

**THE BURDENED WITNESS:  
CATERING FOR THE NEEDS OF MOTHERS WITH SMALL  
CHILDREN REQUIRED TO GIVE EVIDENCE IN CRIMINAL  
TRIALS IN ZIMBABWE**

**Abstract**

**This dissertation shows that the universal, but harmful, practice of removing small children from their mothers who are witnesses in criminal trials is not based on any law. The practice subsists despite the lack of proof that accompanied children actually materially disrupt proceedings. Focusing on the ‘lived realities’ of these usually poor and legally illiterate female witnesses (in terms of the Women’s Law and other methodologies, including, the Grounded Theory and Human Rights based Approaches), the writer, a prosecutor, traces their fearful journey through an unintelligible, unsympathetic and heavily patriarchal criminal justice system. Therefore, in order to improve the ability of these women to fulfil their civic duty (and, consequently, to improve the administration of justice in accordance with local and international Human Rights instruments), she suggests several simple gender-sensitive administrative judicial reforms.**

**BY**

**FORTUNE CHIMBARU**

**Supervisor: Professor Julie Stewart**

**A Dissertation submitted in partial fulfilment of the Masters In  
Women’s Law Degree, Southern And Eastern Africa Regional  
Women’s Law Centre, Faculty of Law, University Of Zimbabwe**

**2008**

## TABLE OF CONTENTS

Acknowledgements .....	3
DEDICATION.....	4
<b>CHAPTER 1: INTRODUCTION: NO BABIES ALLOWED. ....</b>	<b>5</b>
<b>1.1 BACKGROUND .....</b>	<b>5</b>
<b>1.2 WHY THE TOPIC?.....</b>	<b>5</b>
<b>1.3 STATEMENT OF THE PROBLEM. ....</b>	<b>6</b>
<b>1.4 OBJECTIVES OF THE RESEARCH.....</b>	<b>7</b>
<b>1.5 THE HUMAN RIGHTS FRAMEWORK.....</b>	<b>8</b>
<b>1.6 DOMESTIC LEGISLATION.....</b>	<b>9</b>
<b>1.7 LITERATURE REVIEW.....</b>	<b>9</b>
<b>CHAPTER 2: ARE THERE BABIES? : RESEARCH METHODOLOGIES AND METHODS. 10</b>	
<b>2.1 WOMEN’S LAW APPROACH .....</b>	<b>10</b>
<b>2.2 GROUNDED THEORY APPROACH.....</b>	<b>10</b>
<b>2.3 ACTORS AND STRUCTURES PERSPECTIVES.....</b>	<b>11</b>
<b>2.4 SEX AND GENDER ANALYSIS.....</b>	<b>12</b>
<b>2.5 RESEARCH STRATEGY AND METHODS.....</b>	<b>13</b>
2.5.1 INTERVIEWS.....	14
2.5.2 GROUP DISCUSSIONS.....	15
2.5.3 OBSERVATIONS.....	15
2.5.4 OWN INSIDE KNOWLEDGE.....	15
<b>2.6 LIMITATIONS.....</b>	<b>16</b>
<b>CHAPTER 3: EVERYBODY’S RULE AND NOBODY’S RULE .....</b>	<b>17</b>
<b>3.1 THE “RULE” .....</b>	<b>17</b>
<b>3.2 WHY THE “RULE?”.....</b>	<b>17</b>
<b>3.3 WHERE IS THE RULE? .....</b>	<b>19</b>
3.3.1 SOURCE AND ORIGINS OF THE RULE .....	19
<b>3.4 WHO ARE THE ENFORCERS?.....</b>	<b>20</b>
<b>3.5 WHAT DO THE MAGISTRATES SAY? .....</b>	<b>21</b>
<b>3.6 JUDGES’ VIEWS .....</b>	<b>22</b>

<b>CHAPTER 4: THE OTHER SIDE OF THE STORY.....</b>	<b>26</b>
4.1 <i>IS IT THE PROSECUTORS' RULE?</i> .....	26
4.2 <i>WHAT DO THE POLICE SAY?</i> .....	30
4.3 <i>JUDGES' CLERKS' AND INTERPRETERS' VIEWS</i> .....	31
4.4 <i>HEAR WHAT THE PRISON OFFICERS SAY</i> .....	32
<b>CHAPTER 5: WHAT'S REALLY GOING ON? .....</b>	<b>34</b>
5.1 <i>MAJOR OBSERVATIONS</i> .....	34
5.2 <i>CAN THE SYSTEM RESPOND?</i> .....	34
5.3 <i>IT IS NOT JUST IN COURT</i> .....	35
<b>CHAPTER 6: WHOSE JUSTICE SYSTEM? .....</b>	<b>41</b>
6.1 <i>PERCEPTIONS AND ATTITUDES</i> .....	41
6.2 <i>WOMEN'S COPING STRATEGIES: AT WHOSE EXPENSE?</i> .....	44
6.3 <i>I AM AFRAID I WILL BECOME THE ACCUSED</i> .....	47
6.4 <i>THE "STATE" SAYS SO : SO BE IT!</i> .....	48
6.5 <i>SUGGESTED SOLUTIONS</i> .....	50
<b>CHAPTER 7: DISCUSSION.....</b>	<b>52</b>
7.1 <i>IGNORANCE AND MISGIVINGS</i> .....	52
7.2 <i>POINTING FINGERS</i> .....	54
7.3 <i>ME AND MY TIME COUNT FOR NOTHING</i> .....	55
7.4 <i>HUMAN RIGHTS IMPLICATIONS</i> .....	56
7.5 <i>WHOSE "RULE" IS IT, ANY WAY?</i> .....	58
7.6 <i>CONCLUSION</i> .....	58
7.7 <i>RECOMMENDATIONS</i> .....	59
<b>BIBLIOGRAPHY.....</b>	<b>60</b>
<b>Human Rights Instruments and National Legislation.....</b>	<b>60</b>

## **Acknowledgements**

I would like to thank all those who collaborated in one way or another in making possible the production of this dissertation. This includes all those who provided data and valuable information towards the research.

Special gratitude goes to my supervisor Prof Julie Stewart for expert advice and generous support during the research process and writing of the dissertation. Special appreciation goes to NORAD for the financial support that allowed me to undertake the Masters in Women's Law.

I owe deep gratitude to Women's Law Centre for providing a conducive environment and to the staff members at the centre for their cooperation.

A very special thanks to my husband Alex and the girls Rutendo and Munashe for their patience and support during the trying times when I had to work on rather tight schedules and deadlines.

I would also extend my appreciation to my colleagues in the masters in law class Thoko and Pau who gave me encouragement and support both in the class and socially and lightened my workload.

## **DEDICATION**

This dissertation is dedicated to my baby Anesu Blessings Chimbaru who travelled with me in-utero during the research and made me prove that pregnancy is not a disease.

## **CHAPTER 1: INTRODUCTION: NO BABIES ALLOWED.**

### **1.1 BACKGROUND**

Through my experience as a prosecutor in rural Mount Darwin, where witnesses necessarily have to travel long distances to come to court, I realised that many people who come to court as witnesses end up receiving treatment which almost reduces them to the status of accused persons. The situation of women who come to court with babies and young children was even more problematic and stressful, to both the mother and the child. What made their plight worse is the fact that they brought extra “baggage” or an attachment in the form of their babies, whom the system has no use for and is not prepared to cater for. The “rule” in all criminal courts in Zimbabwe is that babies and young children are not allowed in court. I found the “rule” in place when I joined the system and never questioned the rationale behind it nor its origins. For the thirteen years of my practice as a prosecutor, I have religiously followed the practice. Thus the magistrate’s courts, as with all the higher courts, are not baby or toddler friendly; small children, who are part and parcel of women’s lives, are seen as a disruptive influence in the court environment.

### **1.2 WHY THE TOPIC?**

Though, personally, I was always touched by the plight of both the mother and the child, and, at times, even offered assistance in the form of food or playing with the child, I never bothered to find out the source of the “rule” or the basis for practising it. I started being bothered by the situation after about seven years of having joined the system; when I started dealing with High Court matters on the continuous roll in Harare and High Court circuit matters in Mutare. This, I believe, was due to the fact that all witnesses for such matters are subpoenaed for one specific date yet the matters run over a period of time which is usually two weeks. The idea is that as many witnesses as possible are made available at once to maximise the use of time and resources and ensure that the court does not run out of business during the short period that it is on circuit. Whilst this appears to be a sensible practice to the administrators, it causes a lot of problems to innocent witnesses who, at times, may not even be the victims of the crime. This is so because the subpoenas with which they are issued are silent on fact that they may end up spending days or even weeks at court before testifying as the court will be dealing with many matters, not on a first

come first serve basis, but on the basis of which case has the most witnesses available and is most likely to reach a speedy conclusion. Whilst this inconveniences all such witnesses, among the hardest hit are women, who would have come to court with breast-feeding babies or young children. Due to lack of proper information about the duration of their stay at court, most of them would be ill-prepared for the long stay.

The system itself offers no assistance at all. Necessary assistance would include buying food for mother and baby, sourcing petroleum jelly for both or soap for washing nappies and baby clothes or even buying an extra nappy for the baby. There were times that I personally had to chip in with such services or had to assist a colleague in doing so. In spite of all the problems that I saw women encountering, I still blindly continued to impose the “rule”. I ensured that these hungry and soiled babies were violently separated from their mothers when it was their mother’s turn to take the witness stand. It was only when this opportunity for research arose that I decided to focus on the topic, in the hope that will be able interrogate the system and at the end come up with recommendations that will enable gender mainstreaming for female witnesses in the justice delivery system.

### **1.3 STATEMENT OF THE PROBLEM.**

The criminal justice system is heavily dependant on the availability of witnesses. Without witnesses the system cannot function, it can actually grind to a halt. The scene of the crime and events that unfold during and after the commission of an offence determines who will be the witnesses in a particular case. This therefore means that even the criminal justice system itself has no control over the “creation” of witnesses. Thus witnesses will, depending on the offence, come from all sectors of society and will include men, women and children.

The value of witnesses cannot be over emphasised. The criminal justice system thrives on them, for without them no trials can ever reach their just conclusion. This means that the system should be well equipped to cater for this very important contribution to the justice delivery system, regardless of their sex, gender or social status. It is the objective of this research to assess whether the criminal justice system is well organised and equipped to cater for witnesses, in general, and female witnesses, in particular, and those who come to court with breast-feeding babies and

young children below the age of two. What facilities are in place for the comfort and dignity of such witnesses?

The study will also look into the reasons why some women have to bring such young children to court and try to establish whether this was ever envisaged when the court system was put in place. In most jurisdictions and societies, there is an assumption that women are best placed to fulfil a child's needs. Fathering is seen as a function which it is possible to perform at a distance and on a part time basis, and as such courts are rarely faced with a situation where by a male accused person or witness turns up at court with a baby or young child in tow. Mothering, by contrast, is supposed to be based on a continual interaction between mother, baby or young child. Almost all courts in custody cases acknowledge that young children are best with their mothers, yet somehow when they call mothers of babies and young children to court as witnesses, they expect them to come without them. Day care facilities for children are expensive and can only be accessed by a privileged few leaving the great mass of women without provision or forcing them to rely upon their families or unregistered and unsatisfactory arrangements. Hence, most mothers are left with the responsibility of continuing to care for their children when attending court, since only a few can afford to leave them in the care of relatives, crèches, nursery schools and nannies. It is therefore not surprising that many female accused persons and witnesses do indeed turn up at court with their babies and young children. Thus the law should be seen playing a major role in assisting these women in the exercise of these two onerous obligations concurrently.

#### **1.4 OBJECTIVES OF THE RESEARCH**

The objectives of the research were as follows -;

1. To review the system of witness care in the magistrates court and high court with specific reference to female witnesses who come to court with babies and young children.
2. To assess whether the system is user friendly to such witnesses.
3. To influence law reform and make the system responsive to the needs of female witnesses with children.
4. To interrogate the origins and the rationale behind the rule that children are not allowed in court.



5. To determine what provisions are in place to deal with such women and children. Also to establish why some women have to bring their children to court and find out from such witnesses how the system treated them.
6. To establish from the police officers and prison officers, who end up baby-sitting for female witnesses, their experiences and whether it is included in their training for court duties.

### **1.5 THE HUMAN RIGHTS FRAMEWORK.**

This research had to refer constantly to human rights frameworks for measuring compatibility with the treatment of female witnesses who come to court with young children. Throughout the research, I sought to link the treatment of such witnesses to the broader national and international human rights obligations to ensure equal access to courts for both men and women and to eliminate discrimination against women in all its forms. Whilst there is no specific provision relating to women accessing courts as witnesses in either the national or international frameworks, the following human rights instruments are relevant.

