

The Republic of Uganda
In The High Court Of Uganda, At Kampala
Miscellaneous Cause No.163 of 2010

1. Kasha Jacqueline 2. David Kato Kisuule 3. Onziema Patience	}		Applicants
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Versus

1. Rolling Stone Ltd. 2. Giles Muhame	}		Respondents
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Before: Hon. Mr. Justice V.F. Musoke-Kibuuka

RULING

INTRODUCTION

This motion was presented under Article 50(1) and (2), of the Constitution and rule 7, of the Judicature (Fundamental Rights And Freedoms) (Enforcement Procedure) Rules, 2008. It was also presented under Order 41 rules 2 and 9, of the Civil Procedure Rules.

The applicants seek the following reliefs:

- a) a permanent injunction restraining the respondents from publishing injurious information against the respondent;
- b) an order awarding compensation (general damages) to the respondents for pain and mental anguish caused to the applicants; and
- c) an order awarding the costs of this application to the applicants.

The first respondent, Kasha Jacqueline, swore the affidavit in support of the motion. Mr. Giles Muhame, the second respondent and Managing Director of the first respondent deposed the affidavit in reply.

At the hearing of the motion, the applicants were represented by learned counsel, Dr. Henry Onoria and Mr. John Francis Onyango. Mr. Akankwasa Edward appeared for the respondents.

FACTS:

The respondents are publishers of a newspaper called **"Rolling Stone."** The Newspaper labels itself, **"Uganda's Leading Investigative Political Newspaper."**

It is not in dispute that on 2nd October, 2010, the respondent's publication carried a story in the part of the newspaper that was labeled as **"SCANDAL"**

The heading to the story was written in the following fashion:

"HANG THEM; THEY ARE AFTER OUR KIDS!!!!!"

Pictures of Uganda's 100 Homos Leak."

Some extracts of the story read:

"A 12 months clandestine investigation into the dark world of homosexuality and lesbianism in the country has led to the full exposure of the facial appearances of leading gays in this

nation. The mighty Rolling Stone is glad to reveal some of the most horrible secrets in community, which is bent on recruiting at least one million members by 2012.

Threateningly, gays are after very young kids, who are easily brain washed towards bisexual orientation.

Our investigators have secured 100 pictures and more are coming in, but for space purposes we shall publish them in a four-part series.

The leaked pictures of Uganda's top homosexuals and lesbians have rendered calls for the strengthening of the war against the rampage that threatens the future of our generation by hanging gays.

Unless government takes a bold step by hanging dozens of homosexuals, the vice will continue eating up the moral fabric and culture of our great nation. "unless a strong action is taken, the country will soon go to the dogs, said a radical church leader who preferred anonymity."

On the first applicant, the paper wrote inter alia,

"at the end of every month, gays usually gather the homes of gay organization leaders especially at Kasha Jacqueline's mansion in Makindye. Kasha is said to be Naon Ruzindana's girlfriend. At Kasha's place, wine is popped and sometimes

gays engage in orgies. Kasha usually hangs out at Effendy's bar in Kampala."

Regarding the third applicant, the paper, inter alia, stated;

This newspaper also discovered that most secondary schools and tertiary institutions have been penetrated by gay activists to recruit kids. One Stosh Sheilla, a resident of Kisaasi in Kampala and Patience Onzima, are said to be behind this sinful project."

Learned counsel for the applicants, Dr. Onoria, relying upon averments in the affidavits in the affidavit of the first applicant made extensive submissions. He submitted that the story exposes the applicants to possible violence, ridicule, hatred and mob justice would constitute a threat to violation of the right of respect to human dignity and protection from inhuman treatment entrenched in Article 24, of the Constitution.

Dr. Onoria submitted further that the call for homosexuals or persons perceived to be homosexuals to be hanged, coupled with the threat to violence and mob justice amounted to a threat of death without due process of law. It was, therefore, a threat to the right to life entrenched under Article 22, of the Constitution. Dr. Onoria submitted that the applicants felt

that the call to hang them was a call for arbitrary actions by the general public.

Thirdly, Dr. Onoria also submitted that the story was affront to the applicants right to liberty as well as the right to movement under Articles 23 and 29(2), of the Constitution.

Lastly, learned counsel submitted that the story constituted a threat to the applicant's right to privacy of both the person and the applicants' homes, under Article 27, of the Constitution.

Counsel concluded by submitting that there was uncontroverted evidence, by way of affidavit, of pointing to both infringement and threats to infringe the rights of the applicants. He prayed that court finds that the applicants are entitled to the reliefs they seek from this honourable court.

On the other hand, learned counsel Mr. Akankwasa, representing the respondents, apposed the motion. He submitted that the applicants were not entitled to the reliefs sought through the motion because:

- relying upon Annextures B1 and B2 to the affidavit in reply by Mr. Giles Muhame, the applicants themselves had already exposed themselves on the internet as homosexuals. Their right to privacy

could not, therefore, be said to have been breached or threatened to be breached.

