on the one hand and mere submission on the other may not be easy to withdraw. However where the diving line has to be drawn it is for the court applying their combined good sense, experience and knowledge of human nature and Modern behavior to all the relevant facts of that case.⁶⁵

2.6 Importance of corroboration

In practice, issues of corroboration have played a crucial role in sexual offenses. Corroboration is looked for as a matter of practice.⁶⁶ And in such cases the judge must warn himself of the danger of convicting on the basis of certain uncorroborated evidence. Despite the use of the term “matter of practice”, the requirement for a warning is mandatory and its absence will be a ground of appeal.⁶⁷ However, if the warning is properly given, the judge may convict even in the absence of corroboration.⁶⁸

The essence of a full corroboration warning in sexual offences is that it is dangerous to convict in the absence of corroboration of the witness concerned.

In **R V Spencer** , Lord Ackner (as he then was) said that;

⁶³ Card, Cross and Jones(2005) Criminal Law(16th ed), p. 314.

⁶⁴ R V Day (1841) 9C and F 722 at 744

⁶⁵ Ibid

⁶⁶ DPP V Kilbourne (1973) A.C 729, 750.

⁶⁷ Sepra P 497

⁶⁸ Ibid

“...while it may be convenient to use the words ‘danger’ or dangerous the use of such words is not essential to an adequate warning, so long as the jury are made fully aware of the danger of convicting on such evidence”.⁶⁹

Where there is no corroboration, the rule of practice requires that the judge should be warned of the danger of relying on the sole evidence of the witness. The warning must explain why it is dangerous so to act.⁷⁰

However the judges are of course, told that, while as a general rule it is dangerous to act, they are at liberty to do so if they feel sure that the uncorroborated witness is telling the truth.⁷¹

A judge in sexual offences should warn himself against treating as potential corroborative evidence that which may appear to him to be such, but which is not so in law.⁷² A special direction is also needed where evidence of the complainant’s distress is relied on by the prosecution in sexual cases as potentially corroborative material.⁷³

In all sexual offences a properly worded corroboration warning is all that is required and the evidence to be corroborated must be credible and if it is found as a question of fact that the evidence is not credible, it is unlikely that corroboration of it will assist the prosecution.⁷⁴

⁶⁹ (1987) A.C 128 at 142

⁷⁰ P Murphy (2002) Evidence, p. 499

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Katebe V The people(1975) Z.R p13.

2.7 Necessary qualities of corroborative evidence

In order to be capable in law of constituting corroboration, evidence must be:

- (a) admissible in itself
- (b) from a source independent of the evidence requiring to be corroborated
- (c) Such evidence should show, by confirmation of some material particular, not only that the offence charged was committed, but also that it was committed by the accused.⁷⁵

In **R V Baskerville**. Lord Reading C.J expressed the requirement in the following terms.

“...evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.”⁷⁶

Consent obtained by force

In the case of **Tembo V the People**⁷⁷, it was established as trite law that in cases where it is alleged that consent was obtained by force, there must be corroboration.⁷⁸ In this case the appellant was charged with rape. The complainant gave evidence that she had gone with her small baby to look for firewood. She met the appellant who grabbed her arms and pushed her on the ground and he had connection with her, her friend came in answer

⁷⁵ Ibid

⁷⁶ (1916) 2 K.B 658 at 667

⁷⁷ Corroboration means Independence, Evidence in support of a Material in particular as decided in R V Baskerville(1916) K.B 642

⁷⁸ (1982) Z.R 77

to her shouts and when the appellant saw her friend, he got off and ran away. Her friend testified that she heard her cries and she saw the appellant walking away. She also noticed that the complainant had dust on her body. The complainant was medically examined, but there was nothing abnormal. A vaginal swab was also taken but there was no ejaculation as shown by the results of the examination. In his judgment the learned magistrate stated that although the complainant was not a dishonest witness, it would be unsafe to rely on her evidence that there was actual penetration and that corroboration should be looked for in sexual offences. He found no corroboration in this case and decided that the only explanation was that the appellant had the intention of raping the complainant. He allowed the appeal.

Consent Obtained by threats

In the case of Emmanuel Phiri V the people⁷⁹ it was held that where consent was obtained by threats, there is need for the court to warn itself on the dangers of convicting on uncorroborated evidence, in this case the appellant was convicted of raping the complainant. The complainant alleged that she was walking along a road near her village, when a man on a bicycle came up to her. He forced her to the ground, beat her up and threatened her with death if she refused and had carnal knowledge of her without her consent. Throughout the incidence she was struggling and shouting for help. She was beaten up, bruised and covered in dirt. She made an immediate complaint to several people. She also gave a description of her assailant and the bicycle he had. A few moments later the appellant who fitted the description was seen and intercepted where upon he dropped the bicycle and ran off into the bush. The following day the appellant

⁷⁹ (1982) Z.R 77

was identified by the complainant when he came to retrieve the bicycle. It was held that there was ample evidence to support the finding that the complainant had been raped there was adequate support for her testimony, Her distressed condition, her appearance and the substance of the Medical evidence which disclosed a state of affairs which was in the doctor's opinion, constituent with having had something inserted in her private part.

In the case of **Butembo V the People**⁸⁰, it was held that conviction may be upheld in a proper case notwithstanding that no warning as to corroboration had been given if there in fact exists in the case something more as to exclude the danger of convicting on un corroborative evidence.

Complainant's distress as corroboration

In rape cases the complainant's distress is regarded as corroboration. This has been held to be evidence capable of amounting to corroboration of the complainant's evidence subject to two conditions that it must be independently observed, and that it must appear to the court to be genuine and unfeigned.⁸¹

In **R V Chauhan**⁸², the accused was charged with a sexual assault on a woman. She extricated herself and ran to a lavatory, where she was observed by a fellow employee, who had heard her cries. The trial judge considered the complainants distress as potentially corroborative of her evidence.

⁸⁰ (1976) ZR. 193

⁸¹ Ibid

⁸² (1981) 73 Cr AppR. P233

In **R V Red path**⁸³. Lord parker C.J (as he then was) pointed out that even where there is evidence of distress of the witness if the evidence lacks the quality of independence necessary for potentially corroborative evidence it should not be relied upon.

To remove the possibilities of deliberate, dishonest, false and malicious implications of the accused in rape and other sexual offences. In **Inspector – General of Police v Suara Sunmonu**⁸⁴, it was held that a complaint made by the complainant soon after the occurrence is no corroboration of the truth of the complainant's story.

Evidence is a crucial factor in gaining a successful conviction in a rape case. There must be some evidence of penetration of the female organ.⁸⁵ A certified doctor should perform a medical examination as soon as possible after the rape. The doctor can then determine if the woman has in deeded had sex and also note any bruises or cuts that resulted from the rape. The doctor's report then serves as medical proof in the case without medical evidence, it is very difficult to prosecute a rape and obtain a conviction.⁸⁶ There must be some form of evidence showing that the woman or girl did not give her consent to the sexual encounter. Again medical evidence can show this by the presence of bruises, and cuts. Also, torn clothing indicates that the perpetrator used some sort of force to override the woman or girls consent.⁸⁷

⁸³ (1962) 46 Cr AppR. P319

⁸⁴ (1957) WRNLR 23

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Ibid

2.8 Mental and conduct element of the defendant required under the law.

Two elements need to be proved to establish criminal liability in a rape case. The first is the conduct which the particular crime prohibits known as Actus reus, a Latin phrase literally meaning “the guilty act”, but which is more aptly translated as the forbidden conduct⁸⁸. The second element is known as the Mens rea, meaning the state of mind required on the part of the defendant.⁸⁹ Mens rea is often used loosely to encompass fault elements such as negligence and recklessness.

