

**IN THE HIGH COURT OF LESOTHO**

**CONSTITUTIONAL CASE/14/2017**

**HELD AT MASERU**

*In The Matter Between:*

***KOALI MOSHOESHOE***

***1<sup>ST</sup> APPLICANT***

***LESOTHO SOCIETY OF MENTALLY  
HANDICAPPED PERSON, PARENTS  
AND FAMILIES***

***2<sup>ND</sup> APPLICANT***

***LESOTHO NATIONAL FEDERATION  
OF ORGANISATION OF THE DISABLED***

***3<sup>RD</sup> APPLICANT***

*and*

***DIRECTOR OF PUBLIC PROSECUTIONS***

***1<sup>ST</sup> RESPONDENT***

***MINISTRY OF LAW, HUMAN RIGHTS AND  
CONSTITUTIONAL AFFAIRS***

***2<sup>ND</sup> RESPONDENT***

***ATTORNEY GENERAL***

***3<sup>RD</sup> RESPONDENT***

**THE JUDGMENT**

***CORAM: Acting Chief Justice M. Mahase***

***Justice S.N. Peete***

***Justice L. Chaka - Makhooane***

*Date of Hearing: 28<sup>th</sup> March, 2018*

*(Ex Tempore)*

*Date of Judgment: 16<sup>th</sup> May, 2019*

**Annotations:**

**Statutes**

*Constitution of Lesotho 1993*

*Universal Declaration of Human Rights 1948*

*Criminal Procedure and Evidence Act No.9 of 1981*

**Cases**

**Lesotho**

*Peta v Minister of Law Constitutional Affair & Human Rights – CC/1/2016*

**South Africa**

*Both v Els and Others – 2010 (2) SA 622 (CC)*

**Books**

*Hoffam and Zeffert – South African Law of Evidence – Fourth Edition 373*

***The Court:***

- [1] On the 28<sup>th</sup> March, 2018, this Court empanelled as a Constitutional Court handed down an “*ex tempore*” judgment. It read as follows:-

***“EX TEMPORE JUDGMENT”***

**Having heard *Advocate Dr. Shale* - for applicant - and *Advocate Sekati* for respondents and having perused papers filed of record and having read their respective Heads of Arguments.**

**It is ordered that:-**

- (a) Section 219 of the Criminal Procedure and Evidence Act No.9 of 1981 be and is hereby declared unconstitutional as being inconsistent with Section 18 and 19 of the Constitutional of Lesotho (Section 2).***
- (b) Their unconstitutionality has been conceded by Advocate Sekati or respondents – and rightly so.***
- (c) The Director of Public Prosecutions exercise his/her powers under Section 5 of Criminal Procedure and Evidence Act – No.9 1981 to prosecute the suspected perpetrator(s).***
- (d) No order as to costs.***
- (e) A fully reasoned judgment shall be handed down by this Court as soon as practically possible.”***

*The following are the reasons:*

- [2]** Although we had indicated that full reasons would soon be filed later, it was only when the *Lesotho National Federation of Organization of the*

*Disabled (LNFOD)* wrote a letter on the 5<sup>th</sup> March 2019 requesting these reasons and justifiably so. Our delay in giving the same is much regretted.

[3] In their *Notice of Constitutional Motion* filed in the High Court on 21 June 2018, the Applicants prayed for relief couched thus:

- “5.1. *That Section 219 of the Criminal Procedure and Evidence Act 1981 be declared inconsistent with Section 18 and 19 of the Constitution of Lesotho and therefore invalid.*
2. *That the decision of the 1<sup>st</sup> Respondent to decline to persecute the case in which the Koali Moshoeshoe is a victim of a sexual offence be declared inconsistent with Section 18 and 19 of the Constitution of Lesotho and therefore invalid;*
3. *Costs of suite in the event of an unsuccessful opposition to the application;*
4. *Further and/or alternative relief.”*

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### *Factual Matrix*

[4] In his affidavit, *KOALI MOSHOESHOE*, claim he was sexually abused by one woman *Hlomohang Mokebisa*. She states:

- “5.1. *The facts that precipitated the institution of this application are in a nutshell as follows: Sometime in august 2016, I was sent by my mother. ‘Makoali Moshoeshoe, to deliver amount of M300.00 (Three Hundred Maloti) to one “Malineo at our village in Maqhaka. On the way, I passed by a house of one Hlomohang Mokebisa. She invited me into her house and offered me soft porridge (motoho). After eating she directed me to sit on her bed and she started undressing me, I then asked her what she was doing and she said she wanted to sleep with*

*me. I told her that I did not want to but she forcefully, took of my clothes and had sexual intercourse with me without my consent. When she was done, she let me go.”*

- [5] *Dr. Shale* contends in the main that the fact that the prosecution of *Hlomohang Mokebisa* has been declined upon the sole ground that he, the Applicant has been “*deemed incompetent*” to give evidence and testify against *Hlomohang Mokebisa* upon the ground that he had been declared incompetent under *Section 219* of the *Criminal Procedure and Evidence (CPE) Act No.9 of 1981*. It reads:

*Incompetency from insanity or intoxication*

- [6] “*219. No person appearing or proved to be afflicted with idiocy, lunacy or inability or labouring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.*”

Preceding this section is *Section 218* of *Criminal Procedure Evidence Act* which in turn reads:

*“It shall be competent for the court in which any criminal case is pending or, in the case of a preparatory examination, the magistrate, to decide upon all questions concerning the competency or compellability of any witness to give evidence.”<sup>1</sup>*

- [7] In the law of evidence competence relates to the ability or capacity of a person to give evidence in court proceedings.

