



# **REPUBLIC OF ZAMBIA**

**REPORT** 

**OF THE** 

# COMMITTEE ON YOUTH, SPORT AND CHILD MATTERS ON THE REPORT OF THE PETITION BY THE NEW GENERATION TIME ON THE NEED TO STIFFEN LAWS ON CHILD ABUSE AND DEFILEMENT

#### **FOR THE**

#### FOURTH SESSION OF THE TWELFTH NATIONAL ASSEMBLY

Printed by the National Assembly of Zambia

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REPORT OF THE COMMITTEE ON YOUTH, SPORT AND CHILD MATTERS ON THE PETITION BY THE NEW GENERATION TIME ON THE NEED TO STIFFEN LAWS ON CHILD ABUSE AND DEFILEMENT FOR THE FOURTH SESSION OF THE TWELFTH NATIONAL ASSEMBLY

# 1. Membership of the Committee

The Committee consisted of Mr C Miyutu, MP, (Chairperson); Ms E Kabanshi, MP (Vice Chairperson); Mr M Mutelo, MP; Mr E Sing'ombe, MP; Mr P Kalobo, MP; Mr L N Tembo, MP; Mr Y Siwanzi, MP; Mr W Banda, MP; Mr R Bulaya, MP; and Mr C K, Mwiinga, MP.

The Honourable Mr Speaker National Assembly Parliament Buildings **LUSAKA** 

Sir

The Committee has the honour to present its Report on the Petition by the New Generation Time on the Petition to stiffen the laws on Child Abuse and Defilement for the Fourth Session of the Twelfth National Assembly.

#### 2. Functions of the Committee

Pursuant to the functions of the Committee set out under Standing Order No. 157(2), the Committee is mandated to consider any matter referred to it by the Speaker or an Order of the House.

# 3. Meetings of the Committee

The Committee held seven meetings to consider the Petition by the New Generation Time on the need to stiffen laws on Child Abuse and Defilement.

#### 4. Procedure adopted by the Committee

In order to familiarise itself with the issues under consideration, the Committee requested written and oral submissions from the stakeholders listed at Appendix II.

# 5. Background

The New Generation Time (NGT) petitioned the National Assembly following the rising cases of child abuse and defilement in Zambia.

According to the Petitioner, some research carried out showed that the criminal justice system was allowing perpetrators to get away with light sentences. The research indicated that child sex predators were getting away with lighter sentences because magistrates and judges were reluctant to impose deterrent sentences.

The Petitioner also stated that the age of consent was 16 years and that this age should be upheld in practice even by the judicial system. Children under the age of 16 year could not consent to sex. It was, therefore, important that the criminal justice system saw these acts as rape and defilement which should carry severe sentences. The Petitioner objected to the practice of reducing these sexual crimes to assault. The Petitioner was of the view that the justice system needed to pass sentences that could deter would-be offenders, thus making the making the law effective.

Further, the Petitioner stated that parents had resorted to making their children marry the offender as the law was not effective. The Petitioner believed that the numbers of defilement cases kept rising because the punishment was too light, hence the need to put in place laws that would deter would-be offenders. In this regard, the Petitioner proposed:

- (a) no bail for defilers;
- (b) no bond for defilers;
- (c) castration of defilers; and
- (d) fast track courts to prosecute defilers.

#### **6.0 SUBMISSIONS BY STAKEHOLDERS**

Most stakeholders who appeared before the Committee were in agreement with the Petitioner that children and, in particular girls had been subjected to the worst forms of sexual violence or abuse, mostly perpetrated by men. Among the reasons advanced why such vices had continued to rise were lack of trust in institutions set up to address such acts and the deep rooted patriarchal nature of the Zambian society where a young girl was viewed as a bride, hence promoting child marriage.

While stakeholders fully agreed with the Petitioner that there was a high prevalence of sexual violence against girls and that more needed to be done to protect the girl-child by handing down stiffer punishment to perpetrators, they did not support the view that one of the ways to address the situation was to deny police bond and bail for suspects or accused persons charged with defilement. They were also against the proposal to introduce castration as a form of punishment for those convicted of defilement. This was because police bond and bail were premised on the constitutional right of presumption of innocence regardless of the charge that one might be facing. Further, the proposal

to introduce castration as a punishment was contrary to international and regional human rights standards as well as national laws because it would amount to subjecting a person to torture and other forms of cruel, inhuman and degrading treatment or punishment. However, stakeholders were in agreement with the Petitioner on the need to have fast track courts in place to deal with sexual offences, including defilement.

Despite most stakeholders being in agreement with the Petitioner that defilement cases were on the increase, the Ministry of Home Affairs submitted that there was a decrease in number of reported defilement cases. However, the Ministry acknowledged that there could be defilement cases that had not been reported. According to records at the Ministry, in the decade 2008 to 2018, the country experienced a high number of defilement cases between 2009 and 2013. There was a downward movement from 2014 when the number of reported defilement cases begun to decline. Figure 1 is a graphical representation of the number of reported defilement cases the country experienced during the period under review.