Actus Reus

The constituent elements of the Actus reus of rape, under S. 132 of the penal code are: intentional penetration of the vagina, with his penis, without the consent of the woman or girl and where the accused does not reasonably believe that the woman or girl is consenting.⁹⁰

Several points emerge from the above conduct elements needed to prove rape. Firstly the definition of rape is restricted to vaginal intercourse.⁹¹ This can be contrasted with section 1 of the sexual offences Act 2003, which provides that a person commits an offence of rape if he intentionally penetrates the vagina, anus or mouth of another with his penis. Therefore the law rape in Zambia can be interpreted to mean that only men can

⁸⁸ J Herring (2005) Criminal law p 9

⁸⁹ Ibid

⁹⁰ Simon E. Kulusika (2006) Text Cases and Materials On Criminal Law.p.512.

⁹¹ Ibid

commit rape, where as in other England penetration can be effected through the anus or mouth for a offence of rape to suffice.

More so the penal does not specify by what means should penetration be effected and therefore penetration of the female with a finger or any other object would not amount to rape by literal interpretation of section 132.⁹²

The term vagina includes vulva⁹³secondly in Zambia the definition of rape is only restricted to vaginal intercourse. In England it is possible for a man to be victim of rape, if the mouth or anus are penetrated by a penis.⁹⁴.

Finally only penetration is required. So it is not necessary for there to be full sexual intercourse in order for the offence to suffice.⁹⁵ Penetration must be a continuing act from entry to withdrawal. The significance of this is that if the complainant consents to the defendant in initially penetrating her and there after asked him to with draw but he deliberately does not and continues to remain inside her, then from the time when the victim asked the defendant to withdraw he will be committing rape.

In the case of R V Yohani Mporokoso⁹⁶ Robinson Ag. C.J, Said, "To prove rape it is necessary to prove penetration or partial penetration.

⁹² Chapter 87 of the Laws of Zambia.

⁹³ Section 75 of the sexual offences act 2003

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ (1939) 2 N.R.L.R 152

Capacity to consent to sexual intercourse.

A person who is asleep during the penetration or is unconscious for example due to drink or drugs is presumed not to be consenting. A person consents if he agrees by choice, and has the freedom and capacity to make that decision.⁹⁷ Consent is supposed to be freely given without any pressure. A victim who gives up resisting because of pressure is not consenting but submitting.

Mens rea

The law under S. 132 of the penal code, requires that the defendant must intentionally penetrates the vagina of a girl or woman with his penis. In addition, the defendant must not reasonably believe that the woman or girl is consenting to the penetration.

Whether a belief (in consent) is reasonable is to be determined having regard to all circumstances, involving any steps the defendant has taken to ascertain whether the victim consents.⁹⁸

The words “all the circumstances” must refer to those which might be relevant to the issue, including any characteristic of the defendant, permanent or transient, which might affect his ability to perceive or understand whether or not the victim is consenting.⁹⁹

⁹⁷ Ibid.

⁹⁸ Card, Cross and Jones (2001) Criminal Law, P. 317.

⁹⁹ Ibid.

Despite the reference to all the circumstances, characteristics should obviously only be taken into account to the extent that they could reasonably affect the defendants perception or understanding of whether or not the complainant is consenting.¹⁰⁰

Need for Reform of the law on rape

There is need to up date the law in Zambia to reflect current social attitudes and in particular to ensure that the law clearly set out what is unreasonable behaviour and ensure that the penalties reflect the seriousness of the offence,

In order to achieve the reform of the law it is necessary to consider some of the suggestions which include.

It should be expressly specified under S. 132 of the penal code, what body parts or times should be used to effect penetration. It should also be clearly expressed what would be the possible consequences of penetrating other body parts apart from the vaginal. For instance under the S. 1 (2003) of the sexual offences Act,

The law in England has been reformed and penetration of the mouth has been added to the actus reus of rape.

The Mens rea of rape under the penal code should also be changed. Under the current law if the defendant honestly believed that the victim consented, even if his belief was

¹⁰⁰ *ibid*

unreasonable this would be a defence. Therefore if the defendant honestly but carelessly believed that the victim consented this would be a defence.

Government should implement a policy that hinges around boosting a woman's self perception and esteem through the acquisition of knowledge of their human rights, inter alia but also educating boys and men on the importance and well being of a woman which are often compromised by the harmful attitudes displayed by the sexual violence and all forms of abuse, coercive and discriminatory customary practices exercised by the male over the powerless female human being, which manifest themselves in violence in marriage, sexual exploitation and sexual abuse which may sometimes facilitate HIV/AIDS transmission.

Generally therefore, it has been the essence of this chapter to draw attention to the fundamental principles pertaining to the law on rape in the Zambian legal system. The chapter has also endeavored to highlight the elements which must be proved by the prosecution to prove rape.

CHAPTER THREE

THE INADEQUACIES OF THE LAW IN ZAMBIA ON RAPE AND OTHER FORMS OF SEXUAL VIOLENCE.

3.1 Introduction

The preceding chapter was an analysis of the law relating to rape as a form of sexual violence. This chapter discusses the inadequacies of the law in Zambia on rape and other forms of sexual violence. In addition, it will also look at the difficulties that are faced by the criminal justice system in dealing with complaints of sexual violence.

3.2 The Patriarchal Ideology

Zambia is primarily a patriarchal nation and most people are socialised to believe that women are inferior to men, meaning that women should do everything possible to make men happy even if it is at the expense of their own happiness.¹⁰¹ Therefore this notion manifests itself in many different ways one being sexuality.¹⁰² In Zambia women are taught to please and submit to their men from the time they are young. This is further enshrined during premarital celebrations and initiation ceremonies. Emphasis on these arrangements is on pleasing the man, because if they do not, he may justifiably walk out and go to another woman.¹⁰³ In this way, a woman is educated to see herself primarily as a sexual object and instrument for sexual pleasure.¹⁰⁴ According to a study done among a

¹⁰¹ Siame, Mercy et al (2004) Beyond Inequalities Women in Zambia, p.39.

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid p. 41

sample of sexually active women in Lusaka, 86 percent of those interviewed practiced “dry sex” (that is using herbs to dry vaginal fluid before sexual intercourse) in which case the woman has to endure the act of sex because dry sex is extremely painful.¹⁰⁵ Within the patriarchal sexual relationship, male control the use of contraceptives and are not likely to agree to wives to use condoms or other forms of contraception. It is therefore difficult or impossible for a woman to protect herself from the risk of pregnancy or HIV/AIDS infection¹⁰⁶.

3.3 Religious Beliefs

Religious beliefs have also fueled the adherence to the patriarchal ideology. Zambia being predominantly a Christian Nation, with Muslim and Hindu minorities. Most notions about the inferiority of women to men which is a cause of sexual violence are based on some provisions of both the Old and New Testament, which commands women to submit to male authority.¹⁰⁷

National Law

Zambia’s bill of Rights is contained in part of her constitution.¹⁰⁸ The Zambian bill of rights guarantees a wide range of rights but does not recognise the attention that is due to women, particularly as far as sexual violence is concerned. Therefore with respect to the protection of women against sexual violence it has a deficiency.

