

# Sexual Orientation, Gender Identity, Gender Expression And Sex Characteristics And Justice

An African Comparative Law Casebook

March 2026



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An African Comparative Law Casebook

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The Casebook was researched and written by Ayo Segunro and edited by Kaajal Ramjathan-Keogh. Legal review was provided by Livio Zilli. Additional contributions were made by Khanyo Farise, Mulesa Lumina, Timothy Fish Hodgson. The ICJ is grateful to the Charles Mott Foundation and The Other Foundation, whose financial support made the Guide possible

Published in March 2026

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International Commission of Jurists  
Rue des Buis 3 P.O. Box 1740  
1211 Geneva 1  
Switzerland  
t: +41 22 979 38 00  
[www.icj.org](http://www.icj.org)

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Law Casebook*

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This publication was made possible with the support of the Other Foundation. The views expressed herein do not necessarily represent those of the Other Foundation.  
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# I. General Introduction

## **Background**

In 2011, the International Commission of Jurists (ICJ) published a comparative law casebook on national court decisions that addressed questions concerning sexual orientation, gender identity (SOGI) and justice.<sup>1</sup> This initial SOGI casebook consisted of 108 case summaries from 41 countries across a variety of regions, covering a span of more than forty years. It recognized that public interest litigation over human rights mattered to issues of SOGI and vice-versa, and that this type of litigation was being waged increasingly in domestic courts and not just before regional and global human rights bodies.

In the present collection of case summaries, we have focused on 20 cases from domestic courts in eleven countries in Africa. Each chapter in this Casebook begins with a general introduction to human rights questions relevant to sexual orientation and/or gender identity and/or gender expression and/or sex characteristics (SOGIESC), followed by summaries of legal cases that discuss those issues. Each case summary sets out the legal issue/s raised by the case and the relevant domestic law, and then summarizes the arguments, judicial reasoning and ultimate decision in the case.

## **Purpose**

This Casebook is intended for lawyers, judges and human rights activists - particularly those in the Global South - to better understand how to use the law to protect the human rights of sexual and gender minorities and to raise arguments in their domestic courts that are grounded in international and comparative law. The Casebook is also intended to promote public awareness and public interest litigation in defence of the human rights of sexual and gender minorities and to assist lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) individuals whose human rights have been violated to seek legal redress, including before the court.

## **Limitations**

Like the previous publication, this Casebook also has certain limitations. It does not contain every decision from Africa in recent years that touches on SOGIESC issues as these are not always: (i) comprehensive in their jurisprudence on human and constitutional rights; (ii) reported through verifiable sources; or (iii) conclusively determined in a domestic court. Also, it does not include cases from North African or Francophone jurisdictions. This Casebook reviews cases that have set out some comprehensive jurisprudence - both advantageous and disadvantageous to the progress of human rights issues relevant to SOGIESC in Africa - and to take account

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<sup>1</sup> [\*Sexual Orientation, Gender Identity, and Justice: A Comparative Law Casebook\*](#), International Commission of Jurists, 2011.

of the types of factual scenarios that are most relevant and the lines of reasoning that parties and judges have relied upon.

Because this area of law is changing so rapidly, the Casebook may not fully reflect the current state of the law as of the date of publication.

In the main, wherever possible, the text preserves the original wording of the decisions reviewed. For example, the acronym "LGBT" or the terms "homosexual", "sex per anum" and "sexual diversity" are used where the courts have done so; the Casebook also adopts the courts' use of personal pronouns in some of the transgender cases reviewed, even if such use did not reflect the preferred gender of the individuals concerned. The Casebook also reflects the original terms identifying the parties, such as "appellant", "defendant" and "plaintiff".

## II. Decriminalization

### **Introduction**

The issue of criminalization of consensual same-sex sexual conduct continues to be at the root of SOGIE advocacy across the world and particularly in the Global South. Even when unenforced, the existence of criminalizing laws contributes to the sustained lack of equitable access to justice for crimes against LGBTIQ+ persons; enables an exploitative environment to target visible community members and perpetuates structural challenges in accessing broader human rights guaranteed in a State's constitution to all. This section features summaries of cases that challenge laws criminalizing consensual same-sex sexual conduct across various jurisdictions. While not all of these cases resulted in a successful outcome, they are all critical in shaping the human rights landscape for LGBTIQ+ individuals and communities, and help in framing advocacy for a shift from punitive legislation towards more inclusive legal frameworks and societies. Although focusing on decriminalization, the issues in several of the cases also include the human rights violated by the existence of criminalizing laws.

1. ([MAHGB-000591 16](#)) (Botswana) *Letsweletse Motshidiemang v The Attorney-General 2019*

*The High Court of Botswana judicially decriminalized consensual same-sex sexual acts by finding sections 164(a) and (c), and 165 of the Penal Code, which relate to carnal knowledge (sodomy), to be unconstitutional and ordered the word "private" to be removed from section 167.*

## **Background**

The Applicant, a homosexual male, joined by the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) as *amicus curiae*, brought an action challenging the constitutionality of provisions of sections 164(a) and 164(c) and 165 of the Penal Code creating offences criminalizing anal sex between consenting adult men and "indecent" acts done in private among consenting adults on the grounds of discrimination, breach of constitutional rights to liberty, privacy, dignity of the human person, and indirect discrimination.

## **Legal issue**

- Whether laws criminalizing sexual activity between consenting adult men violated the Constitution of Botswana.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of Botswana, section 3 and 15 (non-discrimination), section 7 (dignity), and section 5 (right to personal liberty).

### *Comparative law*

- [Banana v The State, Supreme Court of Zimbabwe, 2000](#) - Where the Supreme Court was called upon to determine the constitutionality of sodomy laws on the ground of discrimination.
- [Grisworld v Connecticut, United States Supreme Court, 1965](#) - Striking down a statute forbidding married couples from using birth control, for violating privacy of the marital bedroom.
- [Lawrence v Texas, United States Supreme Court, 2003](#) - Where the court decriminalized sodomy for breaching the right to privacy.
- [Leung v Secretary for Justice, Hong Kong Court of Appeal, 2006](#) - Finding that a gender neutral provision can be discriminatory in effect due to its effect on gay men.
- [Minister of Home Affairs & Another v Fourie & Another, Constitutional Court of South Africa, 2005](#) - Emphasizing the importance of equality and non-discrimination in a democratic society.
- [National Coalition for Gay and Lesbian Equality v Minister of Justice, Constitutional Court of South Africa, 1999](#) - Decriminalizing sodomy laws in South Africa for being incompatible with the Constitution.

- [Navtej Singh Johar v Union of India, Ministry of Law and Justice, Supreme Court of India, 2016](#) - Where the Court struck down sodomy laws as unconstitutional for breaching fundamental rights.
- [Orozco v Attorney General of Belize, Supreme Court of Belize, 2016](#) - Finding unconstitutional laws criminalizing private consensual conduct between adults and consequently striking them down.
- [Vriend v Alberta, Supreme Court of Canada, 1998](#) - Where the Court expanded sex to include sexual orientation as a prohibited ground of discrimination.

#### *International law*

- [Norris v Ireland, European Court of Human Rights, 1988](#) - Finding that the sodomy laws of Ireland violated the right to privacy under the European Convention.
- [Toonen v Australia, United Nations Human Rights Committee, 1994](#) - Finding that the sodomy laws of Tasmania violated the rights to privacy and non-discrimination under the International Covenant on Civil and Political Rights (ICCPR).
- Universal Declaration of Human Rights, article 12 (Right to privacy)

### **Judicial reasoning**

*(Per Justice Leburu)*

The Court began by attempting a historical analysis of the origin of sodomy as a criminal offence and how it was imported into Botswana laws. The Court further broke down the grounds upon which a law can be rendered unconstitutional and the powers and duty on the Court to do so when it is called upon to perform this in justified cases.

The Court then delved into the merits of the case by examining the relevant sections in line with the various constitutional defects the Applicant had asserted. Beginning with the issue of vagueness, the Court determined that it was essential that laws be clear, precise and consistent. It held that, "As a starting point, the law maker, in crafting and enacting laws, must speak with irresistible clarity, lucidity and certainty. Such a public policy imperative is informed by the nature of law, which is an edict for societal regulation. For a subject to dance and fashion his conduct in sync with the law's normative repertoire, then the law must be clear and certain. Without clarity, precision and consistency, the law lacks predictability." The Court found that the provisions of the laws under scrutiny in the extant case were clearly defined and ascertainable and held that they were not vague.

Next, the Court considered if the provisions of the sodomy laws under scrutiny were unconstitutional in that they breached a right to privacy. The Court held that "privacy is essential to who we are as human beings. It gives a person space to be himself/herself without judgment. It allows persons to think freely without hindrance and is an important element of giving people personal autonomy and control over themselves and those who know what about them (*sic*)." It further held that the right to privacy "protects the liberty of people to make certain crucial decisions regarding

their well-being, without coercion, intimidation or interference, from any direction, be it governmental or otherwise." The Court found that the "laws impaired the Applicant's right to express his sexuality in private with his preferred adult partner", and that "the Applicant has a right to a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that it is consensual. There is no complainant/victim in that regard."

On the argument that the impugned laws breached the right to liberty, equality and dignity, the Court held that there is a need for the nation to respect diversity and plurality through the tolerance of minority views and opinion without trying to cajole people to become what they are not. "Personal autonomy on matters of sexual preference and choice must therefore be respected. Any criminalization of love or finding fulfilment in love dilutes compassion and tolerance. The Court further held that, "Sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important attribute of one's personality and identity; hence all and sundry are entitled to complete autonomy over the most intimate decisions relating to personal life, including choice of a partner. The right to liberty therefore encompasses the right to sexual autonomy." The Court found that by prohibiting anal penetration and criminalizing it, the law had effectively abridged "the Applicant's right to choose a sexual intimate partner", "the impugned provisions force him to engage in private sexual expression not according to his orientation, but according to statutory dictates. Without any equivocation, his liberty has been emasculated and abridged."

Furthermore, the Court found that the sodomy laws in view did not pass the dignity test. The position of the Court was that sections under review, "deny the Applicant the right to sexual expression in the only way available to him. Such denial and criminalization go to the core of his worth as a human being. Put differently, it violates his inherent dignity and self-worth. All human beings are born free and equal in dignity." The Court cited articles 1, 2 and 3 of the United Nations Universal Declaration of Human Rights to support the need for the laws to respect the right to dignity as a fundamental right belonging to every human by virtue of being human, a right that the State should not abrogate, and concluded on the issue that "by parity of reasoning and logic, the applicant's sexual orientation, lies at the heart of his fundamental right to dignity. It is his way of expressing his sexual feelings, by the only mode available to him. His dignity ought to be respected, unless lawfully restricted."

The Court reviewed the provisions further in the light of the right to non-discrimination guaranteed by section 15(1) of the Constitution of Botswana. The Court's position was that "sex" is a protected ground of discrimination and expanded "sex" to include "sexual orientation" by virtue of legislative precedent and judicial interpretation of articles 2 and 26 of the International Covenant on Civil and Political Rights (ICPPR), which Botswana ratified. The Court considered that a law that appears neutral and applicable to all might actually be discriminatory in that it targets only a category of people in its breach. "Denying the Applicant the right to sexual expression, in the only way natural and available to him, even if that way is denied to all, [it] remains discriminatory in effect, when heterosexuals are permitted the

right to sexual expression, in a way that is natural to them. Simply put, it is indirect discrimination founded upon sexual orientation. The impugned provisions render the Applicant a criminal, or an 'unapprehended felon', always on tenterhooks, waiting to be arrested."