- based upon the voluntary appearance in public by the applicant as homosexual activists, their rights could not be said to be infringed by the publication by the respondents.
- the applicants had not shown any evidence to prove that the publication had exposed the applicants to any danger with regard to their lives. They were merely speculating.
- no evidence had been shown to prove that the applicant's right to movement had been infringed because there was no evidence showing that the story had incited any public violence leading the applicants to restricted circulation or to hiding.
- relying upon the affidavit by Paul Kagaba, Counsel finally submitted that homosexuality was a criminal offence under section 145 of the Penal Code Act, and that since the applicants by their conduct, as demonstrated in the Annextures to Giles Muhame's affidavit, admit being homosexuals they had not come to court with clean hands and equity would deny them the reliefs sought by them through this motion.

Court intends to restrict the determination of this motion to only two rights. That is the right to life under Article 24 of the Constitution and the right to privacy of the person and the home under Article 27, of the Constitution.

Court must state, broadly, that it duly agrees with learned counsel, Dr. Onoria, that his motion is neither about homosexuality as such nor is it an abstract application, as learned for the respondents seems to suggest. It seems to me that what is in dispute is whether the publication infringed the rights of the applicants or threatened to do so.

Secondly, and in that regard, it is quite important to note that the jurisdiction vested in a competent court, under Article 50(1), of the Constitution, is not about infringed rights alone. That jurisdiction is duo in nature. It extends to any person whose fundamental rights or other rights or freedoms have been infringed in the first place. In the second place, the jurisdiction also covers persons whose fundamental rights or other rights or freedoms are threatened to be infringed. In either case, a court of competent jurisdiction may give appropriate redress to the aggrieved applicant. The redress may include compensation.

In that regard, therefore, the submission by learned counsel, Mr. Akankwasa which appears to cut across the board, to the effect that the applicants have provided no evidence either of actual violence against their persons or to the

privacy to their homes, does not appear to be well founded. Relief may be obtained by an applicant, in this constitutional litigation, under Article 50(1) where court is satisfied that the right or freedom in question is threatened to be infringed by the action of the respondent.

With regard to the right to human dignity and protection from inhuman treatment, under Article 24, of the Constitution, the central issue is whether the publication threatened or tended to threaten the human dignity of gay persons and in particular, the applicants. Court agrees with the persuasive decision in **Hugh Owen Vs. Saskatchewan Human Rights Commission 2002, SKQB.506** that the court must use an objective test. The effect of that approach being that the intention of the respondents in publishing the identities of the applicants and their homes and making the calls for hanging them, is left out as being irrelevant. Upon that objective test, court would easily conclude that by publishing the identities of the applicants and exposing their homes coupled with the explicit call to hang them because **"they are after our kids"**, the respondents extracted the applicants from the other members of the community who are regarded as worthy, in equal measure, of human dignity and who ought to be treated as worthy of dignity and respect. Clearly the call to hang gays in dozens tends to tremendously threaten their right to human dignity. Death is the ultimate end of all that is known worldly to be good. If a person is only worthy of death, and

arbitrarily, then that person's human dignity is placed at the lowest ebb. It is threatened to be abused or infringed..

With regard to the right to privacy of the person and home, under Article 27, of the Constitution, court has no doubt, again using the objective test, that the exposure, of the identities of the persons and homes of the applicants for the purposes of fighting gayism and the activities of gays, as can easily be seen from the general outlook of the impugned publication, threaten the rights of the applicants to privacy of the person and their homes. They are entitled to that right.

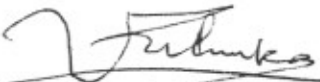
It must be noted that this application is not about homosexuality per se. it is about fundamental rights and freedoms. However, court not agrees that section 145, of the Penal Code Act renders every person who is gay a criminal under that section of the Penal Code Act. The scope of section 145 is narrower than gayism generally. One has to commit an act prohibited under section 145 in order to be regarded a criminal.

Court would, therefore, find that the impugned publication threatened the rights of the applicants to respect for human dignity and protection from inhuman treatment and the right to privacy of the person and home. Court would, upon that account issue the injunction sought by the applicants under

the motion, restraining the respondents, their servants and agents, from any further publications of the identities of the persons and homes of the applicants and homosexuals generally.

Regarding the prayer for an order of compensation, the authorities relied upon by the applicants, i.e. Victor Juliet Mukasa and Yvonne Oyo Vs Attorney General Miscellaneous Cause No.24/06, Francise Tumwekwasize And Others Vs Attorney General HC Miscellaneous Cause No.0036 of 2009 and Ronald Reagan Okumu & Others Vs. Attorney General HCMA No.63/2002, there were actual infringements of the rights complained of by the applicants in all those case. The awards for compensation made are, therefore, not good guides with regard to this application where there were mere threats to the rights in question.

Court accordingly awards shs.1,500,000/= to each applicant as compensation. In addition, the applicant shall recover their costs from the respondents.


V.F. Musoke Kibuuka

Judge

30.12.2010