¹⁰⁵ Ibid

¹⁰⁶ Research conducted by WILSA, Gender and the criminal justice system (2001). P.8.

¹⁰⁷ Ephesians 5 v 22-24.

¹⁰⁸ Chapter 1 of the Laws of Zambia.

Zambia's Bill of rights and the absence of protection of women against sexual violence can be contrasted with Article 33(6) of the Ugandan constitution which provides that, 'Laws ,cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this constitution'¹⁰⁹.

Zambia's bill of rights also fails to protect women from domestic violence which can be a form of sexual violence. This contravenes Article 1 and 16 of the convention on the Elimination of violence Against women (CEDAW) and Article 2(a) of the Declaration on the violence Against women (DEVAW) which guarantee women to the right to protection form violence within the family.

Because Zambia's Bill of rights does not take into the rights of women against sexual violence, sexual violence is now a medium through which HIV/AIDS and other sexually transmitted disease are transmitted from an infected person to another.¹¹⁰

This is in contravention with Beijing Declaration and platform for action which provide that government ought to reinforce laws, reform institutions and promote norms and practices that eliminate discriminates against women and encourage both women and men to take responsibility for their sexual and reproductive behaviour; ensure full respect for the integrity of the person, take action to ensure the condition necessary for women to exercise their reproductive rights and eliminate coercive laws and practices¹¹¹.

¹⁰⁹ M.M.Munalula (2005) Women Gender Discrimination and the Law: Cases and Materials, p.75.

¹¹⁰ Katarina Tomasevski (1993), Women and Human Rights, p.44

¹¹¹ Article 107 (d).

3.4 The penal code

The penal code prohibits virtually all abuses associated with sexual violence. Chapter XV of establishes offences against Morality .However Under the Zambian legislation relating to sexual violence, spousal rape is not criminalised as is the case in the United Kingdom. This was attested to the case of R v R¹¹² in which Mr. R had forceful sex with his wife his after which she reported him to the police. Mr. R was later convicted and sentenced for rape.

The penal code also criminalises all abuses associated with sexual violence. However the reality of enforcement is entirely different: bias against the victims, endemic problems of the criminal justice system and discrimination and other short comings in the delivery of justice.¹¹³ These problems often lead to failure to investigate, prosecute and punish these offences.¹¹⁴ As a result, the victims have little recourse to the justice system, while the perpetrators face little disincentive to abuse again.¹¹⁵

3.5 The dual legal system

At independence in 1964, Zambia inherited a dual legal system. Zambian law now integrates the two legal systems. Customary law, based on pre colonial legal systems as interpreted by the colonial 'native courts,' known as local courts today; and statutory law, much of it still inherited from the pre-independence era, but modified and extended by

¹¹² (1991) 4 All E.R 481.

¹¹³ Josephine B Muchelema (1991) "Economic Battering." A Paper submitted at YWCA Seminar in Lusaka.

¹¹⁴ Ibid

¹¹⁵ Ibid.

the Zambian parliament since 1964. In general customary law grants substantiality less protection to women and girls against sexual violence.

Under statutory law, 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.¹¹⁶ The meaning of this provision is that whoever has unlawful carnal knowledge with any girl below age of sixteen (16years) will be guilty of defilement.

On the other hand under customary law age is not very much considered provided a girl has attained puberty. There fore having sexual intercourse with a girl under the age of 16 is not criminalised under customary law provided you are married to her.

In the case of **R.V Chinjamba**.¹¹⁷ A villager married a girl under the age of sixteen years of age and lived with her as husband and wife. The accused, who was the village headman new of these facts and took no steps to prevent, reports the matter. He was charged with being on accessory after the fact to unlawful carnal knowledge of the girl under the age of sixteen and convicted. It was held that it was not unlawful for a man to have carnal knowledge of the girl who he is lawfully married to. There was marriage subsisting between the two and it is not unlawful for a man to have carnal knowledge of a girl whom he is lawfully married to.

¹¹⁶ S. 138 of chapter 87 of the laws of Zambia.

¹¹⁷ (1949) N.R.C.R. 384.

Although the penal code is adequate in providing protection from sexual abuse, however there is a discrepancy between what the statute provides and what happens in reality.

The Zambian Human rights report of 2003 revealed that between 1991 and 2000 out of 4700 case of rape reported to the police, only 30% resulted in conviction.¹¹⁸ This is as result of a number of factors such as bias against victims, procedural requirement under the law delays and inefficiencies.¹¹⁹

Procedural requirements under the law in sexual offences such as rape, indecent assault and defilement have in some instances provided more protection to the perpetrators than the victim.

3.6 Legal technicalities and procedural Requirements

Studies of some decided Zambian case have revealed that procedural requirement such as corroboration tends to work against the victim and give more protection to the offenders. In the case of Emmanuel Phiri v the People¹²⁰ it was held that in a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaints and false implication. Therefore in sexual offences the judge should warn himself against the dangers of convicting on

¹¹⁸ WILSA (2001) *Gender Violence in Invisible Struggle*. P 7

¹¹⁹ Research by WILSA (1999) on the Justice system in Zambia

¹²⁰ (1982) ZR 77(SC).

uncorroborated evidence and the record should indicate that this was done.¹²¹ The corroboration evidence serves to satisfy the court that it is safe to rely on the complainant.

However the implication of corroboration is that a lot of offenders who have genuinely committed sexual offenses have not been convicted because of the legal technicalities. In circumstances where some corroboration is provided, the court uses its discretion and refuses to admit the evidence as corroborating the commission of the crime.¹²² In **Jackson Zambian V the People**¹²³, the appellant was convicted of rape. The evidence against the appellant was that he was alleged to have seized a woman in the bush and raped her. The woman was thereafter seen to be crying by an independent witness. The complainant stated that during the course of the alleged rape she sustained scratches on her legs and she said that the third party whom she met had asked her how she had obtained those scratches. It was contended by the court that in the circumstances there was a complete lack of corroboration and the evidence of distress may not be enough to amount to corroboration. The court quashed the conviction and set aside the sentence.

Similarly in **Machalika V the People**¹²⁴ in which the appellant was convicted of rape. A doctor conducted a medical examination and spermatozoa were found. The court contended that since spermatozoa can live for several days in the vagina, the medical evidence was no corroboration of the fact that the complainant had had sexual intercourse

¹²¹ Nsofu v the People (1973) ZR 103.

¹²² WILDAF (1994) Gender Bias in the Zambia Court System.

¹²³ (1980) ZR 259 (SC)

¹²⁴ (1978) Z.R 44 (S.C)

with the accused, but simply evidence that she had had sexual intercourse with someone within a period of days prior the medical examination. The court set aside the conviction.

Voire Dire

In defilement cases, which are also a form of sexual violence against women below the age of 16, accused persons have been acquitted on legal technicalities. In **Zulu V the People**¹²⁵ the court held that before a conviction, if the court is faced with a witness of tender years, it must inquire whether the child understands the nature of an oath and the importance of telling the truth. If it decides that the child understands the nature of an oath, it then must satisfy the reception of her evidence. But if the court is not satisfied of the foregoing matters the child's evidence may not be received at all. This legal technicality has given more protection to the perpetrators at the expense of victims of sexual violence. The judge can also use his discretion to determine whether the child is competent and therefore whether his or her evidence is admissible.

