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Handbook on Juvenile Law in Zambia

Center for Law and Justice (Zambia)

Cornell Law School. Avon Global Center for Women and Justice

Cornell Law School. International Human Rights Clinic

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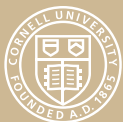
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Handbook on Juvenile Law in Zambia

Center for Law and Justice

Cornell Law School's Avon Global Center for Women and Justice
and International Human Rights Clinic

AUGUST 2014



Cornell University
Law School

Avon Global Center
for Women and Justice



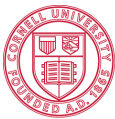
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Cornell Law School's Avon Global Center for Women and Justice and
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Cornell University
Law School

Avon Global Center
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AVON
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Avon Global Center for Women and Justice at Cornell Law School

The Avon Global Center for Women and Justice at Cornell Law School works with judges, legal professionals, and governmental and non-governmental organisations to improve access to justice in an effort to eliminate violence against women and girls. For more information, please visit: www.womenandjustice.org.

Center for Law and Justice

The Center for Law and Justice (CLJ) is a Zambian organization that works to protect and promote the welfare of children and juveniles. CLJ seeks to safeguard the legal rights of children as well as advocate for systematic improvements in juvenile justice. It's programs – legal education, legal research, legal aid, and advocacy – improve access to legal representation for juveniles, inform juveniles of their basic rights, draw attention to gaps within the system, provide specialized training and research support for Magistrates and other legal officials, and advocate for law and policies that strengthen juvenile justice system.

Cornell Law School International Human Rights Clinic

The Cornell Law School International Human Rights Clinic contributes to advancing human rights by providing legal assistance to nongovernmental organisations, judges, intergovernmental bodies, and individuals. Under faculty supervision, students work on a variety of human rights projects, which involve fact-finding and reporting, domestic and international litigation, human rights education and other methodologies. Through these activities, the Clinic seeks to strengthen the rule of law and the protection of human rights around the world.

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Foreword

Juveniles who come into contact with the law are a particularly vulnerable group. They may be victims of abuse, in moral danger and in need of care, or unaware of their rights when they are accused of committing a crime. Zambia's domestic laws recognize this vulnerability of juveniles and grant them special legal protections. One ongoing challenge for juvenile protection is the lack of a compendium on Zambian juvenile law.

To improve access to information on Zambian juvenile law, the Center for Law and Justice and Cornell Law School's International Human Rights Clinic have co-authored this juvenile law handbook. The handbook offers a compendium of Zambian juvenile law, including the processing of juveniles in the criminal justice system. It synthesizes relevant constitutional and statutory law, case law, and international human rights law and highlights best practices that practitioners may consider when working on matters involving juveniles.

This handbook serves as a reminder that legal practitioners, judicial officers, and citizens alike are responsible for protecting the rights of juveniles. I hope that judges, magistrates, prosecutors, and legal officers will make frequent use of this handbook. Doing so will help to ensure that juveniles in Zambia are able to access justice through the courts.

Mumba Malila, State Counsel
Attorney General of Zambia

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Table of Contents

Acknowledgements	1
List of Legal Sources.....	2
Introduction.....	3
A. Purposes of the Handbook	3
B. Scope of the Handbook	3
C. Sources of Juvenile Law	3
D. Court Structure.....	4
Chapter 1: Juveniles as the Accused	5
A. Timeline of Arrest through Appeal.....	5
B. Definition of a Juvenile.....	6
C. Determining the Age of a Juvenile	6
D. Arrest	7
§ 1. Bail and Pre-Trial Detention of Juveniles	7
§ 2. Statements Offered While in Custody	9
E. Jurisdiction of Juvenile Courts.....	10
§ 1. Procedural Requirements for Sitting as a Juvenile Court.....	10
§ 2. Exceptions	11
F. Pre-Trial Motions and Procedures.....	11
§ 1. Requirements of Parents of Accused Juveniles.....	11
§ 2. Explanation of Charges and Initial Plea	12
§ 3. Remanding a Juvenile to Prison During Adjudications.....	12
G. Trial.....	13
§ 1. Persons Allowed in the Court Room	13
§ 2. Presumption of Innocence	13
§ 3. Rights of Unrepresented Juveniles	14
§ 4. Presence of Parents and Guardians.....	14
§ 5. Evidence and Child Testimony.....	14
H. Finding of Guilty	14
§ 1. Note on Abolition of Use of “Conviction” and “Sentence”	14
§ 2. Standard for Finding of Guilty	15
I. Prohibition of the Identification of a Juvenile in a Court Proceeding.....	15
J. Court’s Duty of Inquiry into Juvenile’s Background.....	16
K. Order from Finding of Guilty	16

§ 1. Note on Abolition of Use of “Sentence” and “Conviction”	16
§ 2. Restrictions on Detention and Imprisonment	16
§ 3. Prohibition of Capital Punishment	16
§ 4. Determining Whether to Imprison a Juvenile.....	17
§ 5. Monetary Penalties	17
§ 6. Probation.....	17
§ 7. School Order.....	18
§ 8. Reformatories	18
§ 9. Removals of Persons Out of Zambia.....	19
§ 10. Caning.....	19
§ 11. Order to Parent or Guardian of the Offender to Give Security	20
§ 12. Orders for Escape	20
L. Appeals.....	20
Chapter 2: Juveniles in Need of Care	21
A. Juveniles in Need of Care	21
B. Regulations When Proceedings Involve a Juvenile in Need of Care.....	22
§ 1. Bringing a Juvenile in Need of Care Before the Court.....	22
§ 2. Taking a Juvenile in Need of Care to a Place of Safety	22
§ 3. Duty to Inquire into a Juvenile in Need of Care’s Background	23
§ 4. Rights of Parents, Guardians, or Other Relatives and Responsible Persons at Initial Proceedings.....	23
§ 5. Interim Orders.....	23
§ 6. Fit Persons	23
Chapter 3: Child Victims of Gender-Based Violence.....	25
A. Duty of Police to Inform and Assist Victim	25
B. Procedures for Seeking and Obtaining Protection Orders	26
Chapter 4: Juvenile Witnesses.....	29
A. Trial Proceedings	29
§ 1. Presence of Juveniles in the Court Room.....	29
§ 2. Presence of Other Parties When Juvenile is Testifying.....	29
§ 3. Anonymity for Juveniles in Proceedings.....	29
B. Child Witnesses, Competence, and Corroboration	30
§ 1. Children below the Age of Fourteen	30
§ 2. Children over the Age of Fourteen.....	31
C. Testimony of Medical Experts.....	32
D. Admissibility of Deposition of a Juvenile	33
Appendix A. Resources for Juveniles.....	34

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List of Legal Sources

Constitution of Zambia

Statutes

Anti-Gender-Based Violence Act
Criminal Procedure Code
Juveniles Act
Legal Aid Act
Penal Code
Probation of Offenders Act

Cases

Chipendeka v The People Z.R. 82 (H.C.).
Clever Chalimbana v The People (1977) Z.R. 282 (S.C.).
Davies Mwape v The People (1979) Z.R. (S.C.).
Emmanuel Phiri and Other v The People (1982) Z.R. 77 (S.C.).
John Banda v The People HPA/6/1998.
Legal Resources Foundation v. Zambia, African Commission on Human and Peoples' Rights, Comm. No. 211/98 (2001).
Mbewe v The People (1976) Z.R. 317, 319-20.
Musonda & Another v The People (1976) Z.L.R.
Nyoni v People (S.C.Z. Judgment No. 15 of 1987) [1987] ZMSC 22 (14 July 1987); (1987) Z.R. 99 (S.C.).
People v Manroe (HPA/50/2010) ZMHC 9 (29 December 2010).
People v Mwanza (HJS/68/2010) [2011] ZMHC 77 (25 February 2011) (H.C.).
The People v Mumba (HPC/42/2011) ZMHC 108 (29 December 2011).
The People v Musonda and Another (HPC/40/2011) ZMHC 105 (20 June 2011).
The People v Nephath Dimeni (HP/18/80) [1980] ZMHC 12 (2 May 1980); (1980) Z.R. 234 (H.C.).

International and Regional Human Rights Laws

Convention on the Rights of the Child
UN Standard Rules for the Administration of Juvenile Justice (Beijing Rules)
African Charter on Human and Peoples' Rights
African Charter on the Rights and Welfare of the Child

Introduction

A. Purposes of the Handbook

Designed with judicial and legal officers in mind, this Handbook is meant to be a practical and user-friendly guide to the law that governs juveniles in contact with the law. In drafting this Handbook, the authors have drawn upon constitutional, statutory, and international human rights law. The ultimate goal of this Handbook is to help ensure that all juveniles who come into contact with the Zambian justice system have access to the special protections to which they are entitled.

B. Scope of the Handbook

This Handbook will address the laws relevant to four major categories of juveniles who come into contact with the law: (1) juveniles as the accused; (2) juveniles in need of protection; (3) child victims of gender-based violence; and (4) juvenile witnesses. The Handbook will also refer to applicable international and regional human rights laws that Zambia has signed and ratified. In addition, the Handbook discusses “best practices” that have been adopted in Zambia and its neighboring countries in handling cases of juveniles in contact with the law.

C. Sources of Juvenile Law

The sources of juvenile law used in developing this Handbook include the Constitution of Zambia; numerous statutes, particularly the Juveniles Act, the Criminal Procedure Code, the Penal Code, the Legal Aid Act, and the Anti-Gender-Based Violence Act; judicial precedent; and various international and regional human rights laws to which Zambia is a party, including the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the UN Standard Rules for the Administration of Juvenile Justice (also known as the Beijing Rules), the African Charter on Human and Peoples’ Rights, and the African Charter on the Rights and Welfare of the Child.

