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Sexual consent laws and the child's right to freedom from sexual exploitation in Zimbabwe: Unpacking the 'polarising' legacy of *Kawenda & Another v Minister of Justice, Legal and Parliamentary Affairs & Others*

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Summary: *This article examines the intersection between sexual consent laws and the child's right to be protected from sexual exploitation and abuse in Zimbabwe. It is shown that, by codifying a minimum age of sexual consent, the law performs an integral function in preventing child sexual exploitation and the prosecution of adult offenders. A MASC – without exceptions or gender-based variations – entrenches a protective and irrefutable presumption that children below that age lack the capacity to consent to sexual activities. It is argued that to better protect children, the stipulation of a MASC should be coupled with the criminalisation of consensual sex between an adult person and any child below the MASC and the enforcement of the relevant rules. The article approaches the analysis through the prism of the decision on*

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20 May 2022 by the Constitutional Court of Zimbabwe in Kawenda & Another v The Minister of Justice, Legal and Parliamentary Affairs & Others*, which held that legislative provisions that stipulate the MASC to be 16 years are invalid and unconstitutional for lack of consistency with the child's right to be protected from sexual exploitation and abuse. The article argues that the Court's decision attracts, divides and polarises public opinion on sexual consent issues due to the conflicting messages it conveys. It is a landmark decision in holding that (a) the child's right to freedom from sexual exploitation means that all children, including those over the age of 16 years, have no legal capacity to consent to sexual intercourse with adults; (b) the limitation of the rights of over-16s to be protected from sexual exploitation is not reasonable, necessary and justifiable in a democratic society; and (c) the Criminal Law Code, in criminalising predominantly extra-marital sex with under-16s, perpetuates the sexual exploitation of children already in marriages. Conversely, the case is also a missed opportunity in failing to (a) declare invalid and unconstitutional legislative provisions that stipulate that children aged 12 to 14 years are capable of consenting to sex with adults in certain circumstances; (b) explicitly hold that the physical appearance of a child should not be a partial defence to any sexual offence committed on a child; (c) fully address the way in which sexual relationships between adolescents should be regulated; and (d) require the state to liberalise access to SRHR information and services to all adolescents who have reached the age of puberty to protect and empower sexually-active adolescents before they reach the age of sexual consent. While these gaps have been partially addressed by the Criminal Laws (Protection of Young Persons) Amendment Act, 2024, some have been re-enacted, thereby retaining the legal position that existed before the Court's decision.*

Key words: *minimum age of sexual consent; child sexual exploitation; close-in-age defence; child marriage; adolescent sexual and reproductive health*

1 Introduction

Child sexual abuse and exploitation (CSEA) is one of the enduring problems affecting the whole world today – including rich and poor countries and neighbourhoods – and occurs in all the settings in which children spend their time, including families, schools, workplaces, playgrounds and the digital environment. A comprehensive review of over 200 studies once found that one in eight of the world's children (12,7 per cent) had been sexually abused before reaching the age of

18 years.[1] Further, CSEA is gendered, with approximately 90 per cent of perpetrators being male, and girls predominantly reporting rates of victimisation that are two to three times higher than those of boys. Nonetheless, boys experience higher levels of victimisation than girls in certain contexts and organisational settings, such as single-sex residential institutions.[2] Globally, approximately 120 million girls have been estimated to have suffered some form of sexual violence during their life courses.[3] The United Nations Children's Fund (UNICEF) estimates that one in every 20 girls aged 15 to 19 years (around 13 million) have experienced forced sex during their lifetime.[4]

In Africa, one-third of girls from across all social classes suffer sexual violence and this is often repeatedly experienced.[5] Evidence-based research also suggests that this phenomenon is replicated at the domestic level as slightly more than one in three (39 per cent) reports of abuse received involve sexual abuse. This is particularly the case with girls – especially in the 13 to 17 age category – who are reported to experience sexual abuse more than other forms of abuse.[6] With the emergence of the fourth industrial revolution, many children have access to digital devices and the internet. Their lives are mediated by the digital environment in ways that impact how they both enjoy their rights and have these rights transgressed, including through violations that constitute online CSEA.[7] The term 'sexual exploitation' encompasses multiple practices that include physical or non-physical sexual contact with another person or acts of inducing or coercing that other person to take part in exploitative sexual activities. Article 27(1) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) provides as follows:

> States parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall take … measures to prevent
>
> (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
>
> (b) the use of children in prostitution or other sexual practices;

1 M Stoltenborgh and others 'A global perspective on child sexual abuse: Meta-analysis of prevalence around the world' (2011) 16 *Child Maltreatment* 79-101.

2 UNICEF and End Violence Against Children *Action to end child sexual abuse and exploitation* (2020) 5-6.

3 UNICEF *Global status report on preventing violence against children* (2020).

4 UNICEF *A new era for girls: Taking stock of 25 years of progress* (2020).

5 Big Win *Violence against children: A review of evidence relevant to Africa on prevalence, impacts and prevention* (2018).

6 UNICEF Zimbabwe and Childline Zimbabwe 'A secondary analysis of data from Childline Zimbabwe: Understanding violence against children in Zimbabwe data series (2016) 1 3.

7 African Children's Committee General Comment 7 on article 27 of the African Children's Charter: Sexual exploitation (2021) para 16. See also We Protect *Global threat assessment* (2019) 34.

(c) the use of children in pornographic activities, performances and materials.

The Zimbabwean Constitution 'domesticates' this provision by entrenching every child's 'right to be protected from economic and sexual exploitation, child labour, maltreatment, neglect or any form of abuse'.[8] Child sexual exploitation and abuse includes 'any actual or attempted abuse of a position of authority, differential power or trust, for sexual purposes, including profiting monetarily, socially or politically from the sexual exploitation of another. Sexual exploitation of children can be commercial or non-commercial.'[9] Thus, CSEA includes exploitation of children in prostitution, the use of children in pornography, child trafficking for sexual exploitation and child marriage.[10] The exploitation of children in prostitution has been deemed one of the worst forms of child labour under International Labour Organisation (ILO) Convention 182 on worst forms of child labour.[11]

A sub-category of CSEA, sexual abuse is conventionally defined as 'actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions'.[12] Child sexual abuse is 'the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent to, or that violates the laws or social taboos of society'.[13] Sexual abuse also involves explicit and implicit sexual activities that cause harm, such as penetration, or acts that harm the sexual integrity of the child, such as lascivious exhibition of children's genitals.[14] It is possible to perpetrate against children psychologically intrusive, exploitative and traumatic forms of sexual abuse that are not accompanied by physical force or restraint. Sexual abuse involves contact and non-contact sexual activity and may take place in person or virtually. It is not an essential requirement of the offence that there be an element of exchange, and child sexual abuse can occur for the mere purpose of the sexual gratification of the perpetrator. For CSEA to materialise, there should be an underlying notion of exchange.[15] In this article the terms 'sexual abuse' and 'sexual exploitation' are used

8 Sec 81(1)(e) of the Constitution. See also sec 7 of the Child Protection and Adoption Act 22 of 1971.
9 African Children's Committee General Comment 7 (n 7) para 19.
10 Interagency Working Group on the Protection of Children from Sexual Exploitation and Abuse Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse (adopted 28 January 2016).
11 Terminology Guidelines (n 10) 18.
12 See General Comment 7 (n 7) para 20.
13 As above.
14 Terminology Guidelines (n 10) 15.
15 Terminology Guidelines (n 10) 18; General Comment 7 (n 7) para 20.

interchangeably to refer to all sexual activities that are committed by adults on children with the latter's 'consent' – either authentic or legally presumed to exist.