The problem with applying the strict rules of evidence to victim of sexual violence of a tender age is that, the child is likely to be afraid especially if the defendant is close to her, therefore is likely to tell different stories especially on cross examination. A child of tender age also likely to be intimidated, especially were the case is not being heard in camera or she was given something by the defendant before the parents realised the sexual assault.

¹²⁵ (1973) Z.R 230 (S.C).

3.7 Victim Support Unit and the Zambia Police

Victim Support units are found in all police stations. They deal with sexual abuse cases. Although the Victim Support Unit has intervened in sexual violence case, its potential impact has been undermined by the shortage of resources equipment and training. For example, in 2002-2005, the Victim Support Unit had only two vehicles for the whole country.¹²⁶

It has also been observed that when faced with a sexual problem the victim support fail to respond or the response is ineffective, this shows that the laws are there but there is no one to enforce them.¹²⁷ Most cases have gone through the victim support unit but there has been no follow up or nothing about it.

3.8 Corruption of Court Officials.

The responsibility for the failure to follow up in sexual abuse cases does not exclusively reside with the Victim Support; sometimes the failure to follow up is due to corruption, where court officials as well as the police may be paid off by perpetrators to ignore the charge or misplace the court records deliberately.

3.9 Attitude and ignorance of Victims.

Victims of sexual violence in most case do not want to report sexual violence to the police. This is due to fear that they may bring an embarrassment to the family, to the girl. This lack of knowledge and access to help makes them vulnerable to sexual violence.

¹²⁶ Human Rights watch Interview with Eugene Sibote, Lusaka, Zambia, May 22, 2002.

¹²⁷ Ibid

High court judge, Peter Chitengi at a Permanent Human Rights commission work shop said;” Many women in Zambia do not know their rights are protected by the constitution and therefore they do not know they have the right to challenge their violation against sexual violence.”¹²⁸

Women’s lack of access to legal information aid, or protection and inadequate efforts on the part of public authorities to promote awareness and enforce the law on sexual violence has accelerated the rate of sexual violence in Zambia.

3.10 Lack of equipment and training of police officers.

Another problem experience by the police is lack of equipment for carrying out proper investigations in sexual offences. The police have to conduct investigations at the crime scene using what is known as a “sexual crime kit” which most police stations do not have.¹²⁹

The other problem experienced by the police in prosecuting sexual offences is the low level of training and education of police. This questions the quality of investigations they conduct. Police who prosecute sexual offences are ordinary policemen who receive no training at all in sexual abuse.

The core international treaty on women’s right, the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) obliges states to ‘refrain’ from

¹²⁸ Legal Resource (L.R.F) News number 33, Lusaka, Zambia, 2001.p.6.

¹²⁹ Research conducted by WILSA entitled Gender and Criminal Justice System (2001).

engaging in any act or practices of discrimination against women and to ensure that public authorities shall act in conformity with this obligation with and to take all appropriate measures to eliminate discrimination against women by any person, organisations or enterprise.¹³⁰

It also requires that states; 'take all appropriate measure, including legislation to modify or abolish existing legislations, customs which constitute discrimination against women.'¹³¹

Finally most Zambians have done little or nothing to comply with this requirement. The constitution under Article 23 recognises discriminatory customary [practices, which are based on women's inferiority and therefore accelerating the rate of sexual violence. Women's right to sexual autonomy, physical integrity and security of person are violated when subjected to customary practices.

The Zambian constitution also does not have any provision on the law regarding the transmission of infectious diseases under which laws HIV/AIDS.

Zambia s Bill of Rights does not make provision for the rights of women in marriage.consequently, customary laws governing the rights of women in marriage continue unopposed. This may be contrasted with Article31 (1) of the Ugandan

¹³⁰ CEDAW, Article 2.

¹³¹ Ibid

Constitution which provides in part that... men and are entitled to equal rights in marriage”.

In conclusion, therefore it is worth noting that most sexual violence against women has been largely due to the inadequacy of the law in Zambia and cultural practices about the position of women in the society. Therefore this ever increasingly failure of the law to adequately protect women against sexual violence has increased the spread of HIV/AIDS in the country, because women are forced to indulge in sexual intercourse without a chance to solicit for protected sex

CHAPTER FOUR

HOW THE LAW ON SEXUAL VIOLENCE CAN BE REFORMED IN ZAMBIA TO CONFORM TO THE STANDARDS OF MODERN LAW ON SEXUAL VIOLENCE.

4.1 Introduction

It has been observed that in many sub-Saharan African countries, women are more likely than men to be infected with HIV. In Zambia for example, a multi centre study carried out in Ndola it was found that women are 1.4 times more infected with the virus than the men.¹³² This imbalance sex ratio of HIV infection is attributable almost wholly to the imbalance in power between men and women economically, socially, culturally and psychologically which impacts negatively on the ability of a woman to negotiate for safe sex. Also culturally, women are lack control over their lives and are taught from early childhood to be subservient, obedient and submissive to males. Where a woman does deny her partner sex she places herself at the risk of sexual violence or rape which constitute a source of transmission of HIV/AIDS.¹³³

Women continue to be victims of various forms of sexual violence. There is lack of comprehensive programmes dealing with perpetrators, including appropriate programmes. Inadequate data on sexual violence further impedes policy making and analysis. Social cultural attitudes reinforce women's subordinate place in society and makes them vulnerable to many forms of sexual abuse. In Zambia the coordinated multi

¹³² HIV/AIDS IN Zambia: Back ground projections, Impacts, Interventions. (Ministry of Health and Central Board of Health).p.5.

¹³³ M.Berer (1993), Women and HIV/AIDS: An International Resource Book. p.180.

disciplinary approach to sexual violence which includes the criminal justice system is still limited.

The legal and legislative measures, especially the implementation measures in the criminal justice area to eliminate forms of sexual violence against women are weak in this country. Under the Law in Zambia on rape,¹³⁴ the victim must not consent to the penetration. However this is probably the most complex aspect of the offence of rape. The defendant may argue the victim did consent or that he reasonably believed that the victim consented. However the danger with this provision is that, if the defendant reasonably believed that the victim consented this would be a defence to a charge of rape, even if his belief was unreasonable. This calls for reformation of the law on sexual violence in Zambia. This would therefore need an objective test and when considering the reasonableness of the defendant the judge should take all circumstances of the case into account, including the attributes of the defendant which might be favourable to the defendant. For instance the fact that the victim is wearing a alluring dress mean that the defendant's belief that she would consent to sexual intercourse is reasonable? Surely not, but can we be confident that the judge will not think so. This provision has proved to work in favour of the perpetrators of rape than the victims because the position of the law in establishing criminal is that the defendant should be judged on the facts as they believed them to be, there fore this under the Zambian legal system means that if the defendant believed that the victim consented then he should not be convicted.

¹³⁴ S.132 of Chapter 87 of the Laws of Zambia.

The law is often discriminatory in its rights and application. The main problem which underlines the discriminatory application of the law is that, unwritten customary laws remain in effect. Zambia's dual system of law provides the main legal bases for perpetrating sexual violence. The constitution contains a clause under Article 23, which exempts all forms of discrimination under customary practices.

