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