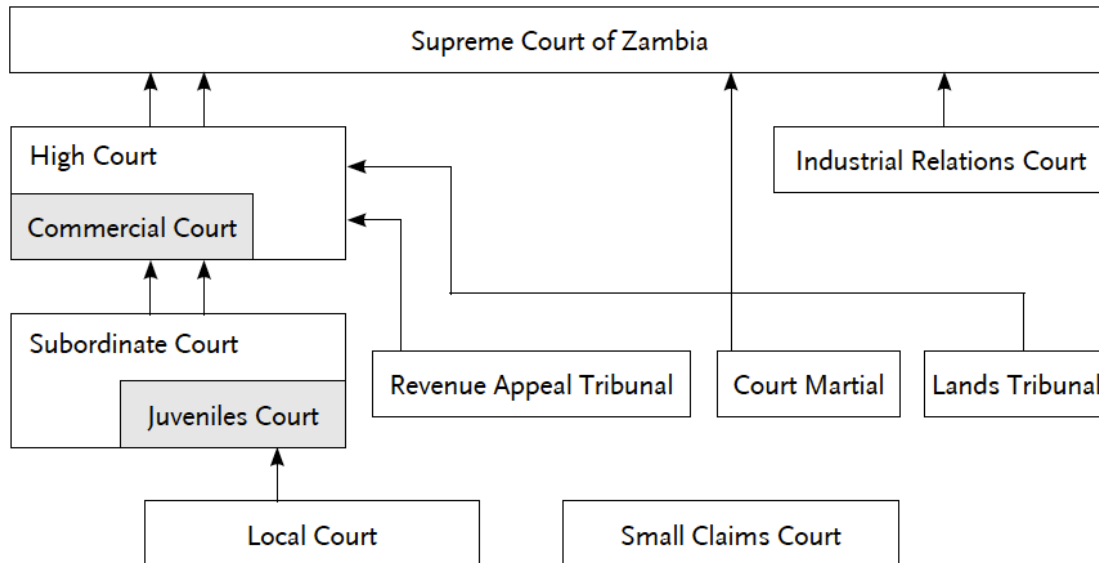
Although Zambian law requires that international human rights laws be incorporated into domestic legislation in order to be directly enforceable in national courts, these laws nonetheless impose binding obligations on Zambia. As the African Commission on Human and Peoples’ Rights noted in *Legal Resources Foundation v. Zambia*, “international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties.”¹ Thus, Zambian courts must recognize international treaties, which impose obligations on the State to protect the rights of juveniles, and should look to them for guidance when interpreting Zambian laws. Notably, as a party to the African Convention on the Rights and Welfare of the Child, Zambia has reaffirmed its “adherence to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child.”²

¹ *Legal Resources Foundation v. Zambia*, African Commission on Human and Peoples’ Rights, Comm. No. 211/98 (2001).

² African Charter on the Rights and Welfare of the Child [*hereafter* ACRWC], Preamble.

D. Court Structure

The following diagram illustrates Zambia's court structure.³ With limited exceptions, most cases involving juveniles as the accused are initially heard by a juvenile court.⁴ These cases subsequently may be appealed to the High Court and the Supreme Court.



³ Reproduced from Joyce Shezongo-Macmillan, A Review by AfriMAP and the Open Society Initiative for Southern Africa (March 2013) (Working Paper, Open Society Foundations).

⁴ Juveniles Act, Cap. 53 s. 64(1) (1956, last amended 2011). See Chapter 1, E, at pages 10-11.

Chapter 1: Juveniles as the Accused

This chapter addresses protections that juveniles receive when they are accused of committing a crime. The chapter takes a chronological approach to this issue, beginning with the arrest of a juvenile and ending with a juvenile's appeal.

A. Timeline of Arrest through Appeal

ARREST

Criminal Procedure Code, Cap. 88 s. 26; Juveniles Act, Cap. 53 ss. 58-60

JURISDICTION OF THE JUVENILE COURT

Juveniles Act, Cap. 53 ss. 63-67

PRE-TRIAL MOTIONS AND PROCEDURES

Juveniles Act, Cap. 53 ss. 58-62, 64, 127

TRIAL

Constitution of Zambia, Art. 18; Juveniles Act, Cap. 53 ss. 64, 119-120

FINDING OF GUILTY

Constitution of Zambia, Art. 18; Penal Code, Cap. 87 s. 14

STATEMENT BY JUVENILE PROVIDING MITIGATING CIRCUMSTANCES, COURT'S DUTY OF INQUIRY INTO JUVENILE'S BACKGROUND

Juveniles Act, Cap. 53 s. 64

ORDER FROM FINDING OF GUILTY

Juveniles Act, Cap. 53 ss. 72-74, 77-79, 81, 83, 85-86, 93-94, 101-103, 108, 115;
Criminal Procedure and Evidence Act, Cap. 9:09 s. 353(4)

APPEALS

Juveniles Act, Cap. 53 s. 130; Subordinate Courts (Amendment) Act, Cap. 28

B. Definition of a Juvenile

A *juvenile* is any person who is under the age of nineteen years.⁵ Therefore, a juvenile can be a *child* (defined as any person under the age of sixteen years) or a *young person* (defined as any person who is at least sixteen but not yet nineteen years old).⁶ Most provisions in the Juveniles Act apply to all juveniles, but the Act addresses children specifically in its provisions regarding detention, child witnesses, and the presence of children at trial.⁷

C. Determining the Age of a Juvenile

Whenever a person who appears to be a juvenile is brought before a court for any purpose other than to give evidence, the court has an affirmative duty to “make due inquiry as to the age of that person.”⁸ This principle has been upheld in numerous cases and is now a time-honored staple of judicial precedent. In *Musonda & Another v The People*, the Supreme Court overturned the juvenile defendants’ sentence of fifteen years’ imprisonment with hard labour because it found that there had been evidence that the defendants were juveniles at the time of the alleged offences, but their case had not been brought before a juvenile court.⁹ According to the Court, at “the first indication that . . . the appellants might be juveniles[,] . . . the trial court should immediately have conducted an inquiry as to the appellants’ ages, and having found that they were both juveniles . . . should have ordered that the matter be heard and disposed of in the Juvenile Court.”¹⁰ In *Davies Mwape v The People*, the Supreme Court further emphasized the importance of inquiring into a defendant’s age where it appears he or she is a juvenile, stating that, in cases where the court is unsure if the defendant is a juvenile or an adult, “the safest course . . . to take is to carry out a due inquiry in accordance with the terms of the [Juveniles Act].”¹¹

In *Chipendeka v The People*, the High Court criticized the lower court’s failure to make any inquiry as to the age of the juvenile appellant, who had subsequently been found guilty of defilement and sentenced to two years’ imprisonment.¹² Although the High Court based its decision to order a retrial on alternate grounds, it stated in its opinion:

[T]he Juveniles Ordinance [the precursor to the modern Juveniles Act] imposes a duty on a court to ascertain the age of a juvenile on his appearing before the court charged with an offence.¹³ It appears to one that the learned magistrate was put on notice by the age stated in the charge sheet and that he should have made such inquiry. This error gave rise to further errors [T]he same Ordinance

⁵ Juveniles Act, Cap. 53 s. 2(1).

⁶ *Id.*

⁷ See Chapter I, K, ss. 2, 4 at pages 16-17 and Chapter 4, A-B at pages 29-31.

⁸ Juveniles Act, Cap. 53 s. 118(1).

⁹ *Musonda & Another v The People* (1976) Z.L.R.

¹⁰ *Id.*

¹¹ *Davies Mwape v The People* (1979) Z.R. (S.C.).

¹² *Chipendeka v The People* (1969) Z.R. 82 (H.C.).

¹³ The Juveniles Act was adopted in 1956, thirteen years before the High Court issued its opinion in *Chipendeka*. It refers to the Juveniles Ordinance, which predated the Juveniles Act, but the Juveniles Act essentially re-enacted the provisions of the Juveniles Ordinance. See Davies Mumba, *The Juvenile Criminal Justice System in Zambia Vis-à-Vis the International Protection of Children’s Rights* (2011) (Masters Dissertation, University of Zambia, Lusaka). Thus, the *Chipendeka* opinion regarding a court’s duty to inquire into the age of a defendant who appears to be a juvenile is still good law. See *People v Mwanza* (HJS/68/2010) [2011] ZMHC 77 (25 February 2011) (H.C.).

provides that no charge against a juvenile shall be heard by a subordinate court that is not a juvenile court. The learned magistrate has made no record that he was sitting as a juvenile court and he did not follow the procedure which a person presiding over a juvenile court is bound by statute to follow . . . [I]f it was shown to an appeal court that the [defendant] was actually a juvenile, then it might well be that the court would hold that the whole proceedings had been a nullity.¹⁴

In the recent High Court case of *People v Mwanza*, the record suggested that the defendant had been a juvenile at the time of his alleged offence, but the lower court had found him guilty without inquiring into his age and had also failed to sit as a juvenile court during his proceedings.¹⁵ Acting “on the authority of the *Chipendeka* case,” the *Mwanza* Court held that the lower court’s proceedings “were nullity” and ordered a retrial.¹⁶

Provided that a court has inquired as to the age of a person brought before it if it appears that he or she is a juvenile, “an order of judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to or estimated by the court.”¹⁷ Furthermore, “the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this [Juveniles] Act, be deemed to be the true age of that person.”¹⁸ Where it appears to the court that a person brought before it has attained the age of nineteen years, the person will not be considered a juvenile.¹⁹

D. Arrest

This section addresses protections that juveniles receive when they are accused of committing a crime. In particular, the section discusses the steps that police officers must take after they have arrested a juvenile.

§ 1. Bail and Pre-Trial Detention of Juveniles

The Juveniles Act provides that the Commissioner of Police is responsible for taking steps to prevent juveniles from associating with adults accused of crimes (other than relatives or those with whom the juvenile has been jointly charged of an offence) while the juveniles are being detained in a police station, are being taken to or from court., or are waiting before or after attending court.²⁰ He or she must also ensure that female juveniles in these circumstances are “under the care of a woman.”²¹

Section 59 of the Juveniles Act governs bail procedures. Section 59 states that when police apprehend a juvenile, the officer-in-charge of the police station must release the juvenile after the juvenile, a parent or guardian, or other responsible person pays an amount that the officer-in-charge deems sufficient for ensuring that the juvenile will attend a subsequent hearing on the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Juveniles Act, Cap. 53 s. 18(1).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Juveniles Act, Cap. 53 s. 58.