*Customary law is patriarchal and regards the wife as her husband's property by virtue of the payment of bride price. This approval of male dominance under customary law marriages is the main reason for sexual abuse and the rapid spread of HIV/AIDS in Zambia*¹³⁵. Cultural practices such as polygamy and the practice of dry sex, which can cause lesions that facilitate the transfer of the virus, sexual cleansing and other forms of ritualistic cleansing, facilitate the spread of HIV/AIDS.¹³⁶

4.2 Need for Reform to Meet the Challenges of the 21st Century

Rape is actually one of the forms of male violence against women and has devastating effects.¹³⁷ It involves total violation of a woman's body, mind and spirit, and its effects are long after the act itself.¹³⁸ **ROBIN WEST** argues,

"Heterosexual penetration and fetal evasion are both harmful to women, as is unwanted fetus no less than unwanted penis which evades my body and can potentially destroy my sense of self. An unwanted pregnancy is disastrous and motherhood is intrusive, the child intrudes similarly while the unwanted intercourse is intrusive. The penis occupies the body and drags the woman in intercourse no less than rape."¹³⁹

¹³⁵ Ministry of Health and Central Board of Health, HIV/AIDS in Zambia: Background projection, Impacts, Interventions. p.5.

¹³⁶ Ibid.

¹³⁷ University of Chicago Law Review, Jurisprudence and Gender (1998). P. 1

¹³⁸ Ibid

¹³⁹ Ibid

It is horrifying that rape is now our culture. One of three females is sexually abused before the age of fifteen¹⁴⁰. In a survey taken around the town of Lusaka, out of 50 men and women of different ages, a quarter of the man and sixth of the women said that a man has the right to have sex with a woman as long as he has the aspect of money on her¹⁴¹. The whole mark of the problem is that men are licensed as sexual perpetrators.¹⁴²

The penal code incorporates a section entitled, "Offences against morality."¹⁴³ This section generally contains offences of a sexual nature. From the title of the section, it is already possible that morality plays a big part in the sense that victims of the offences must be above reproach of moral behaviour.¹⁴⁴ Prostitutes are therefore not protected and many attempts to obtain protection of the criminal law against sexual violence are likely to be severely undermined.

As a rape complainant, the woman is denied subjectivity especially with the requirement of a variety of evidential provisions. For instance she has to be subjected to corroboration.¹⁴⁵

Sexual violence has been noted to be common in most towns, districts and provinces of Zambia. Therefore, the question to be asked is, "what can be done to address problem?"

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² By Mercy Siame, Nakatiwa Mulikita, Sara Longwe and Roy Clarke. Beyond Inequalities Women in Zambia 1999.

¹⁴³ Part XV of Chapter 87 of the laws of Zambia.

¹⁴⁴ M.M Munalula, (2005) Women, Gender Discrimination and the Law: Cases and Materials, p.150

¹⁴⁵ Ibid p.151

4.3 The Courts

Many women (victims of sexual violence) have suffered injuries within the justice system. As a result of judges adhering to gender based myths, bias and stereotypes, the intent of the law is compromised or subverted by judges through the exercise of judicial discretion.¹⁴⁶ For instance, instead of accepting evidence as corroboration a judge would consider all the facts of the case and exclude it. Judicial decisions have shown this, for instance in . In **Jackson Zambian V the People**¹⁴⁷, the appellant was convicted of rape. The evidence against the appellant was that he was alleged to have seized a woman in the bush and raped her. The woman was there after seen to be crying by an independent witness. The complainant stated that during the course of the alleged rape she sustained scratches on her legs and she said that the third party whom she met had asked her how she had obtained those scratches. It was contented by the court that in the circumstances there was a complete lack of corroboration and the evidence of distress may not be enough to amount to corroboration. The court quashed the conviction and set aside the sentence. Therefore this use of discretion by judges should be curtailed if the integrity of women has to be protected.

Attitude of Courts

The courts at times do not take rape cases seriously and have an unfavorable attitude to victims. The courts try to consider whether 'the victim' asked for it. This problem underscores the need for effective protection of sexual violence of women and girls

¹⁴⁶ WILSA (1999) Gender Violence: The invisible Struggle; Responses of the Justice Delivery System in Zambia.

¹⁴⁷ (1980) ZR 259 (SC)

against sexual violence and enhances the total violation of a woman's body, mind spirit and autonomy.¹⁴⁸

Speedy Delivery of Justice

There must also be speeding delivery of justice. Practice has shown that sexual offences are reported but an arrest can not be made because the victim is not believed, the police spend much of the time considering the moral character of the victim to ascertain if she is likely to be raped or she has just fabricated the story even when there is sufficient evidence. This has therefore affected the implementation of the law on sexual violence negatively.¹⁴⁹

4.4 The police

A study conducted by WILSA revealed that most matters of sexual abuse are reported to the police and Victim Support Unit. However they lack equipment for proper carrying out of investigations in sexual offences. Therefore sexual offences kit must be accessible by the government. More education and training police officers on sexual abuse and related violence must be given to the police who are merely trained in military and provision of security to the nation.¹⁵⁰

The Ministry of Home Affairs should also provide transport to the Victim Support Unit for the easy follow up of cases.

¹⁴⁸ Research conducted by WILSA Gender and The Criminal Justice system 2001.

¹⁴⁹ M. Chulu, P.M Chileshe, (2001) Gender Violence: The invisible struggle. P.42.

¹⁵⁰ Ibid.

4.5 Rampant Sensitisation on sexual violence

Many women have been victims of sexual violence. However, few cases of sexual violence have been reported due fear and shame, especially considering the fact that most victims are raped by people they know and their relatives. This makes them more vulnerable to sexual violence. Therefore there is need for sensitisation of women about their rights and steps to take if found to be victims of sexual violence.¹⁵¹

4.6 Legislation.

The Constitution.

Customary law that is applicable in some parts of Zambia today is largely discriminatory. Article 23,¹⁵² allows for discrimination of women. Under customary law women are subjected to traditions and customs that perpetrate sexual violence. Therefore there is a need to outlaw this provision and enact a provision specifically dealing with the rights of women against sexual based violence and criminalise all customs and practices indicating forms of sexual violence. As other countries have done for instance the constitution of Uganda under Article 33 (6), which prohibits laws, cultures, customs or traditions which are against the dignity, welfare, or interests of women or which under mine their status.

The penal code.

¹⁵¹ WILSA (1999) Gender Violence: The invisible struggle: Responses of the Justice Delivery System in Zambia.

¹⁵² Chapter 1 of the Laws of Zambia.

The penal code ¹⁵³ is the prime source of the law relating to sexual violence in Zambia.

Under section 132 rape is defined as

," Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or fear of bodily harm, or by means of false representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape."¹⁵⁴

To prove rape in Zambia one must show that penetration was effected on the victim who did not consent or that the defendant had no reasonable belief that the victim consented.

Section 132 of the penal code providing the definition for rape appears to restrict rape to vaginal penetration. This can be contrasted with section 1 (1) (a) of the Sexual Offences Act,¹⁵⁵ which provides that a person commits the offence of rape if he intentionally penetrates the vagina, anus or mouth of another person with his penis.

