

STRATEGIC LITIGATION FOR ADOLESCENT SRHR



Stanly Kamanga Chimota's world started crumbling around him in 2016. He was 19 years old at the time, in Form Two and looking forward to the future with optimism. Three years on, he faces an uncertain, bleak future due to a series of events that unravelled in 2016.

Chimota — from Nkhata Bay in Northern Malawi, under Group Village Head Chinyenda in the area of Traditional Authority Malanda — was one of 16 teenagers who were suspended from Uhoho Primary School, hauled before a magistrate, fined and incarcerated, because of pregnancies.

BACKGROUND

In April 2016, eight (8) teenage female pupils at Uhoho Primary School at Chintheche, Northern Malawi, were found pregnant. The incident kicked off an astonishing series of events that has cast the spotlight on abuse of the justice system, the re-admission policy of students in Malawian schools and, above all, access to Sexual and Reproductive Health and Rights (SRHR) information and services, especially among the youth.

Following the discovery of the pregnancies, Uhoho Primary School's Head Teacher and the Primary Education Advisor (PEA) for Chintheche Education Zone summoned the pupils and their parents to a meeting to discuss the matter. Malawi's previous education sector re-admission policy was unequivocal on what happened to pregnancies among pupils. Any female pupil found pregnant and a male pupil who was responsible for it earned a suspension from school, ideally for one year in order to care for the child.

In the Uhoho case, however, before the matter could be concluded between the parents and their children on the one hand and the Head Teacher and the PEA on the other, the two education officials escalated it further to the Child Protection Committee (CPC) under Traditional Authority Malanda for its action.

The role of Malanda CPC

Malanda CPC was formed in 2013, at the sponsorship of a Non-Governmental Organization (NGO) operating in the area, with a primary function to act as a watchdog to protect children from dangers and abuses such as alcoholism, smoking, drug abuse, child labour, prostitution and sexual abuse.

To adequately carry out this mandate, the CPC formulated community by-laws in June 2013. Allowing early marriages or forcing children into them were deemed as offences under the broader ambit of protecting children against sexual abuses. However, the by-laws did not include any prohibitions of teenage pregnancies.

Malawi's Ministry of Education recognises pregnancies among school pupils through its Re-Admission Policy for Primary and Secondary Schools and provides appropriate sanctions for people involved. A report jointly produced by the Malawi Human Rights Commission and the Southern Africa Litigation Centre (SALC), *Towards a Human Rights-Based Approach to Learner Pregnancy Management in Malawi*, notes that prior to 1993, schools routinely expelled female pupils found pregnant and the male learners responsible.

However, 1993 witnessed a fundamental shift when the Ministry of Education instituted the Re-Admission Policy. Central to the policy was that a female pupil found pregnant and the male learner responsible would be suspended for up to a year to take care of the child. As noted in the preface to the revised Re-Admission Policy for Primary and Secondary Schools (2018), the implementation of the 1993 policy “encountered a number of challenges... which included punitive and reactionary measures as opposed to support to the learner; lack of clarity in the re-admission procedures and lengthy processes to re-admit the learners; negative attitudes towards teenage mothers and socio-economic constraints which often lead to early marriages.”

The policy has undergone significant changes over the years particularly in relation to procedures for readmission. Admittedly, the CPC ignored this fundamental goal of the readmission policy.

In retrospect, the by-law to ‘criminalise’ early marriages may not have been without merit, even though questions have been raised over extending the sanctions to teenage pregnancies.

The current Traditional Authority (TA) Malanda had not ascended to the throne in 2016 when the saga unravelled, but he acknowledges challenges within the Chintheche community about protecting children, especially girls, under the age of 18 who were dropping out of school due to pregnancies and early marriages.

“*We say when you educate a girl, you have educated a nation, but the girls were regularly dropping out of school due to pregnancies. The community felt moved to protect the girls and a child protection committee was formed under TA Malanda to protect children,*”

Traditional Authority Malanda.



T/A Malanda (front right) with the new Child Protection Committee

TEENAGE PREGNANCY IN NKHATA BAY

Teenage pregnancies, especially among school-going children, have been a growing concern across the country and Nkhata Bay has not been spared. A report by the Youth Watch Society (commissioned by SALC) entitled '*Findings of Students Suspended Over Pregnancy Scandal in Nkhata Bay*', notes that from January 2016 to June 2016 alone, for instance, Malanda CPC had registered 39 girls in primary schools within its catchment area who had become pregnant.

The Malawi Demographic and Health Survey (MDHS) of 2015-16, found that only 6.6% of female respondents in Nkhata Bay had completed primary education, while only 2.9% had completed secondary education. Comparatively, the national averages were 5 and 3.3% respectively. This is despite 70.2% of respondents in Nkhata Bay having indicated to have attended primary school, beating the national average at 67.1%.

