II. CHILDREN AND ADOLESCENTS

Children and adolescents are subjects of sexual and reproductive rights and attendant responsibilities. Put simply, sexual and reproductive rights are those rights that enable everyone, including adolescents, to realise and maintain the highest standard of sexual and reproductive health. As the Programme of Action adopted in Cairo at the International Conference on Population and Development noted in 1994, "reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents."[2] They include the right to make decisions about one's sexual and reproductive health freely and without discrimination or coercion. Sexual and reproductive rights imply, amongst other things, state obligations to protect children and adolescents from sexual abuse, early marriages, and female genital mutilation. They also imply obligations to provide education, information, and services to enable young people to realise sexual and reproductive health.

This chapter discusses court decisions that encourage continued reflection on some of the sexual and reproductive issues affecting young people on the African continent. These include, for example, the challenge that countries face in dealing with forced and child marriages as depicted in the South African case of *Nvumeleni Jezile v. The State and 7 Others*.[3] The Kenyan case of *W.J. & Another v. Astarikoh Henry Amkoah & 9 Others*[4] raises questions about the effectiveness of criminal law in addressing sexual abuse of children. The *Teddy Bear* cases in South Africa[5] invite countries to rethink sex laws that unjustifiably criminalise adolescent sexual conduct and expose children to the harshness of the criminal justice system.

CHILD, FORCED AND EARLY MARRIAGE

Mudzuru & Another v. Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others
Const. Application No. 79/14 [2015] ZWCC 12
Zimbabwe, Constitutional Court

COURT HOLDING

The effect of Sections 78(1) and 81(1) of the Constitution is that the enjoyment of the right to enter into marriage and found a family is guaranteed to a person who has attained the age of 18 years and is legally delayed in respect of a person who has not attained the age of 18 years.

Section 22(1) of the Marriage Act is inconsistent with the provisions of Section 78(1) of the Constitution to the extent that it provides that a girl who has attained the age of 16 can marry, and is therefore invalid.

Summary of Facts

The applicants filed the application before the Constitutional Court of Zimbabwe in terms of Section 85(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (the "Constitution"), and asked the Court to interpret and apply constitutional provisions to the law on marriage to address the problem of early marriages which constituted an infringement of the fundamental rights of the girl child. Their contention was that Section 78(1), as read with Section 81(1) of the Constitution, should be interpreted to mean that a person below the age of 18 years cannot marry under any law.

Issues

1. Whether or not the applicants had sufficient standing interest under Section 85(1)(a) or Section 85(1)(d) of the Constitution to institute the proceedings claiming the relief they sought.
2. Whether Section 78(1) of the Constitution sets the age of 18 years as the minimum age for marriage in Zimbabwe.
3. Whether Sections 78(1) and 81(1) of the Constitution rendered invalid Section 22(1) of the Marriage Act and any other law authorizing a girl who was below the age of 18 to marry.

Court's Analysis

The Court determined that, while the petitioners might not have standing under Section 85(1)(a) of the Constitution to bring this action, they did have the right to bring it under the public interest provisions of Section 85(1)(d), because the interests of children subjected to early marriages were properly identified as a public interest concern.

In order to interpret and apply the meaning of Section 78(1) as read with Section 81(1) of the Constitution, the Court looked to the obligations undertaken by Zimbabwe under various international human rights treaties and conventions. It also took into account the attitude of international law toward the issue of laws regarding marriage and children, and especially through the perspective of the Convention on the Rights of the Child (the "CRC") and the African Charter on the Rights and Welfare of the Child (the "ACRWC"). It noted that a child is defined as a person below the age of 18, and that child marriage is defined as marriage of a person under the age of 18.

The Court found that Section 22(1) of the Marriage Act was enacted in 1965 at a time when states were guided by Article 16 of the Universal Declaration of Human Rights (the "UDHR") and the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962 (the "Marriage Convention"), which did not provide adequate protection for children until the coming into force of the CRC and ACRWC. States such as Zimbabwe therefore set minimum ages of consent based on norms other than the protection of the rights of children, so that the Marriage Act permitted marriage of girls under the age of 18.

The Court also took cognizance of the fact that the Convention on the Elimination of All Forms of

Discrimination against Women ("CEDAW"), which entrenched the principle of equality of men and women, reserved the right to marry and to found a family to men and women of full age (Article 16). Article 16(2) of CEDAW prohibited child marriage, though it did not define "child." However, the full implications of this provision were set when the CRC defined "child" in 1990.

The Court noted that since the coming into force of CEDAW and the CRC, there was progressive recognition of the harm to children of child marriages and the negative implications on the enjoyment of the rights of the child. When the ACRWC came into force in 1999, Article 21(2) clearly and unambiguously prohibited child marriages and specified the minimum age of marriage to be 18 years for any person. The Court noted that the ACRWC specifically targeted child marriage as a "harmful social and cultural practice affecting the welfare, dignity, normal growth and development of the child particularly the girl-child" (page 36 of judgment), which states parties were obligated to eliminate by taking measures, including legislative measures. The Court referenced the concluding comment on Zimbabwe (A/53/40(1998) para. 214) by the Committee on the Convention on Civil and Political Rights (the "ICCPR Committee") which expressed the view that the provisions of Section 22(1) of the Marriage Act allowed early marriage and maintained a difference in the minimum age of marriage for boys and girls.

The Court recognised that Section 78(1) of the Constitution was enacted to comply with the obligations of Zimbabwe under Article 12(2) of the ACRWC to specify the minimum age of marriage and abolish child marriage. It held therefore that Section 78(1) should be interpreted to mean that a person who has not attained the age of 18 has no legal capacity to marry, so that the legal effect of the provision is to set the minimum age of marriage at 18.

According to the Court, in defining a child as a person below the age of 18, Section 81(1) of the Constitution had the effect of supporting the application of Section 78(1). It therefore held that the two provisions, read together, provided that enjoyment of the right to enter into marriage and found a family is guaranteed to a person who has attained the age of 18 years and is legally delayed in respect of a person who has not attained the age of 18 years.

The Court clarified that Section 78(1) had effectively abolished all types of child marriages without any exception for any religious, customary, or cultural practices. Further, it eliminated the practice of having someone else, such as parents or public officials, consent to marriage on the person's behalf. Therefore "no law could validly give a person in Zimbabwe who is aged below eighteen years the right to exercise the right to marry and found a family without contravening Section 78(1) of the Constitution." The Court therefore held that Section 22(1) of the Marriage Act is inconsistent with the provisions of Section 78(1) of the Constitution to the extent that it provides that a girl who has attained the age of 16 can marry, and therefore that it is invalid.

Conclusion

The plaintiffs' application succeeded. The Court issued various declarations including that Section 78(1) of the Constitution set the minimum age of marriage at 18, and that Section 22(1) of the Marriage Act and any law, custom, or practice which authorises child marriage is unconstitutional. The Court also declared that starting January 20, 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or a religious union, before reaching the age of 18.

Significance

The Zimbabwe Constitutional Court recognised and articulated many of the issues that are associated with child marriages. Many countries in Africa have ratified the ACRWC and are obligated under Article 21 of the treaty to abolish child marriages. As the Court recalls, these obligations include legislative measures such as prohibiting persons below 18 from marrying. Some countries in Africa have yet to take such legislative measures. However, the greater challenges are reflected in the recent headline "Legal ages of marriage across Africa: Even when it's 18, they are married off at 12!"[6] Indeed legal ages of marriage can be set, but how should they be enforced by states? Would criminalization be the best way to ensure compliance with domestic law? Such are the sort of questions that states must address.

Nvumeleni Jezile v. The State and 7 Others
[2015] ZAWCHC 31, High Court Case No. A 127/2014
South Africa, High Court, Western Cape Division, Cape Town

COURT HOLDING

The offences for which the Appellant was charged took place after a traditional *ukuthwala*, a practice leading to negotiations for a customary marriage on which the Appellant relied for his defence, would have occurred. Therefore, the Appellant could not rely on the practice of *ukuthwala* to justify his conduct.

Practices associated with the aberrant form of *ukuthwala* do not comply with the requirements of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), and cannot be protected under the law.

Summary of Facts

The Appellant was convicted of human trafficking, rape, common assault, and assault with intent to cause grievous bodily harm, and was serving his sentence. This was an appeal against the conviction and sentence.

In December of 2009 or early January 2010, the Appellant left his residence for his village to find a girl to marry, in accordance with his custom. He identified a 14-year-old girl (the Complainant), who was still in school (Grade 7), as the girl he desired to be his wife. His family and the family of the Complainant initiated and concluded marriage negotiations within one day. The family of the Complainant then forcibly took her to the house where the Appellant resided, where she was informed that he was to become her husband. While there, she was made to undergo traditional ceremonies, even though she protested, at the conclusion of which she allegedly became the Appellant's wife according to customary law. A bride price of 8000 Rand (about 565 USD) was paid to the Complainant's maternal grandmother with whom the Complainant had been living.

The Complainant was forced to accompany the Appellant to his place of residence, where she was unhappy and ran away. She was found by members of her family and returned to the Appellant's

residence a few days later. The Appellant subsequently required the Complainant to travel to Cape Town with him to reside with the Appellant's brother, where the Appellant and the Complainant had sexual intercourse on multiple occasions, all of which instances the Complainant contended were against her will. Shortly after her arrival in Cape Town, the Complainant ran away and reported the matter to police. The Appellant was charged and convicted on one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm and one count of common assault.

Issues

The issues on appeal were:

1. Whether the trial court's determination of the issues should have taken into account the practice of *ukuthwala,* which allows the "bride" to be coerced, and
2. Whether the two convictions for assault should have been treated as one charge, given that both assaults were part of one overall assault.

Court's Analysis

Based on the submission of the Friends of the Court regarding the traditional and aberrant forms of *ukuthwala*, the Court evaluated the Appellant's defence that his actions were justifiable as a customary practice.

The Court took judicial notice of a public debate on the practice of *ukuthwala* that "its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape of not only women but children as young as eleven years by older men."[7]

The Court considered the legal framework regulating customary marriages, including constitutional provisions, legislation, and human rights treaties to which South Africa is a signatory. Section 211(3) of the Constitution of South Africa (Constitution) requires courts to apply customary laws subject to the Constitution and relevant legislation. Section 28 of the Constitution provides that protection of the child from harm and also the best interests of the child are paramount in matters concerning children. Further, Section 28 of the Constitution defines a child as a person under the age of 18 years. The Constitution also provides guidance for interpreting the constitutional rights in the Bill of Rights (Section 39).