NUMBER OF CASES — TREND LINE

Figure 1: Trend of Defilement Cases for the Period 2008 To 2018

Source: Zambia Police Service (Victim Support Unit)

The Committee was informed that the graph indicated that the country witnessed a decline in the number of defilement cases reported during the period 2014 to 2019. This downward trend could be attributed to a number of factors, including the following:

- (a) increased awareness by the general public on the stiff punishments being imposed on child defilers;
- (b) increased awareness by the general public on the long-term negative effects of defilement on the victims (children);
- (c) increased awareness on the need for parents to take full responsibility for the safety of their children;
- (d) increased awareness and the need to prevent some traditional practices that perpetrated the vice against children; and
- (e) increased reporting through print and electronic media on the defilement cases and the stiff punishments imposed on perpetrators also played a role in deterring would-be offenders.

While acknowledging the high prevalence of defilement cases, stakeholders were not in support of the Petitioner's proposals. To elaborate further on why they disagreed with the proposals, they submitted as set out below.

#### 6.1 Bond and Bail

The Committee was informed that bond or bail was a temporary release of an accused person in exchange for security given for his or her appearance at a later hearing. A bond was given by the police while bail was granted by the court. The release of an accused person on bond and bail was premised on the constitutional presumption of innocence where the offence was bondable or bailable in line with Section 33 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia if the matter was in the hands of law enforcement agencies or in line with Section 123 of the same Act which provided for bail pending trial.

Stakeholders submitted that *Section 33 of the Criminal Procedure Code* provided that:

"When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an appropriate competent court within twentyfour hours after he was so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond: but, where any person is retained in custody, he shall be brought before a competent court as soon as practicable.

Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."

Stakeholders cited this provision to remind the Committee that a suspect should be brought before the court within twenty-four hours and not forty-eight hours. If a suspect was not brought before the court within twenty-four hours, the Officer-in-Charge was duty bound to consider releasing the person on bond or bringing him/her before a competent court as soon as they reasonably could.

The Committee was informed that the principle of presumption of innocence had been the cornerstone of criminal justice worldwide. In this regard, stakeholders cited other laws such as *Article 11 of the Universal Declaration of Human Rights* (UDHR) which states that:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

In the same vein, Article 14 (2) of the International Covenant on Civil and Political Rights (ICCP) which Zambia ratified and partly domesticated; states that:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

At regional level, Article 7(1)(b) of the African Charter on Human and Peoples Rights also known as the Banjul Charter states that:

"Every individual shall have the right to have his cause heard. This comprises:

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal..."

Zambia domesticated the fundamental principle of presumption of innocence under *Article 1(2)* of the Constitution, Chapter 1 of the Laws of Zambia which provides that:

"Every person who is charged with a criminal offence-

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;..."

In view of the aforementioned international and regional human rights standards as well as the provision in the Zambian Constitution, stakeholders found it difficult to support the proposal to make defilement non-bondable or non-bailable. If anything, some stakeholders were of the view that even the non-bailable offences such as murder should be made bailable as was the practice in other jurisdictions such as South Africa.

Stakeholders also noted that there were countries where rape offences were non-bondable or non-bailable. They submitted that Section 104 (3) of the Malawian Criminal Procedure and Evidence Code Chapter 8:01 prohibited the granting of bail or bond in respect of genocide, murder, treason or rape. Similarly, Section 17 of the Criminal Procedure Code Act of Uganda (1950) prohibited bond or bail where a person was charged with murder, treason or rape. Section 36 of Kenya's Criminal Procedure Code Act Chapter 75, equally made offences such as murder, treason, robbery with violence and attempted robbery with violence non-bailable. However, stakeholders observed that the above cited countries had some constitutional safeguards which allowed persons to be released on bond or bail for all offences. For Example, Section 42(2)(e) of the Constitution of Malawi stated that:

"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right to be released from detention, with or without bail unless the interests of justice require otherwise;..."

Further, Article 23(6) of the Constitution of Malawi stipulate that:

"Where a person is arrested in respect of a criminal offence- (a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable..."

The situation was similar in Kenya as per Article 49(1)(h) of the Constitution of Kenya of 2010 which provided that:

"An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

For instance, in the case of Fadweck Mhave v Republic MSCA Criminal Appeal No. 25 of 2005, the Supreme Court of Appeal of Malawi interpreted Section 42(2)(e) of the Constitution to mean that all offences were bailable, even the so-called heinous offences such as murder and treason, unless the interest of justice required otherwise.

Stakeholders highlighted that in Zambia, constitutional bail was provided for under Article 13(3) which provided that any person who was reasonably suspected of having committed a crime and who was not released, and had not been tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

In line with the provisions of the law, a person charged with an offence was to be presumed innocent until he was proved guilty or had pleaded guilty. Thus, a denial of police bond or bail by the court on the basis that the suspect had committed a sexual offence was as good as presuming that the said person was guilty. This would be unfair on any person wrongly or falsely charged with a sexual offence. This was because there could be unscrupulous persons seeking to fix their perceived opponents. For instance, the National Assembly in 2001 amended the Penal Code with regard to the offence of theft of motor vehicles. It was made non bailable. To this effect, a person was charged with an offence of motor vehicle theft and detained because it was alleged that he had an affair with someone's wife. It was later found that there was nothing to it. The Committee was also reminded about somebody who was charged with a similar offence and later became a public person was also at one point charged with the offence of motor vehicle theft, and later it was found that there was nothing to it.