This article unpacks the interaction between sexual consent laws and CSEA, focusing particularly on the role of the minimum age of sexual consent (MASC) in protecting children from sexual exploitation in Zimbabwe. It discusses the Zimbabwean Constitutional Court's decision of 20 May 2022 in *Kawenda & Another v Minister of Justice, Legal and Parliamentary Affairs*.[16] In this case the Court found that certain provisions of the Criminal Law (Codification and Reform) Act (Code),[17] which pegged the MASC at 16 years, were inconsistent with the child's constitutional right to be protected from sexual exploitation. The article argues that the Court's decision is a landmark ruling in finding that (a) the child's right to freedom from sexual exploitation means that all children, including those over the age of 16 years, have no legal capacity to consent to sexual intercourse with adults; (b) the limitation of the rights of over-16s to be protected from sexual exploitation is not fair, reasonable, necessary and justifiable in a democratic society; and (c) the Code, in criminalising mainly extramarital sexual intercourse with under-16s, perpetuates the sexual exploitation of children already in marriages. While it is important in that it invalidates the legislative provisions permitting marital sexual intercourse with a minor, this finding perhaps is moot in that the same Court had already abolished child marriage in an earlier judgment[18] and the 'new' Marriage Act now prohibits this harmful practice.

Further, the article discusses four ways in which *Kawenda* constitutes a missed opportunity. To begin with, the Court did not declare invalid and unconstitutional the provisions of the Code that suggest that children aged between 12 and 14 years are capable of consenting to sexual intercourse with adults in certain circumstances. Entrenched in section 64(2) of the Code, these provisions perpetuate the sexual abuse and exploitation of young children because they provide leeway for perpetrators to plead relatively minor offences that attract lesser sentences than those stipulated for serious offences such as rape and aggravated indecent assault. Further, the Court should have explicitly held that the physical appearance of a child should not be a partial or total defence to any sexual offence committed on a child. This partial defence has found itself in the

16 CCZ 3/22.
17 Ch 9:23 Laws of Zimbabwe.
18 *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/2015.

new law which still permits adults to claim that they thought the child was over the age of 18 years. Third, it is argued that the Court should have grabbed the opportunity to fully address the way sexual relationships between adolescents should be regulated by the legislature. Fourth, it would have been ideal for the Court to require the state to liberalise access to sexual reproductive health and rights (SRHR) information and services to all adolescents of a particular age, which should be below the minimum age of sexual consent, in order to protect and empower sexually-active adolescents.

2 Minimum age of sexual consent

The minimum age of sexual consent (MASC) is the legal age at which a person is considered sufficiently mature to give informed consent to sexual activities.[19] The Committee on the Rights of the Child has continuously emphasised that state parties to the Convention on the Rights of the Child (CRC) must ensure that specified legal measures, such as setting a minimum age of sexual consent and marriage, are provided for under domestic laws.[20] Despite considerable evidence of adolescents below the age of 18 years engaging in sexual activities, the notion that the MASC should coincide with the marriageable age is deeply entrenched in many societies, especially given the social, religious and cultural beliefs that sexual intercourse should be the prerogative of married people.[21] Such consistency in the law, it is thought, facilitates the effective adjudication of CSEA cases. This would also ensure the effective eradication of CSEA crimes where any sexual conduct perpetrated against a child below the legislatively-ordained MASC would automatically constitute a crime and be subjected to prosecution without any other considerations.[22] The fulfilment of such obligations at the domestic level helps countries easily combat sexual offences against children.

However, international child rights law does not set a universal age of consent to sexual activities, but leaves it open for states to set their own MASC. Nevertheless, states are mandated to take into account the need to balance children's protection rights and evolving capacities in determining their MASC.[23] The need for and establishment of any sexual age of consent is motivated by

19 ECPAT International *Strengthening laws addressing child sexual exploitation. A practical guide* (2008).
20 CRC Committee General Comment 4 Adolescent health and development in the context of the Convention on the Rights of the Child (2003).
21 UNICEF (n 3).
22 General Comment 7 (n 7).
23 CRC Committee General Comment 20 Implementation of the rights of the child during adolescence (2016).

protective purposes, including the recognition that very young children are incapable of understanding the potentially far-reaching consequences of consenting to sexual acts and that adolescents should be protected from adult sexual predators.[24] The MASC means that it becomes unlawful and prohibited for adults to indulge in sexual conduct with children below the MASC in all situations, regardless of the 'consent' of the child concerned.[25]

Codifying a minimum age for any act or contract shelves the need for an objective empirical enquiry into the psychological maturity of any person (below that age) to perform that act or become party to that contract. A MASC establishes an irrefutable presumption of lack of sufficient maturity for children below that MASC, to decide whether to take part in sexual activities. It is an indispensable prerequisite for the effective prevention of CSEA and the prosecution of adult offenders since it legally denies any person below that age the capacity to consent to sexual activities. The presumption embedded in a MASC is that children below that age lack the level of maturity to fully comprehend the nature, long-term consequences of sex or marriage and the heavy responsibilities associated with it.[26] Legally, children below the MASC are incapable of 'consenting' to marriage and cannot logically be said to have consented to any sexual activities. The child's presumed lack of legal competency to give consent leaves no grey area in the protection of children, especially girls, from CSEA in the name of 'consent'.

More importantly, however, the stipulation of a MASC should be coupled with the criminalisation of consensual sexual intercourse between an adult person and any child below that age (subject to the close-in-age defence discussed below).[27] The criminalisation of intergenerational sex and its enforcement in concrete cases is important if the legal prohibition of CSEA is to bear fruit; would-be perpetrators are to be deterred and the general public is to observe the relevant law. As noted by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), 'the age of sexual consent as defined by law must mean that adults engaging children below that age in sexual activities is prohibited under all circumstances, and that the consent of such a child is legally

24 General Comment 7 (n 7) para 47.
25 Human Dignity Trust *Good practice in human rights compliant sexual offences laws in the Commonwealth* (2019).
26 See, generally, UNFPA 'Harmonising the legal environment for adolescent sexual and reproductive health and rights', https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08Laws%20and%20Policies-Digital_0.pdf (accessed 14 June 2021).
27 See part 4.3 of this article.

irrelevant. It should be criminalised.'[28] In many African countries the minimum age for consenting to sexual intercourse is spelt out or codified in criminal laws.[29] The intention is to ensure the protection of children, mainly girls, from sexual predators by criminalising and penalising every adult person who engages in sexual intercourse with children, even in the context of 'child marriage'.

