

DIANA EUNICE KAWENDA

and

LOVENESS MUDZURU

versus

MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS

and

MINISTER OF HEALTH AND CHILD CARE

and

ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE

TAGU J

HARARE 5 November 2020 & 20 January 2021

### **Opposed application**

*T. Biti*, for applicants

*N. Muchinguri*, for respondents

TAGU J: The two applicants are young Zimbabwean feminists and human rights activists with special interest and concern for children, gender, women's and socio economic rights. They filed the present application as a public interest application to protect the rights of children. In their founding affidavits they averred among other things that the current age of sexual consent in Zimbabwe is 16. This age is defined from the Criminal Law (Codification and Reform) Act [Chapter 9.23] (the CODE) which in Section 61 defines a 'young person' as a boy or girl under the age of 16 years. However, they further averred that Section 81 of the Constitution makes it clear that a "child" is anyone below the age of 18. Therefore, according to them a "young person" should be defined in the CODE to mean a boy or girl under the age of 18 years. The Constitution being the supreme law of Zimbabwe, any law, custom, conduct or practice that is inconsistent with the same is invalid. According to them the CODE is unconstitutional in so far as it fails to recognize that a child is anyone up to the age of 18 years and below. More particularly the CODE is unconstitutional in that it defines the age of sexual consent to be 16. That being the case it is their contention that the various provisions of the CODE which do not recognize that a child is one below the age of 18 are unconstitutional on the basis of being in breach of Section 81 of the Constitution as well as Sections 51, 56, 75 and 76. Accordingly they seek an order that the definition of "young person" and reference to "below the age of sixteen years" in the Sections of the Criminal Code [Chapter 9.23] be declared unconstitutional to the extent that they do not include all children under the age of 18 in violation of Section 81 of the Constitution. In particular they

submitted that the current age of sexual consent set at 16 by section 70 of the CODE is inconsistent with Sections 81 (1) (e), 81 (1) (f), 81 (2), 51 and 53 of the Constitution of Zimbabwe.

They cited various UN Charters that provides for special protection of children and woman. They said the current age of sexual consent fails to protect girls from the detrimental effects of engaging in sexual relationships. They said the courts recommended that the current age of consent should be increased to 18, to be in accordance with the constitutional definition of a minor and aid in protecting girls from adult predators in particular. According to them raising the age of consent to 18 would help to discourage girls from engaging in early sexual relations, and deter older men from engaging in relationships with girls under the age of 18. It was their observation that Section 70 of the CODE only grants children under 16 the advantage of protection from sexual exploitation, leaving 16 and 17 year old children vulnerable and unprotected from harm. They advocated that changing the age of sexual consent to 18 would allow all children to receive protection from the sexual exploitation of adults. They further said the current age of consent is discriminatory towards women as it disproportionately compromises the health and education of girls. By raising the age of consent is a reasonable measure towards equalizing educational and future economic opportunities between boys and girls.

Additionally, they submitted that the legal inconsistency between the marital age and age of sexual consent violates girls' right to human dignity under Section 51 as it leaves the 16 and the 17 year old girls unprotected from sexual exploitation. Hence the current law fails to take the best interest of all children below the age of 18 into consideration. The second applicant even suggested that if she were to be given a chance she would advise every young girl to stay away from men and only to seek to engage in sex well after the age of 28 years and perhaps after attainment of a degree and years of working. They therefore seek the following order-

“It is ordered and declared that:

1. The definition of “young person” and reference to “below the age of sixteen years” in the below Sections of the Criminal Code [Chapter 9. 23] are unconstitutional to the extent that they do not include all children under the age of 18 in violation of Section 81 of the Constitution.
2. The Sections of the Criminal Code [Chapter 9.23] which fail to protect all children under the age of 18, are inconsistent with Section 81 of the Constitution and are thus unconstitutional to the extent of this inconsistency.
3. The current age of sexual consent set at 16 by Section 70 of the Criminal Code [Chapter 9.23] is inconsistent with Section 81 (1) (e) of the Constitution of Zimbabwe.
4. The current age of consent set at 16 years old violates the rights and protections for girls including human dignity under Section 51, equality and non-discrimination under Section 53, right to education under Section 81 (1) (t), protection from sexual exploitation and abuse under Section 81 (1) (e), healthcare under Section 81(1) (f), and best interest under Section 81 (2) of the Constitution of Zimbabwe.
5. The Respondents pay costs of the suit.”