- Article 2 of the Convention on the Elimination of Forms OF Discrimination Against Women [CEDAW] enjoins State parties to condemn discrimination against women in all its forms and to pursue by all means a policy of eliminating discrimination against women.
- Article 2(d) thereof requires State parties to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.
- Article 8 of the Protocol To The African Charter On Human and Peoples' On The Rights of Women In Africa (The Protocol) enjoins State parties to ensure equal access to justice for both women and men.

The national frameworks relevant to this research are section 23(1) and (2) of the Constitution of Zimbabwe which outlaws discrimination on the basis of sex and gender.

## **1.6 DOMESTIC LEGISLATION.**

The domestic legislation relevant to the research is the Criminal Procedure and Evidence Act [Chapter 9:07]. Witnesses are called to court in terms of this Act. The relevant sections are as follows;

- Section 231. Duty of witness to remain in attendance. In terms of this section, every witness duly subpoenaed to attend and give evidence at any criminal trial shall be bound to attend and to remain in attendance throughout the trial, unless excused by the court.
- Section 237 states that if any person subpoenaed to attend criminal trial without reasonable excuse fails to obey the subpoena and there is proof that the subpoena was served upon the person, or if any person, who has attended court in obedience to a subpoena, fails to remain in attendance, the judge or magistrate may issue a warrant of arrest against the said person. When such a person is arrested he or she shall be detained or kept by the person who is in charge of him with a view to secure his presence as a witness at the trial or may be released on a recognisance with or without sureties for his appearance to give evidence.
- Section 239 relates to the right of witnesses to get witness fees and this shall be paid out of moneys appropriated for the purpose by an Act of Parliament.
- The Criminal Procedure and Evidence [Witnesses Expenses and Allowances [Amendment] Reg 2007 [no. 5] regulates and sets out the amounts to be paid to witnesses as expenses.

## **1.7 LITERATURE REVIEW**

Although there is no literature on the topic, the study was very much informed by the WILSA Research on women and justice delivery in Zimbabwe. Stewart J et al (2000) dealt with the problems women encounter in accessing the justice delivery system, mainly as litigants. Although they touched on some criminal aspects, their focus was specifically on the civil aspect of the justice delivery system. The research differs from my research in that mine deals specifically with women as witnesses in the criminal justice system.

## **CHAPTER 2: ARE THERE BABIES? : RESEARCH METHODOLOGIES AND METHODS.**

### **2.1 WOMEN'S LAW APPROACH**

As this study was about how female witnesses with babies are treated in the criminal justice system, I embraced the women's law approach in so far as one of its facets IS to critique the interplay between law and life. This approach allowed me to assess how women are considered in law from a woman's law perspective. I thus started the enquiry by looking at the existing law to verify what it provides for and then proceeded to hear from the women themselves what problems they face as a result of the provisions. The aim was to find out from the women themselves how the rule barring young children from the courtroom affects them and how they view the treatment they get in as far as witness expenses and accommodation is concerned. Hence women were taken as the initial main focus. At the beginning of the research, I was of the belief that law was the problem. Thus my initial assumptions were-;

1. There are no proper facilities at court to accommodate witnesses in general and nursing mothers in particular.
2. There are no childcare facilities at court and children are not allowed in the courtroom.
3. Women and children spent long periods or even days at court and get very little in the way of expenses even for the mother.
4. Children and baby-minders are not catered for in the witness payment system.
5. Women with children are subjected to inhuman and degrading treatment by the conditions they are made to endure.
6. That the whole system is not user friendly and is not sensitive to the needs of female witnesses with young children.

I set out to investigate and interrogate the law and policy. However when I searched for the law, I failed to find it in the statutes, court rules or practice notes.

### **2.2 GROUNDED THEORY APPROACH**

I employed the grounded theory approach, which was critical in as far as it allowed me to engage constantly with the data I had collected and determine what data to

collect next. The grounded theory approach as an iterative process thus enabled me to engage on an on-going basis with the data I had collected, sift and manage it, consider it and determine what to collect next. [Bentzon A.W: 1998:18]. Thus my findings on the ground meant that I had to change my initial assumptions and focus on key actors to verify how the practice came about, why it is practised and its origins or source. There was a need to interrogate the players and their experiences. I then came up with these new assumptions;

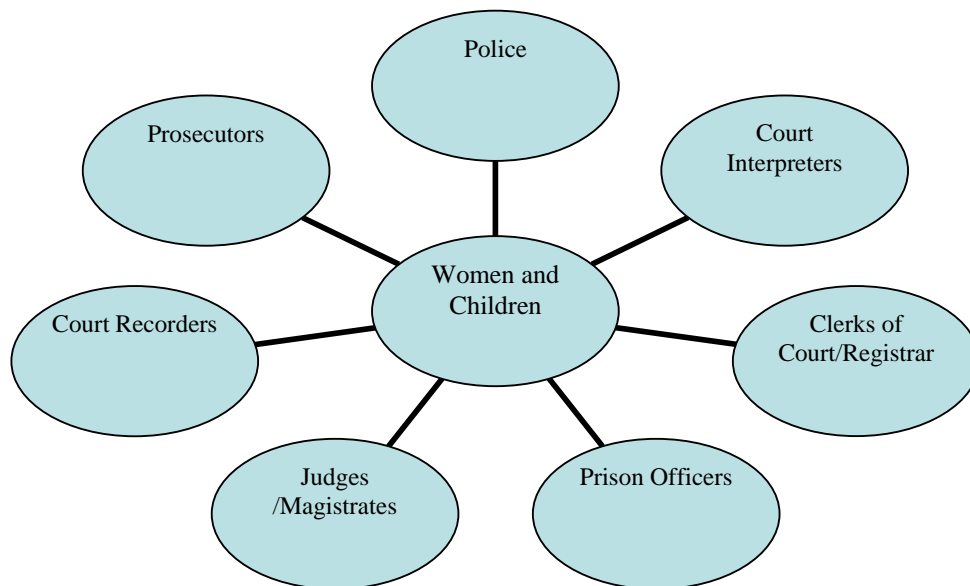
1. That there is no formal legal rule that precludes babies from court.
2. That this rule was structurally imposed as a result of a failure by officials to appreciate the problems that women face.
3. The rule is practised and implemented more at the lower courts and mostly by low ranking officials.
4. As one climbs up the ladder, e.g. regional magistrates and judges, they become less likely to object to the presence of the babies in court.
5. In courts that normally deal with child abuse cases, such as the regional courts, women with children can by default get round the obstacle and enter the court room because no one is sure of the status of the baby; the assumption is that they are the victim and, hence, must be included in the system.
6. Most court officials are unaware of the inconveniences caused by the ad hoc childcare system that women may resort to in the circumstances at the courts.
7. That there is a need for a gender awareness campaign for all court officials.
8. That prosecutors' insensitivity to the needs of these female witnesses causes these female witnesses to become burdened witnesses.

### **2.3 ACTORS AND STRUCTURES PERSPECTIVES**

Two weeks after starting the research and having interviewed only two female witnesses, prosecutors and magistrates countrywide embarked on a strike. They were no longer dealing with any matters and all witnesses were stopped from coming to court. As the strike continued I almost panicked thinking that my research had been halted as my intended targets were no longer available for interview. However by that time I had made my own search about the rule and discovered that it was not law. So, when I consulted my supervisor, she calmed me down and suggested that I focus on the enforcers of the rule. This meant that I had to scrutinise the role played by

prosecutors, magistrates, judges, judges' clerks, court interpreters and prison officers<sup>1</sup>. Thus, there was a need to look at the actors and structures that female witnesses with young children at court engage with in their quest to meet their citizen's obligation to the state. This approach enabled me to interrogate the players and their experiences. It also facilitated the investigation and interrogation of the different levels of courts, as it appeared that the treatment of female witnesses with babies differed from one official or court level to another. Using this approach, I managed to obtain the different perceptions and attitudes of court officials. The different players who contribute to the application of the rule can be best summarised by the diagram below;

**Diagram 1.**



#### **2.4 SEX AND GENDER ANALYSIS.**

Bentzon et al [1998:82] make a distinction between sex and gender and note that while sex is based on the physical distinction between men and women, gender is a social and cultural construct. This approach was very useful in interrogating and establishing the reasons why some women have to bring these small children to court. It also highlights the fact that regulations dealing with witness expenses need to be examined through a gender lense since on paper they appear to be sex and gender neutral, whereas in practice the different gender roles of men and women result in women being prejudiced.

---

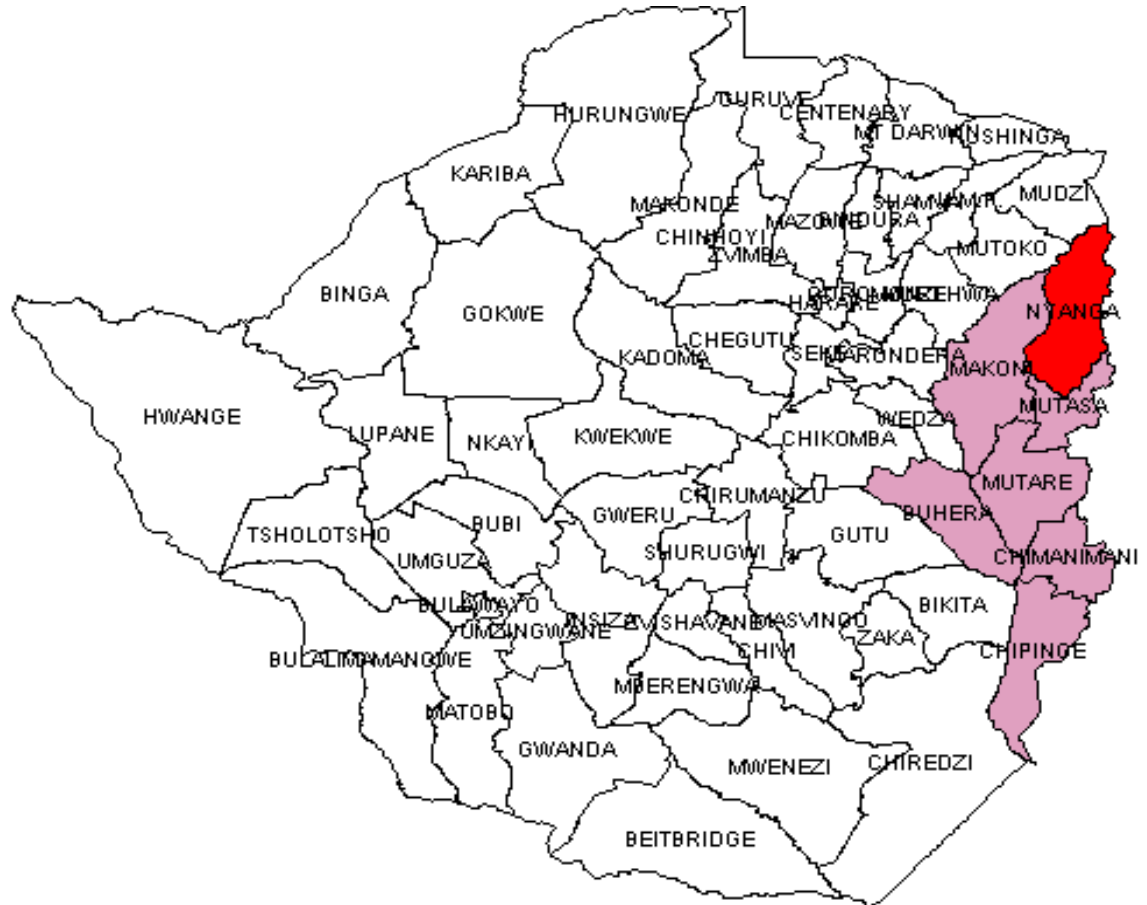
<sup>1</sup> Although there was a strike, officials were available at the courts but were not trying cases.

## 2.5 RESEARCH STRATEGY AND METHODS.

### Location of the Study

The intended areas of Study were Mutare High Court (Circuit), Harare Magistrates Court and Harare High Court.

MAP OF ZIMBABWE SHOWING AREAS FALLING UNDER THE JURISDICTION OF MUTARE HIGH COURT (shaded area):



There are two High courts in Zimbabwe, one being Harare and the other in Bulawayo. Harare was chosen because of its central location and to provide a comparison between local witnesses and those that come from outside Harare. Mutare High court circuit was chosen because the witnesses come from far off places such as Buhera, Chipinge and Rusape.<sup>2</sup> In Mutare however the High Court holds circuit sessions where the judge and prosecutor from the Harare High court travel to the area to hear criminal matters within the High Court's jurisdiction.

<sup>2</sup> The distance between Mutare and Rusape is 93km while Mutare Chipinge is about 120km and Mutare Buhera 330km.