3 Kawenda and Another v Minister of Justice

3.1 The salient facts

The applicants approached the High Court in the public interest for an order declaring multiple provisions of the Code invalid and unconstitutional as they allegedly did not protect children between the ages of 16 and 18 years from abusive or exploitative sexual relationships. The impugned provisions were the following:

- section 61, which defines a young person as a boy or girl under the age of 16 years;
- section 70, which criminalises the conduct of any person, whatever their age, who has extramarital sexual intercourse or commits indecent acts with a young person in Zimbabwe;
- section 71, which makes the crime extra-territorial, by declaring it to be a crime for any citizen or resident of Zimbabwe, whatever their age, to have extra-marital sexual intercourse or to commit indecent acts with a young person outside the country;
- section 76, which makes it an offence for persons in control of premises to permit anyone to have extramarital sexual intercourse or to commit indecent acts with a young person in those premises;
- section 83, which prohibits the procurement of anyone for the purpose of unlawful sexual activities and prescribes a higher sentence if the person procured is a young person; and
- section 86, which makes it a crime for the owner of a place to induce or allow young persons to be in the place for the purpose of engaging in unlawful sexual activities.

All these sections protect children under the age of 16 years to the exclusion of those aged between 16 and 18 years. In the court *a quo* the applicants argued that children aged over 16 years were being

28 General Comment 7 (n 7) para 51.
29 See, generally, World Population Review 'The legal age for consent by country', https://worldpopulationreview.com/country-rankings/age-of-consent-by-country (accessed 12 June 2021).

treated as adults even though they have the right to be protected from sexual exploitation under section 81(1) of the Constitution. The High Court dismissed the application on the grounds that teenagers naturally engage in sexual activity; the law cannot stop them from doing so and they should not be criminally punished for it. It also held that many other statutes distinguish between children under the age of 16 years and young persons in the 16 to 18 years category, and a declaration of invalidity would require that all these statutes be amended rather than just the impugned provisions of the Code. Hence, the High Court declined to declare the sections unconstitutional. Aggrieved by the judgment, the applicants appealed to the Constitutional Court for relief.

3.2 Issue before the Constitutional Court

Section 70 and other provisions of the Code penalise persons who engage in sexual acts with children between the ages of 12 and 16 years only, leaving those in the 16 to 18 year bracket exposed to sexual exploitation. The issue that was before the Court was whether section 70 and other related sections of the Code, which create offences prohibiting extramarital sexual intercourse and the performance of indecent acts with young persons, as read with section 61 of the Code, are inconsistent with sections 81(l)-(2), 70, 56 and 53 of the Constitution as alleged or at all. In the words of the Court, the issue was neither novel nor complex as it called for an interpretation of the relevant provisions of the Constitution and an analysis of the effect of the impugned law on children.

3.3 Decision of the Court – *Kawenda* as landmark

3.3.1 The child's right to freedom from sexual abuse and exploitation: Implications for sexual consent laws

Interpreting section 81(1)(e) of the Constitution,[30] the Court observed that it is an amalgam of the age of majority provisions in the country and makes it clear that the rights protected in it are conferred specifically on children. Section 81(1) provides that a child is a boy or girl below the age of 18 years.[31] According to the Court,

30 Sec 81(1)(e) of the Constitution provides that '[e]very child, that is to say every boy and girl under the age of eighteen years, has the right to be protected from economic and sexual exploitation, from child labour and from maltreatment, neglect or any form of abuse'.

31 *Kawenda* (n 16) 20.

this is important as 'it settles the definition of the term "child" for any other law or practice, and any law, practice, custom or conduct that defines a child differently becomes *ipso facto* inconsistent with the Constitution in that regard and to that extent'.[32] Having given this broad background analysis, the Court zeroed in on the meaning of the term 'sexual exploitation' which it held to mean taking advantage of the child's 'consent' to sexual activities. It further held that children lack understanding of sexual behaviour, the context of normal sexual relationships and knowledge of the consequences of sexual intercourse.[33]

Ultimately, the Court held that the criminal offences described in sections 70, 76, 83 and 86 of the Code amount to the sexual exploitation from which all children should be protected.[34] More importantly, the Court observed that section 81(l)(e) of the Constitution protects every child from sexual exploitation. Yet, the impugned provisions protect some and not all children as it leaves out those aged between 16 and 18 years.[35] In this regard, these provisions were held to be inconsistent with the provisions of the Constitution and to infringe on the rights of those children left out of the protective ambit of the law. To quote the Court:[36]

> The effect of the impugned law is not only to fail to protect those children that are between sixteen and eighteen, it particularly fails to protect all children in child marriages. The impugned law denies some children the protection that the Constitution demands. It cannot therefore 'disobey' the Constitution and hope to remain constitutional. The Constitution has already spoken and has supremely demanded that every child be protected. There is therefore no room to leave some children out of the protective tent.

Makarau JCC, for the Court, observed that it is supremely imperative to protect all children from sexual exploitation even though the 'levels of protection may decrease with age to recognise that the development of a child is evolutionary and, as he or she grows older, a child interacts and responds to the world around him or her such that later, during adolescence, he or she should be able to explore and understand his or her body'.[37] While recognising the role the evolving capacities of the child play in limiting the levels of protection accorded to children, the Court hastened to hold that the impugned law offered no protection whatsoever to children between the ages

32 *Kawenda* (n 16) 20-21.
33 *Kawenda* (n 16) 22.
34 *Kawenda* (n 16) 23.
35 *Kawenda* (n 16) 24.
36 *Kawenda* (n 16) 24-25.
37 *Kawenda* (n 16) 25.

of 16 and 18 years, even in a decreased manner or form. The Court held that these children fall outside the protective reach of the law.[38]

All children are entitled to equal protection and benefit of the law without any discrimination based on gender, sex, age or any other prohibited grounds.[39] Under international standards, under-18s remain incapable of fully comprehending sexual activities, are unable to give informed consent and developmentally unprepared to sexually engage with adults. They are often exposed to multiple violations of their rights to life, survival, development and freedom from sexual violence, abuse and exploitation. This highly stems from the fact that the Code defines a young person as a child under the age of 16 years,[40] which again contradicts with the Constitution which sets the age of majority at 18 years. Therefore, the Court emphasised that there is a need to amend the Code and harmonise it with the Constitution to fully protect all children from sexual exploitation.

3.3.2 Is the limitation of the right justifiable?

Having interpreted the provisions of the Code as a violation of the child's right to freedom from sexual exploitation, the Court proceeded to analyse whether the limitation of this right was necessary, justifiable, fair and reasonable in a democratic society based on openness, justice, human dignity, equality and freedom. In the Court's world, the infringement constituted a complete denial of the right to be protected from sexual exploitation, particularly in regard to both children aged between 16 and 18 years and to all children in child marriages.[41] Given that the infringement of the right amounted to a complete negation of the right, the Court held, there hardly existed any reason for contending that the limitation of the right was justifiable both under the common law and section 86(2) of the Constitution.[42] The respondents did not press on the Court any argument that there was a rational basis for justifying the complete denial of the protection – envisaged in section 81(1)(e) of the Constitution – to children above 16 years or in child marriages. In light of the unambiguous provisions of the Constitution that demand that all children be protected from sexual protection, there was no justification for the violation of these rights.[43]

38 As above.
39 Secs 56 & 81 Constitution.
40 Sec 61(1) of the Code.
41 *Kawenda* (n 16) 28.
42 As above.
43 *Kawenda* (n 16) 29.