The respondents opposed the applicants' application.

The first respondent stated that for the avoidance of doubt the CODE makes a clear reference to “YOUNG PERSON” and not child as this was deliberately drafted in the context and purpose of the legal issues it wanted to address. Reliance is on YOUNG PERSON's understanding of sexual behavior, the context of normal sexual relationships, knowledge of the consequences of

sexual intercourse, for example, pregnancy and infections. Also ability to make an informed decision to engage in sexual intercourse, based on the above awareness and understanding of the right to say “no” and the ability to resist or say “no” in context. For this reason he denied that the CODE is unconstitutional. He said even though children need to be protected from sexual abuse and exploitation it needs to be acknowledged that adolescents start exploring their sexuality and engaging in consensual sexual activity with their peers before they turn 18. Therefore raising the age of consent to sexual activities does not prevent adolescents from engaging in sexual activity, it only leads to adolescents being criminalized as sex offenders. Apart from these harsh consequences it creates barriers in accessing sexual and reproductive health services. This lead to higher levels of unsafe abortions, sexually transmitted diseases (STDs) and unwanted pregnancies. The Minister of Justice, legal and Parliamentary Affairs is therefore of the view that even if the age of consent is raised to 18 years adolescent children below 18 years will still engage in sexual activity and the risk stated by the applicants still arises.

Therefore, raising the age of consent to 18 years is not the solution, as this won't stop girls and boys from experimenting sexually and thus would create a larger problem of underage pregnancies and the spread of STIs and HIV. On the issue of discrimination he said CODE's spirit and mandate is never to discriminate or result in selective protection, it acknowledges all children as being equal and in need of protection. It only considered the best interest of the child in context of the cultural, economic, social and health situation that Zimbabweans children face daily. Discrimination against women and their sexual abuse wont' be addressed by raising the age of consent, rather there is need to enlighten and empower the girl child.

The first respondent acknowledged that in line with Zimbabwean Constitutional Court decision children need to be protected from the harmful implications of child marriages. In contrast sexual activity between adolescents is not as such harmful as long as both adolescents give informed consent and have access to sexual and reproductive information and services. Adolescents that are afforded the information and knowledge necessary to protect themselves are more empowered to make full free and informed decision about when or when not to have sex when they are ready and without suffering negative consequences for doing so. He said the concept of the evolving capacities of adolescents reflects a balance between recognizing children as active agents in their own lives while also being entitled to protection in accordance with their reflective immaturity and youth. Importantly, there is no single age of which maturity or agency occurs. The capacity to take responsibility for decisions affecting one's life can happen at different ages for children and adolescents with diverse life experiences.

On the suggestion that the current age of consent law fails to take children's best interests into account directly breaching Section 81 (2) of the Constitution of Zimbabwe the first respondent submitted that in fact the CODE takes into account the best interests of the child because a higher age of consent to sexual activity does not actually lead to a delayed sexual debut. Rather the current age gives adolescents the capacity to make decisions about their sexual health as they are enlightened at an early age. He denied that Section 76 which is the right to health is violated because Section 76 does not provide for an exclusively right to health but rather a right to health care access. Raising the age of consent will only jeopardize the children as they would fear the law and discrimination when accessing sexual productive health services. This would only lead to

unsafe abortions, unwanted pregnancies. Equally. He argued that girls who become pregnant as adolescents would develop more health complications because of the negative physical and mental risk health associated with early sexual activity, cannot be addressed by the raising of the age of consent but rather by empowering and enlightening them on sexual reproductive health. He confirmed that Zimbabwe in relation with international law has played its part in trying to protect the girl and boy child in pursuit in the full embrace of its obligations. He said in other jurisdictions like South Africa, United States of America and United Kingdom whose constitutions define a child as any person below the age of 18 years also adhere to age of consent of 16 years.

In conclusion he opined that the current age of consent in broad terms attempts to enlighten and empower children at a young age and in turn aims at protecting even 16 and 17 years olds in so far as in making the right choices. The reality is that children are engaging in underage sexual activity and we cannot turn a blind eye and hope that by raising the age of consent to 18 years this would stop or help to save negative consequences associated with early sexual activity. Accordingly there is nothing unconstitutional about the sections cited. He prayed for the dismissal of the application.