The Court reviewed the Children's Act, 2005 (Children's Act), and referred amongst others to Section 1 on the definition of trafficking, Section 12(1) which prohibits subjecting children to cultural practices that are detrimental to their wellbeing, and Section 284(1) which prohibits child trafficking. Section 284(2) provides that it is no defence that the child or the person having control over the child consents to trafficking.

The Court referred to provisions of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (Sexual Offences Act) on rape, and called attention to Section 56(1) which provides that it is not a defence to the charge of rape to rely on a marital or existing relationship. It also referred to Sections 70 to 72 of the Sexual Offences Act, which prohibit trafficking in persons for sexual

purposes. The Court also noted that the Sexual Offences Act defined trafficking in a similar manner to the definition in the Children's Act, and that the Sexual Offences Act makes trafficking of any person without their consent an offence; consent can only be voluntary or uncoerced.

The Court made reference to the Prevention and Combatting of Trafficking in Persons Act, which at the time of the judgment had been passed but had not yet entered into force (it has since been signed into effect). However, the Court stated that the Act's various provisions pointed to the intention of the Legislature to comply with its obligations under international human rights law.

The Court then made reference to the RCMA which provides for recognition of customary marriages under the Constitution and stipulates the requirements for contracting a valid customary marriage. Section 3(1) lists the following requirements: (a) prospective spouses should be over the age of 18 years; (b) both must consent to the customary marriage; and (c) the process must be in accordance with customary law. Sections 3(3)(a) and 3(4)(a) provide for conditions under which a person below the age of 18 can enter into a customary marriage with the consent of parents or guardians.

The Court also referred to Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which prohibits discrimination on the grounds of gender and includes any cultural practice that impairs the dignity of women or undermines the dignity and welfare of female children.

Finally, the Court reviewed several international human rights treaties and South Africa's obligations in relation to them, including the Convention on the Rights of the Child (CRC), which stipulates that member states take measures to abolish traditional practices prejudicial to the wellbeing of children and also protect children from exploitation, and the African Charter on the Rights and Welfare of the Child (ACRWC) which prohibits child marriage and betrothal. The Court determined that there was clear authority that child trafficking and child abuse or exploitation for sexual purposes was "not to be tolerated in [its] constitutional dispensation."[8]

The Court subsequently reviewed information provided by the parties and *amici curiae* regarding the practice of *ukuthwala*. The *amici* indicated that *ukuthwala* is one of a number of alternative ways under customary law to bring about marriage negotiations, and that it generally requires (a) the woman to be of marriageable age, typically child-bearing age; (b) the consent of both parties, though there are instances in which the women's acquiescence in the process occurs after the fact; (c) a mock abduction of the woman at dusk, during which the woman would feign protest but would have agreed beforehand; (d) a smuggling of the woman to the man's homestead; and (e) an invitation sent to the woman's homestead to inform the woman's family that she was with the man's family, which was supposed to signal the desire of the man's family to enter into marriage negotiations. The *amici* argued that, based on the record, *ukuthwala* was not properly performed in the matter due to the Complainant's young age, her lack of consent, and the payment of the bride fee before the *ukuthwala* occurred.

After evaluating the legal framework and the information provided on the practice of *ukuthwala*, the Court then turned to the facts of the case. The Court determined that the offences for which the Appellant was charged had taken place after a traditional *ukuthwala* would ordinarily have happened, as the trafficking and sexual assaults occurred after the customary marriage. Therefore, the Court held that the Appellant could not rely on the traditional practice of *ukuthwala* to justify his criminal conduct.

Further, the Court was persuaded largely by the views of Professor Nhlapo and Inkosi Mahlango on the distinction between the traditional and the aberrant forms of *ukuthwala*. The aberrant form did not have the same requirements of consent and age. The Court found that the Appellant had relied on an aberrant form of *ukuthwala* and held that the Appellant could not rely on the misapplied form of *ukuthwala*, which did not comply with the requirements of the RCMA, to justify commission of the offences of trafficking and rape.

On the second issue, the Court concluded that the Appellant's two convictions of assault both arose out of the same incident. The Court therefore concluded that the two counts should be treated as a single offences in order to prevent a duplication of punishment.

Conclusion

The appeal against the convictions for trafficking and rape was dismissed, and the Appellant's convictions on the counts of assault were set aside.

Significance

The United Nations (UN) General Assembly resolution on child, early and forced marriages (CEFM) recognises that:

> Child, early and forced marriage is a harmful practice that violates, abuses and impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls….[9]

Though CEFM is a global problem, it is most prevalent in Sub-Saharan Africa and South Asia. The African Union (AU) responded to this challenge on 29 May 2014 at its Headquarters in Addis Ababa, Ethiopia,[10] by launching a campaign to end child marriage across Africa. Another important event on the African continent was the First African Girls' Summit on Ending Child Marriage in Africa, held in Lusaka, Zambia between 26 and 27 November, 2015. A statement from this meeting reminded Africa that:

> Article 21(2) of the African Charter on the Rights and Welfare of the Child, which requires that child marriage and the betrothal of girls and boys shall be prohibited, and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and to make registration of all marriages in an official registry compulsory.[11]

As submitted by the *amici curiae*, poor socio-economic conditions and poverty fuel the cycle of CEFM. CEFM is both a manifestation and a cause of poverty which survives the generations because of the complicity of families and the acceptability of the practice to members of the community. Other factors that sustain CEFM include patriarchal socio-cultural norms that subjugate girls and women, especially by suppressing their self-determination in matters relating to their sexuality and sexual relationships. Violence, abduction and rape are tools for maintaining the subjugated position of women in society.

This case has generated debate around an issue the Court did not determine, and that is whether *ukuthwala,* even in its innocuous form as described by Professor Nhlapo and Inkosi Mahlangu, is nevertheless shrouded in patriarchal values that are contrary to gender equality and human rights.[12] Indeed, why should mock-abduction be a feature for the girls and not the boys? Does it not in fact, even if only symbolically, represent the subjugated position of the girl in relation to the man? Another challenge is that *ukuthwala* seems to focus on the consent of families rather than the person's consent. Noteworthy also was the Appellant's appreciation of the ambiguity about consent which the practice of mock-abduction poses. This is an important observation because mock-abduction mystifies the process of consent and obscures whether it does in fact take place, or whether the girl succumbs to pressure or merely acquiesces after being coerced. The whole practice of *ukuthwala* is therefore suspect, as it is based on patriarchal notions about the place of women in society. However, it is no simple matter to dissuade communities from continuing such practices because of the reasons described above, including that they are a source of income, and caused by socio-cultural pressure.

Finally, one is left wondering why family members who participated in the crime were not prosecuted. The evidence showed that the Complainant's uncle and other family members, and also the family members of the Appellant, were accomplices to the abduction. The brother of the Appellant had also allegedly held the Complainant down while the Appellant raped her. The Court, however, agreed with the trial court in the view that:

> … the involvement of the complainant's male family members and grandmother was nothing more than a neutral factor insofar as the Appellant's own blameworthiness was concerned.[13]

The Court agreed with the trial court without explaining its reasoning, even though it was evident that family members played key roles in the commission of the offences. Extending liability to members of the family may have had the implication of prosecuting a whole group of family members or members of a community. Understandably this may not have appealed to the prosecutors or the courts. It may indeed not have been received well by the wider community. However, this raises questions about fairness of the criminal justice system when it fails, without justification, to prosecute those who are involved as accomplices in criminal activity relating to CEFM.

HIGHLIGHT

CHILD MARRIAGE: LEGAL AND SOCIO-CULTURAL ASPECTS

Child marriage is a huge problem in Sub-Saharan Africa, such as in Niger where over 75% of girls are married before age 18 and in Malawi and Mozambique, where over 50% of children are married before the age of 18. Child marriage practices infringe on the rights of the child, and are themselves a consequence of violations of the rights of the child. The causes of the phenomenon of child marriage are complex and interrelated. Social, cultural, religious, and economic factors influence norms, values, and behaviour on individual, community, and society levels. While poverty is an important driver of child marriages in Africa, one of the rationales for child marriage is related to preservation of the traditional value of girls' chastity and virginity. Using Malawi as a case study, one of the reasons some communities have resisted raising the age of marriage to 18 was the argument that it would allow a window period in which sexually mature girls would engage in sexual intercourse before marriage.

Monica J. Grant, a sociologist, found that in rural Malawi, parents worry about the girl-child becoming sexually active when she attains puberty.[14] Parents are anxious that their daughters will not finish school, but will instead get pregnant. Parents construct the girl as easily distracted from their studies by boys who will lure them into sexual relationships. In fact, another study had found that anxious parents preemptively took their girl-children out of school in order to prevent them from getting pregnant.[15]

Therefore, socio-cultural norms about sexuality of the girl-child, the value placed on the girl's virginity, and the construction of the girl-child as sexually weak against the sexual desires of boys, contributes to parents marrying off their girl-child as soon as she reaches puberty. Such constructions of girls' sexuality reveal underlying power dynamics in a patriarchal environment that justifies girl-child marriages.

In 2014, the African Union launched a campaign to eliminate child marriages on the African Continent. In 2016, the Southern African Development Community (SADC) adopted the Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage. In a number of countries, such as Zimbabwe[16] and more recently Tanzania,[17] the courts have supported the application of human rights and legal norms to the eradication of child marriages.

It is important, however, that legal and human rights approaches to end child marriages address social and cultural norms around the sexuality of the girl-child. The anxiety that parents have about sexually mature girls who might be sexually active and get pregnant before marriage is a concern that motivates parents to limit the sexual agency of the girl. Parents may therefore feel justified to either restrict normative consensual sexual conduct, or to marry off the girl-child as soon as she reaches or approaches puberty. Clearly, the root problems of why and how society controls the sexuality of adolescent girls must be explicitly addressed by legal and human rights approaches that aim to end the scourge of child marriages.

FEMALE GENITAL MUTILATION

Law and Advocacy for Women in Uganda v. The Attorney General
[2010] UGCC 4 Constitutional Petition no 8 of 2007
Uganda, Constitutional Court

COURT HOLDING

The custom and practice of Female Genital Mutilation (FGM) violates the rights of women enshrined in Articles 21, 22, 24, 32(2), 33, and 44 of the Constitution. FGM is declared prohibited for being inconsistent with the Constitution.

