

AGUDF

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2006/HP/0327

(CIVIL JURISDICTION)

BETWEEN

ROSARIA MASHITA KATAKWE (A minor, suing by her
Guardian and Next Friend, PETRONELLA MWAMBA)

PLAINTIFF

AND

EDWARD HAKASENKE

1ST DEFENDANT

WOODLANDS 'A' BASIC SCHOOL

2ND DEFENDANT

MINISTRY OF EDUCATION

3RD DEFENDANT

ATTORNEY GENERAL

4TH DEFENDANT

BEFORE HON. MR. JUSTICE PHILLIP MUSONDA

For the Plaintiff:

Mr. Bwalya of KBF and Partners

For the 1st Defendant:

Mr. Wanabo of Lewis Nathan & Associates

For the 2nd, 3rd and 4th Defendants:

Mrs. Wengelani – Senior State Advocate

Cases Referred to:

1. Blyth V Birmingham Water Works (1856) 11 Exch Page 781 at 784
2. Eagle Charalambous Transport Limited V Phiri (1993-94) ZR 180
3. Godfrey Sinabu Sinonge V Attorney General (1970) ZR 73
4. Rutherford V Attorney General (1976) INZL R403
5. Jacob Vs Griffiths (1999) 174 DLR 4th
6. Short V J.W. Henderson Limited (1946) TLR 427 at 429

Works Referred to:

1. Clerk & Lunsell on Torts 17th Edition Chapter 5, paragraphs 5-20, P.176
2. Charlesworth & Percy on negligence, 9th edition paragraphs 8, 128, P.594

Legislation Referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia*
2. *Penal Code Amendment Act No.15 of 2005*

J U D G M E N T

This was a claim by a minor school girl suing through her Guardian and next friend Petronella Mwamba for damages for negligence caused by the defendant's breach of duty to take care owed to the plaintiff. A declaration that the Government is responsible for all school going children in the care of its agents, such as teachers, school authorities and any other person in its employment during the time the schools are in session and with regard to all related matters over which such agents have control. Damages for personal injury and emotional distress caused to the plaintiff as a result of the first defendant's wrongful and unlawful act for which 2nd, 3rd and 4th defendants are vicariously liable.

The evidence as laid by the prosecution was that Rosaria Mashita Katakwe who at the time of trial was a Grade 10 pupil at Kabulonga Girls was a school girl at Woodlands 'A' Basic School. The first defendant was a teacher at the said school and was teaching her civics and history. In February 2000 she asked him if he had past papers in civics and history and he told her he had them at home and promised to bring them for her. However, the following day he never brought the papers and he forgot to bring these papers on more than three occasions.

She was invited to go and collect papers from his home around 1500 hours. At 1500 hours she went to his home and he asked her to go inside and she found him

playing music. He offered her a seat, after which he asked her if she was scared and she admitted she was. When she asked about past papers he said she should not be in a hurry and that he wanted her to be free with him. He told her to go and get past papers from another room. When she went in that room she was shocked to find it was a bedroom. The room had no door but just a curtain. When she turned he was behind her. She asked him what he was doing in there and where the past papers were, but he told her not to rush and he touched her tried to push her on the bed. He started telling her she was pretty, that he could even marry her.

He tried to kiss her, later he said he could not hurt her and she was blank and everything happened so fast. He put his manhood in her vagina and he was on top of her and she was screaming but he covered her mouth with his hand. After that she got her clothes dressed and said she wanted to go home. He told her not to tell anybody as she could be chased from school and he would lose his job.

She went home and did not tell her auntie PW 2. Later her private parts were itching. She decided to go to the clinic where she was examined and they gave her medicine to insert in her vagina and the other was for drinking and they gave her a prescription. Though she was attending school, she started getting low marks she was stressed. She told the headteacher what had happened, who told her that he knew what had happened.

When the problem got worse he told the first defendant who said he was not getting sick himself why was she getting sick, she was crying and she then explained to her English teacher Mr. Mboshe, to whom she explained the ordeal who told her to tell her auntie even if she was difficult. She phoned the auntie at the behest of Mr. Mboshe, but when Mr. Mboshe realized she had not told her auntie, he and Mr. Chanda decided to inform the auntie and advised the auntie to report the matter to the administration. Her auntie spoke to the Deputy Head Mr. Daka, who called a senior teacher Mr. Zyambo and she explained what had happened. Mr. Mulongo the

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Headmaster said they could not blame her as she was a minor. The Headmaster reminded first defendant about a previous relationship. Her auntie decided to take first defendant to the police where she was interviewed and given a medical report.