The second respondent conceded that the right to health care under section 76 of the Constitution is about access to the provision of physical, mental and reproductive health care to every citizen and permanent resident of Zimbabwe and that it is indeed the mandate of the 2<sup>nd</sup> respondent to guarantee that right. However, he submitted that the Children's Act is not administered by the Minister of Health and Child Care but by the Minister of Public Service, labour and Social Welfare who is not cited in this court application. He also said Section 20 of the Constitution also recognizes a category of children that are also Youths, that is to say people between the ages of fifteen and thirty five. This is also in line with the African Youth Charter, a treaty which Zimbabwe is a party. To him the ages fifteen to seventeen is a category that is recognized by the same Constitution as both children in section 81 and as Youth in section 20 and that this category enjoys the rights of being both children and Youths. So the ages fifteen to seventeen already have reproductive health rights in terms of the African Youth Charter, which treaty Zimbabwe, as a member of the African Union, is already a party to. Accordingly on the harmonization of the age of sexual consent as stated in section 70 (3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], being raised from 16 to 18 years in line with section 81 of the Constitution, the 2<sup>nd</sup> respondent will abide by the decision of this Honourable Court.

In their heads of argument the applicants cited among other authorities the case of Mudzuru and another v Minister of Justice 2016 (2) ZLR 45 (CC), where the Constitutional Court of Zimbabwe in no uncertain terms brought the protection of children's rights to the fore and made it sacrosanct. They maintained that Section 70 of the Code breaches Section 81 of the Constitution of Zimbabwe. Their argument being that a child who is defined as any person below the age of 18 and therefore any law that treats and provide separate protection of treatment to any child below the age of 18 is unconstitutional. They further submitted that the age of sexual consent in Zimbabwe does not protect all girls under the age of 18, as it leaves 16 and 17 year old girls unprotected. Therefore by setting the age of sexual consent at 16, Section 70 of the Criminal Code does not serve to deter men from engaging in sexual activity with 16 and 17 year old girls, leaving them vulnerable to the profound physical, emotional and psychological consequences of sexual

activity. According to them Section 81(1) (f) of the Constitution guarantees every child, that is to say a boy or a girl under the age of eighteen years the fundamental right to health care services. Further they said the age of sexual consent set at 16 increases the rate of HIV, unwanted pregnancy or STD infection among girls because it allows much older men to engage in sexual activity with 16 and 17 year old girls. They therefore want the provisions of the CODE to be declared unconstitutional.

On the other hand the 1<sup>st</sup> and 3<sup>rd</sup> respondents in their heads of argument also submitted that the current age of consent as provided by section 70 read together with section 61 (1) of the Code does not in any way violate the child's right to human dignity but instead it is meant to protect the child's dignity. To them the applicants' allegations are unfounded both in law and in fact. They maintained that in *Loveness Mudzuru v Minister of Justice supra*, at page 63, the court reasoned that sexual activity between adolescents is not as such harmful as long as both adolescents give informed consent and have access to sexual and reproductive information and services. Thus adolescents that are afforded the information and knowledge necessary to protect themselves are more empowered to make full free and informed decision about when or when not to have sex when they are ready and without suffering negative consequences for doing so. Thus the current age of sexual consent, so they argued, ensures that children's dignity is protected especially after considering the evolving capacities of adolescents to take responsibility for decision affecting their lives. To them sections 56 of the Constitution read in the spirit and mandate of the Code is never to discriminate or result in selective protection but to afford equal treatment and protection of people before the law. Thus the Code only considered the best interest of the child in the contest of cultural, economic, social and health situations that Zimbabwean children face daily.

They argued that the applicants are misguided in believing that posing a higher age of sexual consent would ultimately lead to a delayed sexual debut by adolescents. Rather the current age of consent gives adolescents the option to make decisions about their sexual health, as they are enlightened at an early age. So raising the age of consent to 18 years cannot be said to be a solution in reducing child pregnancies and school dropouts rather there should be more programs and awareness campaigns to enlighten and empower the girls on that subject. Finally they submitted that in interpreting any piece of legislation we must seek to ascertain the real intention of the lawmaker and in this case the people of Zimbabwe, in so doing we must have regard to the scope and object of the enactment. See *Maharaja and Another v Ramperstad* 1964 (4) SA 638 (A). To them the applicants failed to give the correct interpretation of section 70 as read together with section 61 (1) of the Code by alleging that it is *ultra vires* the provisions of the Constitution. As Lord Denning put it in *Scolgne Properties v Inland Revenue* [1958] ALL ER 4006 (HL)-

“A statute is not passed in a vacuum, but a framework of circumstances, so as to remedy a known state of affairs. To arrive at its true meaning you should know the circumstances with reference to which the words were used, and what was the object appearing from the circumstances, which parliament had in view.”