²¹ *Id.*

charge. If one of the following exceptions applies, the officer may choose not to release the juvenile:

- (a) The juvenile is accused of homicide or another “grave” crime;
- (b) Imprisonment is necessary to stop the juvenile from associating with a reputed criminal or prostitute; or
- (c) The officer-in-charge has reason to believe that releasing the juvenile would “defeat the ends of justice.”²²

Best Practices: Determining Whether to Grant Bail

Whenever possible, police officers should release juveniles on bail. As Registrar Davies Mumba has noted, “[T]he right to be admitted to bail [should be] treated as a sacred right which must be enjoyed by all children who are apprehended or arrested by police” (Davies Mumba, *The Juvenile Criminal Justice System in Zambia Vis-à-Vis the International Protection of Children’s Rights* (2011) (dissertation, University of Zambia, Lusaka)). Furthermore, the Beijing Rules note that “[d]etention pending trial shall be used only as a measure of last resort” (Beijing Rules, Rule 13.1). Consequently, police officers should read these interpretations narrowly and generally aim to release juveniles on bail.

When a juvenile is not released on bail after arrest, the officer-in-charge of the police station must detain the juvenile in a place of safety until he or she can be brought before a court.²³ A place of safety is an “institution, police station, or any hospital or surgery, or any other suitable place the occupier of which is willing temporarily to receive a juvenile.”²⁴ The following places are not places of safety: “remand prison, prison or detention camp.”²⁵ This requirement must be followed unless one of the following exceptions applies:

- (a) It is impracticable to detain the juvenile in a place of safety;
- (b) The juvenile is of such “depraved” or “unruly” character that the juvenile cannot be detained in a place of safety; or
- (c) The juvenile’s health or safety makes it ill advised to detain the juvenile.²⁶

If the officer believes that one of these exceptions exists, the officer must produce a certificate to the court that explains why the juvenile cannot be detained in a place of safety.²⁷

²² *Id.*

²³ Juveniles Act, Cap. 53 s. 60.

²⁴ Juveniles Act, Cap. 53 s. 2.

²⁵ *Id.*

²⁶ Juveniles Act, Cap. 53 s. 60.

²⁷ *Id.*

International Human Rights Perspective on the Detention of Juveniles

International human rights law may be helpful in determining the proper protocol for the arrest and, where necessary as a matter of last resort, the detention of juveniles. Because Zambia has signed and ratified the Convention on the Rights of the Child (CRC) and the Beijing Rules, courts should be guided by the following principles:

- The arrest, detention, or imprisonment of a child should only be used as a last resort (CRC, Art. 37; Beijing Rules, Rule 13.1). Under the CRC definition of “child,” this means any person who is under the age of eighteen years, unless under the law applicable to the child, majority is attained earlier (CRC, Art. 1).
- Every child deprived of his or her liberty has the right to be separated from adults (unless it is in the child’s best interest not to be separated) (CRC, Art. 37; Beijing Rules, Rule 13.4).
- Every child deprived of his or her liberty has the right to maintain contact with his or her family through correspondence and visits (barring exceptional circumstances) (CRC, Art. 37).
- Every child deprived of his or her liberty has the right to prompt access to legal assistance (CRC, Art. 37).
- Every child deprived of his or her liberty has the right to a prompt resolution of his or her case (CRC, Art. 37).

§ 2. Statements Offered While in Custody

The presence of a parent, guardian, or some other person during police interrogation of a juvenile is strongly recommended. The Supreme Court has “urge[d] that it is desirable in the interests of both the police and the juvenile to have a parent or guardian whenever possible to be present at the police station when a statement is being taken from a juvenile.”²⁸ Taking this principle into account, courts have used their discretion to exclude a juvenile’s statements to the police where admitting them would “operate unfairly to the juvenile defendant.”²⁹

²⁸ *Mbewe v The People* (1976) Z.R. 317, 319-20 (S.C.).

²⁹ *The People v Nephath Dimeni* (HP/18/80) [1980] ZMHC 12 (2 May 1980); (1980) Z.R. 234 (H.C.).

The People v Nephath Dimeni

In *The People v Nephath Dimeni*, a murder case before the High Court, the prosecution sought to introduce a confession the juvenile defendant had signed while in custody. In his defense, the juvenile testified that he had been in custody for sixteen days prior to being brought to the police station; that the police had beaten him at least once during his detention; that, once in police custody, he had not been asked about the murder case, but only about property that had been in the possession of his acquaintance; that he had given no statement to the police himself throughout the course of his detention; and that the police officers did not tell him what he was signing when they gave him the written confession. Although the Court determined that the juvenile had signed the confession, it invoked its discretion to exclude the confession from evidence, noting that “although the juvenile has no parents in Zambia[,]. . . in the absence also of a guardian it would have been desirable in the interest of justice to have some other person not a police officer to have been present when recording the statement” (*The People v Nephath Dimeni* (HP/18/80) [1980] ZMHC 12 (2 May 1980), (1980) Z.R. 234 (H.C.)).

E. Jurisdiction of Juvenile Courts

§ 1. Procedural Requirements for Sitting as a Juvenile Court

A *juvenile court* is a subordinate court sitting for the purposes of hearing any charge against a juvenile or exercising any other jurisdiction conferred on juvenile courts by statute.³⁰ Section 63(a) of the Juveniles Act states that a subordinate court becomes a juvenile court when “hearing any charge against a juvenile.” Alternatively, Section 63(b) states that subordinate courts become juvenile courts when exercising any jurisdiction granted by any section of the Juveniles Act or by another act.

A court must ascertain the age of any juvenile appearing before it.³¹ If a subordinate court does not identify itself as a juvenile court, then the case must be retried.³²

A subordinate court may identify itself as a juvenile court by referring to itself as a juvenile court or by sitting in a different room to adjudicate juvenile cases than it does to adjudicate cases involving adults.³³ A UNICEF Working Paper has suggested that, in transforming into a juvenile court, magistrates should strive to create a “non-threatening and participative” environment and make decisions based on the juvenile’s best interests.³⁴

³⁰ Juveniles Act, Cap. 53 s. 63.

³¹ See *supra* Chapter 1, C., at 6-7.

³² *The People v Mumba* (HPC/42/2011) ZMHC 108 (29 December 2011).

³³ Juveniles Act, Cap. 53 s. 119.

³⁴ See Lukas Muntigh, Report on Child Justice in Zambia with Reference to UNICEF Supported Projects 51 (UNICEF, Working Paper).

In cases where a juvenile is initially brought in front of a juvenile court, that court retains jurisdiction and decides the case, unless the juvenile is accused of homicide or attempted murder.³⁵ In such cases, the case is transferred to the High Court for trial.³⁶ Juvenile courts must sit as many times as necessary to resolve cases where a juvenile is the accused.³⁷ A juvenile court may proceed with a hearing even if the court discovers that the accused is not a juvenile.³⁸

§ 2. Exceptions

The Juveniles Act states that a subordinate court that is not a juvenile court may hear any matter that the Act assigns to the jurisdiction of the juvenile courts if one of the following exceptions applies:

- (a) The prosecution jointly charged a juvenile and a person who is at least 19 years old;³⁹ or
- (b) The prosecution charged a person who is at least 19 years old of aiding, abetting, causing, procuring, allowing, or permitting the offence that the juvenile is accused of committing.⁴⁰

However, if a subordinate court that is not a juvenile court, discovers during the proceedings that the defendant is a juvenile, the court may, if it thinks fit to do so, continue with the proceedings and decide the case.⁴¹

Any court that has found a juvenile guilty of an offence other than homicide, may, “if it thinks fit,” transfer the case to a juvenile court, which may “deal with him in any way in which it might have dealt with him if he had been tried and found guilty by that court.”⁴²

F. Pre-Trial Motions and Procedures

§ 1. Requirements of Parents of Accused Juveniles

The Juveniles Act stresses that the parent or guardian of an accused juvenile must attend, wherever possible, all stages of the proceedings. The Act requires parents or guardians to attend courtroom proceedings as long as they live within a reasonable distance of the courthouse and it is not otherwise unreasonable to require their attendance.⁴³ If parents or guardians receive proper notice and still fail to attend a courtroom proceeding, then they may be subject to a fine.⁴⁴

If parents or guardians do not comply with these provisions, the juvenile may be prejudiced. In *Clever Chalimbana v The People*, the Supreme Court set aside a juvenile’s guilty plea because his parents did not attend the proceedings. The court held that it did not know whether the juvenile’s

³⁵ Juveniles Act, Cap. 53 s. 64(1).

³⁶ Criminal Procedure Act, s. 11(2).

³⁷ Juveniles Act, Cap. 53 s. 66(1).

³⁸ Juveniles Act, Cap. 53 s. 66(2).

³⁹ Juveniles Act, Cap. 53 s. 65(1)(i).

⁴⁰ Juveniles Act, Cap. 53 s. 65(1)(ii).

⁴¹ Juveniles Act, Cap. 53 s. 65(1)(iii).

⁴² Juveniles Act, Cap. 53 s. 67(1).

⁴³ Juveniles Act, Cap. 53 s. 127(1).

⁴⁴ Juveniles Act, Cap. 53 s. 127(3).

guilty plea “was the fairest course for him to take without the advantage of advice from a parent or guardian.”⁴⁵

In *The People v Musonda and Another*, the High Court noted: “[T]he Juveniles Act stresses the importance which the legislature attaches to attendance of a parent(s) or guardian at all stages of the proceedings. Thus if the provisions of section 127 are not complied with, there is a risk that a juvenile may be prejudiced.”⁴⁶

§ 2. Explanation of Charges and Initial Plea

The magistrate must first explain the substance of the alleged offence to the juvenile and then ask if the juvenile denies or admits committing the offence.⁴⁷ Even if the juvenile admits to committing the offence, the juvenile court must still hear the prosecution’s supporting evidence.⁴⁸ Thus, magistrates should satisfy themselves of a juvenile’s guilt independent of the juvenile’s admission of guilt.