The Committee was also informed that when dealing with sexual offences, the judiciary sought corroboration of the offence. Corroboration addressed two aspects of the offence. Firstly, it should show that the offence was committed. Secondly, that the accused person committed that offence. This was because a person could frame another. For instance, a man who promised marriage to a girl, but later changed his mind and married another girl, could be framed. To fix this young man, the girl could cry rape, and the young man could be detained without bail until such a time that evidence was found to show that he did not commit the offence.

Against this background, and taking into consideration the human rights aspects as well as the danger of people not telling the truth, the stakeholders were of the view that defilement should remain a bailable offence as was currently the case. The stakeholders expressed the view that if bail or bond should only be taken away for any offence, let it be for two reasons. Firstly, that the offender would not show up at court. Secondly, that the offender would interfere with the witnesses. If either of the two were likely to happen, then bail and bond should be denied. Stakeholders emphasised that the non-provision for bail on motor vehicle theft was unfairly used against one individual who was alleged to have offended a politician.

Further, in view of the inadequate prison space currently in the country, overcrowding in prisons would be further compounded once bond or bail was denied to suspects, as a matter of law. This overcrowding would in turn contribute to denial of the basic human rights of those imprisoned. The prisons were also designed to be places of reform and not necessarily dungeons of punishment.

In view of the foregoing, most stakeholders opposed the proposal to remove provisions for police bond and bail for persons being investigated or charged with sexual offences unless they were interfering with witnesses or were likely to fail to attend court.

Against this backdrop, stakeholders were of the view that Zambia was lagging behind in actualising the presumption of innocence by restricting bond or bail for murder, treason, aggravated robbery and other non-bailable offences. It was anticipated that Zambia should move towards qualified access to bail for all offences as obtaining in other countries rather than lengthening the list of non-bondable or non-bailable offences by the inclusion of the defilement offence.

#### 6.2 Castration of sexual offenders

Stakeholders submitted that the idea of imposing of castration as a means to address sexual violence against children was not new in Zambia as well as world over. For instance, in the United States of America, seven States allowed for some form of castration under very strict conditions which allowed the procedure to be reversed when the judge deemed it fit. The States included Alabama, California, Florida, Guam, Louisiana, Montana, and Wisconsin. They noted that in most cases, castration was voluntary and optional in order to speed up the parole process.

Stakeholders acknowledged that defilement was a serious crime that needed to attract appropriate sanctions commensurate with the

seriousness of the offence, but they did not support the use of castration to punish defilers because it would be a violation of international human rights standards. This was because castration constituted torture and other inhuman and degrading treatment or punishment which was prohibited in absolute terms in line with Articles 5 of the UDHR, Article 7 of the ICCPR and Article 5 of the Banjul Charter as well as Article 15 of the Constitution of Zambia Chapter 1 of the Laws of Zambia.

Stakeholders further observed that international law required that a person consent to any medical procedure such as castration. The absence of the requisite consent constituted a violation of one's right. Article 7 of the ICCPR states that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The United Nations made the following observations when considering Turkish laws and suggestions to impose chemical castration against child sexual offenders:

"Subjecting perpetrators to chemical castration without their consent, constitutes a violation of the international human rights law. Chemical castration without consent is an extreme penalty and constitutes cruel, inhuman and degrading punishment."

Stakeholders also observed that castration without consent of the perpetrator constituted a violation of *Article 1 of the International Convention against Torture* and other cruel inhuman or degrading treatment or punishment. The United Nations Convention Against Torture (UNCAT) defined torture as:

"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed, . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

In this vein, from a human rights point of view, the suggestion to castrate sexual offenders was not supported because there were many other forms of punishment that could be used. In the event that an appeal of punishment was successful, there was danger of wrongful convictions leading to castration which may not be reversible.

Stakeholders were opposed to the recommendation that persons charged or convicted of sexual offences be castrated. This was because firstly, castration was an extreme and emotional response to solving a prevalent problem. The possible ramifications of castration were two-fold as explained below.

Firstly, if allowed, it might encourage a culture of violence, that is, instant mob justice towards suspects of sexual offences. Citizens should not be encouraged to take the law in to their own hands. Rather, they should be encouraged to wait for the due process of the law. It was further argued that if such a law was passed, people in communities could take the law into their own hands and castrate suspects. However, stakeholders were alive to the fact that there were two types of castrations.

- (a) there was medical castration where a person could be stopped from reproduction; and
- (b) the brutal physical one where the genitalia of a person was removed.

Secondly, imposition of castration as a deterrent or punishment would be contrary to the fundamental freedoms enshrined in the Constitution of Zambia as it amounted to torture, inhuman and degrading treatment, which Article 15 of the Constitution prohibited. The Article states that:

"A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment."