Summary of Facts

The Petitioner, a non-governmental organisation (NGO) duly registered in Uganda, filed a petition challenging the custom and practice of FGM by several tribes in Uganda, as being inconsistent with the Constitution of the Republic of Uganda 1995 (the Constitution). The Petitioner asked the Constitutional Court of Uganda (the Court) to declare FGM unconstitutional in accordance with Article 2(2) of the Constitution, alleging that it violated the right to life guaranteed under Article 22(1); the right to dignity and protection from inhuman treatment, secured under Article 24; the rights of women recognised under Article 33; and the right to privacy guaranteed under Article 27(2) of the Constitution.

Issues

The Court identified two issues for determination:

1. Whether the petition raised any matter for constitutional interpretation.
2. Whether the custom and practice of FGM was unconstitutional and should be prohibited.

Court's Analysis

The main judgment was written by Justice of Appeal Twinomujuni. The Court determined that the petition did raise matters that required constitutional interpretation.

The Court then considered the issue of whether the custom and practice of FGM is unconstitutional and should be prohibited. The Court considered the evidence put forward by the Petitioner, which included affidavits stating that the practice of FGM is carried out crudely, causes excruciating pain, and results in excessive bleeding and trauma. The potential consequences include permanent disfigurement or death. Apart from this, the practice could result in urinary incontinence, rendering the woman a social outcast because of the urine odor. Some women end up with paralysis and/or some other permanent disability.

The Court also considered the fact that the affidavits stated that the practice of FGM does not appear to have any medical or social benefits to the community or to the women and girls subjected to this practice.

After reviewing the evidence, the Court moved on to discuss the constitutional provisions relevant to the determination of the matter. It started by highlighting Article 37 of the Constitution, which recognises every person's right to enjoy and practice one's culture and tradition. The Court juxtaposed this with Article 44 of the Constitution, which provides that there would be no derogation from certain rights including freedom from torture and from cruel, inhuman, or degrading treatment, recognised under Article 24 of the Constitution.

The Court then pointed out that Article 32(2) of the Constitution prohibits laws, cultures, customs, and traditions which are against the dignity, welfare, or interest of women, and Article 33(1) and (3) provide that women shall be accorded equal dignity with men and the state shall protect women and their rights. At this point, the Court concluded that any person is free to practice their culture, traditions, or customs as long as none of these infringe on the human dignity of any person or subject any person to any form of torture or cruel, inhuman, or degrading treatment.

The Court evaluated the evidence in the light of the law, and found that FGM is indeed practised among some tribes in Uganda. It also found that the practice has harmful consequences on the health and dignity of women and girls. It made reference to the document entitled Eliminating Female Genital Mutilation: An Interagency Statement (Interagency Statement), published in 2000 by the World Health Organization (WHO), which describes potential harmful consequences of FGM, including chronic pain, decreased sexual pleasure, and post-traumatic stress disorder. The publication also gives evidence of increased risk of childbirth complications and highlights the negative consequences of FGM on newborn babies.

The Court therefore held that FGM violates the rights of women enshrined in Articles 21, 24, 32(2), 33, and 44 of the Constitution, and, to the extent that girls and women are known to die as a direct consequence of FGM, also Article 22 of the Constitution. Further, the Court stated that FGM violates the rights of women, referencing a passage of the Interagency Statement that concluded that FGM violates well-established human rights principles, norms, and standards, including equality and non-discrimination on the basis of sex, the right to life, and the right to be free from inhuman treatment. The passage also stated that FGM has been recognised to manifest discrimination on the basis of sex and is rooted in gender inequalities and power imbalances between men and women, and that FGM is a form of violence against women and girls. The Court therefore held that FGM must be prohibited in the jurisdiction, for being inconsistent with the Constitution.

Conclusion

The petition succeeded.

Note

While this decision was being written, the Ugandan Parliament coincidentally passed a bill on December 10, 2009, titled "Prohibition of Female Genital Mutilation," which was welcomed by the Court as consistent with its own ruling based on the Constitution of Uganda.

Significance

The practice and custom of FGM is said to have been prevalent in 29 countries in Africa including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Eritrea, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, and Zambia. The practice has since been banned in several countries including: Benin (2003); Burkina Faso (1996); Central African Republic (1996, 2006); Chad (2003); Cote d'Ivoire (1998); Djibouti (1994, 2009); Egypt (2008); Eritrea (2007); Ethiopia (2004); Ghana (1994, 2007); Guinea (1965, 2000); Guinea Bissau (2011); Kenya (2001, 2011); Mauritania (2005); Niger (2003); Nigeria (1999-2002, multiple states); Senegal (1999); Somalia (2012); South Africa (2000); Sudan (state of South Kordofan 2008, state of Gedaref 2009); Tanzania (1998); Togo (1998); Uganda (2010); and Zambia (2005, 2011). The current application resulted in Uganda joining the group of countries that have prohibited FGM.

FGM has serious implications on the sexual and reproductive health and rights of girls and women who are subjected to it, and has no social or medical benefit to society or to the victims. Some communities continue to practice this custom because it is associated with identity and belonging and it is socially acceptable. Underlying this practice however, is an attitude about women's position in society and their sexuality, and reflects a denial of their self-determination and control over their autonomy in matters relating to their sexuality. However, this practice is accepted and encouraged by socio-cultural norms rooted in traditions and customs that justify holding such views about girls and women. This is contrary to human rights perspectives articulated by human rights treaties to which many countries where FGM is practised have subscribed through accession or ratification.

The 1993 United Nations World Conference on Human Rights (the "Vienna Conference") was an important milestone for advocacy to eliminate FGM because at this meeting FGM became framed as a form of violence against women. The Vienna Conference affirmed FGM as subject to scrutiny under international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), and the Convention on the Rights of the Child (CRC). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) specifically addresses FGM in Article 5, which provides that states shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards, including Female Genital Mutilation.

This decision of the Constitutional Court of Uganda to prohibit FGM is therefore important as it is one of the measures that states are obligated to undertake under Article 5 of the Maputo Protocol. Although the decision was primarily based on the Constitution of Republic of Uganda, the Court acknowledged the place of international human rights when it referred to the Interagency Statement, which articulated international human rights standards and norms that bear upon FGM.

While elimination of FGM is not the exclusive purview of legislative measures, these legislative measures are important to facilitate and support the transformation of socio-cultural norms around women's sexuality and sexual and reproductive rights. It is therefore important for African states to act in unison and solidarity to end the harmful practice of FGM and prohibit such practices, even if the practice may not have been documented in their countries. For instance, and indeed quite coincidentally, anecdotal sources suggest that FGM is being practised among some communities in Malawi even, though Malawi is not among the countries where FGM is deemed prevalent. It is important that Malawi take measures to curb this practice, including legislative measures. Indeed, it is important for all states that have obligations under international and national law to respect, protect, and fulfil women's rights to take such legislative measures and outlaw FGM.

SEXUAL ABUSE, ASSAULT AND VIOLENCE

C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v. Commissioner of Police/Inspector General of The National Police Service & 3 Others
[2013] eKLR, Petition No. 8 of 2012
Kenya, High Court at Meru

COURT HOLDING

The Court held that the police failed to conduct prompt, effective, proper, and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence, and that this amounted to discrimination, contrary to the express and implied provisions of Article 27 and Article 244 of the Constitution of Kenya 2010.

This failure infringed on the petitioners' fundamental rights and freedoms, under Articles 21(1) and (3), 27, 28, 29, 48, 50(1), and 53(1)(d) of the Constitution and the general rules of international law, including any treaty or convention ratified by Kenya which forms part of the law of Kenya as per Articles 2(5) and 2(6) of the Constitution. These include Articles 2, 3, 4, 5, 6, 7, and 18 of the African Charter on Human and Peoples' Rights, Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights, Articles 2, 4, 19, 34, and 39 of the United Nations Convention on the Rights of the Child, and Articles 1, 3, 4, 16, and 27 of the African Charter on the Rights and Welfare of the Child.

Furthermore, the police did not effectively enforce Section 8 of the Sexual Offences Act 2006. This amounted to a breach of Article 27(1) of the Constitution of Kenya 2010 that provides the right to equal protection and benefit of the law.

Summary of Facts

Eleven petitioners, who claimed to be survivors of defilement, child abuse, and other forms of sexual violence, brought this case against Kenyan law enforcement agencies. They alleged that the police had failed to effectively investigate their complaints and take the necessary action, which would have brought the perpetrators to account for their unlawful acts. They based their petition on diverse national and international laws, including the Constitution of Kenya 2010, the Sexual Offences Act 2006, the Police Act of the Laws of Kenya, the Universal Declaration of Human Rights, the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and Peoples' Rights.

Issues

The issues put before the Court were the following:

1. Whether the neglect, omission, refusal, and/or failure of the police to conduct a prompt, proper, and professional investigation into the complaints of petitioners violated the petitioners' fundamental rights and freedoms under Articles 2, 10, 19, 21, 22, 23, 27, 28, 29, 48, 50(1), and 53 of the Constitution of Kenya 2010.

2. Whether the conduct of the police described above violated petitioners' fundamental rights and freedoms under Articles 1, 2, 3, 5, 7, 8, and 10 of the Universal Declaration of Human Rights; Articles 2, 3, 19, 34, and 39 of the United Nations Convention on the Rights of the Child; Articles 1, 2, 3, 4, 16, and 27 of the African Charter on the Rights and Welfare of the Child; and Articles 2, 3, 4, 5, 6, 7 and 18 of the African Charter on Human and Peoples' Rights.

3. Whether failure of the police to act on the petitioners' complaints constituted an abdication of statutory duty, contrary to the express and implied provisions of the Sexual Offences Act, 2006 and the Police Act.

Court's Analysis

The Court found that the petitioners were survivors of sexual violence and child abuse, that they had suffered physical and psychological harm, and that they had reported the crimes to various police stations. The police had failed to conduct prompt, effective, and professional investigations into these complaints. This caused further harm to the petitioners as the perpetrators continued to threaten their physical and psychological well-being. The Court also stated that this created a climate of impunity for defilement, as the perpetrators were not held accountable for their unlawful acts.

The Court found that while the perpetrators were directly responsible for the harm caused, the respondents were culpable for the ongoing failure to ensure that criminals were brought to account through effective investigation and prosecution of these crimes. The Court found that the police not only failed to take action, but also put the victims under onerous cross-examination, and humiliated and blamed them when they reported their ordeals. For these reasons, the Court found the respondents directly responsible for the psychological harm caused to the petitioners as a result of their actions and inaction.