There was a need for me to determine the origins and the rationale behind the rule that children are not allowed in court and to determine what provisions are in place to deal with such women and children. Also, there was a need to establish why some women have to bring their children to court and to find out from such witnesses how the system treated them. I also needed to discover the experiences of police and prison officers who end up baby-sitting the children and whether any such baby-sitting skills are included in their training for court duties. All this was to be done by way of;

1. Interviews.
2. Group discussions.
3. Passive observations at court

### **2.5.1 INTERVIEWS.**

The greater part of the research was through individual interviews with the female witnesses and officials. Two female informants Ruth Chimanga, a 28 year old Harare house wife, and Marian Dube of Fukaye village chief Musikavanhu Chipinge, who had an 11 months old baby boy, were interviewed. Marian is also a housewife and was interviewed in Mutare and I picked her for the reason that she had a baby and I knew from the dockets I had read in Mutare that she was a witness. Ruth was randomly selected for the reason that when I was seated outside the court at Harare magistrates court for observations, I saw her with a baby and started a conversation with her as a result of which I discovered that she had come to court as a witness. I also interviewed court officials namely two judges, five prosecutors, four regional magistrates, two junior magistrates, one provincial magistrate, one law officer from the Department of Policy Ministry of Justice, three clerks, one prison officer and two court interpreters. These one-on-one interviews enabled me to obtain deeper insights on the issues at a personal level and allowed me to probe issues further. One problem I had was that most of the officers I interviewed know me personally and did not take me seriously on certain issues since they were quick to point out that, as someone who has been in the system for a long time, I should realise that it is difficult to change some of these rules.

### **2.5.2 GROUP DISCUSSIONS.**

I was also able to conduct group discussions with two groups of police court orderlies<sup>3</sup> as follows:

- Harare magistrates court police post where I had a group interview with police officers, consisting of three female officers and five male officers.
- Harare High Court where I had a group interview with three male court orderlies.

Through these discussions I was able to get quick answers on issues. The problem, however, was that in most cases they would just agree with each other and, as a result, I was thus unable to probe deeper into issues.

### **2.5.3 OBSERVATIONS.**

I also engaged in passive observations at Harare Magistrates' Court and at the Mutare court. These enabled me to observe how the system operates from the position of members of the public. During the observations, I joined the queues for the members of the public and would sit with them and listen to their conversations. Although I am employed as a prosecutor, none of the staff members noticed me at the Harare Court and in Mutare they did not even know me before I introduced myself. Hence, this method worked well for me. Through passive observation, I managed to obtain an insight into how court officials treat members of the public and what the public think of their treatment.

### **2.5.4 OWN INSIDE KNOWLEDGE.**

Lastly, as someone working within the criminal justice system, I used my own inside knowledge. Having worked in the system for more than ten years as a prosecutor, dealing with witnesses on a daily basis, I had an insight into what really goes on, which knowledge I used to fill in some of the gaps during the research.

---

<sup>3</sup> These are members of the Zimbabwe republic police who are assigned to criminal courts to maintain order in court and to do errands such as collecting court records from records office and calling out for accused persons or witnesses and any other duties to facilitate the smooth running of the court.



## 2.6 LIMITATIONS

The greatest limitation was the nation wide strike by prosecutors and magistrates which started on the 1<sup>st</sup> of November 2007 and continued until the end of January 2008. This meant that no trials were taking place and thus no witnesses came to court. The strike caused tension between the striking workers and the powers that be, including the Minister of Justice and the Permanent Secretary for Justice. This affected me since I am a prosecutor and was supposed to be on duty during the research period, but I had not resumed duties in solidarity with my colleagues. Though I wrote to the Permanent Secretary requesting an appointment to interview him or the Minister I never received a response. The reason given was that they were busy trying to resolve the impasse between the Ministry and the striking workers.

The other limitation was that in one of my areas of study, i.e. Mutare, the trials did not go to plan. Originally, I was supposed to resume duties in the Mutare high court circuit. Three weeks before departure, however, the Attorney General indicated that high court circuit was to be handled by officers at local stations. I was, however, permitted to go at my own expense for research purposes and also to assist the prosecutor in Mutare on one or two of the cases since it was appearing for the first time in a High court session. This meant that I no longer had control over the court roll and all the circuit dockets had been sent in advance to Mutare for the prosecutor to prepare for court. I therefore lost the opportunity to study the dockets during which I could select intended targets. Nor could I follow up with the police to verify available and non-available witnesses. Thus I simply embarked on the journey with no idea of what was to come. To my utter dismay the prosecutor in Mutare had not done follow ups with the police. As a result, there was a very poor turn out of witnesses and even accused persons.

## **CHAPTER 3: EVERYBODY'S RULE AND NOBODY'S RULE**

### **3.1 THE "RULE"**

The rule in all criminal courts in Zimbabwe, with the exception perhaps of the regional magistrates court, is that babies and young children are not allowed in court. Small children and babies who are part and parcel of women's lives are taken to be disruptive and, therefore, likely to disturb court business.

Thus the magistrate's courts, as with all the higher courts, are not baby or toddler friendly. By bringing these children to court, are women simply being a nuisance or is there a necessity? What does a breast-feeding mother do with a small baby while she attends court? Would allowing these women to bring their babies into courts seriously disturb the flow of justice? From a gendered perspective, the system is male-oriented and female witnesses, who are invited into the system, have to adopt male standards.

### **3.2 WHY THE "RULE?"**

When I set out to do this research, I believed the rule was part of the written law or policy and could be found somewhere in the statute books, court rules or practice notes. Thus my starting point was to search in the relevant statutes and court rules. When I failed to find it, I took it that it would be part of policy, written in some practice note, which probably was issued long before I joined the system and which I had not so far seen. Still believing it to be part of some formal law, I started interrogating the system by interviewing court officials and my findings came as a real shock. Of the thirty-two officials interviewed (that is, two judges, five prosecutors, one law officer from policy department Ministry of Justice, eleven police court orderlies, four regional magistrates, two junior magistrates, one provincial magistrate, three clerks, one prison officer and two court interpreters), only one person knew that it was neither law nor policy that women were not able to bring their young children into the courtroom. He is a high court interpreter and has thirteen years working experience. However he also confessed that he religiously made sure that female witnesses leave their children outside court, as a matter of practice. The rest of the officials believed that it was a law written somewhere. The trend through out my interviews with court officials was that at the beginning of the interview

almost all were quick to say, it is long standing practice, we found it in place when we joined the system and it is logical because babies and young children are unpredictable and can be disruptive by crying or making unnecessary demands in court.

All court officials interviewed except one, regardless of their rank, believed that the rule was written somewhere and thus implemented it without question. On trying to establish from these officials the source of the rule they would then indicate that they have never bothered to find out and as such did not know the basis for the practice. However, some court officials' particularly male prosecutors, argued that although the practice has no traceable origins in our law, it is very logical for there is no way babies and young children should ever be allowed in court as they are disruptive and unpredictable. They are of the view that by giving these babies and toddlers to the police court orderlies and or prison officers, the courts are doing the best that is expected of them in the circumstances, as these women ought not to have brought these children to court in the first place. According to one of them a chief law officer,

“Women should be informed that court business is serious and not kiddie business hence should leave these children home, as court environment is not suitable for young children. There is no way babies and young children should ever be allowed in court as they are disruptive and unpredictable.”

He believed that the solution lies in educating women about the importance of court business and the fact that the court environment is not suitable for young children. This view was shared by many including the judge president, a woman, who although indicated that women should be allowed into court with their babies was also of the view that court environment is not suitable for young children and that these should be left with the fathers at home.

Mrs Tapfumanei a regional prosecutor at Harare magistrate court, started working as a prosecutor in 1986 and according to her it has always been the practice that babies and young children are not allowed in court. She however does not know the origins of this rule but believes that the logic behind it could be that they can be difficult to control and as such may disturb court proceedings by crying, shouting or making unnecessary noises.

Contrary to my initial assumptions, my findings were that it is not the law that has a problem, but the semi autonomous social fields of law and lawyers that has a strong grip on the way individuals think and act to the extent that now almost everyone in the criminal justice system believes this law is written somewhere but nobody has ever verified it.

### **3.3 WHERE IS THE RULE?**

I established from the research that the rule I was investigating is not written down anywhere be it in a statute, practice note or any of the court rules, but simply arose within a system that is not gender sensitive or rather a system that is not aware of the potential needs of women who are mothers. This would also apply to women who are away from home and there are children and various duties to attend to. Because of the blindness of the system to the potential needs of women nothing was ever put in place to cater for this particular group of women.

#### **3.3.1 SOURCE AND ORIGINS OF THE RULE**

Nobody could point to the source of the rule but everybody believes it is written somewhere. It was difficult to establish the origins of the rule. Firstly, it cannot be traced to our local customs and culture as culturally women are accepted at all social functions and in the public arena with their babies. At the chief's court, women come with their babies and they can even breast feed them whilst giving evidence. One judge interviewed, Justice Kudya' indicated that through out his twenty one years of practice he has always assumed that this rule was a law written somewhere only to discover that it was a non existent law when he searched for the law in preparation for my interview. Justice Kudya also indicated that it was only when he received my request for an interview that he sought to establish the source of the rule and even went as far as asking other judges, only to discover that it was a rule of practice which is not written anywhere although almost everyone believed it was written somewhere.

On the origins of the practice, he is quite certain that it could not have originated from the chiefs courts, as he is aware that at the chief's court women can even breast-feed whilst testifying. In his view this could have been carried over from the colonial practice as the white women were not always tied to their babies since they could afford child care facilities or even employ nannies so it was never envisaged that

some women necessarily have to bring their young children to court when they are called either as witnesses or accused persons. He is also of the view that,

“This is a male chauvinistic rule which take court business to be more important than the welfare and comfort of women and children and regard young children as a nuisance to be left to the care of women alone. It could also be that courts were never meant for women or just a question of gender insensitivity which noone has ever bothered to address.”

Although this research could not prove that the rule was inherited from our colonial masters, I am also persuaded by the suggestion that it could have been inherited from our former colonizers. It may never have been envisaged that this could be problematic as white women had the means and could afford baby care facilities. Also it was not part of their culture to breast feed in public. Notions of what is morally right do not always coincide across ethnic bounds. [Stewart J: 2000:25] It is surprising how the courts could have come up with a rule, which is totally alien to our culture. It is a practice, which is totally at variance with moral, ethical or cultural views of our society. It could have surfaced either as result of foreign standards of what is right being imposed on colonized societies or simply a predominance of male needs and values. This rule could also have evolved as a result of preconceived ideas of judicial officers of what the law should be and not what the law is. Although lawyers are trained to ascertain and apply the law, they generally do not do that. What generally happens is that that which is common knowledge to them is taken as law. Similar kinds of rules seem to evolve within the criminal justice system. A good example of this would be the law on the selection of vulnerable witnesses in the victim friendly courts, although the criteria for such selection is clearly provided for in our law, prosecutors have come up with their own method.<sup>4</sup>

### **3.4 WHO ARE THE ENFORCERS?**

Magistrates, prosecutors, police court orderlies, court interpreters, prison officers, judges' clerks and even the judges are the enforcers, but my findings indicated that the vigour in enforcing the rule differs depending on the level of the officials. Most of the high-ranking court officials such as judges and regional magistrates were of the

---

<sup>4</sup> Ethel.N.Ndlovu: 2001DIP (WOMEN'S LAW) Dissertation

opinion that not much disruption is caused by babies crying and that courts can always adjourn to allow the mother to suckle or calm the baby.

### **3.5 WHAT DO THE MAGISTRATES SAY?**

All four regional magistrates interviewed indicated that they were not particularly strict about the rule and on occasions when women have entered court with their babies, they have not ordered that the babies be taken out of court. Three of them, one female and two males indicated that the more experienced one becomes, the less concerned they become with some of these rules. Be that as it may, they all believed that it was a law written somewhere although they were not religiously following it. Their years of experience ranged from 18 to 24 years. According to one of them, Mr Mufunda who has 24 years working experience,

“It is something that one gains with experience. The more experienced you become the more sensitive you become to peoples human rights and start ignoring some of these rules. It is only when the baby is crying that I ask to have them taken out by the court orderlies but if they continue crying we always adjourn court.”

One of the magistrates Lillian Kudya a regional magistrate at Harare Magistrates court, whom I interviewed as a follow up on information I obtained from one prosecutor Mercy Dube who informed me that she did not insist on having these babies and toddlers taken out of court and used to let mothers testify with their babies on the back. She indicated that she has always been doing that even as a junior magistrate. In the event that the child starts crying in court or start showing signs of discomfort she would have the court adjourned to allow the mother time to feed or calm the baby. During the interview she indicated that she started working as a magistrate in March 1991 and ever since that time she has never asked those women who come into court as witnesses to leave their babies outside and that it is in very few instances that these babies really ever disrupt proceedings. She however indicated that she has always been aware of the existence of the rule but simply never bothered to implement it.