For instance, in a land mark decision of the High Court delivered by retired Judge Essau Chulu, the element of canning was removed from the Penal Code because it was found to be an act of torture. Therefore, castration was contrary to the tenets of a democratic society.

Furthermore, stakeholders stated that the nation was moving towards reformation of the offender and that was towards restorative justice as opposed to punishment or retribution, hence the change in name from Zambia Prisons to Zambia Correctional Service.

#### **6.3 Fast Track Courts**

Almost all stakeholders were in agreement on the need for fast tracking sexual violence cases including rape and defilement. The speedy disposal of cases involving sexually abused children could help them begin the healing process quickly. Being victims, they should not be made to relive the events of their attack for a long time through the court process. In addition, an accused person was equally entitled to a trial within reasonable time in line with Article 18(1) of the Constitution.

Stakeholders were of the view that fast track courts designed to deal specifically with sexual offences would greatly reduce the anxiety suffered by victims as they would go through the court process in a relatively short period of time. Further, children would be spared the inconvenience of waiting for extended periods of time before they could be called upon to testify. Long periods of waiting had a negative impact on the quality of evidence tendered by children.

Stakeholders were, however, cognisant of the fact that establishment of fast track courts required long term planning because of the significant financial implications due to the need to build infrastructure. They also acknowledged that efforts were in place to establish such courts as evidenced by the six Anti-Gender Based Violence Fast Track Courts in Lusaka, Kabwe, Mongu, Chipata, Choma and Ndola. The establishment of fast track courts would expedite the delivery of justice in sexual offence cases.

# **6.4** Appropriateness of the minimum sentence

Stakeholders further noted that the Petition was centred around the appropriateness of the minimum sentence of 15 years for the offence of defilement as provided for in Section 138(1) of the *Penal Code* (Amendment) Act No. 15 of 2005 which states that:

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

The Committee was informed that the basic distinction between the offence of rape and that of defilement was the age of the victim. Consent was immaterial in a charge of defilement while rape was defined as having carnal knowledge of a woman without her consent.

#### 7.0 CONCERNS RAISED BY THE STAKEHOLDERS

Stakeholders also raised concerns regarding the allegations in the petition against the judicial system in Zambia as set out below.

# 7.1 The Judicial System letting perpetrators get away with lighter sentences

The Petition stated that "following the increasing cases of child abuse and defilement in Zambia; some research was conducted, and it showed the importance of this petition to raise awareness on how the criminal justice system is letting perpetrators get away with lighter sentences. Child sex

predators are getting away with lighter sentences because magistrates and judges are now reluctant to pass deterrent sentences."

Stakeholders noted that while the conclusions were said to be based on some research, it appeared that both the research and its findings were based on a wrong understanding of the law regarding sexual offences, a failure to understand the principles of sentencing and indeed, unfounded facts. The following appeal decisions demonstrated that magistrates and judges had never been and would never be reluctant to impose deterrent sentences whenever the circumstances justified such sentences. It was highlighted that both sentencing courts and appellate courts had not only imposed and confirmed sentences imposed against child sex offenders and rapists, but had also, in some instances increased the sentences where there were aggravating circumstances.

To augment their argument, the stakeholders submitted that in the Supreme Court decision of *Gideon Mumba v the People, SCZ Appeal No. 50 of 2017*, the court upheld a High Court sentence of life imprisonment against the appellant who had defiled a 15-year old girl. It was explained that the girl had been trapped by a rope which suspended her upside down. Then the appellant and two others later brought her down, beat her up until she became unconscious and then took rounds in raping her. When she woke up, she found herself in hospital. This was the only case in Zambia in which life imprisonment had been imposed for defilement.

The Committee was also referred to the Court of Appeal case of Semmy Lasco Kavinga v the People, Appeal No. 51 of 2018. In this case, the appellant was charged with four counts. On these four counts, a total sentence of 125 years was imposed. The appellant was an apostle leading a church. He was convicted of the rape of a woman and the attempted rape and indecent assaults of her three daughters all in the name of prayer to remove charms that had been allegedly embedded in his victims' bodies. The High Court imposed sentences of 25 years; 3 years and 20 years each for all the four counts respectively. However, on appeal, the Court looked at the circumstances involved and enhanced the sentences to 45, 40, 20 and 20 years each respectively to run consecutively making a total of 125 years imprisonment with hard labour. This decision was made in November, 2019.

Further, in the case of *Mathews Mumba v the People, Appeal No. 163 of 2017*, the High Court convicted and sentenced the appellant to 25 years imprisonment with hard labour for incest. On appeal, the Court of Appeal upheld the conviction and increased the sentence to 45 years. The Court found aggravating circumstances in that the 39 year old appellant defiled a toddler aged 4 years whom he was driving home from school. However, in the case of *Modester Kalaba v the People Appeal No. 86 of 2017*, the High Court slapped a 45-year sentence. On appeal and

reflecting on the factors involved, the Court of Appeal reduced the sentence to 30 years.