She wound up her evidence that her teacher could order her to write notes he could send her to do something and he could punish her and the first defendant knew how old she was, she trusted and respected him, but could not report to the Headmaster as she was scared. Some friends would ask her what happened and some would make her feel bad, some stopped playing with her. She would like to ensure girls are protected and she would not like teachers to take advantage of the pupils, they should be safe at school.

PW 2 was the auntie of the plaintiff Petronella Mwamba. She started looking after her when she was 13. On a Tuesday in March 2006, Rosaria called her around lunch time and said she wanted to speak to her when she got home, but she declined to disclose the topic on the phone. But when she got home plaintiff could not tell her anything so she chased her outside and 30-40 minutes later two teachers came one of whom was her class teacher. They told her plaintiff was sick because she had been raped by one of her school teachers. They then asked her to go and report to the school administration as first defendant had been doing that for some time.

The following day she and plaintiff went to school around 0600-0700 hours but the Headteacher was not there so she instead saw the Deputy Head whom they found with a Senior teacher. When first defendant was called, he admitted plaintiff was his girlfriend and said he knew she was 14 years old. When asked if he had sex with her, first defendant said that was a difficult question. He asked for forgiveness. Later she went to report the police, who gave her a medical report to go to UTH where plaintiff was counseled and later tested for HIV. A docket was opened and the police were looking for defendant. During the week first defendant's mother called her and said what her son had done was wrong. Later at a meeting between first defendant's

mother, her son and herself the police whom she had informed of the meeting arrested first defendant. The HIV results were negative.

She said she wanted to ensure that such a situation does not happen to her niece and other children. It is an emotional scar which doesn't heal. She was of the view that there were no policies because the Head teacher said they knew first defendant had done that before, but they did not take any measures or warned the pupils. The Deputy Head's reconciliation proposal was spurned because the other victim (child) was just transferred from that school. There is no protection at all for the children because if one injures another's child they are given a verbal warning. That was the plaintiff's case.

DW 1 was the first defendant. He testified that he knew plaintiff who was her pupil at woodlands, but he did not have canal knowledge, though the relationship was so close that she could borrow his mobile phone to call her auntie. She could sometimes be with him the whole morning. On the day she asked for past papers, and he promised that he could take them the following day, but he forgot and he forgot on three occasions. He however wanted to talk to her on something, he wanted to tell her that he was interested in her, but he did not mention for three days though she asked him.

She could then say sir, why don't you just say what you want, I know what you want. He then told her that if she knew why should he tell her and she said it was alright - from there she started spreading rumours that she had a relationship with him. He called her and told her that what she was doing was wrong and risky, she denied. Towards Valentine's Day Rosaria followed him with a bunch of flowers and a chocolate.

He tried to avoid her as he realized the whole thing was to put him in trouble. One afternoon he was going home when Rosaria and her friends volunteered to escort him. They were at his home for 25-30 minutes and plaintiff reminded him about past-

papers and he gave them to her and he asked them to go as he wanted to sleep. The following day plaintiff went to the staff room and asked for him, but he told her he was busy. She requested to talk to him on diverse dates but he declined and she complained to his workmates.

She picked him up because she wanted to have a relationship and he denied. He identified the valentine card she gave him. He denied having reciprocated to the plaintiff's love overtures nor did he have sex with her.

In cross examination, he answered that when accosted he admitted that plaintiff was his girlfriend and that she did not propose him. He said he called plaintiff his girlfriend because there was a relationship which started at the beginning of February and ended towards the end.

DW 2 was Christopher Mulongwe a Headteacher of Woodlands A. He testified that he had been Headmaster for 8 years. The case was reported to him about first defendant's behavior. He asked first defendant in the presence of Mr. Ndhlovu the Deputy Head and a senior teacher Mr. Zyambo and first defendant admitted that the girl was his girlfriend. The witness told him it was a chargeable offence and he charged him. He could not handle the matter any further as first defendant ran away and he heard he gone to South Africa and he wrote to the District authorities reporting the matter.

Later he learnt the first defendant had been detained at Woodlands Police Station. He had warned the teacher when he heard that there was a relationship between him and a grade IX girl, unfortunately there was no report made.