She also indicated that while she started doing this, probably as someone who does not care much about trivialities, she now does it as a result of gender sensitiveness

after her exposure through the Masters in Women's law programme. She personally does not understand the rationale behind the rule,

“As it is not like babies are forever crying in fact most babies do cry when they are separated from their mothers and given to strangers. It is in such instances that they become disruptive even when they are outside court, usually they would be within hearing distance and in almost all cases I have seen that the mothers start losing concentration the moment they hear cries of their baby.”

From my findings, it would appear that it is possible for women to enter the regional court with their babies whereas it would be virtually impossible in all the other courts as either the police court orderlies or even court interpreters prevent them. Regional courts in Zimbabwe deal mostly with sexual assault cases and most victims of sexual assault are young children. Therefore, it may be the case that those women who manage to enter court with their babies and small children do so because court orderlies assume that they are the victims of crime and, hence, a necessary part of the court proceedings.

### **3.6 JUDGES' VIEWS**

Two High Court judges interviewed indicated that they have never seen a woman with a baby strapped to her back in court. Yet women and children are always together. Judges generally believed that these women are stopped from bringing their babies into court by junior officers well before the court starts and, hence, they, the judges, never really consciously think about the presence of children in or about the court buildings.

The Honourable Judge President Rita Makarau indicated that prior to her appointment as a judge she worked as a lawyer in private practice and that she was not aware that babies and toddlers are not allowed in court. She said it only dawned on her when she read my research request that she had never seen a woman with a baby strapped to her back in court. She believes it could be because of this “rule” that these women are stopped from bringing in their babies in court by junior officers well before the court starts and hence judges never get to know of the presence of these children at court. In her view it is bad practice to give these children to police court orderlies as they are not trained or equipped to take care of such children. She sees no problems arising if women were simply allowed to bring their suckling babies into court because babies

do not cry all the time. She believes that most children are naturally peaceful when they are with their mothers and the mothers are more content when their young children are under their care rather than that of strangers. She is of the opinion that not much disruption can be caused by babies crying and that courts can always adjourn to allow the mother to suckle or calm the baby. Justice Makarau is, however, of the opinion that when women bring toddlers who are no longer suckling to court, it should not be considered a problem of the criminal justice system. Rather it should be treated as a gender problem which should be tackled at a national level by encouraging the fathers of these children to participate in taking care of these children who, as a consequence, will be able to remain at home with them, whilst the mothers go to court.

“Why should the children always be tied to the mothers? Where are the fathers? Bringing these toddlers to court is not in the best interests of these children as the court is not the best place for children to be as the environment is not conducive.”

In her view the whole nation needs to be sensitised so that fathers play a participatory role in caring for their children. Whilst this is a noble idea, it disheartening to note that society still believes that every woman with a child should have a husband. In so far as suckling babies are concerned she indicated that;

“The criminal justice system should find a way of accommodating these babies either by allowing the women to come into court with their babies or to allow them to bring suitable baby-minders at the state’s expense. The other option would be for the state to provide suitable baby care facilities manned by qualified baby-minders. This should not be something very expensive to set up. The room would need suitable toys, and suitable sleeping material plus nappy changing area. It would also require a place where mothers can sit to breast-feed. At the witness quarters there is need for separate accommodation for nursing mothers with proper sanitary facilities and washing utensils for mothers to wash nappies.”

Having searched and failed to find the source of the rule that babies and toddlers are not allowed in court, Justice Makarau concluded that it was the police and the prosecutors who came up with the rule and this in her view is supported by the fact that they are the ones who seem to be very keen to implement it.



I also interviewed Justice Samuel Kudya. He has worked in the Ministry of Justice for twenty-one years starting in March 1986. He started working as a magisterial assistance soon after graduating from law school and rose through the ranks until he became chief magistrate in 2003, a position he held until he was appointed as a judge in 2006. He indicated that he is very aware of the rule and that he was a strong proponent of it for the greater part of his service as a magistrate. He found the rule in place and, like many officials, has never found out its source or origins. From his experience, the justification for the practice has always been that children may disrupt the serious business of the court by crying, shouting or making demands such as requesting to go to the toilet or asking for food. Having been told that the practice is not part of any written law and that chiefs courts have managed to become baby-friendly without any serious disruption to their day-to-day business, he said:

“ I do not believe these babies would cause serious disruptions if they are allowed to be brought into court with their mothers. From experience I have noted that these children cause disruptions when they are handed over to the police court orderlies who are usually male.”

The judge also noted that our courts particularly the criminal courts are generally not witness friendly and seem to want to punish everyone who passes through the system. He believes that once one takes the oath,

“ There is really no reason for them to give their evidence whilst standing. They should always be asked to choose whether to stand or to sit if they so wish particularly those women with babies on their backs. It could be strenuous for them if they were to be allowed to bring in the children and then be made to testify whilst standing.”

Justice Kudya indicated that as a judge he never sees women who come into court with children and believes that they are stopped by police court orderlies' a long time before judges get to see them. He said, however, if women were to come into his court with babies from now on, he would not stop them or allow anyone to stop them. Instead he would try to create a friendly and comfortable environment by allowing them to testify whilst seated if they so wish and would allow them time to breast-feed or change the babies' nappies. Also, if a prosecutor were to indicate to him that they want to vary the order in which witnesses appear on the case summary in order to dispose of a nursing mother, he said he would gladly accept that.

As far as a solution to the problem is concerned, Justice Kudya is of the view that there is a need to sensitise court officials particularly the police and prosecutors about the problems that those women face. He makes the following suggestions:

“ If police, when they go to serve the subpoenas realise that the woman they are about to serve has a young child who can not be left at home they should find out from her whether she can leave the child on court day and if not they should advise her to bring someone to take care of the baby then get the details of the person and include them on the subpoena. In such cases the police should then notify the prosecutors of the additional person so that they can authorise payment. When it comes to issues of witness payment it is the prosecutor who has the ultimate say and no one question their decision unless there are serious anomalies.”

## **CHAPTER 4:THE OTHER SIDE OF THE STORY**

### **4.1 IS IT THE PROSECUTORS' RULE?**

Mr. Zvekare, a chief law officer, who at the time of the interview was the acting senior public prosecutor eastern division, which includes Harare, Kadoma, Mrewa, Chivhu, Mutare, Mount Darwin and Rusape, had different views about treatment of these female witnesses. He joined the Ministry of Justice as a prosecutor in 1992 and has risen through the ranks from prosecutor grade IV and is now a chief law officer thus he has a wealth of experience in the service.

He is of the opinion that by giving these babies and toddlers to the police court orderlies and or prison officers, the courts are doing the best that is expected of them in the circumstances, as these women ought not to have these children to court in the first place. He was the official whom I previously indicated had said;

“Women should be informed that court business is serious and not kiddie business hence should leave these children home as court environment is not suitable for young children.”

He believes the solution lies in educating women about the importance of court business and the fact that court environment is not suitable for young children. According to him the police should play this role when they serve subpoenas on the mothers. He however is not aware of the origins of this rule but believes it is very logical. He even commented that feminists are taking some of these things too far and simply wants to incite women. When I asked him whether it could be a statutory provision or part of the magistrates court rules, he pointed out that he has never checked as he has never seen any problems with the rule, nor had it ever been objected to by any one. In his view noone ever seems to have problems with it. On whether there is an infringement of the rights of the children when they end up being given to police and prison officers who are strangers to them and have no training whatsoever of child care, his answer was that,

“These are not strangers but trusted court officials.”

As our discussion progressed I sought to find out his opinion on the provision of childcare facilities at court and his answer was as follows,

“Women are asking for too much is it really necessary when the system has operated for this long with no major problem where is all this now coming from.”

The interview ended with his commenting that could it be my pregnant state that was making me worry about women and children. (I was seven months pregnant when I held the interview with him. It is also worth noting that we once worked together and hence my interview with him was very casual.)

According to Mrs Tapfumanei there however has never been a place to care for children whilst the mothers testify. The duty of minding babies has always been done by the police court orderlies or prison officers. From her experience this has caused several problems, particularly where toddlers of about two years are concerned, as police and sometimes the mothers, after being told that children are not allowed in court, have a tendency of leaving them alone at the benches by the court entrance. She recalled that on one occasion she came across a two-year-old toddler seated by the bench who was sobbing. She sought to establish from the police officer who was nearby as to where the mother of the toddler was and was informed that she was a witness in one of the courts but the officer did not know the specific court. She ended up buying some fruit for the child who appeared hungry in a bid to calm him down. Fortunately enough the mother came out whilst she was still talking to the child who by now was happy eating bananas She had to explain to the women her position and who she was as the women appeared uncomfortable to see her child with a stranger. This clearly shows that this is indeed one of the dilemmas these women face when they are asked to surrender their babies to total strangers who have not been introduced to them or when they have to simply leave their babies or toddlers outside court in an unfamiliar place with lots of strangers and then be expected to give their whole-hearted attention to giving coherent evidence in court.

According to her some women end up bringing other older children to court so that they baby-sit the younger one/s whilst the mother testifies in court. She indicated that on many occasions she had seen these youngsters loitering in the corridors with babies on their backs. She was of the view that the provision of a playroom with a place where babies could sleep and supervised by professional baby-minders would be ideal. She however believes that babies should not be allowed in court as they have

the potential to disrupt court proceedings. In her view female witnesses with young children are currently forced to bear the expenses of having babies at court.

Ms Munyoro a senior prosecutor currently working as a high court prosecutor also admitted to being guilty of enforcing this practice without verifying its legal basis. According to her the justification has always been that babies and toddlers have the potential to disrupt court business by crying. On the issue of expenses and care for witnesses she had this to say,

“It is pure hell for the mothers of young children who have to bear the cost of bringing these children to court. The most difficult thing is that though they claim for their expenses from the clerks, they always come back to the prosecutor to say that the money they got is too little to buy anything and in some cases I have ended up using my own money to buy bread for such witnesses.”

Ms Munyoro pointed out that this is particularly a problem at the high court were witnesses usually come from far-off places particularly in murder cases. In her view these witness get a raw deal from the criminal justice system. She highlighted the fact that during lunch breaks people are cleared by police out of the courtyard and have to loiter outside the yard. She indicated that,

“Whilst this would not present major problems to someone who is familiar with the city of Harare it can be a nightmare to someone who is coming from the rural area and with a small child. These usually just sit in the pavement outside the court building waiting for the reopening of the gates after lunch. It can be particularly difficult for women with babies who need nappy changes or toddlers who may request for a toilet.”

This is a problem I also observed in Mutare. Surprisingly, during my thirteen years of practice I have never really been bothered about it. Although I used to see these people including women and children, I have always taken it as normal. This indicates that some practices simply continue because the people manning the system are not sensitive to the problems faced by their clients. In Mutare at lunch people were ordered to vacate the courtyard. Most of them simply went out of the fenced area and sat in the scorching sun. I suppose this is due to the fact that many of them are not familiar with the city of Mutare and are not prepared to wonder about in it before returning to court or simply, those familiar with the city, have no reason to go to town during the lunch break and are prepared to wait at the court house. At 2p.m the same procedure of search is done as people go back into the courtyard. Noone appears

worried about the apparently large numbers of people still at court at that hour. I noticed that court officials are generally very rude and insensitive to members of the public.

In Mutare I interviewed prosecutor Matsikidze. She indicated she was aware of the rule but was not aware of its source or origin. She however indicated that in the Regional court, the magistrate Mrs Mwayera permits women to testify with their babies and in the event that the baby starts crying, the court always adjourns to allow the mother time to calm the baby. She also indicated that the magistrates also wants the court roll to be tackled in such a way that women with babies and small children testify first and the rest later after disposing of all such witnesses. I asked her whether this has presented problems in any way or caused serious disruptions in court and her answer was a clear no. Having worked with a magistrate who is not strict about the rule she said she also is no longer fussy about it anymore and has not faced any serious disruptions from the children. Mercy Dube a senior law officer who worked with regional magistrate Lillian Kudya who was not fussy about the rule either also said the same. She was no longer insistent about enforcing the rule only after realising that the magistrate whom she was working with was also not fussy about it.

Whilst it is the prosecutors who represent the state and call most of these witnesses, none of them ever indicated that they of their own initiative allowed female witnesses to come into court with their babies. Those that say they no longer insist on the rule admitted that it was only as a result of the fact that the magistrates with whom they were working were not fussy about it. Yet, more generally, it is not uncommon for prosecutors to advise the court that a witness is not properly dressed for court or that he/she has special needs and, therefore, to request that he/she be allowed to testify in that state or that a special arrangement be made for his/her special needs. But somehow when it comes to female witnesses with children, noone sees the need to notify the court that these are witnesses with special needs and, therefore, need to be treated accordingly. Instead prosecutors have not thought the matter through and have joined hands with everyone else in burdening these witnesses. I am still trying to forgive myself for having been a culprit of this same insensitive practice for over a decade.