The Court agreed with the principle set out in the South African case of *Van Eader v. Minister of Safety and Security* (2002) ZASCA 123, where a fundamental breach of the petitioners' freedom was found to have occurred when the police failed to pursue the perpetrators of child abuse and sexual violence. The Court cited *Jessica Lenahan (Gonzales) and others v. United States*[18] in support of the proposition that the state had a positive obligation to protect the vulnerable, such as children, and its failure to do so did not need to be intentional in order to constitute a breach of this obligation. The Court further agreed with the principle stated in the Kenyan case of *R. v. Commissioner of Police & 3 others ex-parte Phylis Temwai Kipteyo,*[19] that once a report is made to the police, the police have a duty to take the appropriate steps and actions to investigate and apprehend the perpetrators, and the failure to do so violated constitutional rights of the victims as guaranteed under Article 244 of the Constitution of Kenya 2010.

The Court referred to other supporting case law to demonstrate the central role the police played in facilitating access to the courts by victims of sexual abuse, with the consequence that when the police failed to discharge their obligations, victims are denied access to the courts and therefore access to justice. Furthermore, as the petitioners were children, the Court stated that the failure of the police to act on the complaints of abuse also infringed on the constitutional requirement to protect the best interests of the child.

Conclusion

The Court found that the actions and inactions of the respondents violated various fundamental rights and freedoms of the petitioners that are guaranteed in the constitution of Kenya and other laws, and ordered the respondents to conduct investigations into the petitioners' complaints.

Significance

This case serves as an example of the challenges that vulnerable victims, and in particular children, have to face when reporting sexual abuse and violence to the authorities. Victims are often discouraged from reporting crimes as a result of the treatment they receive from the authorities. In this case, the police disbelieved and blamed the victims and failed to take action.

This case is significant because the Court found that the police failed in their duty to protect the fundamental and constitutional rights of the petitioners. They were held accountable for their actions and inactions under local police statutes as well as under the constitution of Kenya and international treaties ratified by Kenya that enshrine fundamental rights and freedoms.

In its ruling, the Court was clear that the petitioners, who it noted were a vulnerable group, were owed equal protection and benefit of the law by the law enforcement agencies.

The significance of this case can be understood against the backdrop of the common law principle, restated in *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 (United Kingdom), that the police did not owe a general duty of care to unidentified members of the public. This set the precedent in the common law tradition for refusal by the courts to hold the police accountable for their failure to protect and undertake proper investigations, even in cases where the police were aware of the threat a known perpetrator posed to a particular victim. This precedent is still influential in many jurisdictions that have adopted the common law tradition.

The High Court at Meru, Kenya, however, took a different line of reasoning. Its approach hinged on human rights law rather than common law. It found that the petitioners could be heard on the grounds that a constitutional right or fundamental freedom had been infringed. The Court not only looked at how the police failed in their duties and obligations under the relevant laws, but also how the police mistreated the victims when they reported the crimes. The Court cited expert testimony on Kenyan and international police standards which described the investigations as "inadequate" and "fall[ing] short of international standards." The Court found that the police were directly responsible for the psychological harm the victims suffered as a result of their failures. The Court found further that such failures by the police have contributed to the development of a culture of impunity and tolerance for pervasive sexual violence against girl children.

Since 2010, Kenya has revised its Constitution and enacted legislation, including the Police Act, which has brought the country into line with internationally accepted human rights standards. This enabled the Court to come to a decision that favoured the victims who had suffered at the hands of the police. Other countries, such as South Africa, have also adopted stronger human rights approaches in court decisions based on a strong rights-based Constitution and supporting legislation. As such, this case can be seen as a positive step among efforts being made in Africa to address the problem of sexual abuse and violence against girls and women.

W.J. and Another v. Astarikoh Henry Amkoah and 9 Others
[2015] eKLR, Petition No. 331 of 2011
Kenya, High Court at Nairobi, Constitutional and Human Rights Division

COURT HOLDING

The High Court had jurisdiction to hear the matter because it raised issues of violations of constitutional rights. That there was a criminal matter pending against one of the respondents on the same facts, or that the petitioners could have sought redress in a civil court, did not exclude the jurisdiction of the Court.

The acts of sexual abuse perpetrated by the petitioners' teacher,1st respondent, amounted to violations of constitutional rights of the petitioners, including the right to health, dignity, and education.

By virtue of the oversight responsibilities over the school and the conduct of teachers, the 2nd, 3rd and 4th respondents were liable for the acts of sexual abuse perpetrated by the 1st respondents.

The rights of the 1st respondent were not infringed upon as a result of the petition.

Summary of Facts

The petitioners were two minors who at the time of filing the petition were aged 12 and 13 years, respectively. The 1st respondent was the petitioners' teacher (respondent teacher) at the school the petitioners attended. Their school was the 2nd respondent. The 3rd respondent was the Teachers Service Commission (the "TSC"), a public authority established under Article 327 of the Constitution of Kenya, 2010, whose responsibilities included registering, recruiting, employing, and exercising disciplinary control over teachers. The 4th respondent was the state in the person of the Attorney General.

The petitioners alleged that the respondent teacher had had sexual intercourse with them, and that disciplinary action was then taken against him by the TSC. The matter was reported to police and the respondent teacher was charged with defilement of the children contrary to Section 8(1) as read with Section 3 of the Sexual Offences Act No 3 of 2006.

The petitioners sought damages against the respondent teacher for the alleged sexual abuse. They also claimed damages against the 2nd, 3rd, and 4th respondents jointly for their responsibility for the actions of the respondent teacher, and sued the Government of Kenya for failing to put in place measures to control sexual abuse of students in schools.

Issues

The Court isolated four issues to determine:

1. Whether the Court had jurisdiction to entertain the petition and grant the orders sought.
2. Whether the petitioners had established violations of their constitutional rights by the respondents.

3. Whether the 2nd, 3rd, and 4th respondents were vicariously liable for the violation of the petitioners' rights by the 1st respondent.

4. What remedies (if any) to grant to the petitioners and/or 1st respondent.

Court's Analysis

In its reading of Article 22(1) of the Constitution, which gives persons the right to seek courts' intervention in cases of rights violations, and Article 23(1) read together with Article 165, which provides for the jurisdiction of the High Court in enforcing constitutionally guaranteed rights, the Court agreed with the petitioners that it had jurisdiction over the matter. Its view was that the petition alleged violations of constitutional rights and there was nothing in the law prohibiting the Court from entertaining the matter. The Court therefore held that it had jurisdiction to hear the petition.

The Court went on to determine whether the respondent teacher violated the rights of the petitioners. It took note of two apparently conflicting facts: that the petitioner was acquitted of the criminal charge of sexual abuse, but on the other hand, that the TSC took disciplinary measures against him on the allegations. The Court referenced a decision in *Spadigam (J.) vs. State of Kerala*, (1970) ILLJ 718 Ker, where the Indian High Court observed that an acquittal did not mean a person could not be found culpable in a disciplinary proceeding. The Court therefore found, on a balance of probabilities, that the respondent teacher had committed the alleged acts.

The Court reconciled the fact that the events occurred when the repealed constitution was in force, which did not have provisions on the right to dignity, the right to health, and the right to education, though it contained provisions on non-discrimination and the right to freedom and security of the person. The Court followed the principle that the Constitution did not apply retrospectively so that acts done under the 1963 Constitution would not be determined by the new Constitution unless the nature of the violation was continuing. It found that the violations on the right to dignity, which included emotional and psychological trauma, were of a continuing nature, and therefore fell under the new Constitution.

The Court also observed that the rights guaranteed to children under the 2010 Constitution, specifically the right not to be subjected to any form of sexual or physical violence, and the rights to education, non-discrimination, and dignity, are guaranteed to children under the Children's Act, 2001 (the "Children's Act"). These rights are also guaranteed under the Convention on the Rights of the Child (CRC) which is domesticated by the Children's Act. The Court therefore included Article 19 of the CRC in its discussion because it provided for measures that state representatives ought to take to protect the child from all forms of abuse, including sexual abuse, and also to support the child in cases where violations have occurred.

As a result of its analysis, the Court held that the acts of the respondent teacher amounted to violation of the rights to dignity, education, and health of the petitioners. The Court also held the respondent teacher liable for damages.

The Court then turned to whether the 2nd, 3rd, and 4th respondents had violated the petitioners' rights. It examined this issue from two perspectives: (1) the failure of the respondents to put in place

measures to protect the petitioners from sexual abuse; and (2) the responsibility of the respondents for the acts of the respondent teacher.

The Court inquired into the measures the respondent authorities had taken to protect school children from sexual abuse. It expressed the view that the good intentions of the Government and the TSC were limited, as there was not only insufficient enforcement of ethical standards, but they also were ineffectual. The Court drew attention to the fact that there was insufficient awareness raised among both students and teachers about the ethical standards that stipulated the professional boundaries of the teachers. Furthermore, the Court observed that the Government and respondent authorities appeared to have failed to take any measures to address the consequences that the sexual abuse perpetrated by teachers had on the survivors.

In determining whether the 2nd, 3rd, and 4th respondents were liable, the Court was persuaded by the argument that these respondents owed a duty of care to the students, such that if they failed to safeguard the students from sexual abuse, they not only failed in their duty, but were also responsible for the conduct of teachers who sexually abused the children. The Court therefore held that the 2nd, 3rd, and 4th respondents were responsible and liable for the conduct of the respondent teacher.

The Court observed that the Government had not done enough to hold accountable those who abuse vulnerable constituents under their care, "or to place a duty of care on those who employ them, to diligently exercise their duty of care, first by ensuring that they do not employ persons with a history of abuse, and secondly, to ensure that they avoid instances of abuse in their institutions." The Court expressed the opinion that it was not enough to prosecute sexual offenders. Rather, it was important to commit to ensuring that there is no room at all for abuse in institutions that care for vulnerable groups.

The Court then considered the respondent teacher's argument that his rights were violated because the court proceedings were initiated when a criminal matter was pending, based on the same facts, which had in fact ended with an acquittal. From the evidence before it, the Court held that the rights of the respondent teacher had not been violated.

Conclusion

The Court declared that the respondents' actions and inactions violated the rights to health, education, and dignity of the petitioners. It also declared that all schools and school teachers are at all times under the legal status of a guardian and are under a duty to protect all students from sexual and gender-based violence or harm by teachers. It awarded damages amounting to 2 million Kenyan shillings (equivalent to 20,000 USD) to the first petitioner, and 3 million Kenyan shillings (equivalent to 30,000 USD) to the second petitioner.