These are compelling remarks for purposes of ensuring that children are protected from sexual abuse and exploitation as envisaged in the Constitution. While the finding that the limitation of the child's rights was unjustifiable can perhaps not be faulted, the process of reaching this noble conclusion was, with due respect, logically questionable and somewhat unsystematic. First, it was incorrect for the Court to hold that the violation constituted a complete denial of over-16s' rights to protection from sexual exploitation. Establishing a MASC does not force all children over that age to agree to sexual intercourse with adults. They can still withhold or withdraw their consent. For sexually-active adolescents who are developmentally mature to make informed sexual choices, a MASC below the age of majority can actually be both liberating and empowering. Therefore, it is only for over-16s who lack the capacity for informed consent that an earlier MASC can increase possibilities for sexual abuse and exploitation. This is because their 'consent' would be tantamount to manipulation as they would have no capacity to make the decision in question.

Second, the learned judge did not apply the limitations analysis prescribed in section 86(2) of the Constitution. Makarau JCC rushed to the conclusion without explaining or following the prescribed process. For instance, there was no analytical engagement with the factors that should guide courts in determining whether the limitation of the child's right to sexual exploitation is fair, necessary, reasonable and justifiable in a democratic society. These factors include the nature of the right or freedom in question; the purpose of the limitation; the relationship between the limitation and its purpose; the availability of less restrictive means to achieve the purpose; and so forth.[44] It appears that the stipulation of the age of sexual consent at 16 years was not directly intended to limit any of the stipulated rights of children, but to ensure respect for children's evolving capacities and to confer on children with sufficient maturity the freedom to consent to sexual activities between them, peers and adults. Making a finding, as the Court did, that a MASC below the age of majority leads to the sexual exploitation of children, is a different matter that does not necessarily require a finding that such MASC was initially designed to limit the child's right to freedom from such exploitation.

Third, the Court could still have found that the purpose of the limitation of the right – namely, the expansion of children's agency and participation in sexual and reproductive decision making – could

44 See sec 86(2) of the Constitution.

still have been achieved without lifting the protection to which children over 16 are entitled under the right to freedom from sexual abuse or exploitation. In other words, decisions about whether to have intergenerational sex are too big and developmentally damaging for adolescents that none of them should be deemed to have acquired the capacity to make them before they attain the age of 18 years. In this way, the Court could have found that there was no rational connection between the limitation of the right to be protected from harmful sexual activities and its purpose – the need to empower sexually-active adolescents. In any event, the analysis would have proceeded, there are less restrictive means to achieve the purpose of the limitation. Such means include involving adolescents in self-empowerment and SRHR initiatives that enable them to make informed sexual and reproductive choices without necessarily removing the protection to which all children are entitled before they attain majority.

3.3.3 Addressing the relationship between sexual exploitation and child marriage

Section 70 of the Code makes it a crime for any adult male person to have extramarital sexual intercourse or commit indecent acts with a young person, legislatively defined as any person under the age of 16 years.[45] This offence constitutes a violation of the 'sexual offences' section. As a result, it is illegal for a male person to have extramarital affairs with a girl under the age of 16 years, and the infraction exists to preserve society's sense of legality.[46] Section 70(1) of the Code reveals that the crime of indulging in sexual intercourse with a minor will only materialise if the perpetrator has extramarital sexual intercourse with a young person. Thus, if an adult male person is married to the child victim, then no offence is committed.[47] Section 78(1) of the Constitution prohibits child marriages, yet the impugned legislative provisions 'sanitise' sexual encounters between adults and children in the context of marriage. After *Mudzuru & Another v Minister of Justice*, a person who indulges in sexual intercourse with a minor will fortunately no longer claim marriage as a defence to a charge of sexual penetration, violation or assault.

Given that sexual intercourse is a material component of marriage, criminal laws that effectively outlaw child marriage are

45 See sec 61 of the Code.
46 *Mharapara v The State* HC/CA 9/17.
47 See, generally, C Govhati 'Existing laws in Zimbabwe fail to protect the rights of children' 2017, https://www.humanium.org/en/existing-laws-in-zimbabwe-fail-to-protect-the-rights-of-children/ (accessed 8 January 2023).

an important part of efforts to eliminate CSEA, especially against girls. In *Kawenda* the Court observed that the impugned law did not offer any protection to children in marriages as it remained a defence under the impugned section 70 of the Code that the accused adult person was married to the child.[48] Makarau JCC was at pains to emphasise that the impugned law particularly failed to protect 'children who are in child marriages notwithstanding the age of the child concerned'. This made the entire law inconsistent with the Constitution and, therefore, invalid.[49] In the Court's words, the law that affords a defence to persons accused of having sexual intercourse with children on the basis that they are married to such children is unconscionable, unconstitutional and must be struck down immediately. It cannot be saved even if the respondents are given time before the order of constitutional invalidity takes effect.[50] In this respect, the Court drew inspiration from its own ruling in *Mudzuru*, where Malaba DCJ (as he then was) authoritatively held as follows:[51]

> The age of sexual consent which currently stands at sixteen years is now seriously misaligned with the new minimum age of marriage of eighteen years. This means that absent legislative intervention and other measures, the scourge of early sexual activity, child pregnancies and related devastating health complications are likely to continue and even increase. The upside is that the new age of marriage might have the positive effect of delaying sexual activity or childbearing until spouses are nearer the age of eighteen. The downside is that children between sixteen and eighteen years may be preyed upon by the sexually irresponsible without such people being called upon to take responsibility and immediately marry them. *Thus, there is an urgent need, while respecting children's sexual rights especially as between age-mates as opposed to inter-generational sexual relationships, to extend to the under-eighteens the kind of protection currently existing for under-sixteens with the necessary adjustments and exceptions.*

A comprehensive approach to combating CSEA and its root causes requires a legal ban on child marriage. Accordingly, the Court's position that the minimum of age of consent to sex (as between adults and children) and marriage should coincide with the age of majority, helps curb CSEA in intergenerational relationships involving under-18s, in theory at least. The link between child marriage, sexual abuse and teenage pregnancy is underscored by the fact that approximately 80 per cent of teenage mothers in most African

48 *Kawenda* (n 16) 25.
49 *Kawenda* (n 16) 27.
50 *Kawenda* (n 16) 30-31.
51 My emphasis.

countries are married or cohabit with a male partner or have already been married.[52] Once married, girls are expected to engage in sexual intercourse and fall pregnant to consummate the union. Girls who are trapped in early or forced marriages face a very high risk of sexual exploitation, abuse and pregnancy.[53]

There is a close association between child marriage, CSEA and early pregnancy as girls are often pressured to prove fertility early on in the union.[54] There is evidence that married girls are often confronted with pressure from their adult partners and, in some cases, in-laws to conceive within a short period of time after marriage. In many instances, marriages of young girls to older men are done for procreation and to benefit from the long reproductive life of a young girl. Accordingly, many girls are sexually abused and fall pregnant soon after marriage, even when their bodies are still physiologically underdeveloped.[55] This is because the use of contraceptive methods among married teenage girls is extremely low for several reasons, including girls' inability to give or withhold sexual consent. The Court's holding on the need to reconcile the age of marriage and sexual consent will help protect adolescents, particularly girls, from sexual exploitation and abuse by older males. While this is an important finding, it should have been coupled with a recommendation that children should not be criminalised for engaging in consensual, non-exploitative sexual intercourse among themselves.