§ 3. Remanding a Juvenile to Prison During Adjudications

A juvenile court that remands a juvenile for trial who is not released on bail shall commit the juvenile to a place of safety or a remand prison.⁴⁹ A juvenile court shall remand a juvenile to prison only if the juvenile is extremely “unruly or depraved [in] character.”⁵⁰ Thus, juvenile courts should rarely remand a juvenile to prison. If the juvenile is remanded to prison, the juvenile must be separated from the adult inmates.⁵¹

Best Practices: Separating Juveniles from Adults

The Juveniles Act explicitly states that juveniles must always be detained separately from adult inmates. Keeping juveniles with adult inmates exposes juveniles to physical or sexual harm and increases their chances of contracting STDs. Additionally, juveniles may experience psychological harm and bullying, or be subjected to forced labour. The Mukobeko Medium Security prison has addressed this issue by detaining juveniles in a clear fenced-off area that separates them from the rest of the prison population (See Lukas Muntigh, Report on Child Justice in Zambia with Reference to UNICEF Supported Projects 27-29 (2011) (UNICEF, Working Paper)). If prison officials are unable to separate the juvenile from the adult prison population, then the juvenile should not be detained in prison.

⁴⁵ *Clever Chalimbana v The People* (1977) Z.R. 282 (S.C.).

⁴⁶ *The People v Musonda and Another* (HPC/40/2011) ZMHC 105 (20 June 2011).

⁴⁷ Juveniles Act, Cap. 53 s. 64(2).

⁴⁸ Juveniles Act, Cap. 53 s. 64(3).

⁴⁹ Juveniles Act, Cap. 53 s. 61(1).

⁵⁰ Juveniles Act, Cap. 53 s. 61(1)-(2).

⁵¹ Juveniles Act, Cap. 53 s. 62(1).

G. Trial

§ 1. Persons Allowed in the Court Room

Only the following people are allowed to attend a proceeding of a juvenile court:

- (a) Members of the court;
- (b) Parties to the case, their lawyers, witnesses, and other individuals “directly concerned in that case”;
- (c) Bona fide members of the press; and
- (d) Other persons that the juvenile court specifically authorises to attend.⁵²

Furthermore, a juvenile court has the power to clear the courtroom when a juvenile is called as a witness.⁵³

§ 2. Presumption of Innocence

Under Article 18 of the Constitution of Zambia, a court must presume that any criminal defendant is innocent until the prosecution proves the charge or the defendant pleads guilty.

International Human Rights Law and the Presumption of Innocence

International human rights law also mandates that juveniles be presumed innocent. The Convention on the Rights of the Child notes that every accused juvenile must “be presumed innocent until proven guilty according to law.” CRC, Art. 40(2)(b)(1). The Committee on the Rights of the Child’s General Comments further note:

The presumption of innocence is fundamental to the protection of the human rights of children in conflict with the law . . . State parties should provide information about child development to ensure that this presumption of innocence is respected in practice. Due to the lack of understanding of the process, immaturity, fear or other reasons, the child may behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond any reasonable doubt (Comm. On the Rights of the Child, Jan. 15-Feb. 2, 2007, General Comment No. 10: Children’s Rights in juvenile Justice, 44d Sess., U.N. DOC, CRC/C/GC/10 (Apr. 2, 2007)).

Thus, magistrates should be sure to emphasize to the prosecutor and the accused that the accused is presumed innocent until a finding of guilty.

⁵² Juveniles Act, Cap. 53 s. 119(2).

⁵³ Juveniles Act, Cap. 53 s. 121(1).

§ 3. Rights of Unrepresented Juveniles

The Legal Aid Act stipulates that an individual, charged with an offence in front of the subordinate court, may apply to the court for legal aid.⁵⁴ In ruling on this request, a subordinate court must consider whether the accused lacks the financial means to hire representation and if “it is desirable in the interests of justice” to provide the accused with representation.⁵⁵ Given the importance of protecting the rights of an accused juvenile, magistrates should read these provisions broadly and attempt to provide a juvenile with legal assistance.

Even if a juvenile is not represented, the magistrate must provide particular procedural protections. Notably, if a juvenile pleads guilty and does not have legal representation, then the presiding magistrate must still hear evidence from the prosecution’s witnesses before issuing a verdict.⁵⁶ After each prosecution witness’s testimony, the magistrate must ask the juvenile and the juvenile’s parents or guardian whether they want to cross-examine the witness.⁵⁷ If the juvenile does not cross-examine the witness, then the magistrate must ask the witness any questions he or she “thinks necessary on behalf of the juvenile.”⁵⁸ The purpose of this section is to ensure that the magistrate protects the rights of a pro se juvenile to rebut the prosecution’s evidence against him or her even if the juvenile decides not to cross-examine the prosecution’s witnesses. Following any cross-examination, the prosecution has the right to re-examine the witness.⁵⁹

§ 4. Presence of Parents and Guardians

Please refer to Chapter 1, F, § 1 at pages 11-12. Generally, the Juveniles Act stresses that the parent or guardian of the accused juvenile must attend, whenever possible, the legal proceedings of the juvenile’s case.

§ 5. Evidence and Child Testimony

Please refer to Chapter 4, B at pages 30-31.

H. Finding of Guilty

§ 1. Note on Abolition of Use of “Conviction” and “Sentence”

The Juveniles Act prohibits the use of the words “conviction” and “sentence” in connection with any juvenile court proceeding.⁶⁰ Furthermore, any reference in any enactment (even if it was passed prior to the Juveniles Act) to “a person convicted, a conviction, or a sentence” must be interpreted as a reference to “a person found guilty of an offence, a finding of guilty, or an order

⁵⁴ Legal Aid Act, Cap. 34 s. 8(1).

⁵⁵ *Id.*

⁵⁶ Juveniles Act, Cap. 53 s. 64(3).

⁵⁷ Juveniles Act, Cap. 53 s. 64(4).

⁵⁸ Juveniles Act, Cap. 53 s. 64(5).

⁵⁹ *Id.*

⁶⁰ Juveniles Act, Cap. 53 s. 68.

made upon such a finding” if that person is a juvenile.⁶¹ This provision of the Act seeks to disassociate juvenile offenders from the stigma of a conviction or sentence.⁶²

§ 2. Standard for Finding of Guilty

Under the Constitution of Zambia, every person charged with a criminal offence is presumed innocent until he or she is proven guilty or has pleaded guilty.⁶³ To establish that an accused person is guilty, the prosecution must prove its case beyond a reasonable doubt. According to the Penal Code, children under the age of eight years cannot be held criminally liable.⁶⁴ A child who has attained the age of eight years, but is not yet twelve years old, can be held criminally liable for his or her acts or omissions, but only “if it can be proved that at the time of doing the act or omission he [or she] had the capacity to know that he [or she] ought not to do the act or to make the omission.”⁶⁵ Because it is very difficult to prove that a child of this age had the capacity to know that what he or she did was wrong, courts should be extremely reluctant to impose criminal liability in these circumstances.

I. Prohibition of the Identification of a Juvenile in a Court Proceeding

Under the Juveniles Act, the media is prohibited from revealing the name, address, school, or any other information “calculated to lead to the identification[] of any juvenile concerned” in any court proceeding.⁶⁶ This prohibition applies whether the juvenile is a defendant, a complainant, or a witness.⁶⁷ The publication of any pictures of any juvenile concerned in any court proceedings is also generally prohibited.⁶⁸ Anyone who violates these prohibitions will be criminally liable and forced to pay a fine.⁶⁹

International Human Rights Perspective on Juveniles Concerned in Court Proceedings’ Right to Privacy

Under the Beijing Rules, a juvenile’s right to privacy must be respected at all stages of proceedings in order to avoid causing the juvenile harm through unsolicited publicity, attention, or labeling (Beijing Rules, Rule 8.1). Therefore, no identifying information about any juvenile charged with an offence should be published.

⁶¹ *Id.*

⁶² Davies Mumba, *The Juvenile Criminal Justice System in Zambia Vis-à-Vis the International Protection of Children’s Rights* 25 (2011) (dissertation, University of Zambia, Lusaka).

⁶³ Constitution of Zambia, Cap. 1, Art. 18(2).

⁶⁴ Penal Code, Cap. 87 s. 14(1).

⁶⁵ Penal Code, Cap. 87 s. 14(2).

⁶⁶ Juveniles Act, Cap. 53 s. 123(1)(a).

⁶⁷ *Id.*

⁶⁸ Juveniles Act, Cap. 53 s. 123(1)(b).

⁶⁹ Juveniles Act, Cap. 53 s. 123(2).

J. Court's Duty of Inquiry into Juvenile's Background

If the court is satisfied that the prosecution has proven an offence against a juvenile defendant, the court has the duty to ask the juvenile if he or she wants to make a statement regarding mitigation of the penalty.⁷⁰ The court should also, to the extent practicable, seek to obtain background information about the juvenile that will enable it to handle the case in the juvenile's best interests.⁷¹ The court is to make this inquiry regardless of whether or not the juvenile decides to make a statement of his or her own accord.⁷² Relevant information may include, but is not limited to, the juvenile's general conduct, home surroundings, school record, and medical history, and the court may ask the juvenile any question arising out of such information.⁷³ Though the Juveniles Act does not state who should provide this social welfare inquiry report, a social welfare officer from the Department of Social Welfare may be well placed to do so.⁷⁴ This inquiry enables the court to ensure that its order is in the best interests of the juvenile.⁷⁵ It also comports with the Beijing Rules' mandate that courts base punishment on both the offence and the circumstances of the child who comes into conflict with the law.⁷⁶

K. Order from Finding of Guilty

Chapter 1, K describes the orders that a juvenile court may take after finding a juvenile guilty of a crime. It should be noted that a person who commits an offence as a juvenile but is not a juvenile at trial should be tried as an adult but must be given a punishment as a juvenile.⁷⁷

§ 1. Note on Abolition of Use of "Sentence" and "Conviction"

Please refer to Chapter 1, H, § 1 at pages 14-15.