There was also a case of Alfred Mauma v the People, Appeal No. 13 of 2019, the Court of Appeal upheld a sentence of 35 years imprisonment with hard labour imposed by the High Court on the appellant for incest with his 15-year old niece, while in Kenneth Masheka v the People Appeal No. 73 of 2018, a sentence of 20 years was upheld for defilement.

Accordingly, the stakeholders were of the view that the recent decisions of the superior courts demonstrated clearly that magistrates and judges were not at all reluctant to impose deterrent sentences whenever the circumstances demanded. Therefore, it was wrong to accuse judges and magistrates of letting perpetrators get away with light sentences. It was emphasised that the criminal justice system in Zambia was not letting perpetrators get away with light sentences. This allegation contained in the petition was vigorously denied as false and baseless.

# 7.2 The Age of Consent is 16 years and that should be practiced even by the Judicial System

Stakeholders noted that a reading of the sentence created the false impression that learned magistrates and judges were not alive to the provisions of Section 131(a) of the *Penal Code Chapter 87 of the Laws of Zambia* which defines a child as being a person under the age of 16 years when the opposite was the case.

The Committee was informed that in all cases of defilement, one of the ingredients to be proved was the age of the victim. Magistrates, being trial courts, always ensured that the age of the victim had been proved beyond all reasonable doubt to be under 16 years, before they convicted. Similarly, when imposing a sentence, High Court judges had to satisfy themselves that the age of the victim had been proved to the required standard before they could pass a sentence. When these judgements were appealed, again, the Court of Appeal and the Supreme Court both had to be satisfied that the age of the victim had been proved to the required stand before they passed the sentence or upheld the one imposed by the court below. Therefore, magistrates and judges clearly took into account the age of the victim in cases of defilement.

# 7.3 Sexual Crimes Being Reduced To Assault

Stakeholders noted that the Petition also appeared to argue that the justice system was failing to appreciate sexual offences as such but was, instead, reducing them to assault or perhaps, indecent assault. In this regard, the Petitioners was encouraged to bring to the attention of the Chief Registrar any sexual offence that was reduced to a mere assault.

They further advised that the law provided for alternative verdicts in some offences. In particular, Section 186 of the *Criminal Procedure Code Chapter 88 of Laws of Zambia* provided for alternative verdicts in that a person charged with rape may be convicted of defilement, incest or indecent assault. The one charged with defilement may be convicted of rape or indecent assault depending on the circumstances of the case.

# 7.4 The recurring view that prescribed minimum mandatory sentences are not stiff enough to be deterrent

Stakeholders highlighted that the Petition indicated that sentences prescribed by law and imposed by courts were not sufficiently stiff to deter would-be perpetrators. Stakeholders were of the view that the sentences prescribed by law were sufficiently stiff.

The Committee was informed that the period 2002 to 2005 experienced unprecedented rise in rape and defilement cases in the country. As a result, civil society organisation petitioned the late President and through that petition this amendment was born. Consequently, the *Penal Code Chapter 87 of the Laws of Zambia* was amended through Act No. 15 of 2005, to enhance prison sentences. As a result, provisions like *Sections 132 and 138 of the Penal Code Chapter 87 of the Laws of Zambia*, were amended to prescribe a minimum mandatory sentence of fifteen years for rape and defilement.

As regards indecent assault, Section 137 was revised to impose a minimum mandatory sentence of fourteen years imprisonment. A minimum mandatory sentence, meant that the shortest sentence that one could serve was fifteen years for defilement. It could be even higher, but it could not be lower. Such sentences, by any stretch of the imagination, were not light. It was notable that in the case of Gideon Mumba versus the People cited earlier, the Supreme Court handed down a sentence of life of imprisonment.

Stakeholders noted that a generation was twenty-five years and once a fifteen-year sentence was slapped on an offenders, it meant that 60 percent of their life in terms of a generation had been taken away. Therefore, in the stakeholders' views these sentences were sufficiently stiff to deter any would-be offenders from committing the offences. Those that would proceed to commit any sexual offence would do so at their own peril.

#### 8.0 STAKEHOLDERS' PROPOSALS

Considering the importance of the subject, the stakeholders made proposals as outlined below.

# 8.1 Stand-alone Sexual Offences Act

The Committee was informed that there was need to have a stand-alone "Sexual Offences Act" as was the case in Kenya and Nigeria. It was explained that Kenya and Nigeria had put in place Sexual Offences Acts in 2006 and 2012, respectively. India had gone a step further by enacting a law called the Protection of Children from Sexual Offences Act, 2012. These statutes, specifically, dealt with sexual offences against children. Nigeria even had judges whose duties were to specifically deal with sexual offences.

Similarly, stakeholders were of the view that there was need to put in place specific legislation on sexual offences and to assign specific magistrates and judges to deal with sexual offences. The judges and magistrates should focus specifically on sexual offences in order to expedite the process. This would also expedite the trial of sexual offences.

In the same vein, there was need to provide for the criminal procedure of the Anti-Gender Based Violence Fast Track Court. This is because currently, the Anti-Gender Based Violence Act and Rules did not provide for the criminal jurisdiction of the Fast Track Court. The Anti-Gender Based Violence Act only dealt with the civil aspects and not criminal. Therefore, once the sexual offences legislation was put in place, it would provide for the criminal procedure that would be followed when dealing with these offences under the fast track court. Currently, what was happening at GBV fast track courts was a mere initiative by the adjudicators to ensure that these processes were flowing.