4 Kawenda as missed opportunity

This part demonstrates how the case under study was a missed opportunity in that the Court did not comprehensively address key issues relating to teenage sexuality and CSEA. The missed opportunity comes in three forms: first, the failure to unpack the textual contradictions entailed in section 64 of the Code that potentially permit the sexual exploitation of children between 12 and 14 years of age; the failure to address the idea that the accused's belief that the child was above the age of sexual consent is a partial

52 See African Children's Committee *Teenage pregnancy in Africa: A review of status, progress and challenges* (2022).

53 AM Ochen and others 'Predictors of teenage pregnancy among girls aged 13-19 years in Uganda: A community-based case-control study' (2019) 19 *BMC Pregnancy Childbirth* 19; NC Kaphagawani and E Kalipeni, 'Sociocultural factors contributing to teenage pregnancy in Zomba district, Malawi' (2017) 12 *Global Public Health* 694-710.

54 SADC PF SADC Model Law on Eradicating Child Marriage and Protecting Children already in Marriage (2016) 11.

55 African Union Campaign to end child marriage in Africa: Call to action (2013) 3.

defence to criminal charges under the Code; and the Court's implicit refusal to prescribe rules regulating child-to-child sexual conduct in a manner that does not lead to the criminalisation of children who engage in consensual, non-exploitative sexual activities.

4.1 Failure to declare that children aged 12 to 14 years categorically lack the capacity to consent to sexual activities with adults

To some extent, the sexual consent rules entrenched in the Code amount to a shocking story of ambiguities and textual contradictions. The provisions are not fully designed to ensure that adults are fully accountable for their actions if they engage in 'consensual' sexual activities with children in the 12 to 14 year age category. Section 64(1) of the Code provides that any person accused of engaging in anal or vaginal sexual intercourse or other sexual conduct with a young person aged 12 years or younger shall be charged with rape, aggravated indecent assault or indecent assault, and not with sexual intercourse or performing an indecent act with a young person, or sodomy. Sexual conduct of any kind with a minor above the age of 12 years, but below 14 years, attracts the same charges unless otherwise proven that the young person was capable of giving consent and in actual fact gave the consent,[56] in which case the competent charge becomes having sexual intercourse with a young person as provided for under the now declared unconstitutional section 70 of the Code. If a male person engages in anal sexual intercourse or other sexual conduct with a young male person of or below the age of 14 years and there is evidence that the young person (a) was capable of giving consent to the sexual intercourse or other sexual conduct, and (b) gave his consent thereto, the first-mentioned adult male person alone shall be charged with sodomy.[57] What is not clearly said? It is the implicit normative claim that adolescents (aged 12 to 14 years) have the mental and legal capacity to consent to sexual activities with adults and, where they do consent, the sexual intercourse should not be deemed to constitute rape or (aggravated) indecent assault.

Through section 64 of the Code, the legislature established the rule that children can consent to sexual activities with adults, despite other provisions of the Code making it clear that children under the age of 16 years are incapable of consenting to sex.[58] Section 64 of the Code establishes an exception to the usual legal position that

56 Secs 64(2)(a) & (b) of the Code.
57 Secs 64(4)(a) & (b) of the Code.
58 Sec 70(2) of the Code.

under-16s cannot consent to sexual intercourse or other related activities with adults. By creating this exception, the Code codifies a contradiction to the presumption that children under the age of 16 years have no legal capacity to consent to sexual activities, thereby exposing even younger children to the risk of sexual abuse and exploitation. Sections 64(1) to (4) are built around the idea that some children aged between 12 and 14 years have sufficient maturity to understand the potential risks associated with sexual activities and to make informed choices relating to such activities. The law stipulates that, where this is the case, the adult person commits less serious offences such as sodomy or having sexual intercourse with a young person, with their attendant less punitive sentences, instead of rape or (aggravated) indecent assault, with its attendant more punitive sentences. Relying as they do on another person's subjective analysis of whether a child (over 12, but under 14 years) is sufficiently mature to give informed consent to sexual activities with adults, these provisions can be abused by perpetrators, defence lawyers and the courts.

What perhaps is more alarming is the fact that in reviewing the constitutionality of the MASC (16 years), the Court neither referred to nor declared unconstitutional the provisions of section 64 of the Code that stipulate that under-14s who are over the age of 12 years can consent to sexual activities in certain circumstances. In its ruling, the Court declared unconstitutional and set aside the definition of 'young person' in section 61 of the Code.[59] It also declared unconstitutional and set aside sections 70, 76, 83 and 86 of the Code. However, the Court did not make any pronouncements on the unconstitutionality of section 64 of the Code. Accordingly, it is not clear whether the provisions of sections 64(1) to (4) of the Code remain in force, especially given that the Court appeared to be inclined towards mentioning all the sections of the impugned law that were not fully aligned with the Constitution.

While it would have been ideal for the Court to expressly affirm the unconstitutionality of section 64 of the Code, it can be argued that all legislative provisions or common or customary law rules that confer on under-18s the capacity to consent to sexual activities are no longer valid by dint of the Court's ruling that all children have no legal capacity to consent to sexual intercourse with adults. As shown above, the Court categorically held that the child's constitutional right to freedom from sexual exploitation requires that the age of consent to sexual activities be increased to 18 years, which is the age

59 *Kawenda* (n 16) 32.

of majority. To comply with this part of the Court's ruling, all legislative provisions that confer on under-18s the capacity to consent to sexual intercourse with adults are rendered unconstitutional by the holding that the MASC be the same as the age of majority.

4.2 Failure to hold that an accused's subjective belief that the child was above the MASC is not a defence to sexual abuse charges

Some of the Court's findings do not address the deep-seated legislative stereotypes and social attitudes about children's capacity to consent to sexual intercourse with adults. For instance, the supposedly now repealed section 70(1) of the Code creates the offence of sexual intercourse or performing indecent acts with a young person.[60] The crime, attracting an imprisonment term of up to 10 years, is committed when any person (a) has extramarital sexual intercourse with a young person; or (b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or (c) solicits or entices a young person to have extramarital sexual intercourse with them or to commit any act with them involving physical contact that would be regarded by a reasonable person as an indecent act.[61]

While section 70(2) of the Code provides that the consent of a young person – legislatively defined as a person under the age of 16 years – is not a defence to the charge, perpetrators have a defence if they are able to satisfy the court that they believed the young person was 16 years or older when they consented as provided for under section 70(3) of the Code. Under such obscure circumstances, courts are overly made to rely on the subjective state of mind of an accused person at the expense of a child victim of sexual abuse. It is difficult for the state or any person to prove that the perpetrator knew or should have known that they were performing indecent acts with the child victim at the time the offence was committed, especially if the child is physically bigger than the perceived 'standard size' for that child's age. Fortunately, the old section 70(3) further provided that the apparent physical maturity of the young person concerned shall not, 'on its own', constitute a reasonable cause to believe that the young person was 16 years or older.[62] This appears to comply

60 Sadly, the use of the word 'with' tends to impose on the child some responsibility for the crime committed, and the text in the section confirms this misplaced thinking.
61 Sec 70(1) of the Code.
62 Sec 70(3) of the Code.

with the normative principle that discourages arguing a child's older physical appearance as a defence to sexual crimes.[63]

After the Court's decision in *Kawenda*, Parliament purported to repeal and replace the provisions of the old section 70 of the Criminal Law Code.[64] However, the gist and, in many cases, the wording of the 'old' section 70 were merely re-enacted. First, the offence of sexual intercourse or performing indecent acts with a young person has been re-enacted, roughly with similar criminal sanctions.[65] Second, it is now a defence to the charge 'for the accused person to satisfy the court that he … had reasonable cause to believe that the putative child concerned was of or over the age of eighteen years at the time of the alleged crime'.[66] This is a regression from the previous legal position in terms of which the Code provided that the 'apparent physical maturity' of the child could not, 'on its own', constitute reasonable cause to believe that the young person was of age. In terms of the new section 70 of the Code, the term 'reasonable cause' is wide enough to imply that the 'apparent physical maturity' of a child partially constitutes a defence to a charge of sexual intercourse or performing indecent acts with a young person.