The Court also reviewed the provisions in the light of public interest to the effect that "criminalizing consensual same sex in private, between adults is not in the public interest". It found that evidence was available that such criminalization disproportionately "impacts on the lives and dignity of LGBT persons. It perpetuates stigma and shame against homosexuals and renders them recluse and outcasts. There is no victim within consensual same sex intercourse *inter se* [among or between] adults."

The Court's decision made it clear that the impugned penal provisions oppressed a minority and then target and mark them for an innate attribute that they have no control over, and which they are singularly unable to change. The Court was of the view that consensual anal sex is only a variety of human sexuality, and that there was no compelling State interest to necessitate laws criminalizing such conduct. It held that, "the State has failed to single out the objective that is intended to be satisfied by the impugned provisions" and that, "the retention of the sodomy provisions in our Penal Code, imposes [an] unconstitutional burden on the Applicant's fundamental rights of privacy, dignity, liberty and equal protection of the law; taking into account that the Applicant's only available sexual avenue is per anus."

The Court drew on legal precedents, such as *Grisworld v Connecticut*, where the United States Supreme Court struck down a statute forbidding married couples from using birth control as a violation of the privacy of the marital bedroom; *Lawrence v Texas*, where the United States Supreme Court decriminalized sodomy for breaching the right to privacy; *Leung v Secretary for Justice*, where the Hong Kong court looked at the age for consent for gay men; and *Navteev Singh Johar v Union of India Ministry of Law and Justice*, where the Supreme Court of India struck down sodomy laws as unconstitutional for breaching fundamental rights.

## 2. [Attorney General of Botswana v Motshidiemang & Ors. \(CACGB-157-19\)](#) (Botswana)

*In a unanimous decision, the Court of Appeal of Botswana upheld the decision of the High Court. The Court dismissed the Appellant's appeal and declared sections 164 (a) and 164 (c) of the Penal Code on sodomy as null and void.*

### **Background**

The Attorney General of Botswana brought an appeal against the judgment of the High Court that had declared sections 164 (a) and 164 (c) and 165 of the Penal Code null and void and in violation of sections 3, 9, and 15 of the Constitution, and had struck them down accordingly. This decision arose from a petition originally filed by the Respondent, Mr Letsweletse Motshidiemang, requesting the court to declare the abovementioned sections of the Penal Code null and void on the basis that they discriminated against homosexuals, interfered with his right to liberty, privacy, dignity and his right not to be subjected to inhuman and degrading treatment.

### **Legal issue**

- Whether sections 164 (a) and 164 (c) of the Penal Code infringed upon the rights of homosexuals as enshrined in sections 3, 9, and 15 of the constitution.

### **Relevant laws and jurisprudence**

#### *Domestic law*

- Constitution of Botswana, section 3 (fundamental rights and freedoms of the individual), section 9 (protection for privacy of home and other property), section 15 (protection from discrimination).
- Penal Code, sections 164 (a), (c) and 165 (Prohibition of carnal acts that go against the order of nature).
- [Kanene v The State, Botswana Court of Appeal, 2003](#) - The court held that section 164 of the Penal Code was not unconstitutional.
- [Attorney General of Botswana v Unity Dow, Botswana High Court, 1991](#) - The Citizenship Act discriminated on the basis of gender under both the Botswana Constitution, and the Declaration on the Elimination of Discrimination Against Women.
- *Ntesang v The State*, Botswana Court of Appeal, 1995 - The Constitution allowed for deprivation of life under a lawful sentence and that the death penalty by hanging was a lawful punishment.
- [Kamanakao and Others v Attorney-General and Another Botswana High Court, 2002](#) - Section 15(9) of the Constitution does not override all other fundamental human rights guaranteed by the Constitution.

## **Judicial reasoning**

*(Per Justice Kirby)*

The Court of Appeal of Botswana unanimously held that the Appellant's appeal to the Court to reverse the decision of the lower court on the issue that section 164(a) and 164(c) of the Penal Code infringed on the Respondent's rights as enshrined in sections 3, 9, and 15 of the Constitution failed. In dismissing the appeal, the Court held that sections 164 (a) and 164 (c) are null and void as they infringe on the sections 3, 9, and 15 of the Constitution and were therefore rightly struck down.

In reaching this conclusion, the Court considered the facts, evidence and arguments canvassed by both the Appellant, Respondent and Amicus Curiae. The Attorney General argued that the lower court had reached its decision *per incuriam* on the following grounds:

1. Purporting to depart, in an impermissible way, from the decision of the full Court of Appeal on sections 164 (a) and 164 (c) of the Penal Code in *Kanene v The State*.
2. Failing to respect the separation of powers and so intruding on the space of the democratically elected Parliament, by purporting to rule on a question of policy and so to alter the law.
3. Failing to apply section 15(9) of the Constitution, which preserved intact statutory provisions that were already in place at the time the Constitution was enacted.

Analyzing the first ground of appeal, the Court distinguished the instant case before the Court and *Kanene's* case using the fact that there had been an amendment of the laws upon which *Kanene's* case was settled. In this respect, it highlighted that, while the charge for *Kanene's* case was brought in 1995, the Penal Code (Amendment) came into force 1998, and thus the Court stated that "it is this amended section that was accordingly considered by this Court".

Furthermore, the Court considered the fundamental right of protection from discrimination under section 15 of the Constitution. The Court, relying on the *Kanene* and *Unity Dow* cases, held that the list of prohibited grounds of discrimination provided in this section is not: "intended to be conclusive as changing times and circumstances would reveal further groups or minorities worthy of, and entitled to constitutional protection from discrimination as well". Consequently, the Court considered the global attitude of the government towards decriminalization of homosexuality, the growing positive attitude of the people of Botswana towards homosexuality, which was not the case when *Kanene's* case was settled, the

advancement in judicial pronouncements and policies favouring homosexuals (here the Court relied on cases such as *The Attorney General of Botswana v Thuto Rammoge and 19 Others*, *Tapela and Others v Attorney General and others, ND v Attorney General and Another*), and progressive utterances of the head of State speaking on the non-discrimination of homosexuals. All these considerations further established distinguishing facts between the current case before the Court and *Kanene*.

Beyond public opinion, however, the Court also considered the expert evidence that highlighted that section 164(a) and 164(c) had unjustified negative consequences, particularly on homosexual men, and those negative consequences undermined their rights guaranteed in section 3 of the Constitution. According to the Court: "Those sections [sections 164 (a) and 164 (c)] lead to stigmatization of gay men, make them more vulnerable to HIV/AIDS and STDs [sexually transmitted diseases] through a resultant reluctance to access public health for testing and treatment purposes and can lead to stress related mental health and also suicidal tendencies". None of this was presented as evidence in *Kanene's* case which further distinguishes the case from the one before the court." Consequently, the Court dismissed the Attorney General's first ground of appeal.

In respect of the second ground of appeal, the Court held that the Attorney General's submission that the Court cannot make law as this was within scope of powers granted by the Constitution to Parliament was incorrect. The Attorney General made this submission relying on section 86 of the Constitution and on the cases of *Ntesang v The State*, *Kobedi v The State*, and *Reyes v The Queen*. However, the Court held that "the sections highlighted by the appellant are a far cry from those which this court is [to] construe because while the death penalty is authorized by section 4(1), sexual orientation is not mentioned anywhere in the constitution". The Court further noted that while they might not have been imbued with the power to make laws, judges have been granted the power to interpret laws and this case focused on interpretation of whether section 3 and 15 of the Constitution had been infringed upon by sections 164 (a) and 164 (c) of the Penal Code. The Court held that, inclusive of this power to interpret, is "the power to strike down laws or sections of laws it finds unconstitutional". The Court gave instances of when this power had been invoked by relying on *Tapela and Others v Attorney General and others*, where the Court held that the decision of the President that anti-retroviral drugs should not be accorded to foreign prisoners was unconstitutional and, therefore, unenforceable. In view of the foregoing, the Court dismissed the second ground of appeal.

Finally, the Court considered the Attorney General's third ground of appeal, which focused on the principle that the derogation clause in section 15(9) preserved sections 164 (a) and 164 (c), which, as such, may not be considered null and void.

The Court held that section 15(9) does not override all other fundamental rights guaranteed by the Constitution and, as far as these existing laws were concerned, its purpose is nullified entirely. The Court highlighted previous pronouncements that "Derogation clauses contained in the constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest".

Consequently, the appeal was dismissed, and the relevant sections of the Penal Code were declared null and void.

### 3. [The People v Paul Kasonkomona \(Zambia\) \[2015\] HPA/53/2014 \(May 2015\)](#)

*A human rights activist was accused of "soliciting for immoral purposes," after discussing the human rights of homosexual in Zambia on a television programme. He was arrested and charged with the offence of "idle and disorderly conduct" under the Penal Code Act of Zambia. The Court found that Respondent's actions of publicly advocating for the human rights of homosexuals did not infringe the Penal Code Act. Rather, his actions fell within his right to exercise his freedom of expression.*

#### **Background**

Paul Kasonkomona, a human rights activist, was invited to engage in a discussion on the human rights of homosexuals in Zambia during a television programme, *The Assignment*. Afterwards, he was accused of "soliciting for immoral purposes," arrested, and subsequently charged with the offence of "idle and disorderly conduct" under section 178(g) of the Penal Code Act of Zambia (Nuisances and Offences Against Health and Convenience - Idle and disorderly persons). The trial court acquitted him, finding that his actions of publicly advocating for the human rights of homosexuals did not infringe section 178(g) of the Penal Code Act. Rather, his actions fell within his right to exercise his freedom of expression. The State subsequently brought this appeal to the High Court against the Magistrates' Court's acquittal of Paul Kasonkomona.

#### **Legal issues**

- Whether the trial magistrate erred in law and fact by limiting the term "soliciting" to a conduct that is persistent only.
- Whether the trial magistrate erred in law by acquitting the accused in the light of evidence tendered before the Magistrates' Court.

#### **Relevant laws and jurisprudence**

##### *Domestic law*

- Constitution of Zambia, article 20 (right to freedom of expression)
- Penal Code of Zambia, section 178(g) (criminalizing solicitation for immoral purposes – sub-section under 'Idle and disorderly persons')

##### *Comparative law*

- [HKSAR v Cen Zhi Cheng, High Court of Hong Kong, 2008](#) - Where the court held that immoral purpose must refer to some kind of sexual activity.
- [Hutt v The Queen, Supreme Court of Canada, 1987](#) - On the meaning of the word "solicit".
- [Chimakure v Attorney General of Zimbabwe](#), Constitutional Court of Zimbabwe, 2014 - Holding that only serious harm from free expression of ideas can lead to a limitation of the right to freedom of expression.

- [Jean Paul Labaye v The Queen, Supreme Court of Canada, 2006](#) - On the requirement of proving beyond reasonable doubt that the indecent act complained of can lead to a degree of harm or risk of harm that is incompatible with the proper functioning of society in proving the crime of indecency.

## **Judicial reasoning**

*(per Hon Justice JZ Mulongoti)*

It was the contention of the Appellant that the Respondent's comments amounted to soliciting for immoral purposes considering that immoral purposes must refer to a kind of sexual activity. The Appellant further contended that since homosexual activities were prohibited under the Penal Code, any discussion of promotion of the rights of homosexuals amounts to soliciting for immoral purposes.

In dismissing the Appellant's grounds of appeal, the Court was in agreement with the reasoning of the trial court that expressing views on the need to protect the human rights of homosexuals was not equated with soliciting for immoral purposes.