There is need to include the penetration of the anus, mouth and other openings of the woman's body within the definition of rape provided it can be proved that she did not consent, because all this involves the violation of her body and undermines her freedom to choose how, with whom and when to have sexual intercourse.

Under the penal code¹⁵⁶ a defendant will only be guilty if he did not reasonably believe that the victim is consenting. However reasonable belief postulates an objective test, so that liability is based on negligence and the alleged belief is reasonable is to be answered

¹⁵³ Chapter 87 of the laws of Zambia.

¹⁵⁴ Section 132 of chapter 87 of the laws of Zambia.

¹⁵⁵ 2003.

¹⁵⁶ Section 132 chapter 87 of the laws of Zambia.

by reference to the surrounding circumstances¹⁵⁷. The danger with this provision is that a defence has been given to the accused, who had a reasonable but mistaken belief that the victim was consenting. There fore there is need for reform because this provision has proved to work against the victims by offering a defence to the accused.

4.7 Rules of Evidence

The rules of evidence pertaining to sexual violence and conduct of trials relating to sexual offences especially for child victims need to be revised and favorable to witnesses of tender age who happen to be victims of sexual abuse because judicial decisions have shown that they have worked more in favour of the defendant than the victim. For instance in the case of, Nsofu v The People¹⁵⁸, The appellant was convicted of defilment. This girls said that they were playing when the accused arrived and defiled the girls. The accused admitted having been with the girls but denied having had sexual Intercourse with each of them. It was held that it was important ascertain if the witness is of tender age if she understands or appreciates the nature of the oath and such evidence must be corroborated.

4.8 Rehabilitation

There should also be a facility for rehabilitation of victims of sexual crimes; the only rehabilitation currently available is for perpetrators.

¹⁵⁷ J Herring (2005) criminal Law. p.171.

¹⁵⁸ (1973) Z.R 47.

4.9 Participation of Women in legislation and policy.

In order to ensure that the efficient and expedient passing of policies and their attendant pieces of legislation, the government must ensure the participation of women at all levels of the policy and legislation making process to ensure that subsequent policies are amended especially those of socio-economic nature that contribute to women's HIV/AIDS infection.

Men and boys should also be educated from an early age on the role played by women in National development and the society general. The government should include come up with a curriculum aimed at respecting women and not to be viewed as sex objects for personal satisfaction.

Finally, the legal status of women and girls in Zambia should be enhanced through better knowledge of the law and a citizen oriented judiciary. A strategy for disseminating Information about sexual violence should be developed at the grass root level as well as judicial institutions.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS.

This chapter will concentrate on giving conclusions and recommendation on the problems identified in the Zambian legal system on rape and other kinds of sexual violence against women.

The definition of a legal system adopted encompasses statutory laws, customary laws, decided cases, court processes and law enforcement mechanisms such as the police.

5.1 Conclusions

Zambia's commitment to Eradicating Gender Violence

Zambia has demonstrated commitment and political will to deal with gender and sexual violence at various levels.

At international level, Zambia has signed and ratified all the major international instruments including his convention on the Rights of the Child (CRC), and she is a signatory to the African Charter on Human and people's rights (ACHPR)¹⁵⁹. In 1995, Zambia attended the fourth world Conference at which violence against women was identified as one of the priority areas of concern.

¹⁵⁹ M.M.Munalula (2005) Women, Gender Discrimination and the Law: Cases and Materials, p.34.

At the regional level, Zambia is a signatory to the Southern African Development Community (SADC), the declaration on Gender and Development, 1997 and its addendum on the “prevention and eradication of violence against women and children 1998”. In the addendum, the SADC Heads of State and Government reaffirmed their commitment to the prevention and eradication of violence against women and children in the region.

At national level, the condemnation of various acts which cause physical, sexual or psychological harm or suffering to women and children is enshrined in the Republican constitution, Article 23 prohibits discrimination on the basis of sex. However, Article 23 allows for discrimination of women in wide areas of social practice by making the provision in clause 4, which excludes application in relation to custom and tradition, which are a source of sexual abuse, and licensing men as sexual predators¹⁶⁰.

Zambia has also established various institutions which include Gender in Development Division (GIDD), Zambia women’s Parliamentary caucus (ZWPC), the Gender Forum, the Permanent human Rights Commission (PHRC) and the Victim Support Unit (VSU).

Legally, the Zambian constitution ensures that men and women are equal under the law and have the same protection under the law. However, customary law and some cultural notions of women’s role in society often undermine this constitutional guarantee. The

¹⁶⁰ This is against the spirit of Article 4 of the Declaration on the Elimination of All Forms of Violence Against Women asks states to condemn violence against women and not to invoke any practices and traditions considered as violence against women.

way the law views women is often different from the way communities and families view women.

According to feminist jurisprudence the equality under the law can not be resolved by a simple declaration.¹⁶¹ Feminist jurisprudence regard the law as male this stems from the empirical observation that most law makers and practitioners are biologically male¹⁶² Therefore, although the law protects women and girl, sexual violence against them continue.

It can be said that there is need to repeal all articles and section that extenuate or justify sexual violence.

In 1985 Zambia ratified CEDAW (Convention on the Elimination of All forms of Discrimination Against women), however, although Zambian law prohibits discrimination of any kind on the basis of sex. Discrimination is part of the legal system. The dualistic nature of the Zambian legal system which recognises the existence of both customary and statutory laws has contributed to sexual violence. Under customary law women are treated as second class citizens with minimal rights.

¹⁶¹ M.M Munalula (2004). Women Gender Discrimination and the Law: Cases and Materials, P.10.

¹⁶² Ibid. p. 11.

Rape as provided by the law,¹⁶³ is a felony and carries a life sentence, however there is a gap between the maximum sentences provided by legislation and the jurisdiction and the courts. This sends messages to perpetrators that rape is not a serious issue.¹⁶⁴

Although the penal code prohibits having carnal knowledge of a girl below the age of 16 years, one can have carnal knowledge a child under customary law provided the parents of the child consent and all the requirements of a customary law marriage such as payment of bride price are satisfied.¹⁶⁵ Therefore this indicates that one can break the law (defilement) under the guise of customary law.¹⁶⁶ There is need to have a complete revision of customary law to suit modern day life.¹⁶⁷

Sexual violence has also often contributed to the spread of HIV/AIDS in Zambia. This has devastating effect on the women's health. The consequences of HIV/AIDS reach beyond women's health to their role as mothers and care givers and their contribution to the economic support of their families.

5.2 Recommendations.

It is therefore important to use all-encompassing definition in addressing the issue of violence against women. Furthermore, there is need to take heed of all different

¹⁶³ Section 132 of chapter 87 of the laws of Zambia.

¹⁶⁴ Research conducted by WILSA. 1999.

¹⁶⁵ This can be contrasted with Article (2) of the Namibian Constitution which provides that, Marriage shall be entered into only with the free and full consent of the intending parties.

¹⁶⁶ S.138 of chapter 87 of the laws of Zambia

¹⁶⁷ Article 4 of the Declaration on the Elimination of Violence Against Women asks states to condemn violence against Women and not to invoke any custom, tradition or religious practices that perpetrate violence against women.

perceptions and types of analysis used to identify the common threads and root causes of the problem. All international instruments relating to sexual violence against women should be ratified and domesticated in order to enable citizens make use of them and enforce their rights through domestic courts. Zambia however, has a legal regime under which international instruments are not self executing but require enabling legislation that is directly enforceable by the courts.