§ 2. Restrictions on Detention and Imprisonment

Juvenile courts may not order a *child* (a juvenile under the age of sixteen) to be imprisoned or confined in a detention camp.⁷⁸ They may not order a young person (a juvenile between the ages of sixteen and nineteen) to serve a term of imprisonment "if he [or she] can be suitably dealt with in any other matter."⁷⁹

§ 3. Prohibition of Capital Punishment

Zambian law prohibits the use of the death penalty for anyone who was under the age of eighteen when she or he committed the offence.⁸⁰

⁷⁰ Juveniles Act, Cap. 53 s. 64(7).

⁷¹ *Id.*

⁷² See *id.*

⁷³ *Id.*

⁷⁴ See Davies Mumba, *The Juvenile Criminal Justice System in Zambia Vis-à-Vis the International Protection of Children's Rights* 59 (2011) (dissertation, University of Zambia, Lusaka).

⁷⁵ *Id.* at 41.

⁷⁶ Beijing Rules, Rule 5.1.

⁷⁷ *Nyoni v People* (S.C.Z. Judgment No. 15 of 1987) [1987] ZMSC 22 (14 July 1987); (1987) Z.R. 99 (S.C.).

⁷⁸ Juveniles Act, 53 Cap. s. 72(1).

⁷⁹ Juveniles Act, 53 Cap. s. 72(2).

⁸⁰ Penal Code, Cap. 87, s. 25(2).

§ 4. Determining Whether to Imprison a Juvenile

Juvenile courts must not imprison a *young person* if an alternate, sufficient measure of punishment is available.⁸¹ Furthermore, if a juvenile court finds a juvenile guilty of an offence for which imprisonment is the appropriate punishment, the juvenile court may instead order the juvenile to a reformatory.⁸² Read together, these statutes suggest that magistrates should read the phrase “alternate, sufficient measure of punishment” liberally and sentence a juvenile to imprisonment only as a last resort.

International Human Rights Law and Juvenile Imprisonment

International human rights law requires that magistrates order imprisonment only in the most extreme circumstances. The CRC requires that states imprison children “only as a measure of last resort and for the shortest appropriate period of time” (CRC, Art. 37(b)).

§ 5. Monetary Penalties

Juvenile courts may require either the juvenile or the juvenile’s parents or guardian to pay a fine for the damages or costs associated with the crime.⁸³ In an order, juvenile courts may include these monetary penalties along with other additional penalties such as sending the juvenile to a reformatory or an approved school.⁸⁴

§ 6. Probation

Juvenile courts may order a juvenile offender to serve a term of probation.⁸⁵ In deciding whether merely to order probation, a juvenile court must give consideration to the “character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed.”⁸⁶ The language of the statute also suggests that magistrates must take these various extenuating factors seriously in determining whether to order probation.

If a juvenile court issues a probation order, a probation officer must supervise the juvenile for a specified period of time.⁸⁷ This specified period of time must be no less than one year and no more than three years.⁸⁸ The probation officer will generally be a social welfare officer who

⁸¹ Juveniles Act, 53 Cap. s. 72(2).

⁸² Juveniles Act, 53 Cap. s. 73(2).

⁸³ Juveniles Act, 53 Cap. ss. 73(1)(f)-(g).

⁸⁴ See Juveniles Act, 53 Cap. s. 73(3).

⁸⁵ See Juveniles Act, 53 Cap. s. 73(1)(b).

⁸⁶ Probation of Offenders Act, 93 Cap. s. 3(1).

⁸⁷ *Id.*

⁸⁸ *Id.*

ensures that the juvenile does not commit any more crimes during the probation period and exhibits good behavior.⁸⁹

§ 7. School Order

Juvenile courts may also issue a school order. Under this provision, the juvenile is sent to an approved school.⁹⁰ The Commissioner for Juvenile Welfare is responsible for supervising those schools that are established as “approved schools.”⁹¹

A school order must include the juvenile’s age and religion.⁹² The High Court must confirm any school order.⁹³ Pending the High Court’s confirmation, the juvenile court may issue a temporary order “committing the juvenile to the care of a fit person . . . or to a place of safety.”⁹⁴ A juvenile will remain in the approved school based on the following calculations stipulated in section 78 of the Juveniles Act:

- (a) If the juvenile is less than fourteen years old at the time of the order, the juvenile will remain at the approved school for three years or until the juvenile is fifteen, whichever event occurs later;
- (b) If the juvenile is older than fourteen but younger than sixteen at the time of the order, the juvenile will remain at the school for three years;
- (c) If the juvenile is older than sixteen, the juvenile will remain at the school until the juvenile is nineteen.

The Minister⁹⁵ has the authority to move a juvenile to a different approved school if that juvenile is exercising a poor influence on the other juveniles or is not benefitting from attending that particular school.⁹⁶ Furthermore, if the managers of an approved school believe that a juvenile would benefit from an additional six-month period at the school, they may ask the Commissioner of Juvenile Welfare for an extension of the order.⁹⁷

§ 8. Reformatories

Juvenile courts may send juvenile offenders to reformatories.⁹⁸ A juvenile court should not, however, order a juvenile offender to a reformatory unless no other suitable punishment exists for dealing with the juvenile.⁹⁹ In *Musonda and Another v. People*, the Supreme Court held that a

⁸⁹ Davies Mumba, *The Juvenile Criminal Justice System in Zambia Vis-à-Vis the International Protection of Children’s Rights* 44 (2011) (dissertation, University of Zambia, Lusaka).

⁹⁰ See Juveniles Act, 53 Cap. s. 73(1) (c).

⁹¹ See Juveniles Act, 53 Cap. s. 81.

⁹² Juveniles Act, 53 Cap. s. 77(1).

⁹³ Juveniles Act, 53 Cap. s. 79(1).

⁹⁴ Juveniles Act, 53 Cap. s. 79(2).

⁹⁵ There is presently a lack of clarity in the Act as to who the relevant minister should be as a portfolio relating specifically to juveniles is not currently in existence. This is a gap that should be addressed in the future.

⁹⁶ See Juveniles Act, 53 Cap. s. 83; Juveniles Act, 53 Cap. s. 85.

⁹⁷ See Juveniles Act, 53 Cap. s. 86.

⁹⁸ See Juveniles Act, 53 Cap. s. 73(1)(d).

⁹⁹ See *Musonda and Another v People* (S.C.Z. Judgment No. 9 of 1979) [1979] ZMSC 8 (20 February 1979); (1979) Z.R. 53 (S.C.).

juvenile court erred in sending first-time juvenile offenders to a reformatory.¹⁰⁰ The Supreme Court reasoned that a reformatory order was a “very severe punishment” and so juvenile courts should use a reformatory order only when other punishments were inappropriate and “proved to be in vain in the past.”¹⁰¹ The reasoning in this case suggests that magistrates should only use reformatory orders for serial offenders whose previous actions have demonstrated that other types of orders (such as school orders) will not rehabilitate them.

A reformatory order may range from nine months to four years.¹⁰² A reformatory order is not valid until certified by the High Court. The juvenile court that writes the order is required to deliver the juvenile to the receiving center.¹⁰³

If a juvenile is exercising poor influence on other juveniles in the reformatory or is not benefitting from the reformatory, then the Chief Inspector of Reformatories may commute that juvenile’s detention or imprison the juvenile.¹⁰⁴ A person may not be detained in a reformatory once he or she reaches the age of twenty-three.¹⁰⁵

The Minister for Juvenile Welfare has the authority to discharge any order detaining a juvenile at a reformatory.¹⁰⁶

§ 9. Removals of Persons Out of Zambia

If the President signs a warrant, a juvenile may be removed from a reformatory, approved school, or other institution to a reformatory, approved school, or other institution outside of Zambia but within the “scheduled territories” of Botswana, Malawi, South Africa, and Zimbabwe.¹⁰⁷

§ 10. Caning

The Juveniles Act does provide that a juvenile court has the authority to order that a juvenile be caned.¹⁰⁸ The High Court, however, held in *John Banda v The People* that judicial corporal punishment, as provided for in the Penal Code, is unconstitutional because it is “inhuman, degrading and barbaric in nature.”¹⁰⁹ This ruling led to the amendment of the Penal Code so that it no longer permits courts to order corporal punishment.¹¹⁰ Juvenile courts should apply the reasoning of the *Banda* decision and never order any juvenile to be caned.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Juveniles Act, 53 Cap. ss. 93, 103.

¹⁰³ Juveniles Act, 53 Cap. s. 94(3).

¹⁰⁴ See Juveniles Act, 53 Cap. s. 101.

¹⁰⁵ See Juveniles Act, 53 Cap. s. 102.

¹⁰⁶ Juveniles Act, 53 Cap. s. 103(ii).

¹⁰⁷ See Juveniles Act, 53 Cap. s. 115(1).

¹⁰⁸ See Juveniles Act, 53 Cap. s. 73(1)(e).

¹⁰⁹ *John Banda v The People* HPA/6/1998.

¹¹⁰ See Penal Code, Cap. 87, s. 27.

International Human Rights and Corporal Punishment

International human rights law explicitly condemns corporal punishment. Article 5 of the African Charter on Human and Peoples' Rights and Article 37(a) of the CRC prohibit the cruel, inhuman, and degrading treatment of all offenders, including juvenile offenders, and the Committee on the Rights of the Child, charged with monitoring implementation of the CRC, has interpreted these provisions as prohibiting corporal punishment (Comm. on the Rights of the Child, May 15-June 2, 2006, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, 42d Sess., U.N. Doc, CRC/C/GC 8 (Mar. 2, 2007)).