The trial Magistrate had held that the elements of soliciting were not proven by the prosecution. In arriving at this conclusion, the trial court examined the elements of the offence covered under section 178(g) and ruled that the action involved must have occurred in a public place and the court must be satisfied that the accused, whilst on the programme was enticing or persuading other people to do some act or thing or seeking from them some response, so as to bring about an eventuality or state of affairs which is sexually immoral. It was based on the foregoing that the trial Magistrate held that, "if it is true that the accused was invited to give his views through the programme then he was exercising his freedom of expression provided for under article 20 of the Constitution..."

The Court affirmed the position of the trial court and held that "the trial magistrate was on firm ground in his findings. The onus is always on the prosecution to prove its case by adducing evidence in a fair manner, which they failed to do. The Respondent's conduct of participating in a debate advocating for gay rights did not amount to soliciting for immoral purposes". The Court further held that "The respondent was exercising his right to freedom of expression as found by the magistrate and canvassed by his counsel." Consequently, the Court dismissed the appeal for lacking in merit.

4. [EG & 7 others v Attorney General; DKM & 9 others \(Interested Parties\); Katiba Institute & another \(Amicus Curiae\) \(Kenya\) Petition No. 150 of 2016 \(May 2019\)](#)

*Two Petitions challenging the constitutionality of sections 162 (a) & (c) and 165 of the Penal Code of Kenya were joined together. The Petitions asked the High Court of Kenya to declare these sections of the Penal Code unconstitutional as they are in violation of rights guaranteed to all Kenyans in the Constitution of Kenya. These rights include: the right to privacy, dignity, health, equality and non-discrimination and freedom and security of the person as enshrined in the constitution. The Petition also argues that the above-mentioned sections of the Penal Code continue to validate discrimination and violence towards individuals who do not conform to society's expectations of gender identity, expression or sexual orientation. The Court found that the sections in question remain valid and in no way a violation of the rights guaranteed to all Kenyans in the Constitution of Kenya.*

## **Background**

Two consolidated Petitions, in which the Petitioners for themselves or as representatives of the gay, bisexual and men who have sex with men (MSM), and lesbian community in Kenya, contested the constitutional validity of sections 162 (a) & (c) and 165 of the Penal Code of Kenya. The Petitions asked the Court to declare these sections of the law unconstitutional and in violation of rights guaranteed to all Kenyans in Chapter Four of the 2010 Constitution of Kenya. These rights include: "the right to privacy, dignity, health, equality and non-discrimination and freedom and security of the person as enshrined in the Constitution." The Petitions also argue that sections 162 (a) & (c) and 165 of the Penal Code continue to validate discrimination and violence towards individuals who do not conform to society's expectations of gender identity, expression or sexual orientation. These individuals include lesbian, gay, bisexual, transgender and queer persons.

Additionally, the first Petition attacked the said provisions on grounds of vagueness and uncertainty. The second Petition sought a declaration that sexual and gender minorities are entitled to the right to the highest attainable standards of health, including the right to health care services as guaranteed in article 43 of the Kenyan Constitution. The Petitioners also sought an order directing the State to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and gender identity or expression in the health sector.

## **Legal issues**

- Whether sections 162 (a) & (c) and 165 of the Penal Code are unconstitutional on grounds of vagueness and uncertainty.
- Whether the impugned provisions are unconstitutional for violating articles 27, 28, 29, 31, 32 and 43 of the constitution.

## Relevant laws and jurisprudence

### *Domestic law*

- Constitution of Kenya, particularly article 27 (Right to equality and freedom from discrimination), article 28 (Right to human dignity), article 29 (Right to freedom and security of the person), article 31 (Privacy) and article 43 (Economic and social rights-specifically health), articles 10 and 50 of the Constitution (relating to legal certainty), article 50(2)(n)(i) (the right to a fair hearing).

### *Comparative law*

- *Noble v State*, Ohio Supreme Court, 1997 - On the interpretation of "Carnal Knowledge".
- [The Johar case, Supreme Court of India, 2018](#) - Decriminalizing all consensual sex among adults in private, including homosexual sex in India.
- [Lawrence v Texas, United States Supreme Court, 2003](#) - The Court found that the sanctions of criminal punishment for those who commit sodomy are unconstitutional.
- [Orozco v Attorney General of Belize, National Coalition for Gay and Lesbian Equality and another v Minister of Justice](#)

### *International law*

- [Willis v The United Kingdom, European Court of Human Rights, 2002](#) - Observing that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.
- [Dudgeon v United Kingdom, European Court of Human Rights, 1981](#) - Finding that the sodomy laws of Northern Ireland violated the right to privacy under the European Convention.
- [Norris v Ireland, European Court of Human Rights, 1988](#) - Finding that the sodomy laws of Ireland violated the right to privacy under the European Convention.
- [Toonen v Australia, United Nations Human Rights Committee, 1994](#) - Finding that sexual orientation was included in the anti-discrimination provisions as a protected status under the International Covenant on Civil and Political Rights (ICCPR).

## Judicial reasoning

*(per Justice Roselyne Aburili)*

From the petitions, the Court was able to distill two questions:

- (i) whether sections 162 (a) and (c) and 165 of the Penal Code are unconstitutional on grounds of vagueness and uncertainty; and
- (ii) whether the impugned provisions are unconstitutional for violating articles 27, 28, 29, 31, 32 and 43 of the Constitution.

In determining the first issue, the Court explored the importance of certainty of statute, holding that: "Certainty is generally considered to be a virtue in a legal

system while legal uncertainty is regarded as a vice. Uncertainty undermines both the rule of law in general and the law's ability to achieve objectives such as determining anti-social conduct." The Court observed that, "It is true that the Penal Code does not define the phrases 'Unnatural offences', and 'against the order of nature'" and thus it had to ascertain whether "lack of definition renders the provisions uncertain, vague and unambiguous (*sic*)."

The Court then proceeded to define the terms contained in the sections by resorting to legal dictionaries and case law to the effect that, "Prior to determining whether the challenged language is overbroad, we must properly construe its meaning. In so doing, we must read the text as a whole, assigning a meaning to every word and phrase, and not permitting any portion of the text to be rendered redundant. Thus, the various forms of sexual conduct, natural, indecent, against the order of nature, and gross indecency listed in the impugned provisions, must each be accounted for, and assigned distinct meanings." The Court thus found that, "Having established that the impugned phrases have been clearly defined in law dictionaries and in a catena of judicial pronouncements, it is our considered view that lack of definitions in the statute per se does not render the impugned provisions vague, ambiguous or uncertain." The Court thus held that: "we decline the invitation to declare the said provisions unconstitutional on grounds of vagueness, uncertainty, ambiguity and over broadness."

It held that this conclusion is based on a number of reasons which the Court stated to be "First, the phrases used in the sections under challenge are clear as defined above. Second, the provisions disclose offences known in law. Third, a person accused under the said provisions would be informed of the nature, particulars and facts of the offence. Fourth, even though we are not persuaded by the Petitioners' contention that the provisions under challenge are overbroad, it is our considered view that there is a real danger that in reading down an overbroad statute, we will simply substitute the vice broadness with the equally fatal infirmity of vagueness."

On the second issue as to whether the impugned provisions are unconstitutional for violating articles 27, 28, 29, 31, 32, 43 and 50 of the Kenyan Constitution, the Court began its determination by addressing each article alleged to have been violated. It began by examining the right to equality and freedom from discrimination under article 27 of the Kenyan Constitution. It held that, "First, the court has to establish whether the law differentiates between different persons. Second, whether the differentiation amounts to discrimination, and third, whether the discrimination is unfair." The Court held further that, "The principle of equality attempts to make sure that no member of society is made to feel that they are not deserving of equal concern, respect and consideration, and that the law or conduct complained of is likely to be used against them more harshly than others who belong to other groups."

The Court found that, "the substance of the Petitioners' complaint is that the impugned provisions target the LGBTIQ community only", and that if the Court "understood them correctly, their contestation is that the impugned provisions do not apply against heterosexuals." The Court then held that its "reading of the challenged provisions suggests otherwise. The language of section 162 is clear. It uses the words

'Any person.' A natural and literal construction of these words leaves us with no doubt that the section does not target any particular group of persons." It held further that, "Similarly, section 165 uses the words 'Any male person.' A plain reading of the section reveals that it targets male persons and not a particular group with a particular sexual orientation. The wording of this section leaves no doubt that in enacting this provision, Parliament appreciated that the offence under this section can only be committed by a male person. In fact, the short title to the section reads 'indecent practices between males.' The operative words here are 'Any male person' which clearly does not target male persons of a particular sexual orientation."

The Court did not consider that beyond the operative phrase "any person", it was possible for the substantive provisions to be worded in such a way that their effect applied only to a particular section of the population (E.g., "Any person of a height below six feet"). Instead, the Court dismissed the Petitioners' arguments that, "in the enforcement of the above provisions, they have been subjected to various discriminatory acts on the basis of their sexual orientation", holding that, "save for the allegations made in the Petition and the affidavits, no tangible evidence was given to support the allegations. No iota of evidence was tendered to establish any of the cited acts of discrimination". In the end, the Court found that, "the Petitioners have failed to establish that the impugned provisions are discriminatory."

On whether the impugned provisions infringed the Petitioners' right to the highest attainable standard of health, under article 43 of the Kenyan Constitution, the Court held that the impugned provisions did not breach article 43 of the Kenyan Constitution, finding that, "decisions on violation of constitutional rights should not, and must not, be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses. The Petitioners and the Interested Parties supporting the Petition argued that their right to health as stipulated in article 43(1) had been violated. That may be true. However, no evidence was placed before this court to support the allegations. None of the Petitioners tendered evidence to prove that they had been denied medical attention in any health facility in the country or were subjected to mistreatment in the course of seeking medical attention. They merely made generalized statements without proof. Based on our analysis of the material placed before us, and this being a constitutional Petition, it is our conclusion that the answer to this issue is in the negative."

Next, the Court considered whether the impugned provisions violate the Petitioners' right to a fair hearing under article 50 of the Constitution. The Court held that no evidence was tendered to demonstrate that any of the Petitioners was ever subjected to any examination in breach of their rights under the Bill of Rights. "Put differently, none of the Petitioners tendered evidence to suggest even in the slightest manner, that evidence was illegally procured from them and used against them in violation of their rights guaranteed in the Constitution." The Court was of the view that in any event, such a claim would "constitute a distinct cause of action." The Court further

held that the provisions of article 50(2), guaranteeing every accused person the right to a fair trial, was only applicable to persons undergoing trial, and that, "none of the Petitioners or the interested parties supporting the Petition, or persons on whose behalf this Petition was brought, has demonstrated that he/she has been charged under the impugned provisions before any court or has a pending complaint against him or her before a police station to warrant the invocation of article 50 (2). Accordingly, the Petitioners' argument that their right to a fair trial has been denied, violated, infringed or is threatened fails."

The Court proceeded to examine whether the Petitioners' right to freedom and security of the person had been violated (article 29 of the Constitution). The Court held that, "article 29 guarantees every person the right to freedom and security of the person, that is, not to be deprived freedom arbitrarily or without just cause; not to be subjected to any form of violence from the public or private sources and not to be treated or punished in a cruel, inhuman or degrading manner." The Court stated that, "The article combines the right to freedom and security of the person with the right to be free from bodily and psychological harm. It is essentially intended to protect the physical integrity and dignity of an individual. The right not to be subjected to torture in any manner or not to be treated or punished in a cruel or degrading manner are components of the right to freedom and security of the person. These components are inviolable under article 25(a) of the Constitution, and therefore, no law can stand if it seeks to limit such right or freedom." Given the foregoing, the Court held that any person alleging a breach of these rights must adduce sufficient evidence as to the violation or attempted breach. The Court stated that: "It is not sufficient for a Petitioner to allege in general terms that a fundamental right or freedom has been violated. A court confronted with a claim of violation of a constitutional right is required to inquire into the allegations only when there are specific facts supporting a right in the constitution or the law. A Petitioner cannot merely enumerate constitutional provisions and allege their violations. He must prove the actual violations." The Court found that, "weighing the Petitioners' alleged infringements, violations and threats vis-a-vis article 29, we are of the view that the impugned provisions do not apply exclusively to the Petitioners as already explained elsewhere in this judgment." In the same vein, the Court disposed of the question as to whether the Petitioners rights to freedom of conscience, religion, belief and opinion under article 32 has been violated.