Whether an accused person had 'reasonable cause' to believe that the child was a person of age is a subjective inquiry into the accused's state of mind. It is highly likely that an accused person would almost always resort to this justification by alleging that their state of mind reasonably concluded that the maturity of the child victim matched that of a person above the age of 18 years, despite having known that the person concerned was below 18 years. These stereotypical messages have spilled over to the amendments of the Code even if the age of consent has been legislatively raised to 18 years. Accordingly, adult sexual predators may still allege that they thought the child had attained majority status. Ultimately, the Court should have given adequate guidance to the legislature to ensure that, in amending the Code, the physical appearance of a child cannot at all be a defence to a charge of rape, (aggravated) indecent assault and other sexual offences. It offers little to no consolation that the defence of having a 'reasonable cause' to believe that the child was a major 'may be refuted by the prosecutor adducing evidence to the effect that the accused person knew or had reasonable cause to believe that the child concerned was under the age of eighteen

63 UNFPA *Harmonising the legal environment for adolescent sexual and reproductive health and rights: A review of 23 countries in East and Southern Africa* (2017) 8.
64 See the Criminal Laws Amendment (Protection of Children and Young Persons) Act, 2024.
65 See the new sec 70(1) of the Code.
66 See the new sec 70(5) of the Code.

years at the time of the alleged crime'.[67] This is partly because, in most cases, it may be hard for the prosecutor to adduce evidence to prove the accused's knowledge that the child had not reached the age of majority.

4.3 Failure to give guidelines on the regulation of sexual activities between adolescents?

It was incorrect for the Court to hold that the case had nothing to do with the age at which adolescents should be granted legal capacity to explore their sexuality with their peers. On numerous occasions, the Court insisted that 'the application before the court did not require the court to make a finding on the appropriate age at which children should be allowed to have their first sexual experiences. The application challenged the constitutional validity of the law that seeks to protect children from sexual exploitation.'[68] A MASC should still regulate the age ranges within which children may engage in sex without assuming criminal responsibility for their conduct. For instance, a 'consensual' sexual encounter between a 17 year-old and a 10 year-old is naturally abusive due to the differences in the ages and levels of maturity of the children involved. A well thought-out MASC helps in giving clarity on how sexual relationships between adolescents are regulated.

More outrageously, the Court found that under Zimbabwean law, 'children under the age of 16 years are not automatically prosecuted for having sexual intercourse with a peer, [therefore] the finding by the court *a quo* that affording protection to all children from sexual exploitation will lead to children being criminalised as sex offenders is somewhat startling'.[69] This finding is questionable for multiple reasons. First, only children below the age of seven years are irrefutably presumed to lack the capacity to commit crimes.[70] Second, children aged seven years or older, but below the age of 14 years, are presumed to lack criminal capacity unless it is shown beyond reasonable doubt that they had such capacity at the material time.[71] Third, regarding children aged 14 years or older, there is no presumption of lack of capacity to commit criminal offences. They are 'automatically' fully criminally responsible for their conduct

67 As above.
68 *Kawenda* (n 16) 7-8.
69 *Kawenda* (n 16) 7. The Court went on to hold, erroneously in my view, that the ruling of the court *a quo* 'is not based on a correct interpretation of the law and, more importantly, it was not directly relevant to the issue that was before the court'.
70 Sec 6 of the Code.
71 Sec 7 of the Code.

and should 'behave in the way that a reasonable person would have behaved in the circumstances of the crime'.[72] In light of these provisions, children over the age of 14 are 'automatically' prosecuted for sexual offences with other children, especially those substantially younger than them. Accordingly, there is nothing 'startling' about the finding that a high MASC leads to the criminalisation of children below that MASC if it is not coupled with an exception to accommodate consensual, non-exploitative sexual intercourse between adolescents within permissible age ranges.

In its decision the Court glossed over the regulation of consensual sex between children and did not explain what the extension of the MASC to 18 years might mean for persons below that age. The Court did acknowledge that raising the MASC 'in such a way that it protects all children will have serious impact on the "Romeo and Juliet" relationships' but maintained that fear of that impact cannot derogate from the need to protect all children from sexual exploitation in obedience to the constitutional imperative in section 81(I)(e) of the Constitution. Child-upon-child sexual exploitation and abuse must be dealt with in accordance with a law that recognises the rights of all children as set out in the Constitution. This may entail the enactment of a comprehensive Children's Act.[73] These sweeping over-generalisations do not provide solid guidance to the legislature on what exactly needs to be done to comply with the Constitution in regulating consensual sex between adolescents.

While making attempts to protect children, especially girls, from intergenerational sexual abuse by adult male predators, the government should take reasonable legislative, administrative and other measures to ensure that children who engage in consensual sex are not criminalised.[74] Depending on their evolving capacities and whether they are close-in-age, adolescents have the right to engage in consensual sexual relationships that are not exploitative or abusive. This is an exception to state parties' duty to criminalise sexual conduct where a child below the MASC is involved. More importantly, the Court should have expressly held that Zimbabwe should decriminalise consensual peer-to-peer sexual conduct provided that the adolescents involved are both sufficiently mature and close in age. As noted by the African Children's Committee:[75]

> State parties should decriminalise consensual, non-abusive and non-exploitative sexual activities among child peers. Some states apply a

72 Sec 8 of the Code.
73 *Kawenda* (n 16) 26.
74 General Comment 7 (n 7) para 50.
75 As above.

> 'close-in-age' exception to age of consent provisions (sometimes known as the 'Romeo and Juliet defence') where one or both participants are under the age of consent. This exception is usually available as a defence to child sexual assault charges to avoid criminalising genuinely consensual sexual activity between young people who are close in age. This applies, for example, where one person is 16 years and the other is only a few years older, eg, 2-5 years, provided there is no relationship of trust, authority or dependency between the two people. Sexual activity between adolescents is not as such harmful, as long as both adolescents give informed consent and have access to sexual and reproductive information and services.