Violence against women is perceived differently by different disciplines and actors. To some, it is a crime calling for penal sanction and the solution lies within the criminal justice system. To others sexual violence is a legal problem, requiring broader legal interventions. For some people, violence against women is a human rights issue that can be tackled by in the wider context of violations of women's or indeed people's human rights. To others, violence against women is a medical problem best handled by the medical professionals. Till others say it is a psychological problem that requires psychological treatment. Violence against women has also been seen as cultural issue. To these people, the solution lies in attitudinal changes within the society.

Sexual violence is the most destructive form of violence, and we need to face it head on, however unpleasant and difficulty the task may be, sexual violence has far reaching implications which may permanently harm the life of the victim.

If a woman is sexually assaulted, their personal and social development can be hampered. They may be unable to do both productive and reproductive work they would

otherwise have done if someone had not incited torture on them. In addition to physical injury, victims of sexual violence may be infected with the sexually transmitted diseases including the deadly HIV/AIDS, thus not only affecting the immediate victim but also the members of the family, friends and the nation at large.

November 25th was declared an international day on violence against women at a conference in 1981¹⁶⁸. Women systematically denounced gender violence from domestic battery, to rape and sexual harassment.

Corrective and positive action should be taken in those areas where sexual violence against women continues to exist in law and in fact. The court must be more efficient in handling gender cases; this can be done by increasing their number of female adjudicators country wide.

Women should also be sensitised on their rights. The victims should also be well informed of the steps that are necessary to ensure that pertinent evidence is preserved to build the strongest case possible against the perpetrators. These include not remaining silent about the issue, talking with a trusted friend, family member, pastor or professional counselor; not to wash, bath or change clothes (for preservation of evidence and corroboration); and reporting to the nearest police station or police officer immediately. The victim should also be advised to go to the hospital or medical clinic immediately after being sexually violated to receive an examination by a certified doctor and receive a medical report, and to give the medical report to the police.

¹⁶⁸ Siame, Mercy et al (2004) Beyond Inequalities: Women in Zambia, p. 9.

Sensitisation can be done through public education of people from different walks of life to modify the social and cultural patterns with a view to achieving the elimination of all other practices which are based on the idea of the superiority of the male over the female.

Legislation on sexual ,international, regional and at national level is enough but effectively implementing appropriate regulatory measures including those prohibiting and curbing all forms harmful practices which endanger the health and well being of women is the only problem in the Zambian legal system.

All laws, customary practices and stereotyped attitudes which are against the dignity and which affects the dignity of women adversely should be prohibited. For instance any law that would require the disclosure of personal details of the victim to the public, would led to victims to conceal cases of sexual abuse for fear of being stigmatised and embarrassed, especially considering the fact that most victims of sexual violence are assaulted by the people they know.

The constitutional provisions are presently under review in the hope of making them more relevant to women. Women's rights as part of human rights have been on the constitution review since 1990 when the Mvunga¹⁶⁹ commission recommended a democratic constitution. However the majority of recommendations on human rights were rejected on grounds that they were adequately covered by other relevant laws.

¹⁶⁹ M.M Munalula (2004). Women Gender Discrimination and the Law: Cases and Materials, p.50.

Similarly the Mung'omba Constitutional review commission has specific provisions on Women rights which should be adopted if the reality of women in Zambia is ever going to be restored. Article 41(2) of the draft constitution of the republic of Zambia,¹⁷⁰ provides that men and women are entitled to be accorded the same dignity and respect of the person.

This is the first time the rights of women to equality with men is being expressly recognised. Article 41(5) of the draft constitution of the Republic of Zambia provides that, any law, culture, custom or tradition that undermine the dignity, welfare, interest or status of women or men is prohibited.

The Articles in the draft constitution of the republic of Zambia are a step further in the implementation of the Convention on the Elimination of All Forms Discrimination Against Women, which seeks to eliminate all forms of discrimination against women in order to ensure that they are able to enjoy their rights in full.¹⁷¹

Some of the following steps should be taken by government to address the problem of sexual violence in Zambia:

(1) Encouraging victims promoting awareness through campaigns to change harmful and negative cultural attitudes through appropriate mechanisms, to report cases of all forms violence and abuse to relevant law enforcement agencies;

¹⁷⁰ The secretariat, constitution Review commission, Lusaka 20th December.2005.

¹⁷¹ Article 3.

(2) Establishing a mechanism to coordinate the effort of the police, social welfare workers and legal personnel in dealing with cases of gender violence;

(3) Expanding and strengthening the operation of the police Victim support Unit to effectively cover the entire country;

(4) Building capacity among law enforcement agencies to handle cases of gender violence by increasing their skills in counseling, psychology, social work, gender and human rights;

(5) Promoting and conducting awareness campaigns targeted sexual violence , Sexual harassment and abuse.

(6) Improving women participation in law enforcement and crime prevention.

5.3 The penal code.

The law relating to sexual violence is archaic and full of Latin maxims. For instance S.132 of the penal code uses words such a carnal knowledge when the court is faced with a witness of tender age in sexual offences, it must conduct a voire dire to ascertain if the child is competent and understands the nature of an oath and importance of telling the truth. The form in which a law is written influences the extent to which people know and

use it. Therefore when drafting the laws on sexual violence, careful attention must be given to the language used to facilitate the understanding by the general population less it will be a preserve of few individuals who can understand and apply legal terms (The legal profession), which should not be the case in democratic states like Zambia. Therefore the law on sexual violence should be couched in simple and clear language without Latin maxims.

Legislative and regulatory gaps as well as lack of implementation and enforcement of legislation and regulations perpetrate sexual violence. The law relating thereto and providing penalties therefore must be reviewed in order to stiffen the penalties for those who sexually exploit women Rape as provided by the law,¹⁷² is a felony and carries a life sentence; however there is a gap between the maximum sentences provided by legislation and the jurisdiction and the courts

Section 132 of the penal code, which is the definition section of rape, should be reviewed to remove the provision, which gives a defence to a defendant who had a reasonable belief that the victim of rape was a consenting. The danger with this provision is that one can have a reasonable but mistaken belief; still he can be protected by the law, therefore giving more protection to the defendant than the complainant.

In sexual offences as a matter of practice corroboration is need before conviction. Procedural requirements for instance the need for corroboration as to the identity of the accused and commission of the crime to remove possibilities of false implications and

¹⁷² Section 132 of chapter 87 of the laws of Zambia.

fabrications of the story by the complainant has in some cases have provided more protection to the perpetrators of sexual violence than the victim¹⁷³

5.4 Customary practices and traditions.

The dualistic nature of the Zambian legal system which recognises the existence of both customary and statutory laws has contributed to sexual violence in Zambia. Customary law applicable in Zambia today is discriminatory. Therefore customary practices and traditions that make women and girls prone to sexual violence should be criminalised and Article 23 should be repealed to conform to the modern law on sexual violence.

Customary law teachings that indoctrinate women into believing that they should always be sexually available should be prohibited by enactment of the relevant law. As Article 24(2) of the Malawian constitution provides in part that, legislation shall be passed to eliminate customs and practices the discriminate against women.