With regards to reproductive health, the 2015-16 MDHS notes that 12.8% of females in Nkhata Bay would have had their first sexual intercourse by the age of 15 compared to 22.2% of males by the same age. These are largely school going ages across most parts of the country.

Nkhata Bay also scores poorly in terms of teenage pregnancies, with the survey recording that as many as 22.8% of 15 to 19 year olds having had a live birth compared to the national average of 22.2%. Further, 8.3% of 15 to 19 years olds are pregnant with the first child (national average 6.8%) and 31% having begun child bearing (national average 29%). Coupled with that, usage of family planning commodities in Nkhata Bay is at 44.4% in comparison to the other districts some of whom record a usage of 69.6%.

Such statistics, among others, may have formed the backdrop to the formation of by-laws by Malanda CPC to curb the latent challenges besetting the community around Uhoho Primary School.

To deal with matters arising out of the by-laws, Malanda CPC formed a tribunal whose mandate was to arbitrate on their infringement. Tellingly, the tribunal comprised, among others, community child protection officers, representatives of Nkhata Bay District Commissioner, community policing fora, youth networks and religious organisations, police, health workers, teachers and the First Grade Magistrate Alexander Gombar of Chintheche Magistrate's Court.

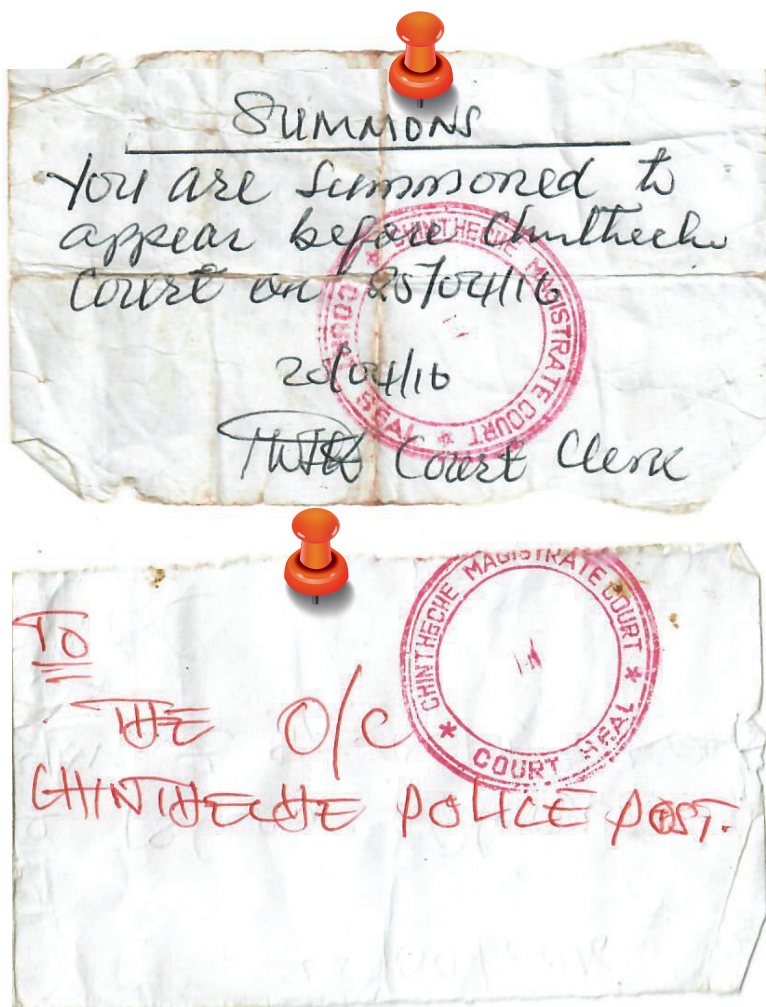
The tribunal was mandated to hear complaints, make findings of guilt and fine offenders, but had no power to enter a conviction or pass a sentence of imprisonment as they are more or less a community informal justice system. The fines ranged from K1,500 to K50,000 and funds raised from this were designed to be used for the protection of children from sexual abuses and other dangers in the area.

LAW WITHOUT BASIS

The female pupils and some of the boys who were responsible for the pregnancies were all suspended in keeping with Malawi's education regulations at the time. The CPC, in turn, referred the case of the children (and their parents) to Chintheche First Grade Magistrate's Court. This action was notable for the blurring of roles between the CPC and the court given that the magistrate, who was a key member of the committee, was the presiding officer at the court.

Not only did the Magistrate use court stationery and court personnel to summon the children and their parents, the court provided the space for the hearing. As a key member of the CPC, the magistrate essentially referred the case to himself wherein he made himself complainant, prosecutor and judge.