In South Africa, for instance, the age of sexual consent is set at 16 years for boys and girls. In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[76] the Constitutional Court of South Africa declared the criminalisation of consensual sexual activities between adolescents unconstitutional.[77] Before that, the Sexual Offences Act required the reporting of sexual activities between adolescents by any person who had knowledge thereof. If the adolescents were found guilty, their names would be written in the National Register of Sex Offenders. Apart from recognising children's evolving capacities, the Court reiterated the need to avoid treating children as criminals when they begin to explore their sexuality and to offer them appropriate guidance in the exercise of sexuality-related rights.[78]

After the Court's decision in *Teddy Bear Clinic*, children are no longer criminally charged for having consensual sex when they are between 12 and 16 years of age. Further, it is no longer criminal for a child under 16 years to have sex with a partner less than two years older than them. Further, the law confers on adolescents the right of access to SRHR information and services from the age of 12 years and puts the minimum age of marriage at 18 years, sadly with an exception for girls. These provisions entrench a close-in-age exception to the MASC to ensure that sexual acts between two children who both are between 12 and 16 years of age, or where one is under 16 years and the other is less than two years older, are not criminalised.[79] They ensure that adolescents are not unnecessarily brought into the criminal justice system for taking part in what essentially amounts to sexual experimentation. As noted by the African Children's Committee, sexual activities between adolescents are not harmful as

76 2014 (2) SA 168 (CC).
77 Secs 15(1)-(2) of the Sexual Offences and Related Matters Act 32 of 2007 (Sexual Offences Act) criminalised consensual sexual activities between adolescents.
78 See *Teddy Bear Clinic* (n 76) paras 2 & 44-47.
79 See *Child marriage and the law: Technical note for the global programme to end child marriage* (2020) 10.

such, provided both of them are close in age, give informed consent and have access to SRHR information and services.[80]

The criminalisation of consensual sexual intercourse between adolescents may constitute an absolute denial of their evolving capacities and their normative development in the domain of SRHR. In *Mudzuru* the Court acknowledged that there is an urgent need, while respecting children's sexual rights, especially as between age mates as opposed to inter-generational sexual relationships, to extend to all under-18s who engage in consensual sex with peers, relative levels of protection from prosecution.[81] This should be done with the 'necessary adjustments and exceptions', thereby ensuring the accountability of older adolescents who sexually abuse young children. In *Kawenda* the Court should have made similar findings, with a clearly-articulated close-in-age defence, to ensure that peer-to-peer sexual intercourse between children is not criminalised.

Leaving the matter open ensures that the issue remains unregulated and may drive the sexual abuse and exploitation of young children by their peers. In this respect, both the African Children's Committee and the CRC Committee have emphasised that if children are involved in perpetrating sexual abuse and exploitation, the law should differentiate their level of responsibility, with particular emphasis on the reintegrative and rehabilitative potential of children.[82] In the process, legal systems and governments should – where appropriate – avoid bringing children into criminal justice systems, especially given children's rehabilitative potential. This approach places the focus on the use of specialised systems and structures to divert child offenders to therapeutic services in appropriate cases and prevent criminal records or the inclusion of child offenders in registers.[83] All these issues could have been addressed by the Court in its attempt to curb the sexual abuse of children by other children. Fortunately, after the Court's decision in *Kawenda,* Parliament swiftly intervened and adopted legislative provisions to prevent the prosecution of sexually-active adolescents who engage in consensual sex. Adopted in 2024, the new section 70(3) of the Criminal Law Code provides:

> Where sexual intercourse or an indecent act takes place between (a) children between whom the difference in age is not more than three years, or (b) a child and an adult who is not more than three years older than the child, neither of them shall be charged with sexual intercourse or performing an indecent act with a child unless the Prosecutor-

80 General Comment 7 (n 7) para 53.
81 *Mudzuru* (n 18).
82 General Comment 7 (n 7) para 134.
83 As above; CRC Guidelines OPSC paras 71 & 73.

> General, after considering a report by a probation officer appointed in terms of the Children's Act [Chapter 5:06], has authorised the charge.

These transformative legislative provisions introduce the close-in-age defence and decriminalise consensual, non-exploitative sex between adolescents. Sadly, the new legal framework still leaves open some wide room for the Prosecutor-General to authorise that children be charged for consensual, non-exploitative sex after considering a report by a probation officer. This exception to the general rule unjustifiably violates the country's constitutional and international obligations to avoid charging children for what essentially constitutes sexual experimentation.

4.4 Illogical analysis on the MASC and adolescents' sexual and reproductive health

Surprisingly, the Court did not fully address the impact a lift of the MASC to 18 years may potentially have on sexually-active adolescents. As noted by the court *a quo*, raising the MASC to 18 years to afford protection to all children potentially creates barriers for sexually-active adolescents in accessing SRHR information and services.[84] If access to SRHR information and services is criminalised for children below the MASC, it may also prevent care givers and institutions from responding to adolescents' SRHR issues for fear of prosecution. Given that evidence indicates that adolescents start exploring their sexuality and engaging in consensual sexual activity with their peers earlier than is generally thought,[85] it was important for the Court to clearly recommend that the proposed amendment to the Code explicitly allows children of particular ages access to SRHR information and services, including through comprehensive sexuality education, among others.[86]

The criminalisation of consensual sexual activities between adolescents does not necessarily prevent them from engaging in such activities, but merely drives such activities underground. This may serve to prevent sexually-active adolescents from accessing education, and SRHR information and services, thereby driving high unwanted pregnancies, unsafe abortion and sexually-transmitted

84 For a summary of the holding of the court *a quo* in this respect, see *Kawenda* (n 16) 7-8.

85 See, generally, R Tallarico and others 'Age of consent: A case for harmonising laws and policies to advance, promote and protect adolescents' sexual and reproductive health rights' (2021) 25 *African Journal on Reproductive Rights* 94.

86 In South Africa there is no minimum age at which children can have access to sexual and reproductive health information and services. See sec 13(1)(a) of the Children's Act.

diseases (STDs).[87] It was incumbent upon the Court to require the government to establish informal, child-friendly strategies to ensure that sexually-active adolescents have access to SRHR information and services as guaranteed by law. Similarly, the Court should have also held that mandatory reporting systems should not be applied in a manner that drives consensual sexual activities between adolescents underground as this is detrimental to their rights to SRHR information and services. To its credit, the Court acknowledged that there is some confusion around the MASC and the child's right to reproductive health care services. In the words of the Court:[88]

> The paradox is that whilst it is highly desirable that children should stay away from sex until they are adults, the lived reality may be otherwise. Children who have sexual relations still have the right to health care services notwithstanding their youthfulness. Efforts to accommodate their health care services needs must be scaled up [the same way] laws to protect them from sexual exploitation are made to comply with the Constitution. Health care providers need to be empowered by the law to provide sexual and reproductive health services to children in need of such services without regarding them as being too young to need such services. This is an issue of law development generally with which I will not further burden this judgment.

While acknowledging children's rights to healthcare services, Makarau JCC did not make a clear statement on the age at which children should have access to SRHR information and services. Some textual references to the right to reproductive health care under the Constitution[89] would have provided the legal basis for the Court to enunciate child-specific rules on access to SRHR information and services, without necessarily having to harmonise the MASC to the age of access to SRHR information and services. This is the approach codified in South Africa and other countries where the age of access to SRHR information and services is 12 years (roughly meant to coincide with the age of puberty) and the MASC with adults is pegged at 16 years of age.[90] Further, the Children's Act confers on every child the right to have access to information on, among others, sexuality and reproduction; without any age-based restrictions.[91]

It is patently clear that the Court missed the opportunity to categorically hold that children's right to healthcare services is not just an issue of law development, but one of interpretation of the

87 General Comment 7 (n 7) para 51.
88 *Kawenda* (n 16) 26.
89 On the child's right to health care, see secs 76(1)-(3) & 81(1)(f) of the Constitution.
90 See, generally, secs 10, 129(1)-(10), 130(2), 132(1)-(2), 133(2) & 142(2)-(3) of the Children's Act 38 of 2005.
91 See sec 13(1)(a) of the South African Children's Act.

available legal provisions, to which the Court never referred. Section 76(1) of the Constitution provides that every citizen and permanent resident has the right to have access to basic health care, including reproductive healthcare services.[92] These provisions are given effect by the Public Health Act.[93] Under section 37(1)(vi) thereof, healthcare practitioners have the duty to ensure, among others, that 'appropriate, adequate and comprehensive information is disseminated on the health services for which they are responsible'. This is supplemented by other provisions that bind healthcare practitioners to inform a user, including a child, of the range of diagnostic procedures and treatment options generally available to the user; the benefits, risks, costs and consequences generally associated with each option; and the user's right to refuse healthcare services and explain the implications, risks, and obligations of such refusal.[94] These provisions demonstrate that the law is already sufficiently developed to require healthcare practitioners to inform adolescents of a particular age – which the Court should have stipulated – of the range of SRHR services available to them even before they reach the legislative MASC. Accordingly, such practitioners are already legally empowered to provide SRHR information and services to adolescents 'in need of such information and services without regarding them as being too young to need such services'.