As a follow up on Matsikidze's interview I had to interview regional magistrate Mwayera. She indicated that she has twenty-two years working experience and that she found the rule in place when she joined the bench. Like all the others she never thought of finding the source or origin of the rule. She indicated that although she does not openly encourage women to come into court with babies, she had found no justification for expelling those who had already entered court with their babies. As to why she is not a strict enforcer of the rule she said,

“Firstly I do not appreciate the rationale for barring the women and (the court) has never faced any serious disturbances from these toddlers. Where do you expect these women to put these children when they are called to court?”

#### **4.2 WHAT DO THE POLICE SAY?**

Following up on the judge president's observations that it is the police who must have devised the rule and it is they who strictly implement it, I needed to interview some police court orderlies both at the provincial court and the high court. At Harare high court I had a group discussion with three police court orderlies who agreed to be interviewed on condition of anonymity. They all indicated that they were aware of the rule and all said as far as they are concerned,

“It is a rule of the court and all police officers who have worked as court orderlies are very much aware of the rule.”

One of them had this to say about the rule,

“Any police man who does not know the rule or who fails to implement it risks being dressed down by the judge or the prosecutor for failing to properly carry out duty hence we are very strict when it comes to implementing the rule.”

Whilst both his colleagues agreed with him, they were quick to point out that what they hate about the rule is that they end up being asked to be the “nannies”, a duty they do not like at all. When I indicated to them that the judge president indicated that almost all judges do not know the origins of the rule and do not mind having women come into court with their babies and that it was even suggested that the police and the prosecutors must have come up with this rule, they indicated that as court orderlies they are given rules to implement at court and do not make any themselves. One indicated that it must be put in writing by either the judges or the prosecutors. Without it being put into writing, they will continue implementing it for fear of being reprimanded in court in court for failing to carry out their duties properly. To the

suggestion that the police and the prosecutors must have come up with this rule, they simply said that as court orderlies they are given rules to implement at court and do not make any themselves. Thus whilst judges and regional magistrates indicated a willingness to change their approach, there seem to be resistance to change by the gatekeepers. This is saddening in that these are the people to whom witnesses report first before going anywhere. Thus whilst there may be a willingness to change on the part of the senior officials within the system, real change may still be a far cry as the door is blocked by the gate keepers.

I visited the Harare magistrates court police post and had group interview with police court orderlies. The group consisted of three female officers and five male officers. All indicated that they were aware of the rule that babies and young children are not allowed in court but none of them was aware of its origins. Five of them indicated that they learnt it from fellow officers when they came for induction as court orderlies and all believe that every police officer that had worked at court is aware of the rule. One indicated that he was ordered by the magistrate to take a baby who had been brought into court by a female accused person and that's when he learnt that babies and young children are not allowed in court.

As the discussion progressed others indicated that even court interpreters order them to take babies outside court. These can be babies belonging either to female witnesses or female accused persons and they take the babies when the mother is about to get on the witness stand or in the dock. Before that they simply order the mothers to sit outside with their babies. According to them, this is such a common practice at court that no experienced court orderly would wait to be advised by anyone to remove the babies or order the mother to leave the baby outside. They just do it automatically according to the practice.

#### **4.3 JUDGES' CLERKS' AND INTERPRETERS' VIEWS**

The other enforcers of the rule are court interpreters and judges' clerks. Of the two interpreters interviewed, one Lazini Ncube indicated that although he is aware that there is no law that precludes babies and toddlers from the courtroom, he only does so



since he is aware that prosecutors and magistrates want them out. He indicated that in his fourteen years experience he has on many occasions been ordered by the magistrates to advise these witnesses to leave the children outside court. He indicated that magistrates usually order interpreters to tell the witnesses because they are the ones who speak their vernacular language. He also indicated that he once worked with a magistrate who used to ask such witnesses whether they had brought anyone to look after the baby while they testified. Unfortunately this magistrate is based in Bulawayo and I did not manage to interview him. Ncube's revelation reinforced my assumption that these witnesses are burdened witnesses as the system expects them to find their own strategies for coping with the unfair situation. Both interpreters interviewed believed that this was a magistrates' rule, whereas the judge's clerk who was in their company indicated that it was a rule of the court, which any court official is duty-bound to implement.

#### **4.4 HEAR WHAT THE PRISON OFFICERS SAY**

Due to the strike by magistrates and prosecutors, the courts were not functioning properly and hence prison officers were not always in attendance. I managed however to interview one male prison officer. He indicated that he has been a prison officer for nine years and is aware of the fact that women are not allowed in court with their babies and that these babies usually end up with the police or the prison officers. According to him, prison officers only get to take care of the babies when specifically ordered to do so by the magistrates. He indicated that this only happens in the absence of the police orderlies or where the orderly is doing other duties. From his experience, prison officers do not themselves ask women to leave their babies outside the court as it is not their duty to do so. Their duty is to guard the inmates and ensure that they do not escape. Therefore, in his view, being asked to baby-sit causes prison officers to neglect their primary duty and may even put their job at risk in the event of an inmate's escaping while a prison officer is baby-sitting. He however indicated that,

“When asked to do so by the court what can one do? You have no choice but to obey. Luckily most of the times there will be more than one prison officer in every court room.”

He acknowledged that baby-sitting is not an easy job particularly where the baby is not familiar with the minder and is resisting being separated from the mother. Thus in his view these children should be left with their mothers.

From the attitude of Ms Dube and Ms Matsikidze, it would appear that prosecutors take the rule to be the magistrates' rule and hence it can only be varied by the magistrates. On the other hand the judge president believes it is a rule made by prosecutors and the police. Police take it as a rule of the court belonging to the prosecutors, magistrates and judges. According to them, their role is simply to enforce it.

My findings show that, even though the practice has neither the force of law nor any clear origin, its enforcement causes unnecessary prejudice to women and their young children. It is indeed surprising that that such a practice, so obviously burdensome to its victims, has been so uncritically enforced for so long by officers of a legal system, whose very essence demands that its laws be administered with justice and mercy.

## **CHAPTER 5: WHAT'S REALLY GOING ON?**

### **5.1 MAJOR OBSERVATIONS**

Most of the high-ranking court officials such as judges and regional magistrates were of the opinion that not much disruption can be caused by babies crying and that courts can always adjourn to allow the mother to suckle or calm them. Thus it would appear that experienced court officials do not always insist on barring these female witnesses from bringing their babies and toddlers into court. It is the junior and low ranking officers who still implement the rule with a passion and their belief is that failure to stop these women would amount to a dereliction of duty on their part which could even lead to their being reprimanded by the senior officials. The police court orderlies and interpreters interviewed indicated that they bar these women well before judges and at times magistrates get to see them. They consider this as an act of efficiency on their part and the proper carrying out of their duties. Thus my findings indicate that the enforcement of the rule differs depending on the level of the officials. The majority of senior officers interviewed, particularly female officers who included two regional magistrates, the judge president and two senior prosecutors indicated that they saw no problems arising if women were simply allowed to bring their suckling babies into court because babies do not cry continuously.

### **5.2 CAN THE SYSTEM RESPOND?**

There are no proper facilities at court to accommodate witnesses in general and nursing mothers in particular. Noone advises these women in advance that babies and young children are not allowed in court. The subpoena is silent about that. Also women who bring their babies, in all probability only have the model of the chiefs' court and the civil courts to inform them of what is acceptable. Thus most women only get to know of this fact when they try to get into the courtroom. Police officers that are assigned duties as court orderlies at court have to baby-sit babies and toddlers who are brought by witnesses or female accused persons. There being no childcare facilities at court, they have to resort to ad hoc childcare facilities whereby they end up asking the police court orderlies or prison officers to take care of these babies and toddlers.

At Harare magistrates court police post where I had a group interview with police court orderlies, I asked where they take these babies. Their answer was unanimous. They all indicated that if the child is not crying they just let them loiter in the corridors of the court building. If the child is crying they have to go with them outside the court building so as not to disturb courts. In response to my question about whether they liked this baby-sitting role, all their responses were in the negative, but their reasons for disliking it differed between men and women. The men said that it was very difficult for them to look after babies because they lacked experience. Sometimes it is even demeaning. The women said that they did not like ending up being soiled and smelling after looking after wet or dirty babies.

When I asked whether they could ask for an adjournment when the baby is wet the majority indicated that they have never done so. They all indicated that baby minding is not part of their training and is not specifically indicated as part of the duties of a court orderly but they felt they have to do it in order to facilitate their main duty, the smooth running of the court.

They indicated that if a baby, once outside, falls asleep, they have to find some place to sit with him or her. They usually sit on the bench by the courtroom entrance. I also sought to establish from them whether a baby must cry first before they order them to remove them from the court and the answer was in the negative. One female police officer said that,

“The instruction comes the moment a women walks into the courtroom with a baby and it does not matter whether the baby is crying or not In the event that the baby starts crying, one has to devise her own means of calming the baby.”

Police court orderlies at High court Harare and Mutare magistrate court emphasised the fact that they do not like the role of baby-sitting and all implored me to make strong recommendation to the powers that be to have it taken off from them.

### **5.3 IT IS NOT JUST IN COURT**

For the meals that witnesses eat at the police mess, the police officers at court in a set of three forms, one of which is given to the witness as a meal ticket and the other two are for the accounts clerk at court who processes payment to the police. In Mutare the

witnesses walk to the witness quarters for lunch at the lunch break, as it is not far from court. In Harare, due to the distance involved, witnesses do not walk to Tomlinson Depot. They have to be ferried to the depot by a police vehicle. Due to the current fuel shortages it is not uncommon for the vehicle to be delayed in arriving at the court or in totally failing to come, resulting in the witnesses failing to get any food. In such situations the witness will have to make do with the normal expenses paid through the clerk of court which amount is so small it literally cannot buy anything in Zimbabwe. This therefore means that these witnesses will have to go hungry unless they use their own resources or receive donations from prosecutors.

Witnesses who have to stay over are accommodated at the police mess. This is an accommodation facility for members of the police who have not been allocated other accommodation. In Mutare I visited the witness quarters at Mutare main camp in downtown Mutare and interviewed Sergeant Shoriwa who was in charge of the quarters. There are two large rooms, one for men and the other for women. There are no beds but each witness usually gets two blankets. The blankets are small red blankets with blue stripes. The quarters were in a fair state of cleanliness and the blankets were clean. The reason for this I was told was that in Mutare they rarely have to accommodate witnesses. It is usually when the High Court is on circuit that these facilities are used. The officer indicated that when there is no High Court session they get an average of about three witnesses a week. Witnesses share the same showers with police officers who reside at the police mess and they eat the same meals. There are no baby baths and they do not provide baby food. If witnesses are fed at the police mess the Ministry of Justice pays the cost of the meals.

In Harare witnesses who have to stay overnight are accommodated at Tomlinson depot. This is about five kilometres from Harare High Court. Before I could visit Tomlinson, the Judge President indicated to me that she had the opportunity to visit the witness quarters at Tomlinson depot Harare and in her view the quarters are not suitable for any type of witness, let alone suckling mothers and toddlers. The beds and blankets are old and dirty. It is a facility meant for the police and when many courts are sitting, it becomes overcrowded. There is no food allocation for babies and they have to share whatever is provided to their mothers.

She indicated that the Ministry of Justice does not have its own accommodation facilities anywhere in the country but has a special arrangement with the police whereby witnesses in need of accommodation are housed at police witness quarters. She indicated that while there is nothing wrong with such an arrangement there is a need to improve the conditions at the police quarters to make them suitable. Although I had made a request for an appointment, I finally went there without being invited and was taken to the quarters by a junior police officer whom I knew from court. When I later had the opportunity to visit the quarters, there were no witnesses who were in occupation, as the courts were on strike. Despite this the quarters were in a sorry state. Most of the beds were broken and the floors and blankets were dirty.

Where a witness fails to get the food from the police, the witness has to claim for expenses through the clerk of court. In Mutare I interviewed Mr Marapera a clerk who deals with witness payments. He informed me that the amount of money that is due to a witness is as provided for in the Criminal Procedure and Evidence [Witnesses Expenses and Allowances [Amendment] Reg 2007 [no. 5]. In terms of that circular, lunch is Z\$4000.00, lunch Z\$8000.00 and supper is Z\$8000.00. These amounts of money are totally meaningless, as they cannot be used to buy anything in hyper-inflationary Zimbabwe. Transport allowances depend on the fares paid for the particular trip and claims should ordinarily be supported by fare ticket. However due to current transport problems which often forces the public to use private vehicles, the clerks no longer insist on the production of a ticket for payment. They contact bus companies that are supposed to ply the relevant route for current fares or at times simply rely on the witness's word. He admitted that relying on bus companies could actually prejudice witnesses as private vehicles usually charge a lot more than public transport particularly during the fuel crisis.