In short the respondents are saying sections cited by the applicants are not unconstitutional.

Before giving my analysis let me look at the definitions complained of. The applicants are saying the definition in sections 61 and 70 of the CODE are *ultra vires* the definitions in section

81 of the Constitution. On the onset I want to acknowledge that the Constitution is the supreme law of Zimbabwe and any law, custom, conduct or practice that is inconsistent with the same is invalid. The contention by the applicants is that CODE is unconstitutional in so far as it fails to recognize that a child is anyone up to the age of 18 and below.

Section 81 of the constitution of Zimbabwe outlines the various rights of children and in the process defines a “child”. It reads as follows-

**“81 Rights of children**

(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right-.....“  
So a reading of the above provision clearly shows that a child is defined as a boy or girl under the age of 18 years. Section 61 of the CODE defines a young person in the following manner-

**“61 Interpretation in Part iii of Chapter v**

(1) In this Part-

.....

“young person” means a boy or girl under the age of sixteen years....”

This reading shows that the CODE defines a young person while the Constitution defines a child. However, both statutes make reference to a boy or girl. On the other hand Section 70 of the Code talks of sexual intercourse or performing indecent acts with young persons. However, section 20 of the Constitution defines youth in the following terms-

**“20 Youths**

(1) The State and all institutions and agencies of government at every level must take reasonable measures, including affirmative action programmes, to ensure that youths, that is to say people between the ages of fifteen and thirty five years-...”

Boys and girls between 15 years and 35 years are defined in the Constitution as youths meaning a young person. Anywhere this is not the issue before the court. The issue to be decided is whether sections 61 and 70 of the Code are unconstitutional and whether raising the age of consent from 16 to 18 years protects girls and women from sexual abuse and whether the cited sections should be declared unconstitutional.

**MY ANALYSIS**

World-wide the age of sexual consent is a moot issue. In this judgment I am going to examine trends on age of sexual consent, age of marriage, child development, and the effects of raising to 18 years on sexual consent on child protection, and whether section 70 and related sections are unconstitutional.

Various jurisdictions that I checked have set the age of sexual consent at different levels. While putting in place an age of consent is almost a universal approach, there is no global uniformity as to what the benchmark age is. According to *“Justice for Children Trust (2019) Age of Consent, Sexual Intercourse with Young Persons and Access to Sexual and Reproductive Health Care in Zimbabwe”* the legal ages at which one is deemed capable of agreeing to sexual activity ranges from 11 to 21 years in different countries around the world. Nigeria has the lowest age of sexual consent at 11, followed by Angola and the Philippines at 12, seventy –six (76) countries including United States of America, United Kingdom, Canada, and South Africa have 16 years, South Korea

and Bahrain, 20 years. Other countries that have predominantly Islamic populations including United Arab Emirate, Kuwait, Iran and Saudi Arabia do not have a legal age of sexual consent and people in these countries can only engage in sexual activity if they get married.

As a point of departure, it is important to examine issues related to child development. An analysis of child development will help to unpack milestones that are normative at each stage of a child's life particularly how physical, cognitive (intellectual), emotional and social changes impact on a child. All these facets have an influence on the behavior of an individual. Child development is generally understood to progress through infancy, childhood, adolescence and adulthood.

Human development is considered to begin when the child is in the uterus. The child interacts with the mother and learning starts at that stage. Upon birth a child has a set of inherited reflexes that help them to obtain nourishment. According to [https://www.britannica.com/science/psychological\\_development](https://www.britannica.com/science/psychological_development) new born babies are equipped with a predilection for certain visual patterns including that of a human face and certain sounds including that of a human voice. At this stage the child makes rapid advances in recognition and recall memory. This helps the child to understand and anticipate events in the environment.

The next stage of development is childhood which extends from one or two years to the onset of adolescents at 12 or 13 years. At this stage, the child makes strides in the acquisition, understanding and use language.

In terms of cognitive abilities, children make a transition from relying solely on concrete, tangible reality to performing logical operation on abstract and symbolic material. The child's problem solving capabilities are developing. Between 7 and 12 years, the beginning of logic appear in the form of classification of ideas, an understanding of numbers and time and a greater appreciation of seriation and other hierarchical relationships.