Finally, the Court considered whether the Petitioners' rights to human dignity and privacy had been violated (articles 28 and 31). The Court examined this question by giving an overview of the body of legal provisions both domestic and international on the rights to dignity and privacy. The Court held that, "The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 19 appreciates that the Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. The Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, as the foundational values. Article 28 provides for the right to inherent dignity and the right to have that dignity respected and protected. The article does

not define the word 'dignity.' However, its role and importance as a foundational constitutional value, has been emphasized in a number of decisions".

The Court held that in: "a claim of violation of a fundamental right, and a contention is made that there is no violation or that the right is limited, it is important to determine whether indeed there is an infringement, or a limitation, which is justifiable under article 24. This is because under article 165 (3) (b) (d) as read with article 23, the mandate of this court is to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, or, whether any law is inconsistent with or in contravention of the Constitution." The Court stated further that it had considered "foreign and local decisions in this determination", and that, "foreign jurisprudence is of persuasive value because it shows how courts in other jurisdictions have dealt with the issues that confront us. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for interpretation of our Constitution." The Court thus proceeded to examine a number of cases from other jurisdiction including *Naz Foundation, Johar case, Dudgeon v U.K., Norris v Ireland, Toonen v Australia, Orozco v Attorney General of Belize, Lawrence v Texas, and National Coalition for Gay and Lesbian Equality and another v Minister of Justice* concluding that "however persuasive these decisions may be, they are not binding to this court."

The Court then proceeded to examine the impugned laws against the provisions of the Bill of Rights, which "guarantee every person's rights and fundamental freedoms", holding that, "In that regard, article 19 is clear that rights and fundamental freedoms in the Bill of Rights—belong to each individual and are not granted by the State; do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Constitution; and, are subject only to the limitations contemplated in the Constitution." Consequently, the Court in juxtaposing the impugned laws against the Constitutional provision as to human dignity and privacy held that, "The two sections prohibit sexual acts against the order of nature and indecent acts amongst men. The rights under articles 28 and 31 are not absolute. article 24(1) of the Constitution permits limitation by law, the limitation must however be reasonable and justifiable in an open and democratic society. It is undeniable that the limitation is by law. The question is whether the limitation is reasonable and justifiable." The Court stated further that, "The Petitioners' argument that the same-sex sex is consensual among adults and done in private poses one question. The question is if we were to agree with the Petitioners and strike down the impugned provisions, how would that relate to the values, principles and purposes of the Constitution"? It held that, "The values and principles articulated in the Preamble to the Constitution, article 10, 159 and 259 reflect the historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya."

The Court found that, "it is common ground that during the Constitution making process, the issue of same sex marriage was one of the issues raised, discussed, and a recommendation was made outlawing same sex marriage. The Final CKRC [Constitution of Kenya Review Commission] Report at paragraph 8.7 (h) on Family

and Marriage recommended the recognition of marriage only between individuals of the opposite sex and the outlawing of same sex unions.”

Regrettably, the Court did not consider if the Constitution should be interpreted in accordance with the views of the majority only or if it protects minorities also. Rather, the Court considered the Petitioners’ argument that, “sexual orientation is innate, that they were born that way and that, that is the way they express themselves and therefore they should be allowed to express themselves the way they know best”, and stated that, while it appreciated this position, the Court must also uphold the spirit and intention of the Constitution. The Court held that, “We have carefully examined the purport and import of sections 162 and 165 of the Penal Code vis-a-vis articles 28 and 31 of the Constitution; we have also read the Constitution holistically. We are unable to agree with the Petitioners that the impugned provisions violate the Constitution or their rights to dignity and privacy. If we were to be persuaded that the Petitioners’ rights are violated or threatened on grounds of sexual orientation, we find it difficult to rationalize this argument with the spirit, purpose and intention of article 45(2) of Constitution.”

The Court premised its conclusion on the fact that, “article 45(2) only recognizes marriage between adult persons of the opposite sex”, and that, “decriminalizing same sex-sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of article 45 (2).” It held that, “(t)he Petitioners’ argument that they are not seeking to be allowed to enter into a same sex marriage is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution.” The Court stated further that, “decriminalizing the impugned provisions would indirectly open the door for unions among persons of the same sex. If this were to be allowed, it would be in direct conflict with article 45 (2).”

In concluding, the Court found that, “having considered the arguments on both sides, the precedents cited, the Constitution and the law, we are not satisfied that the Petitioners’ attack on the constitutional validity of sections 162 and 165 of the Penal Code is sustainable. We find that the impugned sections are not unconstitutional. Accordingly, the consolidated Petitions have no merit. We hereby decline the reliefs sought and dismiss the consolidated Petitions.”

## 5. [R v Soko and Another \(359 of 2009\)\[2010\] MWHC 2 \(Malawi\)](#)

*Two Malawian men were charged with "unlawful carnal knowledge" among other "offences" and were found guilty.*

### **Background**

The two accused persons were charged with sodomy offences; "having carnal knowledge against the order of nature", contrary to sections 153(a); section 153(c) and an alternative charge of "indecent practices" between males brought under section 156 of the Penal Code of Malawi. It was alleged that the 2nd accused performed "womanly" chores, and that the accused persons conducted an engagement (chinkhoswe) ceremony on the 26<sup>th</sup> December 2009.

### **Legal issues**

- Whether the fact of an engagement (chinkhoswe) ceremony and other attendant issues by the two men leads to the conclusion that the two had "carnal knowledge against the order of nature".
- Whether, in the alternative, there were "indecent practices" between these men.

### **Relevant laws and jurisprudence**

#### *Domestic law*

- Constitution of Malawi, section 42 (2)(f)(iii) (Presumption of innocence)
- Section 153 of the Penal Code of Malawi (Criminalizing "unnatural offences" including carnal knowledge against the order of nature); section 156 of the Penal Code of Malawi (Criminalizing indecent practices between males)

### **Judicial reasoning**

*(per Hon Justice Nyakwawa Usiwa-Usiwa)*

In arriving at its decision, the Court first examined the evidence presented by the prosecution and then delved into the elements of the offences charged to ascertain if the evidence proved the offences. The Court considered how to treat the confessions of the accused persons which had been retracted at trial. Holding that the evidence was admissible, the Court stated that, "We find no use of force by the police when Tionge and Steven's statements were taken, each one of them separately explaining how they had anal sex. So the confessions are allowed in this court because they were made in the presence of Counsel. That is our finding."

The Court further found that the circumstantial evidence against the accused corroborated only one conclusion, that the accused persons had committed the offence. In the Court's words "in this case the state has through its witnesses proved that Tionge is a man. He has all along preferred to be in women (sic) clothes and amongst women. We also find it proved that he cheated a police officer that he was

a woman. He also cheated at the lodge and several places that he was a woman. This behavior ... is corroboration enough that he played the role of a woman. We also find the evidence of the witness who described a dwelling house of the two to be true. This is where the two are said to be living as husband and wife. There was also the introduction of the 'wife' in Tionge to his grandmother by Steve. All these and many others do work as independent pieces of evidence supporting the two men's statements that they used to caress each other and had anal sex for five months before going public into a chinkhoswe ceremony."

The Court, in view of the foregoing findings, held that: "the evidence is so strong against the two men as to leave only a remote possibility in their favour. The case is proved beyond reasonable doubt".

The Court also stated that, on circumstantial evidence alone, without admitting the confessions of the accused, it would still arrive at the same conclusion. "Therefore the Prosecution's proof beyond reasonable doubt of a man who behaves like a woman and likes to be treated as such; the wearing of female clothes by one; the engagement or purported engagement of the two (to the extent of hiring a photographer); the soundness of their mind; they're both being male; and the lie which Tionge had been telling people that he was a woman; all these leave us with one rational conclusion or inference leading to only the guilt of Steven having anal carnal knowledge of Tionge and Tionge permitting it by the anus ... and therefore convict both of them of the offence of buggery."

In deciding the alternative charge brought by the prosecution, the Court held that the "two male persons are found to be in gross indecency because the prosecution has proved that they were acting in consent. And there is no reason why, where two persons are jointly indicted for such an offence and the necessary evidence is forthcoming, one should not be convicted and the other acquitted (*sic*). We also find Indecency established as defined by the Oxford Advanced Learners Dictionary (1989 4th Ed). That is being indecent or doing indecent behaviour; where 'indecent' is defined as something offending against accepted standards of morality. Surely, "indecent and obscene" convey one idea namely offending against the recognized standards of propriety, indecent being on the lower end of the scale and obscenity being on the upper end of the scale."

The Court thus held that "All in all the court, upon the evidence adduced above, find, even in the alternative, Steven Monjeza and Tionge Chimbalanga guilty of indecent practices by males c/s 156 and we convict them accordingly. Otherwise "the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice".

In sentencing the accused persons to the maximum punishment prescribed by the law, the Court held: "we are sitting in place of the Malawi society. Which I do not believe is ready at this point in time to see its sons getting married to other sons or cohabiting or conducting engagement ceremonies. I do not believe Malawi is ready to smile at her daughters marrying each other. Let posterity judge this judgment. So, this case being 'the first of its kind', to me, that becomes 'the worst of its kind'.

I cannot imagine more aggravated sodomy than where the perpetrators go on to seek heroism, without any remorse, in public and think of corrupting the mind of a whole nation with a chinkhoswe ceremony. For that, I shall pass a scaring sentence so that `the public must also be protected from others who may be tempted to emulate their [horrendous] example". The Court thus sentenced each one of them to 14 years imprisonment with hard labor, the maximum punishment under section 153 of the Penal Code.

6. [Abdool Ridwan Firaas Ah Seek v State of Mauritius \[2023\] SCJ \(Mauritius\)](#) (October 2023)

*The Supreme Court of Mauritius held unanimously that section 250(1) of the Criminal Code is discriminatory in its effects towards homosexual men, in breach of section 16 of the Mauritius Constitution.*

## **Background**

Abdool Ridwan Firaas Ah Seek, a gay man and the plaintiff in the case, petitioned the court seeking constitutional redress under section 16 of the Mauritius Constitution. He contended that section 250 of the Criminal Code, which provides for the offence of sodomy and criminalizes anal sex between consenting male adults in private, was unconstitutional as it breached sections 3 and 5 of the Constitution which protect the right to liberty, section 7, which enunciates the principle of proportionality and protects against inhuman and degrading treatment, sections 3 and 9, which secure the right to privacy of the individual and of his home, sections 3 and 12, which guarantee freedom of expression, sections 3 and 13, which guarantee freedom of assembly and association, and sections 3 and 16, which protect from discrimination.

## **Legal issue**

- Whether section 250(1) of the Criminal Code violates the right against discrimination provided for under section 16 of the Constitution.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of the Republic of Mauritius, section 16 (Protection from discrimination).
- Criminal Code, section 250(1) (Crimes of sodomy and bestiality).
- [Matadeen v Pointu](#) - Domestic legislation, including the Constitution, should be construed so as to conform to the international instrument that a country is a signatory to.