The witness detention allowance depends on the time one spends at court or rather on court business i.e. from the time they leave home to the time they expect to return home and the professional status of the witness. Ordinary witnesses such as housewives get less, as their time is less valued as compared with that of professionals. According to the statutory instrument, professional witnesses can claim a maximum of Z\$50 000 for a day and non-professional witnesses can claim a maximum of Z\$20 000 for a day at the rate of Z\$1 000.00 for each hour or part

thereof during which a witness is detained. These amounts of money for both the professionals and non-professionals are worthless, as they have been almost completely eroded by hyperinflation. However, even if these amounts were to be meaningfully reviewed, the female witnesses with young children would still remain prejudiced, as these children are not catered for in the payment system and the fact that these women are not professional people means that their time is less valued. It is worth noting that the class of women who are likely to bring babies and children to court when they are called as witnesses are non professional women and though they suffer double jeopardy by having to cater for the babies their time is considered to be of less value to them and to the system. They are taken to be a people who have nothing to do with their time and as such should not be paid for its wastage by a system which cannot do without them. But any one who has the slightest sense of gender roles in our society and is gender sensitive would know how valuable time is to a breast-feeding mother or a housewife who has a toddler and has no house help or maid.

The two clerks of court interviewed indicated that they as clerks have no discretion on who to pay or who not to pay. They are guided by the subpoena. It is the prosecutors who direct them in that regard. Mr Marapera, the Mutare clerk of court indicated that in his view if prosecutors were to include baby-minders on the subpoenas they would actually get paid.

He indicated that for witnesses expense they are currently given an allocation of Z\$750 000.00 at a time and can only request an extra payment after expending that allocation. According to him this amount is not even sufficient for one witness in view of the current transport fares. After making a request it takes about ten working days for the new allocation to come. In the meantime, the number of unpaid witnesses increases. This means that there is always a backlog of unpaid witnesses. This according to him has a number of problems. He has seen prosecutors particularly Regional court prosecutors buying food for minor witnesses who usually come to court as victims in sexual matters. In his view,

“The witness payment system would operate well and be adequate if it were managed and administered by the prosecutors as representatives of the state. They are better placed because they interact with the witnesses on a personal basis .As the system currently is, they end up having to dig into their own

pockets to cater for witnesses because witnesses always go back to them when we tell them that there is no money for their expenses”

Ms. Lydia Mutambirwa a clerk of court in charge of witness payment at Harare magistrate court also echoed the same sentiments. According to her they have no discretion on who to pay or who not to pay; they pay according to the subpoena and as per the statutory instrument.

I sought to verify this point with a provincial magistrate for Harare who also confirmed that it could be possible for prosecutors to include baby-minders on the subpoena so that their expenses are paid whenever there is a necessity. He indicated that,

“Noone ever questions the state about the people indicated on the subpoenas unless there is gross irregularity.”

Having failed to get the opportunity to interview either the permanent secretary or the Minister of Justice, I later interviewed a law officer who works in the policy department for the ministry of justice. She indicated that they are not ones who determine the rules of court. As a ministry they are, however, responsible for the witness expenses in that they make recommendations for a review of the amounts paid and even suggest the figures. These are then forwarded and tabled before parliament for approval through a statutory instrument. This in her view presents problems in that it lengthens the whole process of coming up with the appropriate figures and in view of the current hyper inflationary environment in the country, by the time these figures are gazetted they will have been eroded and thus of no value to the witness. She indicated that,

“The best would be to have the amounts reviewed at ministry level as and when need arises without having to do it through parliament or alternatively have it done by the prosecution department as they deal with these witnesses on a daily basis. As it stands now the figures are out of touch with reality and are an insult to the witness.”

Her reason for suggesting that the issue of witness expenses should be left to the prosecution department was that prosecutors are in a position to know the problems faced by witnesses as they are the ones on the ground. Therefore, they can give priority to the issue whereas at ministry level the issue is treated like any other matter and is not given any priority.



This view is also shared by the clerk of court Mutare who indicated that prosecutors are better placed to deal with witness expense issues including the paying out to the witnesses and determining amounts to be paid out. Whilst this can be a step in the right direction, it is not an end in itself for even if the funds were to be managed and dispensed by the prosecution, there would still be problems if these officials were not sensitive to the problems these female witnesses face. Rather what is required is sensitisation of the whole criminal justice system to the needs of such witnesses. The initial targets in the sensitisation process should be the prosecution department. Prosecutors can then be instrumental in bringing awareness to all the other ranks. Once prosecutors are sensitised the problem may be solved as they are, essentially, the intermediaries between the court and the witnesses.

## **CHAPTER 6: WHOSE JUSTICE SYSTEM?**

### **6.1 PERCEPTIONS AND ATTITUDES**

In examining the factors that adversely affect women's use of or access to justice or the outcomes of their interactions with the system, Stewart J et al 2000:96 indicated that there seems to be a dichotomy between the legal system's perception of itself and the perception that is held by the public at large.

“On the part of the deliverers of justice, from the clerks through lawyers to magistrates and judges, there is often a lack of appreciation of how the system is perceived by and affects the ultimate consumers. In some instances even where a problem is perceived it is answered by somewhat legalistic approach that the problem lies beyond the responsibility of the judges, the courts and their personnel or lawyers.”

This was apparent in this research as most officials were of the view that the system is user friendly and has worked for so long without anybody questioning the “rule”, yet the women regarded the whole system as fearful and hostile.

All prosecutors interviewed indicated that they call witnesses according to the docket and thus usually order the police to subpoena only such witnesses as they appear in the docket. They all were of the view that simply including baby-minders on the list for payment may result in them being charged for fraud unless all parties concerned support the idea. However none of them have ever tried it and faced problems. It would appear that while prosecutors have the power to authorise these payments, none has ever done so because prosecutors usually lack information about their witnesses and their different situations. Neither the subpoena nor the statutory instrument relating to witness payment mentions baby-minders. Thus, there is a gap in our law. From my findings, it would appear that it would not be a problem to include them on the subpoena if prosecutors were sensitive to the needs of their witnesses. It appears there really is no resistance to change; it is only that nobody has thought about it. However, from my experience as a prosecutor and through observations carried out during the research, I noted that prosecutors never bother to enquire about their witness's situations. As a result many witnesses including women with small children end up spending unnecessarily long hours or even days at court. As a non-participant observer during the research, I was amazed at the ease with which judicial and court officers simply dismiss witnesses and other people waiting for justice. It is

as though they take it for granted that court business is of paramount importance to everyone and hence should be waited upon by all for ages on end.

I noted that what court officials are not aware of is that what may be simple and obvious to them and to those who are familiar with courts may appear very complicated to the lay person. They tend to take everything for granted. Nobody thinks about the layperson's experiences, in fact nobody cares or is even aware of these experiences. During the research, I deliberately positioned myself<sup>5</sup> in the queue with members of the public and experienced the frustrations of waiting to be admitted to the courts. I also sat with the members of the public in the courtyard in Mutare and listened to their conversations, expectations and complaints. I noted that what might appear simple and obvious to someone in the system needs to be questioned and interrogated if the justice system is to be made accessible to all and capable of addressing the needs of all its users. The justice system in its current state is exclusively for lawyers, judges, prosecutors, magistrates and their support staff. It does not address the basic needs of the people, i.e., to make them feel that they are a very important part of the system of justice.

One of the high court witnesses in Mutare, Shingai Gweshegweshe, complained of serious hunger as it was well after 2pm and no one had advised him that he was supposed to obtain a request form for lunch from the court police post, which he was to take to the police station down town for lunch. He indicated that he only got this information from fellow witnesses well after lunch when he was complaining to them about his hunger. He made it clear to the prosecutor that there was no way he could have been expected to know all this without being informed. He then indicated that he was not going to come back to court again, even on the Thursday that he had been advised to come. His reason for this was that he was now being made to suffer as if he was an accused person and moreover he had sourced his own bus fare to come to court.

---

<sup>5</sup> As someone who is employed in the system, I was used to simply walking through the whole system at any time without being searched or having to produce an identity card. I never used to think about the people queuing outside the gates. Everything used to appear normal.

The other witness from old Mutare Joyce Makoko also indicated that she was not going to come back to court on Thursday for the reason that she had had to borrow money for bus fare from her brother in law and was now being told to wait until the following day for her expenses and then come back again on Thursday. She indicated that she could not come back on Thursday because she had left a sick child in the house and she needed to seek medical attention for her. She stated that she was instead going to source bus fare to go back home but that she would never come back to court again for that case or any other matter. The two of them then stormed out of the prosecutors' office and as they were leaving Mrs Matsikidze threatened that should they fail to come back on Thursday they would get arrested and Joyce indicated that she did not care and she left. It appeared to me that prosecutors take advantage of the fact that a competent and compellable witness can always be compelled to come to court and as such do not even make an effort to be courteous to the witnesses. The rest of the witnesses did not complain at all but simply complied. The two that complained did not receive any sympathy from the prosecutors instead they were threatened with arrest. The fact that witnesses are told that should they fail to attend court they will be arrested make most of the witnesses endure whatever conditions they are subjected to by the system. For fear of being arrested most of them end up enduring the most difficult of conditions. In my view their complaints were genuine and simply needed the prosecutor not only to explain but also to apologise on behalf of the system.

From my findings and my experience as a prosecutor, it would appear that the criminal justice system was meant for accused persons only. Police vehicles usually bring accused persons to court except those that come by way of summons. Although these witnesses sometimes are given bus warrants, bus warrants are only accepted by public transporters such as Zimbabwe United passenger Company [ZUPCO] and these do not ply all routes in the country. Thus most of these witnesses end up using their own resources to get to court by private transport in the hope that they will get refunds from court, yet as indicated by the clerks, monies for witness expenses are not always available as these are released in batches from the Ministry of Justice. Thus witnesses can end up being told to come back for their expenses. Whilst witnesses have to be ferried from court to the witness quarters for food, food for accused persons in custody is actually brought to them. Accused persons have their food

delivered to them and thus do not run the risk of failing to get their food in the event that there is no fuel.

I only managed to speak to two prosecutors on the issue of who is better placed to deal with witness expenses and both indicated that if the witness funds were to be managed by the prosecution department this would be advantageous to both the prosecution and the witnesses. One of them indicated that this would minimise incidents where witnesses are called to court and then told that there is no money for expenses. Since prosecutors are the ones who call the witnesses, they would simply not call any if there were no money for expenses. Secondly since witnesses always go to the prosecutor for assistance whenever they face problems with the expenses, prosecutors would have to ensure that the expenses are justified at any given time to avoid problems.

## **6.2 WOMEN'S COPING STRATEGIES: AT WHOSE EXPENSE?**

When female witnesses are called to court, they are called like any other witness by means of a subpoena. The subpoena simply states the court date, the time and court at which the witness is supposed to report. Thus they only get to know that young children are precluded from the court when they are already at court. It is only then that they are required to surrender their babies to the police court orderlies or prison officers. If the child is a toddler, who can sit on their own, most women simply leave them by the bench at the entrance to the court. Under normal circumstances if a woman were to leave a toddler unattended in a public place, as they are sometimes forced to do at court, they risk being prosecuted under the Children's Act. Because the courts have not put anything in place to cater for these female witnesses and their toddlers, these female witnesses now, through no fault of their own, become complicit in practices which are harmful to their children.

However those witnesses with previous experiences with the court like Ruth Chimanga whom I interviewed at Harare magistrates court end up bringing some other person to take care of the baby while they are in court. She indicated that her wish was to have the matter finalised that day as it was costing her a lot of money to come to court and also inconveniencing her as she had to wake the baby early for

them to get transport and be at court on time. When I asked why she had to bring the baby to court her response was that the baby was only six months old and still breastfeeding, as a house wife the baby was not on formula and rightly so.

I learnt that she had been warned for court on the previous date when the trial failed to start and was warned in court by a female magistrate to come back on this day. She indicated that on that day she had brought her baby and when court was about to start she was ordered by,

“ A certain man in civilian clothes who appeared to be putting order in court to sit outside and was told that babies are not wanted in court.”