Significance

Many governments in Africa, like Kenya, have domesticated, or at least incorporated into their local laws, child rights recognised in international and regional treaties, especially the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC). These instruments create obligations on governments to respect, protect, and fulfil the rights of children, including the right to health, dignity, and freedom from harm, which are among the rights violated when a child is

sexually abused. This case highlights the importance of educational institutions taking measures to prevent and address child abuse.

The Court observed that the measures taken to protect school children and also to promote their sexual and reproductive health rights were woefully inadequate and ineffective. Indeed, intentionally or unintentionally, there appears to be lack of concerted effort to root out the problem. There are no effective preventive measures against threats, addressing potential threats, and taking definitive measures to deal with both the perpetrator teachers and the child survivors.

One of the important challenges about sexual abuse is that the stigma and shame associated with suffering sexual abuse prevents cases of abuse from surfacing. This creates challenges for addressing sexual abuse, and is devastating for survivors, who may have no support from their families, school authorities, or the government to address their predicament.

Perhaps the question here is how governments have understood their obligation to protect children from sexual abuse. Governments have tended to place too much trust in criminalisation-based protection regimes that are built around criminal justice and enforcement of sexual offence laws. Unfortunately, as the Court observed, this does not work very well.

One observation is that child protection approaches have emphasised "protecting" the child, based on the assumption that a child is helpless and totally dependent on adults for protection. While it is true that children are vulnerable and have a right to special measures of protection, to regard them as individuals who lack agency undermines the full realization of their human rights.

One effective preventive measure against child abuse is therefore to create an environment in which the children themselves can recognise threats, and initiate responses that are within their capacity. The role of governments is then to provide support for the child. Effective child protection regimes should comprise both the creation of an enabling environment, wherein there are laws, policies, and codes of conduct to protect children which are effectively enforced, and the empowerment of children, to enable them to recognise, prevent, and avert danger.

The Court's decision makes it clear that it is important for governments to require all schools to have child protection and support policies that are simple and clear to everyone, including teachers, parents, and especially students themselves. In cases of sexual abuse, the policies must be clear on what support is provided to the students, including counselling. Policies must also spell out linkages to other supportive processes including the health and justice systems.

HIGHLIGHT

SEXUAL ABUSE, ASSAULT AND VIOLENCE

Sexual abuse, assault, and other forms of violence against women and children have been internationally condemned, and over the past ten years, landmark decisions from courts across Africa, including Kenya, South Africa and others, have established jurisprudence that advocacy groups across Sub-Saharan Africa and beyond can utilise to advance women's and adolescent girls' rights.

Jurisprudence has established that states and other duty-bearers are liable for the failure to effectively protect, respect, and fulfil women and girls' human rights by protecting them against assault, sexual abuse, and violence. For example, in the Kenyan case *C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v Commissioner of Police/Inspector General of the National Police Service & 3 Others*,[20] the court determined that the state and its organs could not hide behind common law to justify their failure to carry out an effective investigation into reported sexual abuse cases, and that this amounted to discrimination against the group of women and girls who were abused.

Allegations of defilement, according to the Court, should be properly investigated and perpetrators of such crimes should be prosecuted to deter others. Further, the Court held that state organs have a duty "to protect" their citizens from sexual abuse, harassment, defilement, and violence, regardless of their gender. The Court held the police responsible for not adequately protecting the interests of the vulnerable women and girls and therefore failing to ensure their safety.

In *W.J. & Another v Astarikoh Henry Amkoah & 9 Others,* the Kenyan Court affirmed the constitutional and fundamental rights of women and girls against assault and sexual violence. The Court upheld a petition by two minors and their guardians that school J, its regulatory body, and the state did not do enough to protect the petitioners against the first respondent, their teacher, who raped them. According to the Court, the first respondent should not have been entrusted with the petitioners and other children, given his previous history of sexual violence and assault which had led to his transfer to that school.

The Court held that the state is obliged by the Kenyan Constitution and international law to prevent violence against women and girls and to ensure that their fundamental rights to welfare and development; education; health, including reproductive and sexual health; and dignity were protected at all times. The Court also held that the employers of the First Respondent should be held accountable (vicariously) for their omission and that the law should not only focus on punishing the perpetrators of violence, in this case sexual abuse and assault against girls, but should also make provisions for victims and survivors' rehabilitation process and costs.

In conclusion, the decisions discussed herein affirm that the state and its organs can be held accountable in circumstances where they breach their constitutional duties towards their subjects or contravene their regional and international human rights obligations. In the instances discussed above, the police and educational institutions were held accountable for failing in their respective duties to effectively protect women and girls against sexual abuse and violence.

CONSENSUAL SEXUAL CONDUCT

C.K.W. v. Attorney General & Director of Public Prosecution
[2014] eKLR, Petition 6 of 2013
Kenya, High Court

COURT HOLDING

Sections 8(1) and 11(1) of the Sexual Offences Act are not discriminatory against adolescents by criminalising sexual conduct between consenting adolescents, because the intention of this law is to protect adolescents from harmful sexual conduct. Where it is alleged that a law has a discriminatory impact, but the law itself was not manifestly directed at discriminating between persons, the discriminatory impact of the law must be assessed and weighed against the rights that the law seeks to protect. In this instance, the Sexual Offences Act seeks to achieve the important societal goal of protecting children from premature sexual activity, which the court found to outweigh any alleged discriminatory impact.

Section 8 of the Sexual Offences Act does not distinguish between a boy and girl. The choice of the prosecuting authority to prosecute only the boy did not render the law discriminatory.

Summary of Facts

The petitioner, who was 16 years old at the material time, was facing a charge before the magistrate's court for the offence of defilement, for having had penetrative penile-vaginal sex with a girl the age of 16, which was contrary to Sections 8(1) and 8(4) of the Sexual Offences Act, 2006 (Sexual Offences Act). The petitioner lodged this application before the High Court of Kenya, calling on the Court to declare Sections 8(1) and 11 (1) of the Sexual Offences Act invalid to the extent that they are inconsistent with the rights of children as protected under the Constitution of Kenya. The Sexual Offences Act criminalises sex between all individuals under the age of 18, without regard to their capacity to consent.

Issues

The two grounds considered by the court for invalidity were:

> (a) that Sections 8(1) and 11(1) of the Sexual Offences Act indirectly prompted disproportionate prosecution against male children in instances of consensual sexual acts between minors and thus indirectly denied male children equal protection and benefit of the law, contrary to Article 27(5) of the Constitution of Kenya; and
>
> (b) that Sections 8(1) and 11(1) of the Sexual Offences Act were inconsistent with the rights of children under the Constitution of the Republic of Kenya to the extent that they criminalised consensual sexual conduct amongst children and in that they criminalise acts for which adults are not subjected to prosecution. The Children Act, 2001, defines "child" as a person under 18 years of age.

Court's Analysis

The Court affirmed that when a person commits an act of penetration with a child, the offence of defilement is committed, and whether or not there was consent is not an element of the offence.

The Court considered the South African case of *Teddy Bear Clinic for Abused Children & Another v. Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, and highlighted that the South African Court held that the fundamental rights of children may be limited by legitimate reasons, such as to protect them from harm. The Court cited the testimony of two experts in child psychology who testified that when adolescents are left to themselves to sort out their sexuality issues, they tend to engage in risky behaviour due to poor decision-making and power imbalances within the sexual relationship. The Court's ruling was greatly influenced by this expert testimony and did not adopt the reasoning of the South African Court, which said that punishing sexual expression that is developmentally normal is degrading to the adolescent.

The Court opined that if it was the opinion of experts that adolescents should not be left to decide about sexual activity, then it was counter-productive to allow adolescents to carry on sexual activity even if such activity was deemed developmentally normal. It was on this basis that the Court went on to rule that the impugned provisions were not inconsistent with the rights of the child because they were meant to protect children from harmful sexual conduct. The limitation of the right of the adolescent to engage in consensual sex was therefore justified.

On the issue of discriminatory impact on the basis of gender, the Court ruled that Section 8 of the Sexual Offences Act did not distinguish, on its face, between a girl and a boy, and so the onus shifted to the petitioner to show, through evidence showing the broad application of Section 8 of the Sexual Offences Act, that it had a discriminatory impact on the basis of gender. The Court found that no such evidence of discriminatory impact was presented and therefore found that the law was not invalid on the basis of gender discrimination. The Court found that evidence of individual instances of gender discrimination in the application of the law, even if such evidence showed that the prosecution chose to discriminate in this particular instance, would not, in the absence of evidence showing broad discriminatory impact, render the impugned provision discriminatory.

The Court borrowed the reasoning in *The National Coalition for Gay and Lesbian Equality & another vs. The Minister of Justice & 2 others* CCT No. 11 of 1998 [1998] ZACC 15 where the Constitutional Court of South Africa laid down the factors to be considered when determining whether the alleged discriminatory provision had impacted unfairly on the complainants, including the position of the complainants in society (i.e. whether there are past patterns of disadvantage) and the nature of the provision and purpose sought to be achieved by it.

The Court decided that the petitioner had not convinced the Court that the alleged discriminatory impact of the laws exceeded the worthy or important societal goal of protecting children.

Conclusion

The petition was without merit and was dismissed.

Significance

This is an important case on the constitutional protections of children and the sexual development of children and deals with the challenging issue of to what extent the law should interfere with the constitutional rights of children and whether the constitution should protect 'normal' sexual conduct amongst children. The Court was asked to strike that balance between protection of the child from harmful sexual conduct and respect for the fundamental rights of children that should allow them to explore their sexuality as part of their development.

It should be appreciated that the Kenyan Court was influenced by underlying coexisting ideologies about adolescent sexuality. Past laws on defilement were not based on human rights but on prevailing social norms that girls should be 'chaste' when a man approached them for marriage. With the advent of Abrahamic religions in Africa, social norms around adolescent sexuality adopted the idea that sex before marriage is morally wrong because sex is only for procreation and therefore only for married people. The emergence of the human rights era placed principles of dignity, equality, and consent at the center of regulations on sex, with emphasis on protecting children.

These ideologies have influenced development of legislation on adolescent sexuality in Africa in various ways. Some countries such as Malawi have maintained the legislation adopted at colonial times and only tweaked the age of defilement from 13 to 16. Other countries such as South Africa have overhauled their legislation to align it to human rights, for instance to redefine 'defilement' provisions in gender-neutral terms.