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<sup>1</sup> *Hoffman and Zeffert – The South African Law of Evidence - Fourth Ed (1988) pages 373*

It is the essential constitutionality of these two sections that is at issue.

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[8] The *Constitution of Lesotho 1993* is no doubt the supreme law of the land and *Section 2* thereof declares:

“2. *This Constitution is the Supreme Law of Lesotho and if any other law is insistent with this Constitution, that law shall, to the extent of the inconsistency, be void.*”

[9] *Section 19* of the *Constitution of Lesotho 1993* reads:

“*Right to equality before the law and the equal protection of the law and the equal protection of the law.*”

19. *Every person shall be entitled to equality before the law and to the equal protection of the law.*<sup>2</sup>

[10] The ethos of “*fair trial*” not only affects the accused appearing before court but also to the victims of crime committed and to the witnesses who can provide evidence to the court of law in order that the court can afford them a fair hearing within a reasonable time before an impartial court of law.

[11] Unique to this case, is the fact that the prosecution came to a decision that the Applicant was incompetent to give evidence against *Hlomohang Mokebisa* under the *Sexual Offences Act 2003*. *Section 218* seemingly vests the power to determine the competency of a witness upon the trial

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<sup>2</sup> See also section 33 of the Constitution on disabled persons

court. In practice, the court may order the witness to be observed by a competent psychiatrist or doctor.

[12] What irks this court is the language in which *Section 219* of the *Criminal Procedure and Evidence Act* is couched and one which antithetical to *Section 2, 12, 18, and 19* of the Constitution. This section is totally inconsistent with rationale of the *Constitution of Lesotho* and must be – as we hereby do – declared as inconsistent with the Constitution.

[13] Decency and respect to human dignity aside, words like “*afflicted*”, “*lunacy*” “*imbecility*” are not pleasing to any reasonable court or man. Indeed, although we are all deemed equal, our intelligence, brilliancy, stupidity, intellect are not the same.

[14] *Advocate Sekati* correctly conceded this inconsistency.

[15] *Section 18 (1) and (3)* read seriatim

*Freedom from discrimination*

“18(1). *Subject to the provisions of subsection (4) and (5) no law shall make any provision that is discriminatory either of itself or in this effect.*

(2) *Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*

- (3) *In this section, the expression “discriminatory” means affording different treatment of different person attributable wholly or mainly to their respective descriptions by race, colour, sex language, religion, political or other opinion, national or social origin, property, birth other status whereby person of one such description are subjected to disabilities or restrictions to which person of another such description and not made subject or are accorded privileges or advantage which are not accorded to person of another such description.”*

- [16] Lesotho is a constitutional democracy, a Christian country and we are all people of God – *“bohle re libopuo a tsa Molimo;”* and more than any other persons, the disabled persons deserve more protection of the law because they are not able to fully defend their own rights and freedoms and are liable to exploitation and abuse by the able.
- [17] As far as this Court is concerned, the Court is the *“Upper Guardian”* of all children and the disabled and it is its sacred and fundamental duty to guarantee that all persons appearing before courts of law as suspect, accused, victims or witness all have a fair hearing – otherwise justice stands imperilled and jeopardized.
- [18] The effect of *Section 219* of the *Criminal Procedure and Evidence Act* is to render a victim of abuse, exploitation, humiliation and exploitation to all kinds of vulnerable treatment the worst kinds being sexual, financial and through other obnoxious methods. The victims of all these are human beings and deserve all protection and equality under law. Even if the insolent or disrespectful words are removed from *Section 219*, the negative




effect to the disabled remains poignant and this is quite obnoxious and must be removed from our statute books.

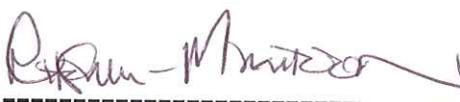
[19] This court therefore declares *Section 219* of the *Criminal Procedure and Evidence No. 9 of 1981* as inconsistent with the *Constitution of Lesotho 1993* and thus *null and void*.

[20] We thank both counsel for helpful submissions.

[21] No order as to costs.

Signed M. Mahase  
**Acting Chief Justice M. Mahase**

Signed   
**Justice S.N. Peete**

Signed   
**Justice L. Chaka – Makhoane**

**For Applicants: Dr. Shale**

**For Respondents: Advocate Sekati**