#### 8.2 Fast Track Courts

All stakeholders were in agreement with the proposal to establish fast track courts for sexual violence cases, including rape and defilement. This was because the speedy disposal of cases involving sexually abused children would help them begin the healing process quickly and also help avoid the possibility of the accused interfering with the witnesses.

In addition, stakeholders submitted that there were only five magistrates designated to sit as GBV courts and ideally, they should be the only ones to try GBV cases. However, due to the high numbers of GBV cases, the five courts could not deal with all the cases, hence cases were allocated to other magistrates, who were not specifically trained and designated to

deal with GBV cases. As a result, some cases might have been dealt with in an ordinary manner by the non-GBV courts, which could have had a negative impact on the victims.

Stakeholders further observed that when designing the fast track courts, emphasis was placed on infrastructure. For example, when the new GBV Court was launched in Chipata, the prosecutors were neither trained nor oriented on how they were expected to operate. The courts were launched but there was lack of investment in human capital development. Further, the idea of the fast track courts was currently focused on civil than the criminal aspects of the case. This in the stakeholders' view was an oversight as most cases on gender-based violence were criminal in nature and required criminal interventions and not only civil remedies.

#### 8.3 Use of Video Links

The Committee was informed that the enactment of a Sexual Offences Act would, among other things, provide for the use of procedures such as video links that would separate victims from their alleged assailants. This would in turn improve the quality of evidence. For instance, in the United States in America an accused person could be in prison and his trial would be taking place in court but the accused would only be present via a live video link. Such video links could also be of great benefit because children were traumatised whenever they came in court and were made to face the adult who abused them or when they were forced to mention the sexual organs in their native language.

#### 8.4 Stand-Alone Court houses

Stakeholders were also of the view that stand-alone court houses for sexual offences would improve the quality of evidence by reducing the stress suffered by the victims and child witnesses who endured long waits for their cases to be heard because sexual offences were currently treated like any other case. Separate court rooms would prevent witnesses from interacting with unruly persons who came for other cases. explained that when there was a high profile case, the Magistrates Court Complex became very difficult to access. The police sometimes even blocked witnesses from entering the magistrate court grounds. Committee was informed that sometimes when politicians appeared at the magistrates' court, all other magistrates' cases were disrupted because of the security measures that were being taken by the police. Both accused persons and witnesses found it hard to access the courts because they were accused of coming for political cases. For this and many other reasons, stakeholders would like to see an arrangement similar to the fast track courts at the civic centre whose proceedings were heldwithout disturbances.

# 8.5 Increase in Magistrates' Jurisdiction

While some stakeholders did not support the view that the criminal jurisdiction for magistrates should be increased, most of them were of the view that the criminal jurisdiction of magistrates be enhanced so as to enable them to not only try sexual offences with minimum mandatory sentences but also complete them by passing applicable sentencing upon conviction. Currently, magistrates only tried sexual offences, but upon conviction, they were required to commit the convicts to the High Court for sentencing. This was because, the highest sentencing jurisdiction for a Subordinate Court was nine years while the minimum mandatory for defilement, rape, indecent assault was fifteen years. Therefore, in accordance with Section 217 of the *Criminal Procedure Code*, a convict should be committed to the High Court for sentencing. This resulted into delays because that convict had to wait for the next High Court Session and on thereafter appeal if he so wished.

It was proposed that, for sexual offences only, magistrates could be empowered to impose sentences more than their current criminal jurisdiction. The result would be that the moment the sentence was imposed, an accused could simply appeal to the High Court and the case could move on. Therefore, an increase in the magistrates' sentencing jurisdiction would remove the delays occasioned to convicts as they awaited sentencing by the High Court at the next session. Stakeholders found it somewhat odd that a trial court that convicted a person was found unworthy to pass sentence on account of sentencing jurisdiction.

# 8.6 Enhancing the digitalisation of the judiciary

The Committee was informed that, a project called Trim was being implemented in the Judiciary. Through this digitalisation process, a judge or magistrate, anywhere in the country, could access a court record from any court because it could be accessed online. However, because of inadequate funding, the project was not working as it should. The Court of Appeal was located at Kamwala and that was where the offices for research advocates were available at the court, but there was no internet. Stakeholders appealed for improved funding to Judiciary so that such facilities could be installed and dispensation of justice could speed up through improved access to records and monitoring as well as electronic filing and retrieval of records. They noted that the digitalisation of the judiciary system had worked very well in the United Kingdom. acknowledging the efforts being made by the Government, a lot still needed to be done to expedite the process. This would result in improved access to records and monitoring, and allow for electronic filing and retrieval of records.

#### 8.7 Research on the increase of defilement cases

Stakeholders submitted that there was need for extensive research on why defilement cases were still on the increase despite the stiff punishment provided in the Penal Code. Therefore, training institutions and coorperating partners should be encouraged to undertake detailed studies in this area.