Now, the question put before the Court that is of relevance to many countries is whether laws should criminalise sexual intercourse between two consenting adolescents. The Kenyan Court answered in the affirmative. Two issues could be raised with the way it arrived at its conclusion. First, the Court purported to base its argument on protecting the child from harm but a closer reading of the reasoning would reveal that this was underpinned by the prevailing attitudes in Kenyan society that it was wrong for adolescents to have sex. Though it referred to the *Teddy Bear Clinic Case*, it only did so to select lines that would support this ideology. Ultimately, it parted reasoning with the *Teddy Bear Clinic Case* and based its decision on moral grounds, though these were couched in human rights language. The Court was less interested in exploring whether criminalising consensual sex between two 16-year-olds would cause them shame and embarrassment and negatively affect their development.

Second, even if adolescents should not be left to decide matters relating to their sexuality, it could be questioned whether criminal law is the best aid for the adolescent. Would not comprehensive sexuality education be more empowering and have a more positive effect on the development of the child than criminalisation? Indeed, while comprehensive sexuality education has been shown to equip adolescents with the information and skills needed to make meaningful choices about whether and when to engage in sexual activity, many governments in the region have not provided adequate comprehensive education to adolescents, thus perpetuating their disempowerment.

Further, the Court did not really do justice to the issue of whether the defilement provision was gender-biased. Penetration in the Sexual Offences Act is defined as "partial or complete insertion of the genital organs of a person into the genital organs of another person". It is difficult to imagine

that the sexual organs of a girl would penetrate those of a boy, so that she could be charged of this crime. The Court could have explored this definitional dilemma and determined whether it was gender-neutral. Indeed, men have suffered a pattern of disadvantage in jurisdictions where rape and defilement only pertain to women. The disadvantage is the invisibility of rape and defilement of men and boys under the law, leaving many men and boys suffering rights violations that the state does not recognise and address accordingly.

S v. Brian M. [surname editorially abridged]
[2015] ZWHHC 106, CRB No. B467/14
Zimbabwe: High Court

COURT HOLDING

A sentence of 24 months' imprisonment for statutory rape was excessive considering that the perpetrator was a young boy of 17 involved in a romantic relationship with a girl of 15.

Summary of Facts

B.M was convicted under Section 70 of the Criminal Law Codification and Reform Act (Chapter 09:23) of having sexual intercourse with a person under the age of 16. B.M was 17 and the girl was 15 at the time of the alleged statutory rape(s). The two were boyfriend and girlfriend. The girl became pregnant. B.M. was charged, convicted, and sentenced to 24 months in prison, with 8 months set to be suspended if he did not violate any sex laws for 5 years, and with the remaining 16 months suspended if he performed 525 hours of community service within a 16-week period.

Issue

Whether a 24-month sentence for statutory rape is excessive for a 17-year old perpetrator who had consensual sex with a 15-year old, with whom he was in a romantic relationship.

Court's Analysis

The Court listed several reasons for determining that the sentence was excessive. First, it stated that the purpose of the law is to protect children under the age of 16 from sexually transmitted diseases, unintended pregnancies, and predatory adults. However, the prohibitions apply equally to persons aged 17 as to persons much older, even though one of the purposes of the law is to protect children from predatory adults. The Court noted that under Section 81 of the Constitution of Zimbabwe, 17-year-olds are "children." Other jurisdictions exempt youthful violators from prosecution when the violator's age is within two or three years of the victim's age. The Court noted that, according to some reports, 66% of people aged 15 to 19 engage in unprotected sex. It also noted that, in another case, juvenile sex offenders who committed the more serious crime of rape were not sentenced to imprisonment, such as in the case of *S v. M* 2009 (1) ZLR 47.

Conclusion

The Court held that under the circumstances of the case, with B.M. being under the age of 18 and just 2 years older than the girl, with whom he was in a romantic relationship, a suspended 24-month sentence was excessive. The sentence was reduced to 210 hours of community service within a 16-week period.

Significance

The Court was faced with the unfortunate effect of criminalizing consensual sex amongst adolescents. The boy was 17 and the girl 15 and were in a romantic and sexual relationship, which might not have been obvious until the girl's pregnancy exposed their relationship to the criminal justice system. Tsanga J., in his judgment, acknowledged the disharmony in the laws where the Constitution recognises a 17-year-old as a child (defined as below 18), while the Criminal Code (where child is defined as below 16) treats the individual as an adult liable to prosecution under the offence of having sex with a young person.

This is a typical example of the idiosyncratic impact of criminalization of consensual sexual conduct on the adolescent. In the "Teddy Bear" cases also discussed in this volume, the South African High and Constitutional Courts grappled with a similar matter and held sexual offences provisions to be contrary to the best interests of the child, and an infringement on their rights, including the rights to dignity and privacy of the child. It is unfortunate that adolescent boys involved in consensual sexual conduct with their girlfriends are caught in the web of discrepant laws and exposed to the harshness of the criminal justice system.

Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another

[2013] ZAGPPHC 1, Case No. 73300/10
South Africa, High Court

COURT HOLDING

By criminalising various consensual sexual conduct or activity: (i) between children who are between 12 and 15 years of age, and (ii) between two children who are within two years of age of one another, where one child is 16 or 17 years old, and the other is under 16 , Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (the "Act") and the definition of "sexual penetration" in Section 1 of the Act are inconsistent with the Constitution of South Africa (the "Constitution") and are therefore invalid.

Summary of Facts

In the case before the High Court, the Applicants challenged the constitutional validity of Sections 15, 16 and 56(b)(2) of the Act, which criminalised consensual sexual activities between children of certain ages. The Applicants brought their applications (i) in their own interest as organizations dedicated to protecting children's rights pursuant to Section 38(a) of the Constitution; (ii) on behalf of children

at risk of being criminalised to protect their rights pursuant to Section 38(c) of the Constitution and Section 15(2)(c) of the Children's Act 38 of 2005 ("Children's Act"); and (iii) in the public interest pursuant to Section 38(d) of the Constitution and Section 15(2)(d) of the Children's Act.

Issues

The broader issue before the Court was whether by criminalising consensual sexual activity between children of a certain age, Sections 15 and 16 of the Act were unconstitutional for infringing on children's constitutional rights to dignity, privacy, and bodily and psychological integrity, and were contrary to the best interests of the child as protected in Section 28 of the Constitution. The issues can be put more specifically as follows:

1. Whether Sections 15(1) and 56(2)(b), as read with the definition of "sexual penetration" in Section 1 of the Act, were unconstitutional to the extent that they:

    - Criminalise a child aged 12-15 for engaging in an act of consensual sexual penetration with another child who is also 12-15 years old; and,

    - Criminalise a child aged 16 or 17 for consensual acts of sexual penetration with a child under 16, where the age gap between them is two years or less.

2. Whether Sections 16 and 56(2)(b) of the Act and the definition of "sexual violation" in Section 1 of the Act are unconstitutional to the extent that they criminalise a child aged 15-15 years old for engaging in consensual sexual conduct with another child aged 12-15 years old, where there is more than a two-year age difference between the two children.

Further, in the event that the Court upheld the constitutionality of Sections 15 and 16 of the Act, the Applicants asked the Court to determine:

3. Whether Section 54(1)(a) of the Act, which requires a person who has knowledge that the impugned offences have been committed by a child under 18 years of age to report such knowledge to a police official; and

4. Whether Sections 50(1)(a)(i) and 50(2)(a)(i) of the Act, which require children convicted of the impugned offences to be included in the National Register for Sex Offenders were unconstitutional insofar as they apply to children engaging in consensual sexual activities.

Court's Analysis

The Court undertook an analysis of the text of the impugned provisions and noted that the terms "sexual violation" and "sexual penetration" were defined so broadly that they included conduct that virtually every normal adolescent participates in at some stage or another, including conduct that could be positive, normal, and healthy if consensual. Sections 15 and 16 as read with Section 56 of the Act produced anomalous results, including that consensual sexual conduct between adolescents was criminalised.

The Court also examined the purpose of the legislation, and noted that it was primarily to protect children from predatory adults. The Court considered evidence from experts in child psychology and mental health, which described ages 12 to 16 as a period when adolescents are vulnerable, as they "have physiological ability and psychological disposition to engage in various sexual activities, but not yet the fully developed cognitive and emotional apparatus to deal with such experiences in a constructive fashion."[21] As such, adolescents need protection and support.

According to the expert evidence, the impugned provisions went beyond protection of children and criminalised harmless and even beneficial consensual sexual activity. This harmed adolescents in a number of ways, including causing adolescents who were charged with such offences to experience emotional distress such as shame, regret, anger, and embarrassment. It further promoted stigmatisation of adolescent sexuality, and suppressed and drove underground expressions of sexuality, making it difficult for adolescents to access guidance they need from adults. Further, it could also compromise the work of organisations and individuals in support of adolescents, as they might be seen to be promoting illegal activities. The Court noted that sexual health services to adolescents would be compromised due to the requirement that individuals must report sexual behaviour that was otherwise normal and healthy.

The Court also considered the expert opinion that the enforcement of the provisions would subject many adolescents to the criminal justice system. This would have a negative impact on their healthy and normal development, as they may suffer trauma and secondary victimisation.

Despite the differing opinions amongst the Deponents, the Court noted that the majority agreed that ". . . using the weapon of the criminal justice system to deal with adolescent sexuality would further marginalise young people and will have long-term harmful consequences not only in respect of their own sexuality but also in respect of their own personal psychological well-being."[22]

The Court then considered the arguments of the respondents, that the provisions of the Act which gave discretion to the prosecuting authorities on offences relating to children, would be implemented in accordance with relevant provisions of the Constitution, the Children's Act, and the Child Justice Act. As such, prosecutions would not be pursued if they were not in the best interests of the child. The respondents also argued that the diversion mechanism could be used to prevent children from facing the full force of the criminal justice system.

The Court considered the constitutionally guaranteed rights that might be violated by the impugned provisions. It held that the effect of the impugned provisions, including the harm caused by unjustified intrusion into the private and intimate sphere of children's relationships, violated Section 28 of the Constitution, which entrenches protection of the best interests of the child, including protecting children from undue exercise of authority.

The Court also held that children have an inherent right to dignity recognised in Section 10 of the Constitution. It referred to the case of *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) where the Constitutional Court of South Africa held that laws that proscribed certain consensual sexual activity were an unjustifiable limitation of the rights of equality, dignity, and privacy. The Court applied the same reasoning to consensual sexual conduct between adolescents.