The 'court' found all the children guilty of violating a non-existent by-law that outlawed pregnancies among girls of school going age. Each of the boys and the girls were fined K10,000 (about \$15 by April 2016 foreign exchange rates). One family paid twice as its male and female children were respondents to the matter. The committee also fined some of the parents K10,000 for *"neglecting the girls and failing their parental responsibility to protect the girls"*.



Court summons issued for the Uhoho learners

A COMMUNITY IN DISTRESS



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“We cried for our children when we were told they wouldn’t be released if the fine was not paid. So, we sold mattresses, bicycles, beddings,” laments Maggie Salima, whose child was one of those who were fined.

Due to economic hardships, few of them paid the fine on the spot, partly because it was unanticipated; partly because they could not afford it.

Those who failed to pay were committed to Chintheche Police Station, to be released only on payment. Some paid the same day, but the others were incarcerated for as long as 24 hours. Meanwhile, parents and guardians were moving from pillar to post selling household items — from mattresses, bicycles, beddings and just as about anything they could lay their hands on — to ensure the children were released from police custody.

Maria Bavu, another involved parent, explains that she expected the school to abide by the government’s readmission policy. “What we know is that when a child gets pregnant, both the girl and the boy would be suspended until after the child is born and weaned off, and then they return to school,” says Bavu.

Bavu’s concern could be explained by the inconsistencies regarding the implementation of the re-admission policy, which were observed in the study report - *“Towards a human rights based approach to learner pregnancy in Malawi”*.

The report reads in part that: “Criticisms were raised against the Ministry of Education for merely issuing circulars on the Re-admission Policy without any regard as to whether the implementers would be able to implement the Policy or not. Head teachers complained of lack of comprehensive information from the Ministry of Education including the provision of guidance or direction on the challenges faced.”

Such inadequacies in the policy may have emboldened the school’s head, the PEA and the CPC to deal with the matter as they deemed fit.

A STITCH IN TIME

The Magistrate Court's verdict caught the attention of Youth Watch Society (YOWSO), a local NGO which, among others, advocates for youth in distress. It is based in Mzuzu, some 40km from Chintheche, the epicentre of the scandal.

YOWSO's Executive Director Muteyu Mukhuta Banda explains that the case was unique in more ways than one. He observes that a number of schools in the area would routinely take learners to hospitals for pregnancy tests (often without their consent), but Uhoho Primary School bucked the trend.

"This one was different because the learners were already pregnant. Instead of the school taking its responsibility, such as suspending the learners, it shifted its role [to the CPC], which is not part of the education system and that is why it raised eyebrows," Muteyu explains.


YOWSO investigated the matter further and, due to funding limitations, approached SALC for support as the organisation runs a strategic litigation programme on SRHR. SALC, through its SRHR Programme, provided YOWSO with technical and financial assistance to institute litigation in the matter and engaged the services of Tennyson and Associates to file an application for review in the High Court, Mzuzu in 2016. An application was filed for judicial review at Mzuzu High Court as the *Olika Nkhoma and 13 Others v Child Protection Team*, Miscellaneous Civil Cause 116 of 2016.

In the application, the Uhoho learners were seeking legal redress to determine;

- 1 Whether the decision of the First Grade Magistrate at Chintheche to make an order during the said lower court proceedings remitting each applicant who had not paid the aforementioned fine into the custody of the Chintheche police and requiring the Applicant to remain in such custody until the fine was paid is consistent; with common law notions of fairness, legality and rationality and with the right to liberty or other constitutional rights.
- 2 Whether the Respondents or society has the right under the present constitutional to make punitive rules which apply to its members and/or to the members of the community in which the society is situate or operates.
- 3 Whether the decision of the Chintheche Magistrate Court or the Malanda CPC made prohibiting or impeding the learners who were in custody from sitting for and writing examinations is in accord with section 25 on the right to education and other constitutional provisions.
- 4 The case also challenged the unlawful detention of the students in police cells until such fines were paid.


In her determination, delivered on 23 April 2019, Justice Dorothy De Gabriele excoriated the magistrate for overstepping his authority and applying unnecessary laws on the matter. The by-law, the Judge observed, has no provisions that penalise the fact of a girl getting pregnant or impregnating a girl, but it is - *"dealing with the protection of children from all forms of danger and abuses such as alcoholism, smoking, drug abuse, child labour and prostitution and sexual abuse"*.

Justice De Gabriele found the judgement of the lower court as "illegal, irrational and unconstitutional" and observed the following in her judgement:





Illegal

The magistrate had overstepped his powers by unjustly inflicting punishment on parents and guardians of the youths involved with pregnancies




Irrational

Penalties were not even provided for in the bylaw itself.