#### 9.0 COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

In light of the submissions made by the stakeholders, the Committee makes the following observations and recommendations.

#### 9.1 Bail and Bond

The Committee observes that international laws, regional human rights standards as well as the provisions of the Zambian Constitution are all premised on the presumption of innocence until proven guilty. Stakeholders were also of the view that even the non-bailable offences such as murder should be made bailable like was the practice in other jurisdictions such as South Africa. This was exemplified in the case of the State versus Oscar Pictorius. However, the police and the courts should reserve the limited power to deny bail or bond to persons deemed to be a flight risk, who were likely to interfere with witnesses or fail to attend court. In view of the foregoing, the Committee recommends that bail and bond should be left as is provided in the Penal Code. The police and the courts and should grant bail and bond as provided in the law.

#### 9.2 Castration

While noting that defilement is a serious crime that should attract appropriate sanctions commensurate with the seriousness of the offence, the Committee does not support the use of castration to punish defilers because it will be a violation of international human rights standards, and constitutes torture and other inhuman and degrading treatment or punishment which are prohibited in absolute terms in line with Article 15 of the *Constitution of Zambia*.

The Committee also agrees with the stakeholders that this is an extreme and emotional response to solving a prevalent problem and if allowed, it will encourage a culture of violence such as instant mob justice against suspects in communities. The Committee recommends that the Government should also embark on a vigorous campaign against defilement and child abuse.

Additionally, members of the public should be sensitised that the nation is moving towards reformation of the offender as opposed to punishment or retribution, as exemplified by the change in name from Zambia Prisons to Zambia Correctional Service.

#### 9.3 Fast Track Courts

The Committee notes that all stakeholders are in agreement with the proposal to establish fast track courts to deal with cases involving sexual offences including rape and defilement. This is because the speedy disposal of cases involving sexually abused children will help such children begin the healing process quickly. The Committee is also cognisant of the fact that an accused person is equally entitled to a trial within reasonable time in line with Article 18(1) of the Constitution. The establishment of fast track courts would help actualise this right. In this vein, the Committee recommends that the Government should, as a matter of urgency, establish fast track courts countrywide to expedite the delivery of justice in sexual offences including defilement.

#### 9.4 Lack of Research on Penalties

The Committee notes that not much research has been undertaken to establish why, even after stiff penalties have been introduced in the Penal Code, cases of child abuse and defilement are still prevalent. The Committee, therefore, recommends that the Ministry of Youth, Sport and Child Development and the Ministry of Community Development and Social Services should undertake a study to appreciate causes of child abuse and defilement.

#### 9.5 Stand Alone Sexual Offences Act

The Committee notes that there is need to have a specific piece of legislation to deal with sexual offences as is the case with Kenya and Nigeria. Such a piece of legislation should provide for specific magistrates and judges to deal with sexual offences and provide for the criminal procedure that will be followed when dealing with offences under the fast tract court. In this vein, the Committee recommends that an appropriate piece of legislation be put in place to address sexual offences.

#### 9.6 Stand Alone Courts

The Committee also notes that dedicated court houses for sexual offences will improve the quality of evidence by reducing the trauma suffered by the victims as they wait for their cases to be heard. In addition, these cases are heard just like ordinary cases. In this

regard, the Committee recommends that the Government considers constructing stand alone court houses countrywide to handle sexual offences.

# 9.7. Use of Video Links

The Committee observes that the enactment of a dedicated legislation on sexual offences should, among other things, provide for the use of procedures such as video links that would separate victims from their alleged assailants. This will improve the quality of evidence. It will also protect children who are traumatised when they are made to face the adult who abused them in court. The Committee, therefore, recommends that the Government should expedite the process of digitalising the Judiciary so as to, among others things, provide for the use of video links when suspects are required to appear before the courts.

# 9.8. Magistrates Sentencing Jurisdiction

The Committee notes that the criminal jurisdiction of magistrates needs to be enhanced so as to enable them not only try sexual offences with minimum mandatory sentences, but also complete the process by passing sentence upon conviction. The Committee, therefore, recommends for an increase in the magistrates' sentencing jurisdiction on defilement cases in order to eliminate the delays occasioned to convicts as they await sentencing by the High Court.

# 9.9 Digitalisation of the Judiciary

The Committee notes that digitalisation of the judiciary is currently underway, but has not progressed as it should due to lack of funding. While acknowledging the efforts the Government is making, the Committee is of the view that a lot still needs to be done to expedite the process. In this regard, the Committee recommends that the Government should provide the requisite funding to expedite the digitalisation of the judiciary to improve access to records and monitoring, and also allow for electronic filing and retrieval of records by judges and magistrates countrywide.

#### 9.10 Training

The Committee notes that the existing fast track courts are focused on gender base violence cases. In designing the existing fast track courts, emphasis was placed on infrastructure and the civil aspects of the cases. The criminal aspects of such cases have been overlooked.

In addition, the Committee notes that when, for example the new GBV Courts in Chipata was launched, some players were neither trained nor oriented on how they were expected to operate. In view of the foregoing, the Committee recommends that all stakeholders who will be handling gender-based violence cases, child abuse and defilement matters should be trained and oriented on how they will be operating.