### *Comparative law*

- [Toonen v Australia, United Nations Human Rights Committee, 1994](#) - Reference to "sex" in article 2 of the ICCPR should be taken as including 'sexual orientation'.
- [Vriend v Alberta, Supreme Court of Canada, 1998](#) - "Sexual orientation" is a personal characteristic and discrimination on this ground is not permissible.
- [Orozco v Attorney General of Belize, Supreme Court of Belize, 2016](#) - Finding unconstitutional laws criminalizing private consensual conduct between adults and consequently striking them down.

- [Navtej Singh Johar & Others. v Union of India & Others, Indian Supreme Court, India, 2018](#) - Where the Court struck down sodomy laws as unconstitutional for breaching fundamental rights.
- [Letsweletse Motshidimang v Attorney General, Botswana High Court, 2019](#) - In interpreting the term "sex" a generous and purposive approach should be used to encompass sexual orientation.
- [Roodal v The State of Trinidad and Tobago UK Privy Council, 2003](#) - The judiciary has the duty to construe and apply the constitution and statutes and to protect guaranteed fundamental rights. It is not a responsibility which the courts may shirk or attempt to shift to Parliament.

### *International law*

- International Covenant on Civil and Political Rights.

### **Judicial reasoning**

*(per Justice Chan Kan Cheong and Justice Gunesh-Balaghee)*

The Supreme Court of Mauritius concluded that section 250(1) of the Criminal Code was discriminatory in its effect against the plaintiff and in breach of section 16 of the constitution inasmuch as it criminalized the only natural way for the Plaintiff and other homosexual men to have sexual intercourse, whereas heterosexual men are permitted the right to have sexual intercourse in a way which is natural to them. Therefore, the relevant section of the Criminal Code was declared unconstitutional and held to violate section 16 of the Constitution in so far as it prohibits consensual acts of sodomy between consenting male adults in private and should accordingly be read so as to exclude such consensual acts from the ambit of section 250 (1).

In resolving the issue before it, the Court reflected on the provisions of section 16 of the Constitution, which generally provides for freedom against discrimination on the grounds of any form of difference whether social or political. The relevant parts of the section reads thus: "16. Protection from discrimination (1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect. (2) ... .. (3) In this section - "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description...."

The interpretation of the term "sex" was critical as the case for the plaintiff was that section 250(1), which criminalized anal intercourse between gay men, violated section 16 of the Constitution as it discriminated on the ground of sexual orientation.

In this respect, the plaintiff contended that the word "sex" in section 16 should be read as including "sexual orientation". In order to derive a conclusion, the Court looked at a plethora of international cases with persuasive status where the courts have interpreted the term sex to include sexual orientation, such as *Toonen v Australia*; *Vriend v Alberta*; *The National Coalition for Gay and Lesbian Equality v Minister of Justice*; *Orozco v The Attorney General of Belize*; *Navtej Singh Johar & Ors v Union of India thr. Secretary Ministry of Law and Justice*; and *Letsweletse Motshidiemang v Attorney General*.

In addition to the persuasive cases, the Court employed a "generous and purposive interpretation" of the Constitution in resolving the issue, although it recognized that such approach or interpretation did not allow the creation of rights that were not contained in the Constitution. Furthermore, it highlighted the importance of the accession of Mauritius to the International Covenant on Civil and Political Rights (ICCPR) by relying on the case of *Matadeen v Pointu* where the Court had held that, "Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well-recognized canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments."

Also, the Court took into account the attitude of the Defendant, who had enacted laws to prohibit discrimination on the ground of sexual orientation in a number of spheres of activities, such as employment, education, and provision of goods, services and facilities, e.g. the Equal Opportunities Act, the Workers' Rights Act and the Employment Relations Act.

The Court further noted that the power to make and amend laws is within the purview of the legislature by virtue of the Constitution. However, the legislature had failed to make laws to protect the human rights of LGBTIQ+ people, despite avowed intention before international fora to do so. In such a case, the Plaintiff had approached the Court to seek succor by asking it to interpret and apply provisions of the Constitution, something which was within the fundamental powers of the Court. With respect to this, the Court relied on *Roodal v The State of Trinidad and Tobago*, which held that: "The Constitution itself has placed on an independent, neutral and impartial judiciary the duty to construe and apply the Constitution and statutes and to protect guaranteed fundamental rights, where necessary. It is not a responsibility which the courts may shirk or attempt to shift to Parliament." Thus, it held that the term sex as contained in section 16 should be read to embrace sexual orientation.

On the question of whether section 250(1) of the Criminal Code was discriminatory against homosexuals in its effect, the Court held that it was because, while the wordings of the section were neutral and applied to both heterosexual and homosexual men, ultimately the section proscribed as an offence the only way by

which homosexual men engage in love making - through anal sex – and, on the other hand, heterosexual men have the option of engaging in love making through the vagina, an option that the section did not proscribe. In this regard the Court relied on the cases of *Lawrence v Texas* 539 and *Leung v Secretary for Justice*.

In view of the foregoing, the Court found that section 250(1) of the Criminal Code was unconstitutional and violated section 16 of the Constitution in so far as it prohibited consensual acts of sodomy between consenting male adults in private and should accordingly be read to exclude such consensual acts from its scope.

6. [Hon. Fox Odoi & 21 Others v Attorney General & 3 Others \[Consolidated Petitions 14, 15, 16 & 85 of 2023\] \(Uganda\) \(April 2024\)](#)

*This case arose from a consolidated petition against the Ugandan Anti-Homosexuality Act, 2023, in which the Petitioners requested the Constitutional Court to nullify on the basis that the legislation infringed, violated and contravened the human rights as entrenched in the Constitution of the Republic of Uganda. The Petition was brought on both procedural and substantive grounds upon which the Constitutional Court elucidated.*<sup>2</sup>

## **Background**

The Ugandan Parliament passed the Anti-Homosexuality Act in 2023 criminalizing homosexuality and any act that may promote homosexuality in any form within the country. This consolidated petition was brought before the Constitutional Court by the Petitioners who requested the Court to hold that a number of sections of the Anti-Homosexuality Act infringed on human rights, as entrenched in the Constitution of the Republic of Uganda and in international instruments.

## **Legal issue**

- Whether certain sections in the Anti-Homosexuality Act 2023 contravened or infringed on human rights as entrenched in the Constitution of the Republic of Uganda and international instruments to which Uganda was a party.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of Uganda, articles 1 (Sovereignty of the people), 38 (Citizenship by registration), 2 (Supremacy of the Constitution), 20 (Right to life), 36 (Protection of right to life), , 79 (The parliament), 31 (Freedom of Expression), 124 (Office of the Attorney General), 44 (Prohibition of derogation from fundamental rights), 88 (The Speaker), and 89.
- Anti-Homosexuality Act 2023.
- Public Financial Management Act.

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<sup>2</sup> For ICJ's statement expressing concerns on this judgement, see <https://www.icj.org/resource/uganda-the-enactment-of-the-anti-homosexuality-act-2023-will-foster-further-stigma-discrimination-and-violence-against-lesbian-gay-bisexual-transgender-and-intersex-persons/> and <https://www.icj.org/uganda-icj-condemns-the-abstract-and-hateful-constitutional-court-judgment-upholding-the-constitutionality-of-the-anti-homosexuality-act-2023/>.

- [Prof. J. Oloka-Onyango & Others v Attorney General, Constitutional Court of Uganda, 2014](#) - Where the court held that the Anti-Homosexuality Act 2014 was passed without the requisite quorum.
- [Kasha Jacqueline and Others v Rolling Stone Limited and Another, High Court of Uganda, 2010](#) - Where the Court held that publication of the personal details of gay persons in a magazine "exposing" them was a breach of their dignity and right to privacy.
- [Violet Juliet Mukasa & Anor v Attorney General, High Court of Uganda, 2008](#) - Where the court held the State liable for assault by public officials.
- [Hon. Francis Zaake v The Attorney General, Constitutional Court of Uganda, 2022](#) - Biased conduct by a Speaker of Parliament contravenes the Ugandan Constitution and vitiates the resultant proceedings.
- [Francis Tumwesige Ateenyi v The Attorney General, Constitutional Court of Uganda, 2022](#) - Where it was held that a criminal offence should define with clarity what its elements are.
- [Attorney General v Salvatori Abuki, Constitutional Court of Uganda, 1999](#) – The duty lies on the legislature to define a criminal offence.

#### *Comparative law*

- [Doctors for Life International v Speaker of the National Assembly, Constitutional Court of South Africa, 2006](#) - The Court held that the duty to facilitate public involvement would require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them.

#### *International law*

- [Toonen v Australia, United Nations Human Rights Committee, 1994](#) - Finding that the sodomy laws of Tasmania violated the rights to privacy and non-discrimination under the International Covenant on Civil and Political Rights (ICCPR).
- International Covenant on Civil and Political Rights.
- African Charter on Human and Peoples' Rights.

### **Judicial reasoning**

*(Per Buteera, DCJ; Kiryabwire, JCC; Kibeedi Mutangula, JCC; Mugenyi, JCC; and Gashirabake, JCC)*

The Constitutional Court of Uganda was called upon to interpret whether certain sections of Anti-Homosexuality Act 2023 contravened the Constitution of Uganda. The principles and rights that the Petitioner alleged the Act infringed included: the principle of legality and certainty, human dignity, right to equality and non-discrimination, right to privacy, right to freedom of expression, thought and association, right to occupation, profession and business, right to health, and right to property.

In its analysis of the substantive issues, the Court began by considering the issues of legality and legal certainty, which the Petitioners had raised in their challenge against the Act. The Petitioners contended that sections 6,<sup>3</sup> 7,<sup>4</sup> 9,<sup>5</sup> 11(1) (2) (a) - (e),<sup>6</sup> 14(1) and (2),<sup>7</sup> and 15(1) and (2)<sup>8</sup> of the Anti-Homosexuality Act were inconsistent with the principle of legality and legal certainty guaranteed under article 28(12) of the Constitution and thus should be nullified by the Court.

The challenged provisions establish the following framework: Section 6 negates consent as a valid defense to charges of homosexuality; Section 7 imposes penalties for unauthorized disclosure of victims' identities in homosexuality cases; Section 9 criminalizes permitting premises to be used for homosexual acts, punishable by up to seven years' imprisonment; Section 11(1)-(2)(a)-(e) defines and prohibits the "promotion of homosexuality," including advocacy, funding, or dissemination of related materials, with violations carrying up to twenty years' imprisonment; Section 14(1)-(2) mandates reporting suspected homosexuality offenses to authorities, exempting privileged communications; and Section 15(1)-(2) penalizes false accusations under the Act with up to one year's imprisonment.

Relying on the case of *Prosecutor v Thomas Lubanga Dyilo*, the Petitioners argued that the Act lacked: "clarity, certainty and foreseeability", which were the tenets of any criminal legislation, especially one with severe penalties like the Act at issue. The Petitioners further argued that the instances of unclarity could be found in wordings included in the Act where it defined the "offence" of "homosexuality" to include actual performance of sexual acts, as well as any attempt to perform a sexual act or "manifesting" the intention to do so by "some overt act". They also relied on *Francis Tumwesige Ateenyi v The Attorney General* and *Toonen v Australia* to highlight that this lack of clarity could lead to considering "group criminal sexual behaviour" and

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<sup>3</sup> Section 6 explicitly voids consent as a legal defense for any charges under the Act, including both basic and aggravated homosexuality offenses.

<sup>4</sup> Section 7 imposes confidentiality requirements regarding victims' identities, prohibiting media disclosure without court/victim authorization, with violations punishable by fines up to 250 currency points (equivalent to 5 million Ugandan shillings).

<sup>5</sup> Section 9 prohibits knowingly allowing premises to be used for homosexual acts or related offenses, with violations punishable by up to 7 years' imprisonment.