The Court further held that the impugned provisions contravened not only the right to bodily and psychological integrity, under Section 10 of the Constitution, but also the right to intimate and personal relationships, under Section 14 of the Constitution.

The Court also referenced the case of *S v. M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) to state that children are entitled to a realm of personal space and freedom in which to live their own lives, and are to be protected even from the conflicting rights of the community.

The Court emphasised that rights of children are not subordinate to adults. It referred to its decision in *Christian Lawyers of South Africa v. Minister of Health and Others* (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509 (T) where it held that rights guaranteed under Sections 10 (right to dignity), 12 (right to bodily and psychological integrity), 14 (right to privacy), and 27 (right to health care services including to reproductive health) of the Constitution also applied to girls under the age of 18.

The Court then gave its opinion on the arguments of the respondents, that prosecutorial discretion and diversion could prevent infringement of children's rights. The Court opined that diversion would still subject the child to processes that would infringe the child's rights. As for the argument that prosecutorial discretion would be exercised in accordance with the Constitution and other laws, the Court dismissed the argument on several grounds including that "prosecutorial discretion can never cure the existence of constitutionally invalid criminal offences."[23] Further, there were no guidelines on exercise of this discretion. The Court referred to other decisions such as *Dawood & Another v. Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), where the Court held that where Parliament conferred discretional powers on an official that limited fundamental rights, Parliament ought to provide guidance on how such constitutional rights would be protected. The Court did not find tangible and concrete guidelines for the discretionary prosecution relating to matters regarding children under the Act.

After finding Sections 15 and 16 in violation of constitutional provisions, the Court inquired whether the limitation of rights was reasonable and justifiable under Section 36 of the Constitution. The Court noted that the purposes of the criminal provisions included protection of children from predatory adults, sexual predators, persons who sexually abuse children, and perpetrators of sexual abuse. However, it held that the criminalisation of consensual sexual conduct between children bore no relationship to the purpose of protecting children from predatory adults and abusers. The impugned provisions could not therefore pass muster under Section 36 of the Constitution.

Conclusion

The Court invalidated the offending provisions and, by way of remedy, suggested amending the provisions by reading words into them. The Court then referred the matter to the Constitutional Court for confirmation.

Significance

If sexuality is a sensitive subject in the human rights discourse, it is even more so when it concerns adolescent sexuality. The subject of adolescent sexuality has normally been within the purview of cultural and religious norms. This case was novel not only in that it brought adolescent sexuality

openly into the realm of human rights, but also in that it positively affirmed adolescents as sexual beings who can engage in consensual sexual conduct, and recognised certain forms of state interference with this as a violation of their rights.

One reason why the subject of adolescent consensual sexual conduct found its way to the Court is because South Africa comprehensively reviewed its sexual offences law to align it with human rights, and dealt more elaborately with the issue of adolescent consensual sexual conduct. Many African countries still maintain, in their sexual offences regimes, the so called "anti-defilement laws" that are designed to protect adolescents (and in many cases only adolescent girls) from engaging in sexual relations. These defilement laws regulate adolescent sexuality by proscribing consensual sexual relationships between adolescents. The following provision taken from the Malawi Penal Code is used here for illustration: "Any person who carnally knows any girl under the age of sixteen shall be guilty of a felony and shall be liable to imprisonment for life."[24] "Any person" could be a boy of 15 or 16. This was the issue that the South African Court addressed, whether consenting adolescents engaging in sexual conduct should be punished.

A report by the Law Reform Commission of Tanzania highlighted a high rate of defilement where most of the victims are teenage girls, and the culprits are mostly within the same age-group.[25] As experts testified before the court, this high rate of defilement may be a result of the fact that many teenagers engage in consensual conduct amongst themselves. However, the criminal laws of countries such as Malawi and others, punish this conduct. In fact, the Tanzania Law Reform Commission recommended that the age of defilement be raised to 18. The side-effect of this indiscriminate law would be to subject more adolescents to unjustifiable scrutiny, condemnation, and punishment. The South African Court protected the children of South Africa from these undesirable effects.

Although criminal laws have an important role to play, they should not be regarded as best suited to ensure child and adolescent sexual health and well-being. Rather, it is by respecting the rights of the child and the adolescent, including the rights to dignity, privacy, and access to sexuality-related health services and education, that children and adolescents will be given the space and opportunity to enjoy sexual health and well-being as they evolve toward becoming adults.

Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another

CCT 12/13, [2013] ZACC 35
South Africa, Constitutional Court

COURT HOLDING

Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Act) have the effect of harming the adolescents they intend to protect in a manner that constitutes a deep encroachment in the rights of dignity and privacy, as well as the best interests of the child principle.

The limitations are not justifiable when subjected to the requirements under Section 36 of the Constitution of South Africa (the Constitution).

Sections 15 and 16 of the Act are declared invalid to the extent they impose criminal liability on children under the age of 16 years old, but their invalidity is suspended for 18 months to allow Parliament to remedy the defects of the statute. Effective from the date of the judgment, there is a moratorium on all criminal proceedings and related activities against children under the age of 16 under Section 15 and 16.

Summary of Facts

This was an application for confirmation of a ruling by the North Gauteng High Court in Pretoria that certain provisions of the Act relating to the criminalisation of consensual sexual conduct with and among children of a certain age are constitutionally invalid. The High Court had held that by criminalising consensual contact between children of a certain age, Sections 15 and 16 of the Act infringed on the rights of the child and were therefore invalid. It went on to suggest a remedy by reading certain words into the provisions. Under the terms of Section 172(2)(a) of the Constitution, the High Court's ruling has no force unless and until confirmed by the Constitutional Court.

Issues

The issue before the Court was whether it is constitutionally permissible for children to be subjected to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith. More specifically, the Court stated that it would determine the following:

1. Whether any rights were limited by the impugned provisions;
2. If so, whether these limitations were reasonable and justifiable in terms of Section 36 of the Constitution; and
3. If these limitations were neither reasonable nor justifiable, the appropriate remedy.

Court's Analysis

The Court started from the premise that children enjoy fundamental rights guaranteed to "everyone" under the Constitution. If any rights should be limited, the limitation ought to be reasonable and justifiable in terms of Section 36 of the Constitution.

The Court then looked at the Applicants' evidence, which included the expert report of a child psychiatrist and a clinical psychologist, which provided information about child development and the impact of the impugned sections. The report stated that South African children reach maturity between the ages of 12 and 16, and during this time their experiences have long lasting impacts on their adult lives. Adolescents engage in sexual exploration including kissing, masturbation, and sexual intercourse which in circumstances where it is consensual is potentially a normal and healthy experience. At this age, they need guidance and support from adults and caregivers to avoid the negative consequences of sexual behaviour.

The report stated that criminalising such behaviour negatively impacted children, as being charged under the impugned provisions would bring shame, embarrassment, anger, and regret. It could further drive adolescent sexuality underground and make it difficult for adolescents to seek help, and equally challenging for adults and caregivers to support children on sexual matters.

The Court then considered the impact of the impugned provisions on the rights of children. It first justified why the matter to be determined should be the rights of children between 12 and 15, which it referred to as "adolescents," as distinguished from individuals of 16 and older. The Court relied on the expert evidence that related only to children between 12 and 16, so that its determination was narrowed to this age group.

The Court agreed with the Applicants in applying the principle in *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) that criminalisation of consensual sexual conduct was a form of stigmatisation that was degrading and invasive. Failure by society to respect consensual sex choices diminish one's innate self-worth. Further, punishing sexual conduct that is otherwise normal disgraces the adolescent. The Court therefore held that the impugned provisions clearly infringed on adolescents' right to dignity.

The Court also referred to the *National Coalition* case, which stated that the right to privacy protected one's "inner sanctum," which included not only one's intimate relationships but also their sexual preference. The Court held that this also applied to adolescents, and the effects of Sections 15 and 16 infringed upon the right to privacy of adolescents by intruding into their intimate lives.

The Court held that the impugned provisions also infringed on the best interests principle by subjecting adolescents to harm and risk, for instance by driving adolescent sexual behaviour underground and undermining the guidance they need from adults and caregivers in matters of sexuality. The Court also considered the respondents' arguments that prosecutorial discretion and diversion would mitigate this harmful and negative impact, but dismissed these arguments as untenable.

Having found that Sections 15 and 16 infringed on the rights of children, the Court determined whether the limitation of rights was reasonable and justifiable under Section 36 of the Constitution. The Court found that the legitimate intention of the Act was to discourage adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and from engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct. However, the respondents did not proffer any evidence to show how the impugned provisions achieve the intended purpose. Rather, the evidence showed that they increased harm and risk to adolescents. The Court therefore held that there was lack of a rational link between the impugned provisions and their stated purpose, so that Sections 15 and 16 of the Act did not pass constitutional muster. Further, the Court opined that there were less restrictive means to achieve the intended purpose than criminalising wide-ranging behaviour, including behavior that would be regarded as normal.

The Court therefore held Sections 15 and 16 unconstitutional to the extent that they criminalise the consensual sexual conduct among adolescents between the ages of 12 and 16, and declared them invalid. However, it departed from the reasoning of the High Court in determining the appropriate remedy. Rather than using a combination of severance and reading-in, it declared the provisions invalid but suspended the invalidity to allow Parliament to remedy the statutory defect. In order to prevent the provisions from remaining operational in the interim, the Court imposed a moratorium on all investigations into, arrests of, and criminal and ancillary proceedings against adolescents for consensual sexual activities with their peers pending the remedial action of Parliament.

Conclusion

The order of the High Court was set aside and replaced by orders that (i) Sections 15 and 16 were invalidated to the extent that they criminalised consensual sexual conduct between adolescents under 16; (ii) the invalidity of these Sections was suspended for 18 months for Parliament to remedy the defect; (iii) a moratorium was placed on implementing Sections 15 and 16 on adolescents below 16 until Parliament took remedial action; and (iv) the Minister of Justice and Constitutional Development were ordered to expunge from the National Register for Sex Offenders details of a child below the age of 16 convicted under the invalidated provisions and of a child who was issued a diversion order following a charge under the invalidated provisions.

Significance

From the perspective of adolescent sexuality and criminal law, children in Africa are frequently treated as one homogenous and asexual group that should be protected from all forms of sexual behaviour, whether positive or negative, until they are adults or married. Intertwined with this are cultural and religious norms that affect adolescents disparately, depending on which norms take precedence in their social setting. In traditional Africa, puberty is regarded as that milestone where the child becomes an adult. In some cultures, the girl and boy child undergo initiation rituals where they are taught how to behave as adults, including initiation into sexual practices. In settings where Abrahamic religious norms take precedence, the expectation is that persons should not engage in consensual sex until they are married.