#### 10. CONCLUSION

The Committee noted that cases including sexual violence and related offences continued to be a source of grave concern in Zambia. The Committee agreed with the Petitioner that children, and particularly girls, have been subjected to the worst forms of sexual violence in the country. While fully agreeing with the Petitioner that there was a high prevalence of sexual violence against girls, more needed to be done to protect children and the girl-child, in particular, against such violations.

Despite the above, the Committee did not support the view that some of the ways to address the situation was to deny police bond and bail for suspects or accused persons charged with defilement. This was because police bond and bail were premised on the constitutional right of presumption of innocence regardless of the charge that one might be facing.

The Committee was also against the proposal to introduce castration as a form of punishment for those convicted of defilement as it was contrary to international and regional human rights standards. Moreover, such a move would also violate national laws because it would subject a person to torture and other forms of cruel, inhuman and degrading treatment or punishment. However, the Committee was in agreement with the Petitioner on the need to have fast track courts put in place to deal with sexual offences, including defilement.

The Committee wishes to pay tribute to the Petitioner and all the stakeholders who appeared before it and tendered both oral and written submissions. It also wishes to express gratitude for the guidance and services rendered during its deliberations by the Office Clerk of the National Assembly.

Mr C Miyutu, MP **Chairperson** 

January, 2020 **Lusaka** 

# **APPENDIX I** - List of National Assembly Officials

Ms C Musonda, Principal Clerk of Committees

Mr F Nabulyato, Deputy Principal Clerk of Committees (SC)

Mr S Chiwota, Senior Committee Clerk (SC)

Ms C R Mulenga, Committee Clerk

Mrs D H Manjoni, Personal Secretary II

Mr M Chikome, Committee Assistant

Mr D Lupiya, Committee Assistant

Mr M Kantumoya, Parliamentary Messenger

#### **APPENDIX II – List of Witnesses**

#### **MINISTRY OF JUSTICE**

Ms T Oteng, Permanent Secretary (Administration)

Ms B Chibbonta, Deputy Chief Parliamentary Counsel

Ms C Kaisala, Parliamentary Counsel

#### **NEW GENERATION TIME**

Mr M Silungwe, Director

Ms J Mwila, Director

Mr A M Kazumba, Teacher

Ms T Phiri, Advocate Officer

Mr C Lubwita, Sensitisation Officer

Ms S Kashweka, Events Coordinator

Ms D Mahula, Volunteer

Mr P Kaluba, Volunteer

MI Zulu, Volunteer

Ms G C Chanda, Volunteer

# YOUNG WOMEN CHRISTIAN ASSOCIATION (YWCA)

Mrs M Mwiinga, Programmes Manager

Ms D Chingobe, Project Coordinator

Ms S Amanzi, Youth Coordinator

#### **HUMAN RIGHTS COMMISSION**

Ms F Chibwesha, Director Mr K Banda, Chief Investigations Officer – Legal

#### **WOMEN AND LAW IN SOUTHERN AFRICA**

Mrs M S Tresha, Executive Director

#### LAW ASSOCIATION OF ZAMBIA

Mr E Mwitwa, President Mr J Matende, Law Reform Committee Secretary

#### MAGISTRATES AND JUDGES ASSOCIATION OF ZAMBIA

Mr E Lubeta, Vice President Ms A N Walusiku, National Secretary

Mr P L Simaubi, Vice-National Secretary

Ms A Masoja, National Treasurer

#### **MINISTRY OF HOME AFFAIRS**

Dr C L Mulenga, Permanent Secretary

Mr M Masiye, Director, HARID

Mr A Sumbulyani, Head Community Services Division

Mr M Phiri, Zambia Police, Legal Officer

Mr T Kabembu, Zambia Police, Researcher

Mr P Mutale, Zambia Police, Chief Research Officer

Ms G Mubita, Zambia Police, National Coordinator, Victim Support Unit

Mr E Peteli, Principal Research Officer, HARID

Mr N Nyirongo, Zambia Police, Victim Support Unit

#### **JUDICIARY**

Mr P Chisha, Registrar High Court

Mr P Mwiinga, Registrar Supreme Court

Mr D Simusamba, Registrar

Mr N N Chikobo, Programme Coordinator, CJF

# NATIONAL PROSECUTION AUTHORITY (NPA)

Mrs N T Mumba, Chief Sate Advocate Mr A Mpembamoto, Director, Human Resource

# MINISTRY OF COMMUNITY DEVELOPMENT AND SOCIAL SERVICES (MCDSS)

Ms P C Kabamba, Permanent Secretary

Mr E Mwakalombe, Director – Planning

Mr K Mumba, Director

Ms N L Mulambia,

Ms Nacy Soko,

# MINISTRY OF YOUTH, SPORT AND CHILD DEVELOPMENT

Mr J Kapembwa, Permanent Secretary

Mr J C Zulu, Director - Child Development

Mr N Nyangu, Director - Planning

Ms K M Mwale, Senior Planner