Emotionally, self-awareness develops and they develop skills to interpret the emotions of other people. These new abilities contribute to children's moral development which typically begin in early childhood as concern over and avoidance of acts that attract pain and punishment and progression to a more general regulation of conduct so as to maintain parental regard and approval. A further shift in moral reasoning to one based on the avoidance of internal guilty and self-recrimination marks the passage from child hood and adolescence to adulthood.

Therefore, adolescence, physically begins with the onset of puberty at 12 Or 13 years and culminates at age 19 to 20 in adulthood. Intellectually, adolescence is a period when the individual becomes able to systematically formulate hypothesis or proposition, test them and make rational evaluation and emotionally it is a time when individuals learnt to control and direct their sex urges and begin to establish their own sex roles and relationships. Early adolescents' sexual exploration is considered to be developmentally normative and is in effect essential for the development of positive and healthy sexual behavior including sexual intercourse in later years. This was observed by Gevers, A;Jekwes, R, Matthews, C, and Flisher, A 2012. 'I think its about experiencing, like, life': qualitative exploration of contemporary adolescent intimate relationship in South Africa, *Journal of Culture, Health and Sexuality*. Vol. 14(10). It is also a time when an individual tries to

come out with his or her own identity. Failure to come up with an identity may result in confusion in the individual and this negatively impacts on a child's personality. The period of adolescence is described as one of significant transition, with many changes occurring to the individual. These multiple transitions can cause adolescents to experience discovery of themselves (identity) and intimacy or it lead them to feel confused and disorientated about their identity and intimacy. See *Hollely, K "The Development issues affecting Consent in Children Under 16 years."*

Adulthood is a period of optimum mental function when the individual's intellectual, emotional and social capabilities are at their peak to meet the demands of career, marriage and children. It should however, be appreciated that some children may reach sexual maturity quicker than others and therefore are able to make choices about their bodies. Check <https://www.theconversation.com/why-the-age-of-sexual-consent-continues-to-be-a-world-wide-challenge-94334>.

From the above it is a notorious fact for recognition that children in Zimbabwe as elsewhere are indulging in sexual activity from an early age. Globally, at least half of all adolescents are sexually active before turning 18 and in Zimbabwe, nearly 40 percent of girls and 24 percent of boys are sexually active before they reach the age 18. This was observed by UNICEF, UNESCO, UNWomen, UNFPA and UNDP (2019) *Adolescents Consent to Marriage and Sexual Activity, And Access to Sexual Reproductive Health Services in Light of the Zimbabwe Marriages Bill (2019)*.

In the United Kingdom, 1 in every 3 teenagers are having sex before the age 16. Therefore it is my view that if we deny teenagers decision-making opportunities, we risk retarding their growth and maturation, similarly if we tell teenagers "just to say no to sex"; we deny them a normal part of their development and sexual exploitation must occur in an age appropriate way. See [https://www.vox.com/thebig\\_idea/2017/11/20/16677180/age-consent-teenage-psychology-law-ro-moore](https://www.vox.com/thebig_idea/2017/11/20/16677180/age-consent-teenage-psychology-law-ro-moore).

My view is that even though children need to be protected from sexual abuse and exploitation, it needs to be acknowledged that adolescents start exploring their sexuality and engaging in consensual sexual activity with their peers. Therefore raising the age of consent to sexual activity from 16 to 18 does not *per se* prevent adolescents from engaging in such sexual activity. It only leads to adolescents being criminalized as sex offenders and apart from these harsh consequences it creates barriers in accessing sexual and reproductive health services. United Nations Organizations operating in Zimbabwe noted that a high age of sexual consent will result in caregivers and institutions being disempowered in responding to adolescents because they could not promote behavior deemed illegal and they may have a legal obligation to report. However, as I said it is common cause that there is need to protect children from sexual exploitation by adults. It is thus submitted that there should be penal provisions in our statutes to deal with adults who have consensual sexual activity with children aged between 16 and 18 years.

Therefore, laws that promote a high age of sexual consent are often used to curb adolescents' and woman's agency. Although both boys and girls face consequences of a high age of sexual consent, efforts to conflate age at marriage with age of sexual consent can be particularly harmful

for girls, as they can deny them the right to make decisions about whether, when, and with whom to have sex. They can also stigmatize or criminalize individuals who have sex before marriage and increase barriers to accessing sexual and reproductive health services. See [https://www.girlsnotbrides.org/wp-consent/uploads/2019/01/age\\_of\\_marriage-brief-pdf](https://www.girlsnotbrides.org/wp-consent/uploads/2019/01/age_of_marriage-brief-pdf).