The combined effect of social and religious norms and criminal law may impact adolescents' development, especially when the principle of evolving capacities in regards to their sexual development is not adequately taken into account. Children may be introduced to sexual matters too early at initiation rituals; for example, in the Chewa culture (Malawi), girls may be forced to have sexual intercourse with an adult as part of initiation rituals. In circumstances where Abrahamic religious norms are followed, adolescents are prevented from accessing information, education, and health services relating to sexuality because society fears that they will engage in sexual conduct prohibited by religious norms. Anti-defilement laws further impact adolescents when they indiscriminately criminalise consensual sexual behaviour.

In this regard, this South African case is revolutionary because it affirmed adolescents as sexual beings who may engage in consensual sexual conduct among themselves, if they choose. South Africa arrived at this decision using its Constitution and domestic laws. Some African countries still have laws that criminalise consensual sex between adolescents. Yet, girls and boys still engage in some form of sexual conduct. The effect is that since the norms and laws prevent them from getting the necessary support, such as sexual and reproductive health information and services, they are susceptible to unwanted pregnancy, sexually transmitted infections, and unsafe abortions.

The South African case perhaps raises questions about the extent to which African countries are implementing various rights for adolescents. For instance, the African Commission's General Comment on Article 14(1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa discussed wide-ranging human rights principles that impact women's sexual and reproductive rights, including the right to non-discrimination, the right to

health, and the right to sexuality education. These rights should fully apply to adolescents. To ensure realisation of these rights, states are obligated to take steps including transformation of legal and policy frameworks, such as by eliminating laws that indiscriminately criminalise consensual sexual conduct between adolescents.

HIGHLIGHT

ADOLESCENT CONSENSUAL SEXUAL CONDUCT

Social norms, religious norms, and criminal law regulate sexual conduct. In many traditional settings in African countries, a girl matures at puberty, and is prepared for sexual activity thereafter. In settings where certain religious norms take precedence, the person is allowed to engage in sexual activity only after celebration of marriage. States also regulate sexual conduct through criminal laws by setting age of consent to sex.

The two *Teddy Bear* decisions of the South African Courts addressed the criminalization of consensual adolescent sexual conduct. Both courts found that indiscriminate criminalization of consensual sexual conduct infringed upon the rights of children and adolescents. These decisions are revolutionary in positing the idea that adolescent consensual sex should not always be viewed as problematic. In the second *Teddy Bear* case, Justice Sisi Kampepe affirmed that consensual sexual conduct between adolescents may not only be innocuous, but is critical for normal and healthy development.

Treating adolescent sexuality as problematic negatively influences how society addresses adolescent sexuality, especially in health care and educational institutions. Adolescents have been denied sexual health information, education, and services for fear that it would encourage them to engage in sexual conduct. They have been subjected to violations of their rights: for getting pregnant outside wedlock, for instance, girls have been denied the opportunity to continue with education, as in the student pregnancy case in the Constitutional Court of South Africa.[26]

Further, sex laws are not necessarily benevolent for the adolescent who it is designed to protect from harm. As Justice Kampepe noted in the second *Teddy Bear* case, criminalization drives adolescent sexual behaviour underground. It puts the adolescent through the harsh criminal justice system, when it is really not necessary. The two South African cases invite a reflection on how Africa has used criminal law to disempower adolescents and infringe on their rights, including, the rights to privacy and dignity. It is noteworthy that these criminal regimes reflect problematic conceptions about sexuality of children and adolescents. Instead of using criminalization to protect adolescents from harm arising from consensual sexual conduct, governments can enhance sexuality education programs, counselling, and comprehensive sexual and reproductive health services for adolescents to achieve the same objective but in ways that conform to the rights of the child.[27]

STUDENT PREGNANCY

Head of Department, Department of Education, Free State Province v. Welkom High School & Another; Head of Department, Department of Education, Free State Province v. Harmony High School & Another
CCT 103/12 [2013] ZACC 25
South Africa, Constitutional Court

COURT HOLDING

The Head of Department ("HOD" or "applicant") did not have the power to formulate policies for a particular school and, consequently, could not instruct school principals not to follow school policies, even if the HOD was of the view that the policies were unconstitutional.

The pregnancy policies *prima facie* violated constitutional principles. However, the Court would not make a declaration on the constitutionality of the pregnancy policies since it was not properly brought before the Court, and also because the Court respected the scheme of powers under the School Act.

Summary of Facts

This was an application before the Constitutional Court of South Africa by the Head of Department of the Department of Education of the Free State Province for leave to appeal against a judgment of the Supreme Court of Appeal. The matter concerned two high schools, Welkom High School and Harmony High School in the Free State (collectively, "respondents"), and their respective school governing bodies ("SGBs"). Both schools had adopted policies that provided for automatic exclusion of any student from school if it is found that she is pregnant. When in two separate instances the schools applied the policies to pregnant students, the applicant intervened in the decisions of the SGBs and ordered the schools and their governing bodies to ignore the pregnancy policy and reinstate the students. The respondents took the matter to the High Court which ruled that the HOD had no authority to tell the principals to go against an adopted policy of the SGBs, nor could the HOD interfere in the decisions of the schools implementing these policies. The Supreme Court upheld this decision.

Issues:

1. Whether the HOD had the power to instruct principals of public schools to ignore policies adopted by the SGBs.

2. Whether and to what extent the Court could determine the constitutionality of the policies on student pregnancy.

Court's Analysis

The majority judgment, written by Justice Sisi Khampepe, reviewed the School Act (the " Act"), which is the primary legislation governing the relationships between the Minister of Education,

Members of Provincial Executive Councils responsible for education ("MECs"), HODs, principals and SGBs. According to Justice Khampepe, the Act gave the SGB powers akin to a legislative authority within the school to formulate policies, while the principal was responsible for implementation of these policies through the supervisory authority of the HOD. The Act does not grant the HOD any powers of policy making, so the HOD was not empowered to formulate binding pregnancy policies for a particular school.

Justice Khampepe held that an SGB may not adopt and enforce a policy that undermines the fundamental rights of pregnant learners, including the rights to education and freedom from unfair discrimination. However, the rule of law obliges an organ of state to use the correct legal process, which in turn requires the HOD to use clear internal remedies where available, rather than resort to self-help. Therefore, the HOD was obligated to ensure that constitutional rights were upheld, but the HOD could not interfere in an arbitrary manner and had to follow the mechanisms provided for by the Act.

Additionally, Justice Khampepe discussed whether the Court should delve into the issue of constitutionality of the pregnancy policies even if this was not properly before the Court. The Court was of the opinion that the pregnancy policies *prima facie* violated constitutional rights. Under section 172(1)(b) of the Constitution, the Court has the power to order any just and equitable remedy "that would place substance above mere form by identifying the actual underlying dispute between the parties" even if the claims were not raised by the parties. The Court invoked these discretionary powers in order to make a just and equitable determination of the matter. The Court therefore elaborated on its opinion about the constitutionality of the pregnancy policies.

The Court held that, first, the policies unjustifiably discriminated on the basis of pregnancy and sex. Second, the policies limited the right to education by requiring that the student repeat an entire year. Third, the policies *prima facie* violated students' rights to human dignity, privacy, and bodily and psychological integrity by requiring them to report their own pregnancy or that of others. Finally, the policies violated the best interests of the child because they failed to take into account the health and other needs of the pregnant student.

The majority judgment concluded that the Court would not make a declaration on the constitutional validity of the pregnancy policies since this was not put properly before the Court, and also because the Court respected the scheme of powers in the School Act. Instead, the Court ordered the SGBs to review their pregnancy policies.

The minority and dissenting judgment written by Justice Raymond Zondo opined that if the pregnancy policies were *prima facie* inconsistent with the Constitution, "then it logically follows that the principal was obliged not to implement that policy and the HOD was not only entitled but obliged to give the instruction that he did to ensure that the principal did not act unlawfully and unconstitutionally."[28] According to the minority judgment, the principle of legality obliged the HOD to ensure that the principal was not implementing policies that were unconstitutional. Further, the Court ought not to have avoided determining the matter of constitutional validity of the pregnancy principles, since this matter had been raised in both lower courts by the HOD.

Conclusion

Leave to appeal was granted. The appeal against the order of the Supreme Court of Appeal was dismissed. The SGBs were ordered to review their pregnancy policies in the light of the judgment, and to do so in collaboration with the HOD.

Significance

This decision follows several others such as *Student Representative Council of Molepolole College of Education v. Attorney General* [1995] (3) LRC 447), where the Botswana Court of Appeal held that a regulation that required a student to report pregnancy to the authorities, and would be obliged to leave the College or be expelled if this was a second occurrence, was unconstitutional as it was discriminatory on the basis of sex. Similarly, in *Mfolo and Others v. Minister of Education, Bophuthatswana* (South Africa, Supreme Court, Bophuthatswana and General Division), [1992] (3) LRC 181, and in *Lloyd Chaduka and Morgenster College v. Enita Mandizvidza* (Zimbabwe, Supreme Court), Judgment No. SC 114/2001; Civil Appeal No. 298/2000, the two Courts held that regulations that required pregnant students to withdraw from college were unconstitutional.

Pregnancy in colleges and schools has been perceived as the problem of the pregnant student, that she has mistimed it, or in the case of unmarried girls and women, that it was morally wrong to be pregnant before marriage. As a result, policies on student pregnancy have been designed to "discourage" others from becoming pregnant and have been rather punitive on pregnant students and young mothers. This also perpetuates the stigma against pregnant and young mothers. This case and the ones referred to above encourage states to change the attitude of duty-bearers and align policies with fundamental rights and freedoms.

An important consideration that the Court brought up is that the pregnancy policies failed to take into account the best interests of the child (the pregnant student or young mother below the age of 18), including her health, arrangements she has made to take care of the newborn, and her wishes generally. This line of thought has far reaching implications. For instance, what would it mean to have policies that would support arrangements about taking care of a learner's new born or baby, including breastfeeding? What wishes of the pregnant student or young mother should be taken into account? This may involve measures that require allocation or reallocation of resources beyond simply allowing pregnant students and young mothers to remain in the school system, and addressing the pattern of bias and discrimination that has operated against pregnant students and young mothers in schools.