§ 11. Order to Parent or Guardian of the Offender to Give Security

Along with requiring a juvenile offender's parent or guardian to pay a fine, a juvenile court may order a parent or guardian to "give security for good behavior."¹¹¹

§ 12. Orders for Escape

If a juvenile escapes from an approved school or reformatory and is then apprehended, a juvenile court may increase that juvenile's detention in an approved school or reformatory up to an additional six months.¹¹² A subordinate court may fine and/or sentence to a term of imprisonment not exceeding six months any person who knowingly assists a juvenile in escaping or who knowingly harbours or conceals that juvenile.¹¹³

L. Appeals

Section 130 of the Juveniles Act provides four types of orders made by juvenile courts that may be appealed to the High Court:

- (a) A juvenile may appeal a juvenile court order placing the juvenile in the care of a fit person, sending the juvenile to an approved school, or placing the juvenile under the supervision of a probation officer;
- (b) A person who is ordered by a juvenile court to take care of a juvenile may appeal that order;
- (c) A person who is ordered by a juvenile court to pay a fine may appeal that order;
- (d) A person who is ordered by a juvenile court to make a contribution may appeal that order.

In addition, a juvenile found guilty of an offence may appeal to the High Court a juvenile court's determination of law, fact, mixed question of law and fact, or a juvenile court's order for punishment.¹¹⁴

¹¹¹ Juveniles Act, 53 Cap. s. 74(1).

¹¹² See Juveniles Act, 53 Cap. s. 108.

¹¹³ See Juveniles Act, 53 Cap. s. 108(3).

¹¹⁴ Criminal Procedure Code, Cap. 88 s. 321(1).

Chapter 2: Juveniles in Need of Care

This chapter of the handbook addresses issues that may arise when the juvenile is in need of care. This area of the law is essential to protecting the welfare of juveniles. Many juveniles lack the support structure necessary for their development. This chapter discusses the basic obligations that the law places on the state to protect juveniles in need of care.

Regional and International Human Rights Laws Ensuring the Welfare of Juveniles

Regional and international human rights laws stipulate that the state has an obligation to ensure the development of juveniles. The Preamble to the African Charter on the Rights and Welfare of the Child (ACRWC) notes that “the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances” and so children need “special safeguards and care” (ACRWC, Preamble). The Charter also notes that member states must “ensure, to the maximum extent possible, the survival, protection and development of the child” (ACRWC, Art. 5(2)). At the international level, the CRC requires states to “ensure to the maximum extent possible the survival and development of the child” (CRC, Art. 6(2)). This means that state parties must “recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” (CRC, Art. 27(1)). Based on these principles, legal actors should work to ensure that juveniles in need of care receive the support and assistance that they need to develop.

A. Juveniles in Need of Care

A juvenile in need of care is one who:

- (a) Having no parent or guardian, or parent or guardian that is not exercising proper care and guardianship, is “falling into bad associations or is exposed to moral or physical danger or beyond control”;
- (b) Has had an offence committed against him or her;
- (c) Is a member of the same household as a person who has been convicted of an offence against a juvenile;
- (d) Is a female member of a household where another member of that household has committed incest against another female member of that household;
- (e) Is “frequenting the company of any reputed thief or prostitute”;
- (f) Resides in a house in which prostitution occurs; or

- (g) Is otherwise “living in circumstances calculated to cause, encourage, or favour the seduction of the juvenile.”¹¹⁵

For purposes of the Act, a juvenile exposed to moral danger is one who is destitute; homeless; begs; or loiters for the purpose of begging.¹¹⁶

B. Regulations When Proceedings Involve a Juvenile in Need of Care

§ 1. Bringing a Juvenile in Need of Care Before the Court

If a police officer or a juveniles inspector has reason to believe that a juvenile is in need of care, he or she must bring that juvenile before a juvenile court, unless he or she believes that doing so is “undesirable in the interests of such juvenile” or that someone else has already been tasked with bringing that juvenile to court.¹¹⁷ If a police officer or juveniles inspector believes that the juvenile is in need of care, he or she should err on the side of caution and generally bring the juvenile before a juvenile court. If the juvenile court agrees that the juvenile brought before it is in need of care, the court may:

- (a) Order his or her parents to exercise proper care and guardianship;
- (b) Commit him or her to the care of a fit person who is willing to care for him or her;
- (c) Place him or her under the supervision of a probation officer or another person appointed by the court for this purpose, although for no more than three years; or
- (d) Order him or her to be sent to an approved school.¹¹⁸

§ 2. Taking a Juvenile in Need of Care to a Place of Safety

If a police officer or a juveniles inspector obtains an order from a magistrate, he or she may take any juvenile in need of care to a place of safety; however, the juvenile cannot be kept in a place of safety for more than fourteen days without a renewal of the order.¹¹⁹ If a police officer or juveniles inspector has applied for an order by the court regarding a juvenile in need of care, and that juvenile has not been removed to a place of safety, the court can issue the juvenile a summons requiring him or her to come before the court.¹²⁰ Where a juvenile has been taken to a place of safety, the police officer or juveniles inspector responsible for taking the juvenile there must send a notice to the juvenile court stating the grounds upon which the juvenile is being brought before the court and to the parents or guardians of the juvenile warning them to attend court on the date and time of the juvenile’s hearing.¹²¹

¹¹⁵ Juveniles Act, Cap. 53 s. 9(1).

¹¹⁶ Juveniles Act, Cap. 53 s. 9(2).

¹¹⁷ Juveniles Act, Cap. 53 s. 10(1).

¹¹⁸ Juveniles Act, Cap. 53 s. 10(2).

¹¹⁹ Juveniles Act, Cap. 53 s. 15(1)-(2).

¹²⁰ Juveniles Act, Cap. 53 s. 15(3).

¹²¹ Juveniles Act, Cap. 53 ss. 15(4)-(5).

§ 3. Duty to Inquire into a Juvenile in Need of Care's Background

Where a juvenile is to be brought before a juvenile court for being in need of care, it is the duty of the juveniles inspector of that area to investigate and furnish the court with “such information about the juvenile’s home circumstances, health, age, character, and general antecedents of the juvenile as are likely to assist the court.”¹²² Upon receiving “information on oath laid by any person who, in the opinion of the magistrate, is acting in the interests of a juvenile, that there is reasonable cause to suspect” that a juvenile is in need of care, a magistrate may issue a warrant requiring the juvenile to be brought before a juvenile court or authorizing any police officer to remove the juvenile to a place of safety and detain him or her there until the juvenile can be brought before a juvenile court.¹²³ If the circumstances of the juvenile’s background suggest that the juvenile is in need of care, the presiding magistrate should freely issue such a warrant.

§ 4. Rights of Parents, Guardians, or Other Relatives and Responsible Persons at Initial Proceedings

Where a juvenile is brought before a juvenile court on the grounds that he or she is in need of care, the court must allow the juvenile’s parents or guardians to come before it and oppose any application for an order regarding the juvenile.¹²⁴ If the juvenile’s parents or guardians cannot be found, or cannot be reasonably required to attend court, the court may allow any relative or other responsible person to take the place of the juvenile’s parents or guardians in opposing the application.¹²⁵

§ 5. Interim Orders

If a juvenile court cannot decide what order, or whether any order, should be made regarding a juvenile thought to be in need of care, the court can make any interim order that it thinks fit for the detention or continued detention of the juvenile in a place of safety.¹²⁶ Any such interim order cannot remain in force for more than fourteen days without the court renewing it.¹²⁷

§ 6. Fit Persons

If a juvenile court orders a juvenile to the care of a fit person, the court “shall endeavour to ascertain the religious persuasion of the juvenile.”¹²⁸ In selecting this fit person, the court must try to “select a person who is of the same religious persuasion as the juvenile or who gives an undertaking that [the juvenile] will be brought up in accordance with that religious persuasion.”¹²⁹

Every order committing a juvenile to the care of a fit person:

- (a) Must include the juvenile’s age, or apparent age, and religious persuasion; and

¹²² Juveniles Act, Cap. 53 s. 15(6).

¹²³ Juveniles Act, Cap. 53 s. 16(1).

¹²⁴ Juveniles Act, Cap. 53 s. 17(1).

¹²⁵ Juveniles Act, Cap. 53 s. 17(2).

¹²⁶ Juveniles Act, Cap. 53 s. 18.

¹²⁷ *Id.*

¹²⁸ Juveniles Act, Cap. 53 s. 19(1).

¹²⁹ Juveniles Act, Cap. 53 s. 19(2).

- (b) Will remain in effect until the juvenile reaches nineteen years of age, unless the court varies or revokes the order.¹³⁰

A juvenile court may also commit a juvenile to the care of the Commissioner for Juvenile Welfare as a fit person.¹³¹ In such circumstances, the Commissioner for Juvenile Welfare may:

- (a) Send the juvenile to live “with persons whom he considers suitable to undertake the care of the juvenile and who are willing to do so”; or
- (b) Send the juvenile to live in any suitable home or institution in Zambia, Zimbabwe, or South Africa where the managers “are willing to undertake the care of such juvenile.”¹³²

The Commissioner for Juvenile Welfare must seek written authority of the court before sending a juvenile outside of Zambia.¹³³ It must be noted that this is a fairly extreme option.

An order committing a juvenile to the care of a fit person may, on the application of any person, be varied or revoked by a juvenile court.¹³⁴ Upon such application, the court may elect to substitute the order for an order placing the juvenile under the supervision of a probation officer for a period not exceeding three years, or of some other person appointed by the court for the same purpose.¹³⁵ Any order placing a juvenile under such supervision must expire when the juvenile reaches nineteen years of age.¹³⁶

¹³⁰ Juveniles Act, Cap. 53 ss. 20, 26.

¹³¹ See Juveniles Act, Cap. 53 s. 23.

¹³² Juveniles Act, Cap. 53 ss. 23(a)-(c).