<sup>6</sup> Section 11(1)-(2)(a)-(e) defines "promotion of homosexuality" to include: (a) encouraging or persuading others to commit homosexual acts; (b) publishing or distributing pro-LGBTQ+ materials; (c) providing financial support for such activities; (d) leasing property for LGBTQ+ activities; and (e) operating pro-LGBTQ+ organizations, with violations punishable by up to 20 years' imprisonment or organizational license revocation.

<sup>7</sup> Section 14(1)-(2) establishes a general duty to report known or suspected homosexuality offenses to police under subsection (1), while subsection (2) provides exemptions for privileged communications such as attorney-client relationships, though subsection (3) imposes 5-year sentences for failures to report cases involving children or vulnerable persons.

<sup>8</sup> Section 15(1)-(2) penalizes false accusations under the Act with up to 1 year imprisonment, defining falsity as either malicious reporting or evidentiary disproval during investigations.

private sexual acts between two consenting adults as the same, which the Courts had over time distinguished and considered as dissimilar.

The Court's examination of this point began with acknowledging that the principle of legality, as raised by the Petitioners, was a valid principle of law present across all legal systems, Uganda included. However, the Court noted that on the principle of legal certainty, this principle was subject to interpretation across the legal systems. Following the interpretation as provided in the Supreme Court case of *Attorney General v Salvatori Abuki*, the Court held that, "although the provision placed a duty upon the legislature to legally define a criminal offence, it neither required the definition of each word in a criminal law provision nor did it necessarily require such definition to be limited to the statutory provision that creates the offence". Combining this holding of the Supreme Court and interpreting and accessing the sections of the Act using the Golden Rule principle of interpretation (which the Court defined as when "words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use"), the Court held that there was no ambiguity, vagueness or uncertainty in sections 6, 7, 9, 11(1) (2) (a) - (e), 14(1) and (2), and 15(1) and (2) of the Act and thus the Act did not flout article 28(12) of the Constitution nor did it infringe the principle of legality.

Regarding the alleged violation of Articles 24 and 44(a) of the Constitution concerning the right to personal dignity, the Court examined sections 2(1)-(4), 3(1), 3(2)(c)-(f), (h) and (j), 3(3)-(4), 5(2), 6, 9, 11(2)(d) and 16 of the Anti-Homosexuality Act. These provisions collectively establish: (i) the criminalization of same-sex sexual acts (sections 2-3), including aggravated offenses punishable by life imprisonment or death; (ii) compensation for victims (section 5(2)); (iii) the invalidity of consent as a defense (section 6); (iv) penalties for permitting premises to be used for homosexual acts (section 9); (v) prohibitions on leasing property for LGBTQ+ activities (section 11(2)(d)); and (vi) rehabilitation measures for convicted persons (section 16). The Court held that these provisions did not violate Articles 24 and 44(a) of the Constitution, applying Article 8a to interpret human dignity through a contextual approach that balanced individual rights against societal interests. Here, the Court's interpretation of dignity reflected a severe misapplication of human rights principles, by considering individual dignity as subordinate to cultural values. The Court found that the evidence provided by the Respondent alleging recruitment of children into homosexuality, high rate of HIV infection in Men who sleep with Men (MSM), and a pervasiveness of mental health problems established a strong interest of the State to limit the dignity of homosexual persons in this respect. In view of the foregoing, the Court held that the Act did not violate the human dignity of homosexuals.

However, it should be noted that the Court's acceptance of evidence suggesting a campaign to "enlist or convert people to homosexuality" was critically flawed. Considering that the Court relied on hearsay prejudicial statements from outside the courtroom evidentiary process, its endorsement of the notion that there was a "deliberate campaign to impose homosexuality on Ugandan culture", including the "recruitment of children into homosexuality", lacked the sound evidentiary basis that legal decisions require. Essentially, the Court proceeded to undermine the legitimacy of individual freedoms and expressions under the guise of protecting societal norms, without substantial evidence placed before and assessed by a court of law. In the same vein, there was a worrying misunderstanding of the evidence regarding HIV/AIDS and MSM by the Court. Despite the *amicus* brief from UNAIDS providing contrasting conclusions, the Court dismissed the idea that private homosexual acts are harmless, highlighting physical harm from anal sex and its burden on the health system as justifiable reasons for State intervention.

On the argument that the provisions of the Act offended the right to equality and non-discrimination, the Court held that sections 1,2(1) - (4), 3(1) and 3(2)(c) - (f), (h), (J), 3(3) and (4), and 6 of the Act did not contravene the right to equality and freedom from discrimination guaranteed under articles 21 (1)(2)(3)(4), 32(1), 43(2)(c), and 45 of the Ugandan Constitution. The Court further held that the limitation to the right to equality and non-discrimination embedded in sections 12 and 13 of the Act abide by article 17(1)(c) of the Constitution, and were demonstrably justifiable in a free and democratic society as envisaged under article 43(2) of the Constitution. The Court reached this conclusion by first interpreting the Constitution in light of the principle of "the rule of harmony" which advances the proposition that the entire Constitution ought to be read together as an integral whole with no particular provision "destroying" the other but each sustaining the other. The Court then held that by virtue of article 31 (2a) of the Constitution, which restricts the legality of marriage to heterosexual unions, constitutional harmony would dictate that discrimination on the basis of sexual orientation cannot be read into article 21 of the Ugandan Constitution. The Court also based its decision on its own recognition that the views of Ugandan society still abhorred homosexuality. Similarly, the Court held that the penalties under the Act served a legitimate public interest in protecting children, and so the Court held that provisions of the Act did not offend the right to equality and non-discrimination.

On the above mentioned issue, the Court did not attempt to consider arguments around the rights of the minority against the opinion of the majority but simply accepted the supremacy of majority opinion as a given. The Court, for instance, did not engage with jurisprudence from other courts that have interrogated the role of the judiciary (as a non-political forum and a resort for minority protection) with that

of the legislature (which is a representative forum), and as such conflates its role with that of upholding majority views.

The Constitutional Court further analysed the argument of the Petitioners that sections 1,2,3, 9 and 11(2)(d) of the Act violated the right of privacy as contained in the Constitution and other international human rights instruments. The Court held that there was no violation of the Constitution, and no inconsistency between those sections and the right to privacy enshrined in article 12 of the UDHR and article 17(1) of the ICCPR. In arriving at this conclusion, the Court stated that, "We do not find the impugned sections of the Anti-Homosexuality Act to authorise unlawful entry onto, search or interference with a person's body, home or other property, correspondence or communication. The insinuation by the petitioners that such violations are inevitable in the enforcement of the Act descends into the realm of speculation that is unsupported by evidence and therefore untenable." As with the prior issues, the reasoning of the Court on this point seems to take more cognizance of hearsay and sentiment rather than, for instance, the evidence of previous cases that had been brought before Ugandan courts on violations of privacy and dignity on the basis of sexual orientation by State and non-state actors.

The Court, however, held that section 14<sup>9</sup> of the Act was inconsistent with the right to privacy encapsulated in article 12 of the UDHR and article 17 of the ICCPR; the right to health, as enshrined in Objectives XIV(b) and XX of the National Objectives and Directive Principles of State Policy, and article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); the protection of the family, as envisaged in Objective XIX of the National Objectives, and freedom to practise any religion, as encapsulated in article 29(1)(c) of the Constitution. In its decision, the Court concluded that section 14 risked eroding professional confidentiality, which could have a "ripple effect on other basic human rights." It further held that "any law enforcement considerations that supposedly underlie section 14 would be over-ridden by the need to preserve medical ethics as a vital component of the right to health but, equally importantly, in the interests of positive national health outcome."

The Court then examined the argument that sections 2, 3, 11 and 13<sup>10</sup> of the Act violated the rights to freedom of expression, assembly and association as guaranteed under the Constitution, and various human rights instruments. The Court held that

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<sup>9</sup> Section 14(1)-(2) imposes a legal obligation on individuals to report known or suspected acts of homosexuality to authorities, with subsection (1) establishing the general reporting duty and subsection (2) exempting privileged communications, while subsection (3) (not requested) specifically penalizes failures to report offenses involving children or vulnerable persons with up to five years' imprisonment.

<sup>10</sup> Section 13(1)-(2) requires individuals convicted under the Act to disclose their conviction when applying for employment involving children or vulnerable persons, with subsection (2) imposing up to two years' imprisonment for non-disclosure and mandating termination of employment for such violations.

sections 11(1) and (2)(b), (c) and (e) of the Act represented permissible limitations within the confines of articles 8a and 43(2)(c) of the Constitution, stating that the Court did not consider the nature of expression contemplated under article 29(1)(a) of the Constitution, "to extend to the expression of sexual intimacy, as proposed by the first to eighth petitioners. In our view, freedom of expression in the sense it accrues under the constitution and the ICCPR entails mental thought that is expressed verbally, in writing or by sign language and not necessarily physically." This reasoning severely limits the scope of expression and implies, for instance, that a physical act of protest may not necessarily fall under the freedom of expression.

The Court also analysed the argument raised by the Petitioner on the criminalization of homosexuality for consenting adults under sections 2 and 3 of the Anti-Homosexuality Act, their disqualification from employment upon conviction under section 12, the duty to disclose a conviction of homosexuality to certain employers under section 13, and the duty to report acts of homosexuality under section 14 of the Act as violating the economic and development rights of Ugandans that were protected under article 40(2) of the Constitution, and article 22 of the UDHR, article 1 of the ICCPR, article 1 of the ICESCR, and article 22 of the ACHPR. The Court disagreed with this argument, holding that the sections seek to protect children and other vulnerable members of the society, as provided for in article 17(1)(c) and 34(7) of the Constitution, and thus were permissible limitations to the economic and development rights of Ugandans. The Court reasoned further that the economic rights guaranteed under article 40 were not part of the non-derogable rights set out in article 44 of the Constitution and so were subject to permissible limitations set out in article 43 of the Constitution.

The Court then examined the argument that the Act infringed on the right to access health services, decent shelter, right to property, other general social justice and economic development guaranteed under Objectives XIV & XX of the National Objectives and Directive Principles of State Policy, and articles 8a, 26, 45 and 287 of the Constitution. It held that section 3(2)(c) violated the right to health enshrined in article 12(1) of the ICESCR and recognized under articles 45 and 287 of the Uganda Constitution, while sections 9 and 11(2)(d) of the Act were inconsistent with the right to an adequate standard of living enshrined in article 25(1) of the UDHR and the right to health enshrined in article 12(1) of the ICESCR, both of which were similarly recognized under articles 45 and 287 of the Constitution. However, the Court reasoned that, considering that the various provisions that impacted privacy and healthcare had been struck out, the rest of the Act could be enforced and was not in contravention of the Constitution.

On the whole, all the challenges raised by the Petitioners against the Act failed, save for those concerned with the sections of the Act relating to housing and healthcare. In particular, the Court struck down: section 3(2)(c) which criminalizes the transmission of a terminal illness through a homosexual act, as violating the right to health; sections 9 and 11(2)(d), regarding leasing premises for homosexual activities, as violating the right to housing and an adequate standard of living; and section 14, imposing a duty to report acts of homosexuality, as violating privacy and professional confidentiality.

Despite striking down these provisions, the Court's general reasoning is self-contradictory and arbitrary insofar as which issues and rights it decides to respect and which ones it considers subordinate to the views of the majority views.<sup>11</sup> The Court also imposed new interpretations on established human rights principles in a way that conformed to political objectives, rather than advance democratic freedoms. And the Court made no attempt to understand or review the lived realities of the LGBTIQI+ community in Uganda in terms of their experience of social stigma, discrimination, violence, conversion practices, and invasion of privacy. Instead, the Court preferred the prejudicial and unsubstantiated statements that the LGBTIQI+ community recruited and converted children and vulnerable persons into homosexuality in Uganda.