The Constitution which is the grund, norm of every democratic society should be have a provision which specifically protects women against sexual violence and all customs and practices that accelerate violence against women and girls should be condemned. Therefore, Article 41(5) of the draft constitution of the Republic of Zambia provides that, any law ,culture, custom or tradition that undermine the dignity,welfare,interest or status of women or men is prohibited. Should be adopted.

¹⁷³ Jackson Zimba V The people (1980)Z.R 259 (S.C)

5.5 Existing Support service in place

Zambia has demonstrated commitment and political will to deal with gender and sexual violence at various levels.

5.6 Victim Support Unit.

Other measures taken by the Government to address the problem of gender violence was the establishment of the Victim support unit (VSU) in 1994. The VSU became operational in 1996 as part of the Zambia Police reform programme to specifically deal with victims of gender violence and other related crimes. Cases dealt which include, property grabbing, spouse barring and sexual abuse. Practice has shown that the victim Support Unit is aware of the occurrence of sexual violence in the communities and cases have been reported to them but there has been no follow up. Therefore there is need to provide resources and more personnel to enable effective follow ups and bring perpetrators to justice and deter would be offenders.

There is also need for resources so as to open more improved institutional support which would give support to victims of sexual violence. This would be in terms of providing information, , counseling and compassion.. More resources to the victims support unity would help to adopt a zero tolerance policy with regards to all forms of violence against women and girls in urban and rural areas.

5.7 Hospitals

The main task of hospitals and health centers is to provide treatment for health problems. Most hospitals and health centers have medical social welfare units, which deal with cases of gender violence and child abuse. The health institutions also participate in the justice delivery system through certifying that a woman or girl has actually been raped or sexually assaulted. More resources need to be allocated to departments dealing with sexual violence in the budgeting of the health sector.

There is need to come up with policy that makes it mandatory for women to have free medical care especially for problems related to sexual violence.

5.8 The Permanent Human Rights Commission (HRC)

The permanent Human Rights Commission is a constitutional body created under Article 125 of the Republican Constitution¹⁷⁴. The commission is mandated to promote and protect all Human Rights and fundamental freedoms including the power to carry out investigations. The commission also receives and deals with complaints of human rights abuses. This Commission should concentrate more sexual violence a form of human rights abuse and come up with effective policies to implement the law on sexual violence in the Zambian legal system if the integrity of women and girls has to be protected.

¹⁷⁴. Chapter 1 of the laws of Zambia.

5.9 Orphanages

There are a number of orphanages operating privately in Zambia. However, these are loosely linked with the Department of Social welfare. A number of girls who are orphans are sexually abused because they have no one to report to therefore there is need to link the orphanages to the social welfare department.

5.10 National Legal Aid Clinic for Women.

The National Aid clinic for women is a project of the Women's rights committee of the Law association of Zambia. It was established with the aim of assisting the underprivileged citizens. The clinic provides full legal services to poor women and children who cannot afford the high costs of consulting and engaging a lawyer. It is mandated to develop law as an instrument of social justice, encourage lawyers to serve the people. Deal with legal aid and representation for the disadvantaged. It also promotes law reform and, in so doing, co-operates with other institutions and professionals. More lawyers should be employed to give legal services to victims of sexual abuse and this will also help increase the number of cases that the clinic will take up.

The goal of the clinic is to empower women by providing them with the means to enforce their legal rights. . The clinic is based in Lusaka and has offices in Ndola. The office covers the Copper belt, Luapula, Northern and North western province, while the Lusaka office covers the rest of the country.

5.11' Non-Government Organizations

The are a number of non-government addressing the sexual violence in Zambia.. These have made tremendous contributions. NGOs are actively involved in the promotion of women's and children's rights. These include Young women Christian associated (YWCA); Law and Development association (LADA); Women in Law and development in Africa (WILDAF); Legal resources Foundation: Medical Women's Association of Zambia (MWAZ); Society for Family Health; and others. There is need for legal personnel to be employed in these NGOs offering the promotion of women's rights and the fight against sexual violence. There should also be an effective not working between NGOs and other institutions involved in the fight against sexual violence.

5.12 The Department of Social Welfare

The department of social welfare is mandated to provide various services to the community. Which include counseling and sensitisation .The department also has mandate to remove physically abused, neglected and sexually abused children from homes where they are abused and place them a home in safety.

The department of social welfare also has statutory responsibilities under the, Juveniles Act,¹⁷⁵ to handle cases involving juveniles there more resources should be allocated to it to protect the girl child against sexual violence. Legal practitioners should take more cases on a proborno basis to help combat sexual violence.

¹⁷⁵ Chapter 217 of the laws of Zambia.

5.13 Curriculum.

There should be a deliberate policy to include human rights with specific emphasis on sexual violence starting from primary school levels. Sexual violence should be one the subjects offered to pupils. This would help to sensitise them and be well informed about sexual violence.

Government should also review its education curriculum and enact laws prohibiting the use of materials that may work adversely on the psychology of pupils to consider women and girls as sex objects.

5.14 Marriage.

Women should be accorded the same rights as men in marriage legislation should be enacted to eliminate domestic violence against women by their husbands or any male person they cohabit with.

The enforceability of lobola (Bride price) should be abolished so as to enhance equality between husband and wife in marriage in light of the fact the lobola contributes greatly to the insubordination of women inferiority in marriage.

I should state that violence against violence against is perceived different disciplines and other people. It is therefore important to use all-encompassing definition and other relevant stake holders, in addressing the issue of violence against women. Furthermore,

there is need to take heed of all different perceptions and types of analysis used to identify the common threads and root causes of the problem.

BIBLIOGRAPHY.

BOOKS

- .Anyangwe,C. (2004) Introduction to Human Rights And Humanitarian Law.Lusaka:UNZA Press
- Card, Cross and Jones (2004) Criminal Law (16th Ed.)Ohio; lexis Nexus Butter worths.
- Dawn B. Berry (1998), Domestic Violence sourcebook; Lowell House, NTC/Contemporary Publishing Group.
- Herring. (2005) Criminal Law. New York: Palgrave.
- Kulusika, E,S. Text cases and materials on Criminal Law In Zambia. Lusaka:UNZA Press.
- Murphy. (2002) Evidence. New Delhi: Universal Law Publishing co. PVT.Ltd
- Legal resources Foundation (LRF) News Number 33; Lusaka Zambia, 2001
- Law Review (1998) Jurisprudence and Gender, University of Chicago
- Murphy. (2002) Evidence. New Delhi: Universal Law Publishing co. PVT.Ltd.
- Munalula M.M (2005) Women Gender Discrimination and the Law: Cases and Materials. Lusaka :UNZA
- Tomasevshki. (1993), Women and Human Rights, London: zed Books.
- Siame, Mercy et al (2004) Beyond Inequalities: Women in Zambia; Harare: Cannon
- Other works**
- Muchelema. (1991) "Economic Battering." A Paper submitted at YWCA Seminar in Lusaka,1991.
- Ministry of Health and Central Board of Health, HIV/AIDS in Zambia: Background projection, Impacts.
- WILSA, Gender and the criminal justice system (2001).

The secretariat (2005), constitution Review commission, Lusaka 20th December.

Walker, A.S., and Semler (1998) Rights of women: A guide to the Most Important United NATIONS,

HIV/AIDS In Zambia: Background projections, Impacts, Interventions.Ministry of Health and Central

Board of Health, Zambia

..

.

The secretariat (2005), constitution Review commission, Lusaka 20th December..