Unconstitutional

No provision in Malawi's Constitution or in any legislation of any recognised written law prohibits or criminalises getting pregnant or making a girl pregnant.



Her observations have traction in Malawi's Ministry of Education's Readmission Policy for Primary and Secondary Schools, applicable at the time which, while it sanctions pregnant female learners or male learners who impregnate school girls, does not criminalise pregnancies and gives second chances to concerned parties. The policy specifically aims at addressing barriers that prevent learners from dropping out of school and complete the education cycles at both primary and secondary schools

Justice DeGabriele, however, observed that bylaws in themselves are not harmful and can be used to advance the rights of the vulnerable in the society. In her determination, Justice DeGabriele also indicated that the complainants had the right to claim damages against the CPC and the First Grade Magistrate in his personal capacity.

Malawi's Local Government Act of 1998 gives district councils the leeway to formulate or approve bylaws that deal with localised problems. The caveat is that such laws must conform to the larger laws of the land. A further caveat is such bylaws can only be implemented and enforced by the councils themselves. Besides, anyone contravening such bylaws shall be liable on conviction to a fine not exceeding the sum of K2,000 and in the case of a continuing offence a further fine not exceeding K200 for each day during which the offence continues after conviction thereof. Obviously, the Uhoho bylaws conformed to neither of this, and neither were they lawfully formulated by the district council.



THE IMPACT OF THE UHOHO CASE

YOWSO Exective Director, Muteyu Mukhuta Banda, observes that the case exposed issues related to early pregnancies and early marriages and it could go a long way in shaping the policies affecting reproductive health of the youth to the benefit of the larger community.

“*The judgement will have a multiplier effect not just for Uhoho or Nkhata Bay, but for the nation as a whole as this will inform the revision of re-admission policies, management of learner pregnancies and making of bylaws*”

Muteyu

YOWSO has since implored the district councils to enforce bylaws in keeping with the laws of Malawi to avoid a recurrence of the Uhoho saga. The NGO, has already engaged traditional leaders, learning institutions and other organisations working within Chintheche on the effect of deleterious bylaws on the rights of children and encouraging them to produce only bylaws that are guided by laws of the land. This resulted in the production of a guidance document by the government on the use of by-laws and their relationship with the national law. Another result of the impact is the use of lessons from the case that informed the development of the revised Ministry of Education Re-Admission policy.

SALC coordinated the strategic litigation process with support from Hivos, through the Regional SRHR Fund, further supported YOWSO to generate awareness on the judgement and its implications among officials from Nkhata Bay District Education Manager's office, the police, senior chiefs and other organisations within the district.

Muteyu adds that, in partnership with SALC and Hivos, legal proceedings have been instituted for compensation as the judgement omitted the compensation of the learners. However, time, he concedes, may be running out due to the statute of limitations for such cases.

After the suspension, and the weaning of the children, of the 16 youths involved, only three — two boys and one girl — have returned to school. This is partly due to the stigma and discrimination faced by other learners as well as the community's perception of the learners' innocence since they were not reimbursed or compensated. Three females got married to the young men who made them pregnant.

A CONDUIT OR CONTRIBUTOR?

The Uhoho learners' case presented an opportunity to partake in the conversation on learner pregnancy and how it was managed by ultimately challenging the policy which was, on the face of it, very problematic.

"The Court has confirmed that a punitive approach to learner pregnancy is unlawful. Our own research and experience shows that by-laws or policies which seek to punish adolescent boys and/or girls for teenage pregnancies is counter-productive and that a more holistic and human rights-based approach is required. Malawi is currently revising both its learner pregnancy management policy and its community by-laws. We hope that this judgment will contribute to a comprehensive, rights-based and effective approach in managing teenage pregnancies in Malawi and the region," says Tambudzai Gonese-Manjonjo, SALC SRHR Programme Lawyer.



Tambudzai Gonese-Manjonjo, SALC SRHR Programme Lawyer.

Tambudzai also notes that the case is a reminder of the role of strategic litigation in policy and legal reform. "Strategic litigation provides an opportunity to close gaps in the law or policy by radically changing things without going through the time-consuming and sometimes complex process of law-making. It can [when it works as it should] provide urgent relief and remedies for abuses and violations as well as provide for accountability that influences maintenance or proper implementation."

Tambudzai notes that:-

“*While strategic litigation may have won the teenagers and their parents some recourse, the work is far from over. What the judgement has done is to provide a legal basis for an introspection of the re-admission policy and the applicability of by laws in relation to the supreme laws of the land.*

What this case and many show us is that a strategic litigation case win is only a start to our advocacy work by creating an enabling legal environment that can be replicated for widespread SRHR change including access to information and services for young people”.

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