¹³³ Juveniles Act, Cap. 53 s. 23(c).

¹³⁴ Juveniles Act, Cap. 53 s. 26(1).

¹³⁵ *Id.*

¹³⁶ *Id.*

Chapter 3: Child Victims of Gender-Based Violence

Juvenile victims of gender-based violence receive special protections. The primary source of law for these protections is the Anti-Gender-Based Violence Act. This chapter will discuss these special protections.

Regional and International Human Rights Laws Protecting Juveniles from Sexual Abuse

While the majority of this Chapter focuses on the Anti-Gender-Based Violence Act, international and regional human rights instruments that Zambia has joined also require that the government protect juvenile victims from gender-based violence. Notably, the ACRWC declares that governments must take necessary measures to protect juveniles from all forms of “sexual exploitation and sexual abuse” (African Convention on the Rights and Welfare of the Child, Art. 27(1)). This provision places a duty on the government to implement procedural measures that ensure that a juvenile who is a victim of sexual abuse is treated with sensitivity and is afforded meaningful redress. The CRC further provides that state parties must “protect the child from all forms of sexual exploitation and sexual abuse” (CRC, Art. 34). Magistrates should look to these international and regional laws for guidance when adjudicating cases involving juvenile victims of abuse.

A. Duty of Police to Inform and Assist Victim

The Anti-Gender-Based Violence Act states that a police officer who learns about the commission of gender-based violence against any individual, including a juvenile, must do the following:

- (a) Inform the victim of his or her rights;
- (b) Provide basic support to the victim;
- (c) Advise the victim on how to obtain shelter, legal support, medical treatment, counseling, or other relevant support; and
- (d) Advise the victim on how to lodge a complaint.¹³⁷

¹³⁷ Anti-Gender-Based Violence Act, Cap. 87 s. 5. This duty also applies to a “labour inspector, social worker, counsellor, medical practitioner, legal practitioner, nurse, religious leader, traditional leader, teacher, employer or other person or institution with information concerning the commission of an act of gender-based violence.” *Id.*

Regardless of whether the person notifying the police is the victim, a police officer shall respond promptly.¹³⁸ This requirement reflects a recognition that the juvenile may be in dire need of protection.

A victim of gender-based violence may also file a complaint with a police officer.¹³⁹ A child who is a victim of gender-based violence may be assisted by a next friend in filing the complaint.¹⁴⁰ A next friend is a person who represents another person who is unable to maintain a suit on her or his own behalf. The victim may file the complaint anywhere that is convenient to the victim, including at the victim's residence.¹⁴¹

If a police officer receives a complaint of gender-based violence, the officer must:

- (a) Interview the parties and any witnesses to the violence;
- (b) Record the victims' statements and provide the victim with a report in a language that the victim can understand;
- (c) Assist the victim in obtaining medical treatment;
- (d) If necessary, assist the victim in finding a place of safety;
- (e) If applicable, protect the victim if the victim needs to retrieve personal items; and
- (f) Assist and advise the victim on preserving evidence.¹⁴²

The police must interview a child victim in front of either a parent or guardian or, when the parent or guardian is the alleged perpetrator, in front of a next friend.¹⁴³ Children may be particularly vulnerable after being the victim of gender-based violence and thus may require emotional support from a parent or next friend.

Additionally, police officers have the authority to arrest, without a warrant, any individual that an officer reasonably believes has committed or is committing, or is about to commit a gender-based violence crime if there is no other reasonable way to prevent the commission of the crime.¹⁴⁴ This provision indicates that police officers should take complaints of gender-based violence seriously and whenever possible work quickly to prevent further incidents of gender-based violence.

B. Procedures for Seeking and Obtaining Protection Orders

The Anti-Gender-Based Violence Act provides that a magistrate of a subordinate court may grant a protection order to a victim of gender-based violence.¹⁴⁵ The purpose of the protection order is to prevent any individual "from carrying out a threat of gender-based violence against the victim"

¹³⁸ Anti-Gender-Based Violence Act, Cap. 87 s. 7.

¹³⁹ Anti-Gender-Based Violence Act, Cap. 87 s. 6(1).

¹⁴⁰ Anti-Gender-Based Violence Act, Cap. 87 s. 6(2).

¹⁴¹ Anti-Gender-Based Violence Act, Cap. 87 s. 6(4).

¹⁴² Anti-Gender-Based Violence Act, Cap. 87 s. 8.

¹⁴³ Anti-Gender-Based Violence Act, Cap. 87 s. 8(2). A "next friend" is a person who intervenes to assist a child victim in bringing a legal action. Anti-Gender-Based Violence Act, Cap. 87 s. 3(1).

¹⁴⁴ Anti-Gender-Based Violence Act, Cap. 87 s. 9.

¹⁴⁵ See Anti-Gender-Based Violence Act, Cap. 87 ss. 3(1), 13.

or “from further committing acts which constitute gender-based violence against the victim.”¹⁴⁶ Furthermore, the Anti-Gender-Based Violence Act specifies that if a child is a victim of gender-based violence, then the following individuals may make a protection-order application on behalf of the child:

- (a) A person with whom the child regularly resides;
- (b) A parent or guardian;
- (c) A social worker;
- (d) A police officer or probation officer;
- (e) A medical officer;
- (f) A representative of a non-governmental organisation; or
- (g) An institution that has information about gender-based violence.¹⁴⁷

A person representing a child does not need to obtain the child’s consent before applying for a protection order on behalf of the child.¹⁴⁸ Children, especially after being the victim of gender-based violence, may lack the capacity to file a protection-order application. Thus, this provision enables other concerned individuals to file a protection-order application on behalf of the child.

Before ruling on the application, a court may initially provide an interim protection order. The court must weigh the following factors in deciding whether to grant an interim protection order:

- (a) The risk of harm to the victim if the order is not made immediately;
- (b) Whether the victim will be deterred from continuing with the application if the interim order is not granted; and
- (c) Whether the court has reason to believe that the alleged perpetrator is “deliberately evading service of notice of the proceedings.”¹⁴⁹ An interim protection order may last up to three months.¹⁵⁰

When ruling upon the application for a final protection order, a court must make its order in chambers. Generally, both parties and their legal representatives, if any, must be present.¹⁵¹ The court may, however, separate the alleged perpetrator from the victim if the perpetrator’s presence “is likely to have a serious adverse effect” on the victim.¹⁵² Given the emotional trauma that a victim may experience from seeing her or his perpetrator again, courts should choose to err on the side of caution when deciding whether to separate the victim from the alleged perpetrator.

A final protection order may prohibit the alleged perpetrator from:

¹⁴⁶ See Anti-Gender-Based Violence Act, Cap. 87 s. 10(1).

¹⁴⁷ See Anti-Gender-Based Violence Act, Cap. 87 s. 10(4).

¹⁴⁸ Anti-Gender-Based Violence Act, Cap. 87 s. 10(5)(a)(i).

¹⁴⁹ Anti-Gender-Based Violence Act, Cap. 87 s. 12(2).

¹⁵⁰ Anti-Gender-Based Violence Act, Cap. 87 s. 12(3).

¹⁵¹ Anti-Gender-Based Violence Act, Cap. 87 s. 11(1).

¹⁵² Anti-Gender-Based Violence Act, Cap. 87 s. 11(2).

- (a) Physically assaulting the victim or an individual associated with the victim;
- (b) Forcibly confining the victim or an individual associated with the victim;
- (c) Depriving the victim from access to food, water, shelter, or clothing;
- (d) Forcing the victim to have sex;
- (e) Having sex with the victim in a manner that “abuses, humiliates or degrades” the victim;
- (f) Depriving the victim from economic or financial resources;
- (g) Contacting the victim anywhere the victim frequents.
- (h) Contacting the victim by phone;
- (i) Disposing or threatening to dispose of the victim’s property;
- (j) Damaging or threatening to damage the victim’s property;
- (k) Hiding or hindering the use of the victim’s property;
- (l) Threatening to abuse the victim;
- (m) Harassing the victim;
- (n) Entering the victim’s residence without the victim’s consent if the two individuals do not share a residence;
- (o) Emotionally, verbally, or psychologically abusing the victim;
- (p) Coming within one-hundred metres of the victim;
- (q) Seeking the assistance of another individual to engage in gender-based violence; or
- (r) Doing any additional act that the court determines is not in the best interest of the victim.¹⁵³

A final protection order may not last more than one year, but the court may extend, modify, or rescind the protection order upon an application from the victim.¹⁵⁴ A court, at the request of an application or on its own motion, may impose additional remedies.¹⁵⁵ The additional remedies include requiring the perpetrator to seek counseling, directing the perpetrator to surrender her or his firearm, or ordering the perpetrator to make periodic payments to the victim for maintenance.¹⁵⁶

¹⁵³ Anti-Gender-Based Violence Act, Cap. 87 s. 14.

¹⁵⁴ Anti-Gender-Based Violence Act, Cap. 87 s. 17.

¹⁵⁵ Anti-Gender-Based Violence Act, Cap. 87 s. 15.

¹⁵⁶ *Id.*

Chapter 4: Juvenile Witnesses

This chapter focuses on the protections that Zambia’s domestic laws afford juvenile witnesses. The chapter also describes several best practices that juvenile courts may consider implementing to further protect juvenile witnesses.

A. Trial Proceedings

§ 1. Presence of Juveniles in the Court Room

A juvenile court must not permit any child, other than an infant in arms, to be present during a trial unless that child’s presence is necessary as a witness or “otherwise for the purposes of justice.”¹⁵⁷ Magistrates should read “purposes of justice” to mean that non-witness children should only rarely be allowed to remain in the courtroom. A juvenile court must remove any unauthorized child who is present in the courtroom during a trial.¹⁵⁸

§ 2. Presence of Other Parties When Juvenile is Testifying

Where a juvenile is called as a witness in any proceedings relating to any offence against a juvenile or “any conduct contrary to[] decency or morality” (for example, defilement of a child), the court has the power to order all persons who are not members or officers of the court, parties to the case, counsel, or “otherwise directly concerned in the case” to leave the courtroom during the juvenile’s testimony.¹⁵⁹

Please refer to Chapter 1, G, § 1 at page 13 for a discussion of the individuals permitted to be present during a juvenile court proceeding.