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<sup>11</sup> <https://www.icj.org/uganda-icj-condemns-the-objection-and-hateful-constitutional-court-judgment-upholding-the-constitutionality-of-the-anti-homosexuality-act-2023/>.

## III. Association and Assembly

### Introduction

The right to freedom of association with others and the right of peaceful assembly are enshrined in international human rights law instruments and are pivotal for LGBTIQ+ individuals to organize, advocate and express their identities and demands publicly. This section explores how courts across various jurisdictions have responded to restrictions imposed on LGBTIQ+ persons. It examines significant cases from countries like Kenya, Nigeria and Uganda, where judicial decisions have either reinforced or challenged the legal barriers faced by organizations seeking official recognition and to uphold the right of individuals to assemble. The *Eric Gitari* case has principal significance having been litigated through the Kenyan courts and demonstrating how the Kenyan legal system recognizes the right of individuals to register and associate as members of nongovernmental organizations even within a criminalizing legal environment. The section also acknowledges ongoing legal setbacks in various jurisdictions, emphasizing the need for continued legal advocacy to achieve and maintain the rights to association and assembly.

#### 7a. [\*Eric Gitari v Non-Governmental Organisations Co-Ordination Board & others \[2015\] eKLR, Petition No. 440 of 2013 \(Kenya\) \(April 2015\)\*](#)

*Eric Gitari sought to register a non-governmental organization (NGO) to address the violence and human rights abuses suffered by LGBTIQ+ people. Eric sought to reserve with the Non-Governmental Organizations Coordination Board (NGO Board) the names "Gay and Lesbian Human Rights Council"; "Gay and Lesbian Human Rights Observancy" and "Gay and Lesbian Human Rights Organization". He was advised by the NGO Board that all the proposed names were unacceptable and should be reviewed. The High Court of Kenya found that by not allowing an NGO focused on protecting the human rights of "the LGBTIQ+ community," the NGO Board violated the Petitioner's constitutional right to association. Accordingly, the Board's decision was overturned, and they were directed to allow the NGO to register.*

### Background

Eric Gitari sought to register a non-governmental organization (NGO) to address the violence and human rights abuses suffered by LGBTIQ+ people. To proceed to registration, Eric sought to reserve with the Non-Governmental Organisations Coordination Board (NGO Board) the names "Gay and Lesbian Human Rights Council"; "Gay and Lesbian Human Rights Observancy" and "Gay and Lesbian Human Rights Organization". He was advised by the NGO Board that all the proposed names were unacceptable and should be reviewed. Consequently, he petitioned the Court for an order of mandamus against the NGO Board on the ground that refusal to

register the NGO was discriminatory and a breach of his right to freedom of association.

## **Legal issue**

- Whether the decision to refuse to register an NGO on the basis of its name violated rights of the Petitioner to freedom of association and freedom from discrimination.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of Kenya, article 36 (freedom of assembly and association), article 27 (protection from discrimination, including on the grounds of gender).

### *Comparative law*

- [Kivumbi v Attorney-General, Uganda Court of Appeal, 2008](#) - Finding that freedom of expression is intrinsic to democratic principles.
- [National Coalition for Gay and Lesbian Equality v Minister of Justice, Constitutional Court of South Africa, 1999](#) - Decriminalizing sodomy laws in South Africa for being incompatible with the constitution.
- [Kasha Jacqueline and Others v Rolling Stone Limited and Another, High Court of Uganda, 2010](#) - Where the Court held that publication of the personal details of gay persons in a magazine "exposing" them was a breach of their dignity and right to privacy.
- [Kanane v State, Botswana Court of Appeal, 2003](#) - Finding that the sections of the Penal Code of Botswana that criminalized same-sex conduct did not prevent association.

### *International Law*

- African Charter on Human and Peoples' Rights, article 10 (freedom of association).
- [Sudan Law Office of Ghazi Suleiman v Sudan, African Court of Human and Peoples' Rights, 2003](#) - Where it was held that the State was in violation of the right to freedom of association and assembly by restricting an individual from gathering to discuss human rights.
- Universal Declaration of Human Rights.
- International Covenant on Civil and Political Rights.

## **Judicial reasoning**

*(Per Isaac Lenaola J)*

The Court began by appreciating the submissions of the 1st and 2nd interested parties, and also that of the Respondent, on the need to preserve the heterosexual family units and the due recognition given to them by local and international laws and treaty but stated that this particular case was not about marriage or morals but on "the right to freedom of association and non-discrimination and equality before the law with regard to persons who belong to the lesbian, gay, bisexual, transgender, intersex and queer groups."

In dealing with the right to freedom of association, the Court examined the relevant section of the Kenyan Constitution relating to freedom of association stating that "article 36 thus grants 'every person' the right to form an association 'of any kind'. It also provides that an application to form an association can only be refused on reasonable grounds, and no person can be compelled to join an association." The Court then considered the Petitioner's request for a declaration that he was a "person", holding that it was nothing short of stating the obvious as "an individual human being, regardless of his or her gender or sexual orientation, is a 'person' for the purposes of the Constitution." The Court however took pains to expound extensively on who a person was, drawing reference from the Constitution of Kenya, Black's Law Dictionary and the Oxford Concise English Dictionary. It concluded on the issue that neither the Constitution nor international treaties to which Kenya was a party, including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights, distinguish between persons in their application of the right to freedom of association. It held that "These provisions clearly include all individual, natural persons, and there is nothing to indicate that sexual orientation is a matter that removes one from the ambit of protection by the Constitution. In fact, subject to the limitations under the Constitution, even persons who have been convicted of criminal offences are entitled to the enjoyment of the fundamental rights and freedoms guaranteed under the Constitution."

The Court emphasized the importance of the right to freedom of association, drawing reference from various international cases, including *Jawara v The Gambia*, *Amnesty International v Zambia*, *Aminu v Nigeria*, *Law Office of Ghazi Suleiman v Sudan* and *Civil Liberties Organization v Nigeria*, all showing the weight which various regional and international courts have attached to the right to freedom of association. The Court further stated that, "Freedom of association is universally accepted as fundamental to a democratic society. The principles of pluralism and democracy necessitate that all citizens be free to assemble and express their opinions and be limited in their ability to do so only by very narrow and specific circumstances."

The Court was of the view that the right to freedom of association was fundamental and persons in a democracy were to enjoy this right irrespective of whether "the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups" and that the Constitution and the rights it protects applied "regardless of the popularity of the objects of the association." The Court further addressed itself to cases from other jurisdictions, including *Patrick Reyes v The Queen Privy Council* and *National Coalition for Gay and Lesbian Equality v Minister of Justice*, and held that, "[i]t cannot also be

proper, as the Board suggests, to limit the right to freedom of association on the basis of popular opinion." While agreeing and accepting that the group is not a popular one in Kenyan society, the Court stated that it "is enjoined by the Constitution to apply the law without fear or favour. More particularly, it must do so without prejudice and be able to distinguish between the right to assemble of those of a sexual orientation that is not socially accepted, and the homosexual acts that the respondents and the 3rd interested party argue are criminal acts prohibited by law." The Court thus held that the Petitioner was entitled to his right to freedom of association without restriction outside of the ambit of the law.

The Court then moved to determine if the Petitioner's right to freedom of association had been limited. Dismissing the Board's argument that it had not limited the Petitioner's right to form associations but "has merely advised the Petitioner against forming an organization perpetrating or promoting an illegality", the Court found that the decision of the Board "rejecting the names submitted by the Petitioner, was a rejection of his application for registration of his proposed NGO." It held that the non-registration of the Petitioner's NGO was a limitation of the Petitioner's right to freedom of association.

Upon concluding that the actions of the Board had indeed restricted the right of the Petitioner to freedom of association, the Court considered if the limitation was justifiable in a free and democratic society. The Court held that for a limitation to be justifiable, "the Board must demonstrate that there is legislation that allows the limitation of the right of freedom of association of people based on their sexual orientation." The Court then considered if the provisions of the Penal Code criminalizing carnal knowledge against the order of nature relied on by the Board can be said to be such legislation. Finding that the Penal Code did not criminalize homosexuality but only certain sexual acts, the Court stated that, "the Penal Code does not criminalize the right of association of people based on their sexual orientation and does not contain any provision that limits the freedom of association of persons based on their sexual orientation." Here again, the Court made reference to decided cases from other jurisdictions showing that a penalization of certain sexual acts does not amount to a blanket criminalization of homosexuality or the association of homosexuals.

The Court disagreed with the Board's argument that sexual orientation was not a prohibited ground of discrimination in the Kenyan Constitution, stating that the list of grounds in article 27(4) is not closed and was "subject to interpretation to include such grounds as the context and circumstances demonstrate are a ground of discrimination." It held further that, "[o]nce a limitation is demonstrated, the onus is on the Board to justify its conduct with reference to the law that allows it to infringe or limit the Petitioner's right to association. The Petitioner is not under any obligation, once he has demonstrated a violation of his right, to show that there is no justification for limiting his rights." The Court was of the view that the Board had not discharged this burden, as the Board could not rely on arguments of morality or religious beliefs in support of its limitation of the Petitioner's rights finding that "the acts of the Board in rejecting the Petitioner's names for the proposed NGO, and by extension its refusal to register the proposed NGO, is a limitation of the Petitioner's right to freedom of

association which the Board has not been able to justify in accordance with the requirements of the Constitution.”

The Court held further that the actions of the Board amounted to discrimination against the Petitioner and a breach of its constitutional duty as a public body entrusted with a responsibility to act lawfully. It stated that “the Board has acted in a manner that is unconstitutional and unlawful, and amounts to an abuse of power. It is not for the Board to only register NGOs whose names are in harmony with the personal views and convictions of its officials regarding gay and lesbian people.” The Court found further that, “[a]n interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination.”

In light of its findings, the Court held that the Petition had merit and granted the orders sought by the Petitioner.

7b. [Non-Governmental Organisations Co-ordination Board v Eric Gitari & others \[2023\] KESC 17 \(KLR\) \(Kenya\) \(February 2023\)](#)

*In a majority decision, the Supreme Court of Kenya upheld the decision of the High Court and Court of Appeal in holding that the refusal of the Non-Governmental Organisations Co-ordination Board to register the proposed organization of the 1<sup>st</sup> Respondent is in violation of the 1st Respondent's right to freedom of association and freedom from discrimination enshrined under articles 36 and 27 respectively of the Constitution of Kenya.*

## **Background**

The current case arose from an appeal challenging the judgment of the Court of Appeal which had dismissed the appeal by the Non-Governmental Organisations Co-ordination Board against the High Court's decision of *Eric Gitari v. Non-Governmental Organisations Co-ordination Board & others*. The Court of Appeal had affirmed the decision of the High Court that had declared that the Non-Governmental Organisations Coordination Board had contravened the provisions of article 36 of the Kenya Constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.

## **Legal issue**

- Whether the decision not to register an organization on the basis that its name and object offends public policy, violates the rights to freedom of association and freedom from discrimination.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of Kenya, article 36 (freedom of association), article 27 (freedom from discrimination), article 24 (limitations of rights and fundamental freedoms).
- Penal Code, sections 162, 163, 165 (Prohibition of carnal acts that go against the order of nature).

### *Comparative law*

- [Gay Alliance of Students v Mathews, United States Court of Appeal, 1976](#) - The refusal to register the Alliance is a violation of their freedom of association.
- [The Attorney General of Botswana v Thuto Rammoge and 19 Others, Botswana Court of Appeal, 2014](#) - The right to freedom of assembly and association protected the rights of lesbians, gays, bisexuals and their allies to register a society and to lobby for legal reform.