Growing evidence indicates that the stigma around adolescents engaging in sexual activity prior to marriage may actually be contributing to child marriages. This observation was made by **GirlsNOTBrides** who noted that in some societies parents' desire to preserve their daughter's sexual purity prior to marriage may drive early marriage and adolescents may feel that the only way they can have sex and access sexual and reproductive health information and services is by being married. These may be the iatrogenic or unintended effects of raising the age of sexual consent.

It must be noted that by raising the age of sexual consent, providing sexual and reproductive health information will be difficult. On the other hand, a low age of sexual consent would make it distinctly easier for appropriate sex education to be provided to children and young people to enable them to make wiser decisions. It would be easier to provide sexual health services to people of this age without the fear of conniving in an illegal activity. See [Ncbi.nlm.nih.gov/pmc/articles/pmc6436061](http://Ncbi.nlm.nih.gov/pmc/articles/pmc6436061).

In South Africa, the Constitutional Court found that criminalizing consensual sexual activity between adolescents increased the likelihood of them participating in unsafe sexual behavior despite their need for sexual and reproductive health services and advice, sometimes as victims of sexual exploitation. See [Amnesty.org/en/latest/campaign/2019/03/op-ed-zimbabwe-confusion-around-age-of-consent-has-devastating-effects-for-childrens-sexual-and-reproductive-health](https://www.amnesty.org/en/latest/campaign/2019/03/op-ed-zimbabwe-confusion-around-age-of-consent-has-devastating-effects-for-childrens-sexual-and-reproductive-health).

As noted above, adolescence in every part of the world are engaging in sexual activity which psychologically is part of their normal development it is however important that children are protected from exploitation by adults and more mature children. My observation is that Section 70 (2) of the Criminal Law (Codification and Reform) Act seeks, as the Minister of Justice also observed, to protect young persons (Children aged between 14 and 16 years) who engage in consensual sexual activity between themselves. This position was confirmed in *State v CF (Juvenile)* HH-143-11 and *State v LC (Juvenile)* HH-34-14. Such provisions are progressive in as much as they seek to protect children from sexual predators and at the same time do not criminalize consensual sexual activity between the children themselves. If the age of consent is raised, then efforts should be made that the law does not punish young persons in romantic relationships because the law does not discriminate the predatory adult and the lover boy/girl. This observation was made by JUSTICE TSANGA in *State v Masuku* HH-108-15. See SRHR Africa Trust (SAT): *Age of Consent: Global Legal Review*.

Alternatively, some jurisdictions have so called Romeo and Juliet Laws or Close- in Age defences. Close- in Age exceptions to the age of sexual are put in place so that young adolescents having consensual sexual activity with one another are not prosecuted and have criminal records at an early age.

In my respectful view laws on their own cannot prevent children from engaging in sexual activity. Therefore raising the age of consent from 16 to 18 cannot *per se* prevent children from having sexual intercourse. Where an adult is involved these children are adequately protected by law such as Rape. Laws cannot substitute parenting. Professor Pierre De Vos opined that the use of criminal law as a parenting tool in matters of sexual development of teenagers is impossible to square with the rights guaranteed in the Constitution. Education and stronger parenting are imperatives so that children may make informed and rational decisions.

Neuroscience and psychosocial evidence confirms that teenagers can make cognitively rational choices in “cool” situations that is when they have access to information, face little pressure and possibly have adult guidance. See <https://www.vox.com/the-big-idea/2017/11/20/16677180/age-consent-teenage-psychology-law-roy-moore>. Adolescence should therefore be armed with information that empowers them to protect themselves from unwanted pregnancies, sexual transmitted diseases and sexual violence. Therefore, when adolescents are left to sort through sexuality issues and choices among themselves they tend to engage in more risky behaviours for a variety of reasons including poor decision making skills and power imbalances in a relationship. See South Africa Constitutional Court, *The Teddy Bear Clinic For Abused Children and Another v Ministry of Justice and Constitutional Development and Others* CC12/13 (2013)ZACC35.