§ 3. Anonymity for Juveniles in Proceedings

Please refer to Chapter 1, I at page 15.

¹⁵⁷ Juveniles Act, Cap. 53 s. 120.

¹⁵⁸ *Id.*

¹⁵⁹ Juveniles Act, Cap. 53 s. 121.

Best Practices: Closed Circuit TV and Lower Budget Alternatives

For juvenile victims of violence, being forced to revisit the offences against them in a courtroom in front of their abusers can be a traumatic experience. Closed-circuit television (CCTV) can be used to help alleviate the emotional stress juveniles may endure when testifying. CCTV is a secured video system in which signals are sent from a video camera to specific television monitors, allowing a child witness to testify in a separate room with the testimony contemporaneously transmitted to a viewing monitor in the courtroom. It has been a key feature of South Africa's sexual offences courts. Some of Zimbabwe's "victim-friendly courts" have also used CCTV during the testimony of juvenile witnesses. (Report on the Re-Establishment of Sexual Offences Courts, available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf> (August 2013); Davies Mumba, *The Juvenile Criminal Justice System in Zambia Vis-à-Vis the International Protection of Children's Rights* (2011) (dissertation, University of Zambia, Lusaka)).

Where CCTV is infeasible, some judges and magistrates have put up screens to physically separate child witnesses from their alleged offenders. Other alternatives to CCTV may include the use of a removable opaque partition preventing the child and the accused from seeing each other, a one-way mirror allowing the accused to see the child but not vice versa, a removable opaque partition with a video camera transmitting the image of the child to a television monitor visible to the accused, or the removal of the accused from the courtroom when the child is giving testimony. (United Nations Office on Drugs and Crime, *Justice in Matters Involving Child Victims and Witnesses of Crimes: Model Law and Related Commentary*, 55 (2009); "They Are Destroying Our Futures": Sexual Violence Against Girls in Zambia Schools 43 (October 2012) (Report, Cornell Law School International Human Rights Clinic)).

B. Child Witnesses, Competence, and Corroboration

§ 1. Children below the Age of Fourteen

In any criminal or civil proceedings against any person where a child under the age of fourteen years is called as a witness, the court must accept the child's testimony if it finds that the child is competent.¹⁶⁰ In order for a child to be competent, the court must find that "the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth."¹⁶¹ If the court determines that the child does not have sufficient intelligence to justify the reception of the child's evidence or does not understand the duty of speaking the truth, the court must exclude the child's testimony from evidence.¹⁶²

If the court determines that the child does have sufficient intelligence to justify the reception of the child's evidence and understands the duty to speak the truth then the child is a competent

¹⁶⁰ Juveniles Act, Cap. 53 s. 122. This portion of the Act was amended in 2011.

¹⁶¹ *Id.*

¹⁶² *Id.*

witness. However the Juveniles Act provides the testimony of children under the age of fourteen years must be corroborated “by some other material evidence . . . implicating the accused.”¹⁶³

The general rule is that there should be corroboration of both the commission of the offence and the identity of the offender.¹⁶⁴ Courts can and should take a broad view of the types of evidence that can be admitted for corroboration. For example, in a sexual offences case, this may involve taking into consideration not only physical evidence (for example, a medical report), but also testimony of people who saw and spoke with the victim about the incident soon after it occurred.¹⁶⁵

§ 2. Children over the Age of Fourteen

If the child or young person is over the age of 14, he or she is competent to testify without the special inquiry mandated by section 122. A child over the age of 14 must be treated like an ordinary witness and as such his or her evidence generally can be received without corroboration.¹⁶⁶

In sexual offences cases, the Supreme Court has held that victim’s evidence ordinarily must be corroborated.¹⁶⁷ However, corroboration is not required “where, in the particular circumstances of the case there can be no motive for a [complainant] deliberately and dishonestly to make a false allegation against, an accused; and the case in effect resolves itself in practice to being no different from any other in which the conviction depends on the reliability of her evidence as to the identity of the culprit.”¹⁶⁸ Thus, if the court is satisfied that there is no danger that the defendant is being falsely implicated, it may convict on the basis of the victim’s uncorroborated testimony.

¹⁶³ *Id.*

¹⁶⁴ *People v Manroe* (HPA/50/2010) ZMHC (29 December 2010).

¹⁶⁵ “They Are Destroying Our Futures”: Sexual Violence Against Girls in Zambia Schools 43 (October 2012) (Report, Cornell Law School International Human Rights Clinic) (citing interview with a senior resident magistrate).

¹⁶⁶ See Juveniles Act, Cap. 53 s. 122.

¹⁶⁷ *Emmanuel Phiri and Other v The People* (1982) Z.R. 77, 79 (S.C.).

¹⁶⁸ *Id.*

Comparative Perspectives on the Testimony of Child Victims of Sexual Violence

Several countries have recently reformed their laws to eliminate the requirement of corroboration or special caution for children and/or victims of sexual violence. Section 127 of Tanzania's Evidence Act, as amended by its Sexual Offences Special Provisions Act of 1998, provides that courts may convict on the basis of uncorroborated evidence proffered by a child of tender years or a victim of a sexual offence "if for reasons to be recorded in the proceedings, the court is satisfied that the [witness] is telling nothing but the truth." In Namibia, section 5 of the Combating of Rape Act of 2000, provides that "[n]o court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence." The Criminal Procedure Amendment Act of 2003, section 2, abolishes the use of special caution in relation to child witnesses, providing that a court "shall not regard the evidence of a child as inherently unreliable." Section 124 of Kenya's Evidence Act, as amended, provides that the testimony of an alleged victim of a sexual offence may be the basis for conviction without additional corroborating evidence "if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

These provisions reflect recognition that neither the testimony of a competent child nor that of a sexual violence victim is inherently unreliable. Although Zambian law mandates corroboration of the evidence of a child under the age of fourteen, courts should take this recognition into account when determining whether the testimony of a juvenile survivor of sexual violence above the age of fourteen requires corroboration or can itself provide the basis for conviction.

C. Testimony of Medical Experts

Prosecutors may need to rely on evidence of medical experts in cases where the victim is a juvenile, notably in cases of defilement. For example, the Criminal Procedure Code provides that a prosecutor may read the affidavit or deposition of a medical officer, attested before a magistrate, even if the prosecutor does not call the medical officer as a witness.¹⁶⁹ Furthermore, a magistrate may order that a medical officer examine an accused person on any material matter. Following the medical exam, the medical officer shall write a report that may be offered into evidence.¹⁷⁰ When the doctor-patient privilege is waived, a doctor can testify as to what the patient stated with respect to the patient's present symptoms, past symptoms or the general cause of the medical condition.¹⁷¹

¹⁶⁹ See Criminal Procedure Code, Cap. 88 s. 259(1); Criminal Procedure Code, Cap. 88 s. 289(1).

¹⁷⁰ Criminal Procedure Code, Cap. 88 s. 17.

¹⁷¹ *Khumalo v The People* (SCZ/14/1981) (11 August 1981).

D. Admissibility of Deposition of a Juvenile

As a general rule, all evidence taken in any court inquiry or trial must be taken in the presence of the accused.¹⁷² However, where a “duly qualified medical practitioner” testifies that “the attendance before a court of any juvenile in respect of whom any scheduled offence is alleged to have been committed would involve serious danger to [the juvenile’s] life or health,” the court may take the juvenile’s deposition, on oath, in writing to avoid the juvenile having to be in the presence of the defendant.¹⁷³ If the court decides to take the juvenile’s deposition in writing, it must note its reason for taking the deposition in this manner, the date when the deposition was taken, the place where the deposition was taken, and the names of any persons present at the taking of the deposition.¹⁷⁴ The deposition will then be admissible in evidence without further proof as long as (1) the defendant had reasonable notice of the intention to take the deposition in this manner or (2) the deposition was taken in the presence of the accused and the accused or his or her lawyer had the opportunity to cross-examine the juvenile.¹⁷⁵

¹⁷² Criminal Procedure Code, Cap. 88 s. 191.

¹⁷³ Juveniles Act, Cap. 53 s. 125.

¹⁷⁴ *Id.*

¹⁷⁵ Juveniles Act, Cap. 53 s.126.

Appendix A. Resources for Juveniles

ORGANIZATION	PURPOSE	FOR MORE INFORMATION
Legal Aid Board	To provide legal aid in criminal and civil cases to people with inadequate means (including juveniles)	Visit http://www.legalaidboard.org.zm or call +260 211 256 453/4
Childline	To help children seek counsel where they are facing various kinds of abuse (an adult can also call on a child's behalf)	Visit www.lifelinezambia.org.zm or dial +116 to speak to a Childline representative
Centre for Law and Justice (CLJ)	To safeguard the legal rights of children, to advocate for systematic improvements in juvenile justice, and to offer programs in legal education, research, aid, and advocacy that will strengthen the juvenile justice system in Zambia	Visit http://cljzambia.org/who-we-are/
Action for Children Zambia	To help children living on the street in Zambia by providing individualized treatment, rehabilitation and transition opportunities	Visit afczambia.org or email the Director at afczambia.org
Plan Zambia	To help children access their rights to education, health and economic empowerment	Visit http://plan-international.org/where-we-work/africa/zambia/ Or call +260-211-260 074
Women and Law in Southern Africa – Zambia (WLSA – Zambia)	To provide legal advice and services to women and children who are vulnerable and cannot afford lawyers	Visit http://www.wlsazambia.org/index.php/projects/legal-aid-and-services or call +260 211 293 989
Young Women's Christian Association Zambia (YWCA Zambia)	To provide counselling, legal advice, and referrals to gender violence survivors	Visit http://ywcazambia.org or call +260 211 255 204