I failed to establish whether this could have been the prosecutor, court interpreter or recorder. She indicated that on that day the trial failed to start due to lack of time but she was at court up to 2.30pm when she was then called into court and told to come back on the 3<sup>rd</sup> of October 2007. When I verified from her as to whether she had the baby with her when she went into court for the warning her answer was that she had baby strapped onto her back. According to her the magistrate did not say anything about the baby. However, since she had already been told that babies are not allowed in court by someone who according to her appeared to be in control, she decided to bring her young sister with her so that she would remain with the baby when she went into court.

She indicated that on that first day she got her witness expenses but could not remember the amount and estimated it to have been about six hundred thousand Zimbabwean dollars. I established that on the day of the interview, they had each paid three hundred thousand Zimbabwean dollars for bus fare and were at court by 7.30a.m for fear of reprimand as they had been warned that they should be at court by 8 a.m and that failure to do so could lead to their arrest As we spoke she was breastfeeding her baby whom she had awoken for that purpose during the tea break. When I advised her that tea break was over she gave back the baby to her young sister and went back to court. It was now windy outside court but the sister remained outside with the baby. I observed that she changed her nappies on a flowerbed and strapped her onto her back again. She started walking towards the road I suppose in a bid to wile away time. By the time I left the court around 3pm Ruth had not yet been excused from court. I later went back on the 4<sup>th</sup> of October to check with the clerk of court Ms Mutambirwa. From her books there was no indication that Ruth Chimanga was paid

her expenses. In her view the reason for this could have been that she was released late after the clerk of court's office was closed. The normal practice is for the prosecutor to advise the office in advance that they may be finishing late and send the court orderly with the subpoenas to the payments clerk before closing time.

In Mutare I interviewed Marian Dube of Fukaye Village Chief Musikavanhu Chipinge who had an 11 months old baby boy. From the one-on-one interview I gathered that she had arrived in Mutare late the previous day and had been directed to the witness quarters by the police in the truck that had ferried her from Chipinge. She had failed to come to court on Monday as per the subpoena because she could not raise bus fare and because of the fear of being arrested for non appearance she then reported to the police where she was advised that they would only get a truck to go to Mutare the following day. She thus found herself with no option but to stay at the police station, as her home according to her is quite some distance from the station. At the police witness quarters she was given Sadza<sup>6</sup> and beans, which she had to share with her baby. They slept on the floor sharing two blankets she was given at the quarters. She was actually very grateful to the police for their hospitality and generosity.

In the morning she had a shower but had to simply wipe the baby with a wet towel, as she could not use the shower to bath him. There was no bathtub or bucket to use for the purpose. She was not given any breakfast for herself or even porridge for the baby so she had to breast feed her baby on an empty stomach. By the time I was interviewing the witness I was already aware that the trial she had come for would not commence as both accused persons had refused to accept the pro deo lawyers allocated to them. Thus I advised her to have her subpoena signed and stamped so that she would get her payment. At the clerk of court's office I noted that she was paid only for one day, that is the day she was at court, and not for the day she spent at Chipinge police station awaiting transport. After she left I sought clarification on that aspect and was informed that if she had indicated that she had spent the day at Chipinge for court business she could have been paid for that day.

---

<sup>6</sup> A stiff mealie meal porridge, which is the staple food in Zimbabwe.

### **6.3 I AM AFRAID I WILL BECOME THE ACCUSED**

Marian indicated that if she were called to court again for the same case she would still come. Her response was,

“Yes, I will come back what can I do if the government wants me. ”

She also believed that if she failed to come back she might end up being the accused person. There were many others who also believed that if they fail to come to court as witnesses they end up being the accused persons. However these were not women with children as I only interviewed two such witnesses. The belief appeared to be that if you fail to come or to remain in attendance you end up as the accused person. From the way they said it appeared as though the person they were supposed to testify against will be released whilst they will take to the dock in his place. Marian had this to say about it;

“ You have to come otherwise you end up being the accused.”

Whilst this appears to be the common perception, what usually happens when a witness fails to attend court is that the state will reissue subpoenas. It is only in exceptional cases that one gets arrested for defaulting court as a witness. There is a general fear of the courts among members of the public. Lay people ordinarily associate courts with arrests and imprisonment. They do not distinguish between the criminal and the civil jurisdiction of the courts. Thus whilst acknowledging that they have to endure very difficult conditions and even incur expenses in order to help the criminal justice system, witnesses still feel obliged to come to court. The fear of being arrested for failure to attend makes most of the witnesses come to court at whatever cost. Witnesses would rather have their matters done away with so as to avoid coming back again or being incarcerated.

The following factors combine to discourage witnesses from revisiting the justice delivery system, even for a civil case [J.Stewart et al, 2000:103.]. The perceptions of lay persons of the prosecution and handling of criminal cases, their experiences as witnesses with the frequent postponements, late or non payment of witness fees and poor management of case loads and witnesses during trial. They generate these perceptions from their own experiences and from their observations of the experiences of others. Many people, women in particular, may be excluded from courts by their perception of the courts and law.



When I sought to find out from Marian if she was aware that babies are not allowed in court her response was in the negative. I then sought to establish whether she would have someone to leave the baby with in the event that she were called again for court and she indicated that she would not leave the baby with anyone as the baby was still breast feeding. Though her husband was unemployed, he in her view could not remain with a breast-feeding baby. At most he could come along with her to court so that he would remain outside with the baby.

From the discussion with Ruth and Marian it is clear these female witnesses are burdened and sacrifice a great deal in order to fulfil their obligations as citizens to assist in the workings of the criminal justice system. These witnesses sacrifice their time, money, food and even their health in a bid to fulfil their citizen's obligation of testifying for the state in criminal matters. Both at court and at the witness quarters, these women are forced to conform to male standards. There are no baby friendly facilities and women are forced to make do with what is available and even have to sacrifice their own food.

#### **6.4 THE "STATE" SAYS SO : SO BE IT!**

What surprised me was that although people get this kind of treatment, not many complain about it to anyone. At most they just grumble to one another as they sit patiently waiting for justice to take its course. Whilst this affects both accused and witnesses, witnesses are in a worse off situation in that, unlike accused persons who most of the time are brought to court by police who leave them in the hands of the prosecutors, witnesses have to find their own way to court and to the prosecutor's office. This is not an easy task to the unsophisticated person or to anyone not familiar with courts and for many people it is usually their first time. The corridors of most courts buildings are not very friendly and have a lot of notices which can be taken to be threatening by someone not familiar with such places, for example notices like: 'Courts in progress do not make noise' or 'The use of cell phones is strictly prohibited'. Such notices coupled with the presence of the police and prison officers in uniform, some of them armed, make the whole environment intimidating. This is clearly evident from the manner of those who seek information. Most of them will

whisper to you or speak in almost inaudible voices. In the case of women they also couple this by bending their knees [a common cultural practice in the Shona culture done by women as a way of humbling themselves and as a way of showing respect to the person they are speaking to] as they speak to those they assume to be in authority. During the time I was trying to sample possible interviewees in Mutare I approached a group of people who were seated by the benches near the entrance and when I started talking to some of them, all of the people gathered around me and started showing their papers and trying to establish whether they were at the right place. This to me indicated that there is need to make the courts more friendly and accessible so that those that need information can simply go to an enquiries desk and get it.

No information is given to the witnesses even as they are searched at the main entrance to the court; people simply have to find their own way. Those with self-confidence are the ones that try to get information by asking any officer who passes by and these are usually men. Both at Harare and Mutare magistrates courts I joined the queue for civilians and pretended that I was not an officer of the court. This worked out well at both stations, as none of the officers at the gate or front offices knew me. I noticed that court officials are generally very rude and insensitive to members of the public. Thus many people including witnesses spent unnecessarily long hours at court simply due to lack of information. In Mutare some people stayed until closing time and then started coming to the prosecutor's office to find out the fate of their cases. One old man had this to say when asked why he had not bothered to get information since morning,

“We thought the register was going to be called out since we had these papers (he was referring to the summons he had.) All along we sat hoping that our turn would come.”

Although he was not one of my targeted respondents, his view could reflect the views of many. From my observations and interviews I discovered that members of the public expect to be served by the staff at court and expect to be given information without necessarily having to look for it. From my interview it appeared that members of the public who come to court believe that once they are called for trial either as accused or witnesses all will be in order, some form of record will be available and that cases will be called according to a roster. This to me indicates the importance of court rolls that should be displayed at the entrance of each court room every morning by the court orderly indicating the name of the accused and witnesses. This used to be

the procedure but when I asked clerks of court from Harare and Mutare all indicated that this was last done more than five years ago but all agreed that this was a very good source of information to the clients of the courts. A shortage of stationary was given as the reason why it was no longer done.

## **6.5 SUGGESTED SOLUTIONS**

The people interviewed came up with different views on what could be the best solution to the problems faced by these female witnesses. The judge president was of the view that where suckling babies are concerned, the criminal justice system should find a way of accommodating these babies either by allowing the women to come into court with their babies or to allow them to bring suitable baby-minders at the state's expense. The other option would be for the state to provide suitable baby care facilities staffed by qualified baby-minders. In her view this should not be something very expensive to set up. The room would need suitable toys, and suitable sleeping material plus a nappy changing area. It would also require a place where mothers can sit to breast-feed. At the witness quarters there is a need for separate accommodation for nursing mothers with proper sanitary facilities and washing utensils for mothers to wash nappies. The magistrates indicated that the best would be to simply let the women testify with their babies. They were of the view that the criminal justice system lacks the capacity to meet the demands of childcare facilities at court. The capacity of the system to these needs would depend on the availability of human, financial and material resources. Such facilities would need to be properly equipped and maintained and owing to the current economic difficulties the government is facing it may not be possible to meet such demands. In their view giving first priority to any such witnesses and letting them bring in their babies and taking adjournments when the need arises would be the fastest and most efficient solution to the problem. Justice Kudya also shared this view,

“Whilst this is a noble idea it can only work if it is donor funded and implemented. It should never be left to the state as the state is already over stretched and failing to meet its obligations. Leaving it to the state may end up leading to further abuse of the children's rights.”

The two women interviewed indicated that they would prefer being given expenses incurred for the baby and be allowed to take their babies into the courtroom. They both were not very sure that a childcare facility would be the best solution since it

would still mean that the children would have to be separated from their mothers. It would appear that the solution recommended by most people is that of allowing the female witnesses to enter court with their children. This would only require court officials who are sensitive to the needs of such witnesses and allow for breast-feeding time and even allow them to testify whilst seated as suggested by one of the respondents, Justice Kudya. The solution would be the most appropriate in view of Zimbabwe's current economic situation, as it would not require much money.

Thus the solution to the problem surrounding female witnesses with young children need not be expensive. Clearly based on my grounded engagement with the problems, simple local, implementable solutions are required. Low cost accessible materials have to form the basis for putting appropriate facilities in place. The state in the broader sense has an obligation to ensure such facilities are in place. The remedies suggested are capable of being done and relatively inexpensive. The state cannot simply be excused on the basis that it is overstretched. Attending to these issues provides a gender-based foundation for reform that should positively affect the efficacy of initiatives to promote women's rights to access justice. None of the solutions that have been suggested need expensive interventions; they do however require commitment, vision and dedication. Whether they are established within a court building, a school or public office, the provision or lack of adequate child care facilities is an important factor in determining how women rights to access justice and participation in public life in general can be delivered in an enabling environment by allowing them adequate and appropriate space in the public sphere.

## **CHAPTER 7:DISCUSSION**

### **7.1 IGNORANCE AND MISGIVINGS**

Having started with the Topic “An analysis of the treatment of female witnesses who come to court with young children in the Zimbabwean Criminal Justice system,” the topic had to change after starting the research and realising that it is not really the system per se that is the source of the problem but the people who staff the courts who have a belief that woman should not and must not be allowed in court with their babies.

I realised that it is not the law that has a problem but a system that is not gender sensitive or rather a system that is not aware of the potential or actual needs of women. Because of the blindness of the system to the potential or actual needs of women nothing was ever put in place to cater for this particular group of women. It is my hope that I will be part of the crusade to sensitise firstly my fellow prosecutors and then all court officials so that this baseless practice be brought to a halt forthwith. I am however glad that some of my informants who, after receiving my research proposal and request for an appointment, endeavoured to establish the source and origins of the practice and have indicated that they are abandoning it forthwith after the realisation that it is not documented anywhere. Thus it would appear that it is an issue of sensitisation and awareness rather than law reform.

Findings on the ground have indicated that this practice is not a law as there are no formal legal rules that preclude babies and toddlers from court. This is simply a regulatory rule with no apparent legal basis. After this realisation and discovery, my initial research topic had to change to the current one. This did not however mean that my initial assumptions were not holding up. In fact most of them save for one, that is, assumption number four, were holding up (see page 10). As regards this assumption, findings seemed to indicate that there is a possibility that expenses incurred by the female witnesses in bringing the babies to court could be reimbursed if the prosecutors were to include the names of the baby-minders on the subpoenas. There however were varying views from different officials over the same issue. Whilst magistrates and clerks who currently do the paying out on the subpoenas were

of the view that this could be possible, the prosecutors indicated that this was not possible and could even lead to criminal charges.