Flishers and Gevers gave uncontradicted expert evidence in the South African Constitutional Court where the Constitutional Court was seized with the question whether it is constitutionally permissible for children to be subjected to criminal sanction in order to deter early intimacy and combat the risks associated therewith. They opined various social and psychological effects of such a stance on child development. Firstly, that children charged will feel a mixture of shame, embarrassment, anger and regret which will have an adverse impact on the individual and his/her development. The feelings may lead to development of generally negative attitude to sexual relations. Secondly, that these feelings are likely to inhibit the individual from seeking help for issues about sex. In order to avoid the emotional distress and interpersonal or social problems, adolescents will avoid seeking help or being open about such issues with their sexuality such that existing problems will grow and future.

A fine balance must be struck that achieves greater and enhanced protection of children and the advancement of the best interest, ensuring that children are educated to make informed decisions where parental guidance is lacking. It is my view therefore that raising the age of sexual consent to 18 years does not *per se* translate into better protection for children and women. To the contrary it is likely to harm the same children that were intended to be safeguarded and protected.

*In casu*, the applicants have approached this Honourable Court seeking to challenge the legal age of sexual consent in section 70 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The basis of the application being that it is *ultra vires* section 81 of the Constitution of Zimbabwe which defines a child to mean every boy and girl under the age of eighteen years. Further, the applicants seek an order to the effect that the current age of sexual consent set at 16 years, violates the right and protection of girls as contained in sections 51, 56, 75, and 81 (1) (f) and 81 (2) of the Constitution of Zimbabwe. The issue for determination being whether the age of sexual consent as provided by section 70 read together with section 61 (1) of the Criminal Law

Codification and Chapter 9.23 is *ultra vires* section 51, 56, 75, 76, 8191) (f) and section 81 (2) of the Constitution of Zimbabwe.

From the analysis that I made above it is my view that the current age of consent as provided by section 70 read together with section 61 (1) of the CODE does not in any way violate the child's right to human dignity but instead it is meant to protect the child's dignity. It is imperative that one has to look at the broader aspect of the law as much as it may not cover all areas, it however attempts to protect the right of all children. As stated elsewhere in this judgment according to the 2015 Zimbabwe Demographic Health Survey, statistics have shown that boys and girls engage in sex before marriage, hence the current age of consent which is at 16 years is meant to fulfil their right to health care as provided in the Constitution. Thus, raising the age of consent to 18 years would result in children being excluded from accessing relevant health care services in false presumption that they would be protected from sexual exposure. Surely the State cannot put a blind eye on children by assuming that by raising the age of consent children are not engaging in sexual activities. By maintaining the current age of consent would go a long way in protecting their right to health care given that they would not be discriminated when accessing proper health care services on sexual reproduction.

In this case the applicants are targeting the provisions of the Criminal Law Codification and Reform Act as being unconstitutional in its interpretation of child or young person. They forget that there are a plethora of other Acts that define a child, that is, a boy/ girl and young person in the same manner that is not consistent with the definition given in the Constitution. As properly submitted by the second respondent, the best solution they can advocate for is to speedily rationalize or harmonize various Acts with the Constitution. Even if this court is to declare the definition in section 61 or 70 of the Code unconstitutional what is going to happen to the definitions in other statutes? For example the Children's Act Chapter 5.06 defines a child in the following manner-

“Child” means a person under the age of sixteen years and includes an infant.”

The same Act defines a young person in the following terms-

“young person” means a person who has attained the age of sixteen years but not attained the age of eighteen years”

Further, a look at the Public Health Act [Chapter 15.09], it defines an “adult” in the following manner-

“Adult means a person of sixteen years of age or over”.

Further, the same Act defines a child in the following manner-

“Child means a person under sixteen years of age.”

These are but a few statutes that seem to define a child/boy/girl/young person differently from the current Constitution.

Therefore, the mischief which the applicants want to be corrected cannot be corrected by merely declaring section 61 and 70 of the CODE as unconstitutional. It will only amount to a patching exercise. A wholesome approach is required. The solution lies in harmonizing the current statutes with the constitution. Even after harmonization it is my considered view that this will not *per se* protect the adolescents. What is required is a strong multi-sectoral approach in educating

the girl or boy child of the evils of indulging in early sexual activities without the necessary precautions. For the above reasons I will dismiss the application with costs.

IT IS ORDERED THAT

1. The application is dismissed with costs.

*Tendai Biti law, applicants' legal practitioners*

*Civil Division of the Attorney –General's office, respondents' legal practitioners*