5 Conclusion and way forward

In conclusion, it is beyond doubt that the Court's decision is both a landmark and a missed opportunity. Its legacy is 'mixed' and 'polarising', as the Court made findings that were progressive but left other more pressing issues unresolved. First, it is a landmark because it categorically declares that the Constitution protects all, not some, children from sexual exploitation, and that the Code, therefore, is unconstitutional as it leaves outside the protective reach of the law children aged between 16 and 18 years. Equally important was the finding that all children are entitled to equal protection and benefit of the law without discrimination based on age, gender and other prohibited grounds. By declaring that all under-18s lack the legal and mental capacity to consent to sexual intercourse with adults, the judgment breaks new ground in domestic child law and sets normative standards from which many countries in Africa and

92 See also sec 61 of the Constitution, which provides that every person has a right of access to information, which obviously includes SRHRs information. In the case of a child, the information must be age-appropriate and consistent with their level of maturity.
93 Ch 15:17 Act 11 of 2018.
94 See secs 34(1)(b)-(d) of the Public Health Act.

beyond may draw inspiration. Further, the Court deserves credit for holding that the legislative limitation of the right to be protected from sexual exploitation is not constitutionally justifiable in a democratic society, because this eliminates all possibilities for arguing that sexual intercourse with a minor is not necessarily offensive or exploitative in certain contexts.

Perhaps one of the compelling findings of the Court relates to the abolition of the 'marital defence' to a charge of sexual intercourse or committing indecent acts with a young person as provided for in the Code. This defence allows an adult who is 'married' to a child to avoid being charged with these offences. Makarau JCC, for the Court, was on point in holding that the accused's 'married-to-the-child' defence created fertile ground for the sexual exploitation of children regardless of their ages. To 'give life' to the ground-breaking findings of the Court, Parliament has amended the Code in a bid to harmonise it with the constitutional command to protect all children from sexual exploitation and abuse, including by legislatively lifting the MASC to the age of 18 years.

Regardless of the encouraging findings referred to above, *Kawenda* will be recorded as one of the missed opportunities for the Court to address the sexual abuse of children in a comprehensive manner. It was a dereliction of duty for the Court not to identify, declare unconstitutional and set aside all provisions stipulating that children aged between 12 and 14 years have the legal capacity to give consent to sexual encounters with adults. Accordingly, the Court could not possibly have been concerned with children aged between 16 and 18 years without deciding that all under-16s irrefutably lack the capacity to consent to sexual intercourse with adults. Compared to over-16s, this category of children even needs more protection due to their young ages, immaturity and vulnerability. The exception entrenched in the Code perpetuates the sexual exploitation of children as it allows perpetrators to plead minor offences that attract lesser sentences than those prescribed for serious offences such as rape and aggravated indecent assault. However, it is very refreshing to note that the drafters of the Criminal Laws Amendment Act, 2024 noticed this omission and ensured that the new section 70 of the Code applies to all children aged between 12 and 18 years.[95]

In addition, the Court should have held that an accused's subjective belief that the child was above the MASC is not a defence to sexual

95 See sec 4 of the Criminal Laws Amendment Act, 2024 and the new sec 70(1) of the Criminal Law Code.

abuse charges. To address this challenge for future purposes, Parliament should make it clear that the physical appearance of a child should neither be used as an indicator of maturity nor as a partial defence to sexual offence charges. Due to lack of guidance in the judgment, the legislature re-enacted the principle that it is a defence for an accused person to satisfy the court that they had reasonable cause to believe that the child concerned was of or over the age of 18 years at the time of the alleged crime.[96] This provision gives accused persons an unreasonable defence – based on subjective considerations – that is likely to lengthen court processes and delay access to justice for victims of coercive sexual conduct.

In my view, the Court's refusal to set guidelines on how to govern consensual sexual intercourse between adolescents is one of the shocking shortcomings of the judgment. This article has generally argued against the criminalisation of children who engage in consensual, non-exploitative sex with their peers, especially if the children involved are close in age. If one of the children involved is charged due to a big age gap between them and the child victim, the accused child should be dealt with through diversionary and restorative justice mechanisms instead of highly punitive ones. This approach to juvenile offending dominates the provisions and philosophy behind the Criminal Laws Amendment Act, 2024.[97] More importantly, this reasoning foresees instances where a young adult aged 18 or 19 years is not charged for having consensual, non-exploitative sexual intercourse with a 16 or 17 year-old child. This is where the close-in-age defence becomes very important in ensuring that consensual sexual relationships between children are not criminalised 'overnight' when one of them becomes a major at 18 years of age. As noted above, the Criminal Laws Amendment Act now stipulates that where sexual intercourse or an indecent act takes place between a child or any person who is not more than three years older than the child, such conduct is not criminalised.[98] This provision plugs some of the gaps left wide open by the Court's decision in *Kawenda.*

In addition, the Court should have stipulated the ideal age at which children should have access to SRHR information and services as part of giving meaning to the child's constitutional right to reproductive health care. To avoid prejudicing or criminalising sexually-active adolescents, the age of access to SRHR information and services does not have to coincide with the MASC, but with the age of puberty,

96 See the new sec 70(5) of the Criminal Law Code.
97 Child Justice Bill, BB 11, 2021.
98 See the new sec 70(2) of the Criminal Law Code.

which is thought to be around 12 years in many jurisdictions. Finally, legislative regimes designed to reduce and prevent CSEA are largely inadequate in the absence of sufficient social protection support systems; changes in socio-cultural attitudes; adequate capacity and commitment from government; skilled personnel; extensive engagement of the civil society sector and fully-equipped child-friendly, gender sensitive, age-appropriate and disability-inclusive structures and institutions. In the Zimbabwean context, existing laws should criminalise CSEA, especially that which is perpetrated by adult sexual predators. However, the existence of strong legal and policy frameworks is not effective in addressing CSEA unless it is backed by full implementation and enforcement of such frameworks.[99] Without adequate institutional and financial support, sexually-abused children run out of options and often return to abusive relationships and environments, with or without the knowledge of authorities.

99 NB Ngondi 'Child protection in Tanzania: A dream or nightmare?' (2015) 55 *Children and Youth Services Review* 10-17, demonstrating that sexual exploitation had increased after the adoption of relevant policies.