It was submitted for the plaintiff the case was novel and that the case was special because it gives the Zambian courts a chance to move the Zambian Government by 'Judge made law' to strengthen its school policy on the protection of the girl child

against sexual abuse. That with the advent of sexually transmitted diseases such as HIV/AIDS which have no cure, the chances of millions of girls being infected with this 'Death Sentence' by unscrupulous teachers/headmasters cannot go unabated.

Mr. Bwalya went to define negligence by quoting Alderson B's passage in *Blyth V Birmingham Waterworks*, which is in these terms:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulated the conduct of Human Affairs, would do, or doing something which a prudent and reasonable man could not do"

Clerk & Lindsell on Torts, defines vicarious liability as:

"Where the relationship of employer and employee exists, the employer is liable for the torts of the employee so long, only as they are committed in the course of the employee's employment. The nature of the tort is immaterial and the employer's is liable even where liability depends upon a specific state of mind and his own state of mind is innocent"

The duty of a teacher/headmaster towards their pupils left in their care by the unsuspecting parents/guardians, the learned authors Charlesworth & Perley, on negligence have stated thus:

"The duty of a school teacher has been said to be to take care of his pupils as a reasonably careful father would take care of the children of the family"

Mr. Bwalya argued that the girl child has legislative protection by the amendment to the penal code by enacting Act No.15 of 2005, which imposed a 15 year hard labour sentence on those convicted of defilement. He also cited Article 4 of The Rights of Women in Africa Protocol which reads:

(1) " Every woman shall be entitled to respect for her life and the integrity of her person. All forms of exploitation, cruel, inhuman or degrading treatment or punishment shall be prohibited

(2) State parties shall take appropriate and effective measures to:

(a) Enact laws to prohibit all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or public;

(b) Adopt such other legislative Administrative, Social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women".

For the first defendant it was submitted that the requirement of corroboration in sexual offences in criminal law is equally required in civil cases and a passage in the Laws of Evidence in Zambia, Cases and materials, by John Hatehard and Muna Ndulo which states that:

- (a) Complaints are sometimes motivated by spite, sexual frustration or unpredictable emotional responses,
- (b) An allegation concerning the commission of a sexual offence is easily made but difficult to defend

The upshot of the first defendant's defence is that there was a relationship which the plaintiff consensually engaged in and therefore she was 'volenti non fit injuria' and the valentine card she sent to the first defendant and its wording i.e., "if loving you is a sin, am hundred percent guilty" and Eagle Charalambous Transport Limited V Phiri⁽²⁾ was cited in support of that defence.

It is fact that the first defendant and the plaintiff had an amorous affair, when the plaintiff was 13 years old and a pupil of the first defendant, who was 25 years. It is a fact that as a result of the sexual act, the plaintiff contracted a sexually transmitted disease for which she was hospitalized and she was also tested for HIV/AIDS. This was not the first time the first defendant was flirting with a school girl. He flirted with one and the Headteacher warned him and they had the girl (the victim) transferred and left the villain to continue teaching.

The legal issues are:

- Is the first defendant's agument that the plaintiff's consent to a sexual act, sustainable?
- Could it be said the second defendant's servants, the first defendant and DW 2 the Headmaster acted negligently?

I am startled by the submission on behalf of the first defendant that a 13 year old pupil can be said to have consented to a sexual relationship with her teacher. To accept such a submission is doing violence to the legislative's intent in enacting Act No.15 of 2005, which repealed the defence in section 138(2), which section creates the offence of defilement of a girl under the age of 16. Belief that a girl may have been above sixteen is no more a defence.

A teacher has moral superiority over his pupils and in any event he cannot be heard to say the student consented without independence advice, even in a contractual

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relationship. In any event a girl saying she loved him did not consent to sex, when she is below 16, her statement may be futuristic. He manipulated the girl by deliberately forgetting the examination papers she asked from him in order to create an opportunity to sexually abuse her at his home. She went to his home to collect school papers from her teacher.