The findings clearly indicated that these female witnesses did indeed have a problem and that the ad hoc baby care facilities resorted to at court were not at all a solution to the problem. Thus the magistrate's courts in general as with all the higher courts are not baby or toddler friendly; small children who are part and parcel of women's lives are seen as a disruptive influence in the court environment. What does abreast feeding mother do with a small baby while she attends court? Would allowing these women to bring their babies seriously disturb the flow of justice in the courts?

There being no legal basis for the rule it is surprising to note that it is practised by almost everyone in the criminal justice system without question. The only reason given for barring these babies and toddlers from the courtroom is that they may disturb proceedings by crying or making demands. However noone ever said that they had ever once been faced with any serious court disruptions caused by crying babies. In fact, there is no proof that these children disturb court proceedings. It is just an unproven assumption. Some of the informants indicated that these children usually cry only after being separated from their mothers. The fact that the chiefs courts have managed to operate even with these toddlers in court indicate that they are not as problematic as our court system assumes. It is not as though babies are in the habit of crying continuously and making demands of their mothers. In fact most of the time babies are generally very calm especially when they are with their mothers.

When I highlighted the problems that the so-called rule imposes on women and the fact that it is not a legal requirement most of the court officials indicated a willingness to change. Thus it can be concluded that this problem arose because noone ever seriously thought about the problems women face. Female specific situations need to be taken into account in all national plans. In the present case, it can be said that it is a failure of the judicial system to appreciate problems faced by its clients. This can have serious implications on the justice delivery system as some women may simply decide not to come to court or may even refuse to stand as witnesses even at the early investigation stage of prosecutions. In the end this may result in some cases being lost by the state for want of evidence. Those women with past experiences may simply

refuse to assist the system knowing that they may end up incurring expenses and being seriously inconvenienced and this would obviously affect the administration of justice. Women may avoid coming forward as witnesses. Many may share the view by Joyce Makoko, the Mutare witness who indicated that she was not going to come back to court for any other matter even after being threatened with the possibility of arrest.

The practice may also act as a deterrent to female victims with young children who would be considering reporting their cases. Some may end up not reporting their cases for fear that they may end up as the losers in view of the time spent and costs incurred at court. Thus women may be excluded from effective use of the formal justice delivery system by failure to manage this real life situation.

“Failing to take these kinds of realities into account makes women’s use of courts doubly problematic compared to men. It also speaks volumes of the maleness or gender insensitivity of the conceptualisation and implementation of the justice delivery system.”[J Stewart et al, 2000:96]

It is surprising how judicial officers could have come up with a law of their own which is different from what is on the statutes. Gender mainstreaming approaches should be adopted in all institutions. Some problems are created and continue due to gender insensitivity and many of the responses I received indicate that all that is required is sensitisation. During interviews with most of the enforcers of this rule, particularly magistrates and judges they indicated that now that they realise that it is not a legal requirement, they were going to change forthwith and will allow women to come into court with their babies. It is only the police that indicated some resistance to change.

## **7.2 POINTING FINGERS**

It is also interesting to note that having realised that it is not a legal requirement, different levels of officials had different explanations of the origins of the rule. Justice Kudya blamed patriarchal conspiracy and colonial past, which resulted in there being cultural pluralism in Zimbabwe. The judge president blamed it on the police and the prosecutors. The police take it as one of the court rules created by the court officials, which the police are supposed to enforce. Prosecutors take it as a long-standing

practice, which enables the smooth running of court business, and some of them are of the view that it should remain as such. These are the ones who believe that since it has been functional for this long with no serious problems why should anyone advocate change now. This is one problem with issues of law or policy reform, there is always resistance from those that believe that for any law or policy to be changed it must be a problem that affects a greater part of the society. Whilst admittedly this “Rule” only affect the poor women who cannot afford child care facilities, the fact that it affects only a few is no reason to let a baseless and harmful practice continue. Measures need be taken to ensure that the problem is dealt with even if it is for the benefit of a very small fraction of the nation. In resolving the problem, not only is a gendered perspective necessary but there also is need for an intra gender perspective that looks at the differences between women and how these may contribute to the different experiences with the criminal justice system.

### **7.3 ME AND MY TIME COUNT FOR NOTHING**

The group of women who are affected by this “rule” are the non-professional women who ordinarily cannot afford child care facilities. Where professional witnesses are concerned, the system bends over backwards to accommodate them. From my experience, when dealing with professional witnesses the practice is that you phone them only when the court is ready to hear their evidence so that they spent as little time as possible at court, yet these female witnesses, the subjects of this study, can spend hours or even days at court. Professional witnesses are rarely detained at court for longer than is necessary. Should there be something that causes a delay in their being processed through the system, there will always be someone to give an explanation to them and apologise for the delay. Even when it comes to detention allowances, professional witnesses are paid at a higher rate. It is worth noting that the majority of them are men. Professional witnesses who have to stay over night are usually accommodated in hotels and not at the police mess. Thus there also appear to be an element of class discrimination in the treatment of witnesses.

My findings were also that there are no legal provisions that were put in place to cater for female witnesses who come to court with young children. Instead the people who man the courts simply came up with this “rule” which is implemented by all as if its



law yet it has no legal basis. Findings have shown that it is a legal fiction. The fact that this legal fiction has been allowed to inconvenience and burden women and innocent children for so long and even result in children being subjected to conditions which may be harmful to them, simply highlight the blindness of the system to the problems women face.

#### **7.4 HUMAN RIGHTS IMPLICATIONS**

No one ever envisaged the problems women might face in dealing with the courts. It is not the law that is problematic, for there is none in this respect, but it is the enforcers and interpreters of the assumed law who are indifferent to gender roles and the obligation of care bestowed on women. There is thus a need to take serious steps toward making the whole criminal justice system more gender aware. As my findings indicate at the moment, the entire system is not user friendly. There is a complete failure by the system to realise that women have different problems from men in trying to access the courts either as litigants or witnesses. These sex and gender role differences need to be taken care of in every system if there is to be fairness and equal treatment of those whom it is meant to benefit.

If one were to analyse the statutory instrument that deals with witness expenses, one would obviously find no differential treatment between men and women. There however is a need to look at it through gender-specific lenses because, while on paper there appears to be equal treatment, the practical effect is that women are prejudiced in that some may have to incur extra costs which are not provided for in the statutory instrument. They end up incurring these costs in a bid to meet their citizen obligation to the criminal justice system. Even if the current valueless expenses were to be meaningfully reviewed on paper, in practice this group of women would still remain disadvantaged. Inadequate attention was given to women's needs and all witnesses are treated in the same way without giving due consideration to different gender roles. The notion of equality should move beyond sameness and be inclusive of the special needs of female witnesses. It is evident that formal equality alone without supporting entitlements is neither adequate nor acceptable in contemporary human rights interpretation.

All the international human rights instruments and domestic laws only talk of women's rights to access courts as litigants accused persons or victims. As such there is a gap in both the international and domestic law. The only focus there is on women as witnesses is on the need to protect them as victims of sexual offences and in war situations. There is nothing on women as mere witnesses hence there may be need to go back to the drawing board and reconsider problems that women face in trying to access courts in that capacity. Nowhere in any of the international instruments is there any direct reference to women as mere witnesses not victims. Thus what needs to be highlighted is the silence and the gap that exists in both the international and domestic law to facilitate access.

This could be provided for perhaps in the general recommendations to CEDAW or The African Protocol to the Charter on Human and Peoples Rights on the Rights of Women in Africa.

Due to lack of awareness and insensitivity, our court's attitude towards these women and children can be called into question. Instead of being the protector of children's rights, our courts have become major culprits in abusing these children in situations such as where female witnesses are made to leave these toddlers outside the courtroom unattended. This exposes these children to danger and causes a lot of distress to both the mother and the child. Courts are public places and as such the possibility that strangers can abduct or harm such children left alone outside cannot be ruled out. International conventions exhort states parties to ensure that all necessary measures are taken to eliminate all forms of discrimination against women and ensure equal access to courts and justice for both men and women. The wisdom of such exhortation need to be questioned in the light of the research if there are no proper facilities in place that specifically address issues relating to the management of gender role differences between men and women. Failure to manage that difference leads to uncomfortable and emotionally bruising experiences for some women. Recognising the problems is a vital part of the management framework required to ensure that women access and use the criminal justice system. A gender perspective that focuses on women as litigants and victims alone excludes the specific problems faced by women as witnesses. (A. Hellum et al 2007:298}

## **7.5 WHOSE “RULE” IS IT, ANY WAY?**

Whilst the judges indicated that they never get to see these babies and toddlers, and that they are not fussy about the implementation of the “rule”, the police court orderlies, prison officers and clerks take it as one of the court rules which has to be enforced without fail. This indicates how a system can operate differently in the hierarchs of power. Those at the top may have no idea of what is going on at the bottom and the bottom is running its own system. The top officials do not think about the issues because they are never presented to them.

In the criminal justice system, this not surprising in view of how judges and magistrates come into the courtroom. Our court system is such that magistrates and judges are the last to come into court. The court orderlies are the ones who come in first and call the members of the public into court. They ensure that everyone and everything is in its right place before the judge comes in. The prosecutors, interpreters also come in before the judges but usually after the court orderlies and members of the public. In the magistrates’ court, the interpreters usher the magistrates in while in the high court the judge’s clerk ushers judges in. The magistrates and judges come into a settled and orderly courtroom and come through a separate entrance. Thus they may never get to see lone toddlers sobbing by the court entrance or the mothers and babies seated outside court. To them everything is very orderly and settled and the system is well functional.

## **7.6 CONCLUSION**

The fact that the “Rule” has no traceable origins or legal basis yet it has deep roots in the criminal justice system points to lack of gender mainstreaming in the whole system. It is taken for granted that witnesses have to and will appear regardless of their personal situations, resulting in a failure to recognise female specific situations and making provision for them. Court business was considered men’s business and only men’s needs were provided for.

## **7.7 RECOMMENDATIONS**

1. There is need to sensitize judicial officers about the problems these female witnesses face.
2. Awareness campaigns must be done for judicial officers so as to make them realize that the rule is not law and they are not bound by it.
3. Childcare facilities manned by trained child minders must be provided at court. These need not be expensive. For example, use can be made of some disused rooms at court. The possibility of establishing childcare facilities at courts needs to be seriously looked into. These could be funded by the government through the Department of Social Welfare or by non-governmental organizations.
4. Alternatively these witnesses should simply be allowed to testify with their children and courts adjourn when the need arises. There appears to be no serious resistance to change. Thus it is something that can be provided for through a practice note or standing order.
5. The Ministry of Justice should establish its own witness accommodation suitable for nursing mothers.
6. At such witness quarters baby food and basic facilities suitable for babies such as baby baths should be provided.
7. The witness expenses should include all expenses incurred by the women with young children.
8. Prosecutors should endeavor to establish whether a female witness intends to bring a young child to court so that they may make the necessary arrangements in advance. This could be done through the police when they serve subpoenas on these witnesses.
9. Prosecutors should, whenever necessary, vary the order of witnesses so as to give priority to female witnesses with young children in order to lessen their burden.
10. There is a need to mainstream gender in the whole criminal justice system.

## **BIBLIOGRAPHY**

- Atkins S, Hoggett B (1984) *Women and The Law* Basil Blackwell Inc
- Bentzon W A (et al) (1998) *Pursuing Grounded Theory in Law South-North Experiences in Developing Women's Law* Tano-Aschehoug Mond Books
- Hellum A (et al) 2007 *Human rights plural legalities and gendered realities; Paths are made by walking.* CARCWL University of Zimbabwe
- Ndlovu E N "The Victim Friendly Court System: An Evaluation of its Effectiveness in Protecting Rape Victims from Further Traumatization- A case study of the Bulawayo VFC" Post Graduate Diploma in Women's Law Dissertation University of Zimbabwe 2001.
- Stewart J (et al) (2000) *In The Shadow Of The Law Women and Justice Delivery in Zimbabwe* WLSA
- O'Donovan K (1985) *Sexual Divisions in Law* Weidenfield and Nicolson London

### **Human Rights Instruments and National Legislation**

- Protocol of the African Charter on Human Rights on the Rights of Women in Africa.
- Convention on the Elimination of All forms of Discrimination Against Women, 1981
- The Constitution of Zimbabwe
- The Criminal Procedure and Evidence Act [Chapter 9:07]
- The Magistrates Court Act [Chapter 7:10]
- The High Court Act [Chapter 7:06]
- The High Court Rules
- The Magistrate Rules