When children are deposited at school the teachers become their parents, and the late Judge Hughes' statement, that the standard of care owed by the headmaster of a school towards the pupils is that of a careful father towards his own children is apt here. *The Headmaster knew the first defendant was a sexual pervert, in the first case he had the victim transferred and he left the villain. Could he would have done the same if the pervert was in his household and it became apparent he was sexually abusing his daughters, would he have left such a matter unreported and still retain the pervert in his household?. I don't think he would have taken a dim view, if it affected his family. His conduct therefore fell below, the standard set by Hughes as he then was in Inonge's case supra.*

The question is can the second, third and fourth defendants be vicariously liable for the tort committed by the first defendant? The first defendant was a servant of Government as a teacher at the second defendant's school in the third defendant ministry and the fourth defendant appearing in his representative capacity as Chief Legal Advisor to Government Lord Thankerton in Short V J & W Henderson Limited⁽⁶⁾ said there are four indicia of a contract of service

- (i) *The employer's power of selection of his servant;*
- (ii) *The payment of wages or other remuneration;*
- (iii) *The employer's right to control the method of doing work,*
and
- (iv) *The employer's right of suspension or dismissal*

A teacher employed by the Ministry is selected by the Ministry, paid by the Ministry, regulated by the Ministry in the performance of his duties, can be suspended or dismissed by the Teaching Service Commission.

Could it be said then that the first defendant was acting in the course of his employment? Mrs. Wengelani has cited Jacob's case supra. However, this can be distinguished as the offender in that case did not have the guardianship of the children surrendered to him nor did he have moral superiority. ***This is a pupil, who asked for past examinations papers from the first defendant as her teacher and the teacher forgot them on diverse dates, and asked her to collect them from home where he sexually assaulted her. Had he taken the past examination papers to school and given her there would have been no opportunity to sexually assault her at his home. The only inference his conduct can be accounted for is that he created an opportunity by deliberately forgetting examination papers for the 'sexual assault'.***

There could be no consent by a child under 16. To characterize a valentine card with words 'if loving you is a sin, then I have committed one', as consenting to sexual assault, is legally, morally and psychologically flawed. Such a perception undermines section 138 of the penal code, is contrary to the ethics of a teacher not to sleep with school girls, and is psychologically wrong as a child under 16 is not cognitively developed to consent to sex. This was a situation where the first defendant had sex with the plaintiff against her will. To accept the defence of volenti-non-fit injuria is to agree that a person having an incestuous relationship, will say after all my daughter sent me a love card, so she consented to be sexually abused and such a submission is preposterous.

From what I have said I find that the first defendant defiled the plaintiff which resulted in her contracting a venereal disease. The plaintiff's evidence was so cogent


and corroborated even by the first defendant himself, that is why he put up the defence of 'volenti non fit injuria'. The case has been proved beyond the balance of probability.

I must say it was dereliction of duty by the police to fail to prosecute the first defendant with the evidence before them, it was common cause that the first defendant was flirting with the plaintiff. It is this dereliction which forced the plaintiff to travel the civil litigation path on her journey to justice.

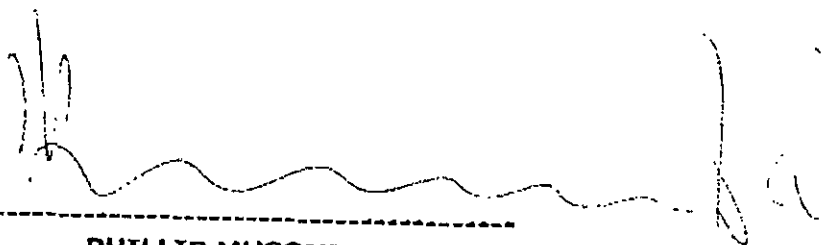
In terms of assessment of damages the case is novel, however, society's indignation has to be reflected. An abusive girl either gets in an abusive relationship or may not trust a partner, the effects are long term. The healing process is long and lonely and the emotional scars never heal. There is **'enduring psychological brutalisation'**. I therefore have to do an intelligent guess. I have to take inflationary trends into account:

Pain and suffering	K 6,000,000
Mental torture (permanent)	K30,000,000
Aggravated damages	K 5,000,000
Medical expenses	<u>K 3,000,000</u>
	<u>K45,000,000</u>

The amount will attract Bank of Zambia long term deposit rate from the issuance of the writ until Judgement and from the date of Judgement until payment short term deposit rate. The matter is referred to the Learned Director of Public Prosecutions for possible prosecution. The Ministry of Education is implored to make regulations which may stem such acts in the future for example male and female pupils must not be allowed to visit teachers' houses nor should teachers send or ask pupils to visit their homes.


The costs will follow the event to be taxed in default of agreement. Leave to appeal to the Supreme Court granted.

DELIVERED ON THIS 26th DAY OF June 2008



PHILLIP MUSONDA
HIGH COURT JUDGE