### *International law*

- International Covenant on Civil and Political Rights, article 22(1) (freedom of association).

- [Sidiropoulos and Others v Greece, European Court on Human Rights, 1997](#) - Parameters for limiting the freedom of association within a State.

## **Judicial reasoning**

*Majority decision (Per Justices Mwilu, Wanjala and Njoki)*

The majority decision of the Supreme Court began with a clarification that the matter before the court was not for the purpose of legalization or decriminalization of same-sex consensual sexual acts, but rather focused on the question of whether the refusal to register an organization of persons who belong to this “demography” infringed on their freedom of association.

Then, the Court highlighted the arguments advanced by both parties. The Appellant argued that its refusal to register the Respondent’s organization was hinged on its opinion that its name and purpose were against public policy as they contravened sections 162, 163 and 165 of the Penal Code which prohibited “carnal knowledge against the order of nature”. On the other hand, the basis of the Respondent’s argument was that article 36 guaranteed the right to freedom of association and “If the drafters of the Constitution wanted to exclude members of the LGBTQIA community from this right, they would have expressly included it in the wordings of Article 24(5)”.

In resolving the issue, the Court began by outlining the content of article 36 of the Constitution, which states that the fundamental right shall apply to “every person...” This was read in conjunction with article 260 of the Constitution, which defines persons to be a “company, association, or other body of persons whether incorporated or unincorporated”. Thus, the Court held that, “the question we have asked ourselves is whether in the instant case, the person(s) referred to in the above provisions also include LGBTQ? Our literal reading of article 36 of the Constitution is that the LGBTQ group is not excluded from the definition under Article 36. Sub-article (3) requires that any legislation that requires registration of an association of any kind shall provide that registration may not be withheld or withdrawn unreasonably. The right to form an association is an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Since the LGBTQ persons are not explicitly excluded from the definition of persons, they are therefore entitled to the rights outlined in article 36 of the constitution”.

The Court went further to determine on what grounds this right could be justifiably limited. To answer this, the Court analyzed article 24 of the Constitution buttressed by both regional and international persuasive laws all of which emphasized that this right can only be limited by law and then only to the extent that is “reasonable and justifiable” in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and

fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose.

Using the above as a guide and following the Appellant's argument that it refused to grant the Respondent's registration because it contravened the law, led the court to further ask the question "does the Penal Code, provide for the limitation of the right to freedom of association of LGBTQ?"

To answer this question, the Court reviewed the content of section 162 of the Penal Code and found that "[it does] not, pursuant to the provisions of article 24 of the Constitution, express the intention to limit LGBTQ's right to freedom of association. Likewise, the sections do not specify the nature and extent of the limitation of the freedom of association, if any. The 1st Respondent's intention was to register an organization to champion for the rights of LGBTIQ, and this has no correlation whatsoever with the offences articulated under sections 162, 163 and 165 of the Penal Code." In conclusion, the Court noted that there was no evidence before it that established that "persons who profess to be LGBTQ are criminals" who had contravened the sections of the Penal Code raised by the Appellant.

The Court placed reliance on several cases both local and comparative, including *Gay Alliance of Students v Mathews*, *Zhdanov and Others v Russia*, *The People v Siyah Pembe Üçgen Izmir Association* ("Black Pink Triangle"), and *Attorney General of Botswana v Thuto Rammoge and 19 Others*. The majority decision held that, "...it would be unconstitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the applicants. Therefore, we are of the view that the appellant's decision was unreasonable and unjustified. As such, we agree with the reasoning of the High Court that just like everyone else, LGBTQ have a right to freedom of association which includes the right to form an association of any kind."

The majority decision also addressed whether the NGO Coordination Board's decision was discriminatory against the 1<sup>st</sup> Respondent and violated Article 27(4) of the Constitution of Kenya. The Appellant had argued that sexual orientation is not among the prohibited grounds contemplated under Article 27(4) of the Constitution and challenged the majority decision of the Court of Appeal which affirmed the High Court's interpretation that the term "including" under Article 27(4) allowed for sexual orientation to be included in the non-discrimination clause.

In analyzing this issue, the Court examined Article 27(4) of the Constitution alongside international and regional human rights instruments including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights. The Court noted that while most international legal instruments do not expressly provide for protection against discrimination based on sexual orientation, the grounds enumerated in these instruments, including Article 27(4) of the Kenyan Constitution, are not exhaustive.

The Court referenced comparative jurisprudence, including the European Court of Human Rights case of *Salgueiro da Silva Mouta v. Portugal* and the Human Rights Committee decision in *Toonen v Australia*, which established that sexual orientation is included within the meaning of "sex" in non-discrimination provisions. The Court concluded that "the use of the word 'sex' under Article 27(4) does not connote the act of sex *per se* but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise." Furthermore, the Court found that the word "including" under the same article is not exhaustive but illustrative, and would also comprise freedom from discrimination based on a person's sexual orientation.

The majority therefore held that the Appellant's action of refusing to reserve the name of the 1<sup>st</sup> Respondent's intended NGO on the ground that "Sections 162, 163 and 165 of the Penal Code criminalizes Gay and Lesbian liaisons" was discriminatory under Article 27(4) of the Constitution. Consequently, the Court found that the 1<sup>st</sup> Respondent's right not to be discriminated against directly or indirectly based on their sexual orientation was violated by the Appellant, providing an additional ground for dismissing the appeal.

The Court thus affirmed the decision of the Court of Appeal and the High Court that the Appellant violated the fundamental right of freedom of association of the respondent and also that the refusal was discriminatory against the respondent.

8. [Republic v Non-Governmental Organisations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 Others \[2014\] eKLR, JR Miscellaneous Application No. 308a of 2013 \(Kenya\) \(July 2014\)](#)

*The Applicant, an association known as Transgender Education and Advocacy, sought a court order compelling the Non-Governmental Organizations Coordination Board (NGO Board) to register it as a non-governmental organization (NGO). The Respondent argued it had postponed registration of the Applicant as an NGO because there was a court matter pending regarding change of name and gender of one of the Applicant's members. Its view was therefore to wait until the issue was resolved. The Court found in favor of the Applicant.*

## **Background**

The Applicant was an association known as Transgender Education and Advocacy. It sought a court order to compel the Non-Governmental Organizations Coordination Board (NGO Board) to register it as a non-governmental organization (NGO), in accordance with the Non-Governmental Coordination Act, of Kenya. The Attorney-General was added as a nominal party. The Respondents argued that it had postponed registration of the Applicant as an NGO because there was a court matter pending regarding change of name and gender of one of the Applicant's members. Its view was therefore to wait until the issue was resolved.

## **Legal issue**

- Whether the Respondents acted properly in not registering the Applicant as an NGO.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of Kenya, article 27(4) (freedom from discrimination).

## **Judicial reasoning**

*(per GV Odunga)*

The Court found that the 1<sup>st</sup> Respondent had not "lawfully exercised a power bestowed on it" as it had refused to exercise a discretion placed on it by law and the basis of its failure to do so was not grounded in law. The Court examined the issue of discretion, and when the court will intervene in the exercise of a public body or authority's exercise of discretion, holding that the courts would intervene: "(1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion

reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable." The Court held that in this instant case the 1<sup>st</sup> Respondent had abused its powers as "To decline to exercise a power on some extraneous grounds amounts to [an] abuse of power".

The Court also held that the 1st Respondent had acted unconstitutionally by refusing to register the Applicant on the basis of the gender or sex of one of its members. In the words of the Court, "to discriminate persons and deny them freedom of association on the basis of gender or sex is clearly unconstitutional. That would contravene the provisions of article 27(4) of the Constitution."

The Court held that, "the 1<sup>st</sup> Respondent has purported to justify its non-action on legally untenable grounds" and, in the circumstances, the Court found that, "the reasons advanced by the 1<sup>st</sup> Respondent have no legal basis and are unreasonable." Consequently, the Court found merit in the application and granted the order of mandamus sought by the Applicant, "compelling the 1st Respondent to carry out its statutory mandate by registering the Applicant as a Non-Governmental Organization."

## 9. [Pamela Adie v CAC \(FHC/ABJ/CS/827/2018\) \(Nigeria\) \(Nov 2018\)](#)

*The Applicant applied for the registration of an organization named Lesbian Equality and Empowerment Initiatives (LEEI) with the aim of advocating for the rights of lesbian women. The Court upheld the decision by the Corporate Affairs Commission (CAC) of Nigeria to reject an application for the registration of a lesbian group.*

### **Background**

In this case, Pamela Adie applied for the registration of an organization named "Lesbian Equality and Empowerment Initiatives" (LEEI) whose aim was to advocate for the human rights of lesbian women. The Corporate Affairs Commission (CAC), the government body responsible for registering non-governmental organizations in Nigeria, rejected the application on the ground that the proposed name was misleading and contrary to State policy. The Applicant unsuccessfully petitioned the Registrar General and thereafter brought an application for an order of mandamus against the Respondent on the grounds that the non-registration breached the Applicant's human rights, including the rights to freedom of expression and association.

### **Legal issue**

- Whether, in the circumstances of the case, the Applicant was entitled to the reliefs sought.

### **Relevant laws and jurisprudence**

#### *Domestic law*

- Constitution of the Federal Republic of Nigeria, section 39 (Freedom of expression), section 40 (Freedom of association).
- Same Sex Marriage (Prohibition) Act, 2014, sections 1, 4(1) (Prohibiting the registration of same sex associations).
- Companies and Allied Matters Act, 2014, section 30(1)(c) (Prohibiting the registration of certain names).

### **Judicial reasoning**

*(Per Hon. Justice Nnamdi O Dimgba)*

The Applicant had argued that the Respondent did not give reasons for categorizing the proposed NGO name as offensive and contrary to public policy. The Court began its determination by holding that this argument lacked merit in view of the fact that the Respondent based its decision on section 30 (1)(c) of the Companies and Allied Matters Act, which gave it discretion on such matters. The Court held that, "The discretion given by statute is that of the Respondent, and except in clear cases of gross unreasonableness, the Court must defer to the exercise of that discretion and cannot substitute its own judgment for that of the responsible agency."

The Court moved on to consider if the refusal of the Respondent to register the NGO breached Applicant's rights to freedom of association, and freedom of expression. It concurred with the submission of counsel for the Applicant that public policy as a ground for refusal by the Respondent must conform with the dictates of law and "as such any public policy that is against the constitutional rights (*sic*) to Freedom of Association must give way to the Constitution." The Court, however, found that the protection and preservation of public safety, public order and public morality were a basis upon which fundamental rights can be limited as provided by section 45(1)(a) of the Nigerian Constitution. Consequently, the Court was of the view that the Same Sex Marriage (Prohibition) Act of 2013 was an example of laws enacted in view of the protection of public morality and effectively functioned as a limitation to the exercise of fundamental rights. The Court held that the prohibition of the registration of gay clubs, societies and organizations, including with respect to their sustenance, processions and meetings, also served as a prohibition of lesbian associations. It held that "the intention is glaring on the face of the name of the Act. It was intended to prohibit the union of people of the same sex, and or any promotion of activities or association of individuals for the support of the same sex ideology. It could not have been the intention of the legislature to prohibit the registration of gay associations while allowing lesbian associations". However, the Court did not consider whether or not the limitations on fundamental rights created by the Same Sex Marriage (Prohibition) Act could be considered reasonably justifiable in a democratic society as required by the Nigerian Constitution and what circumstances would constitute a justifiable limitation.

In view of the foregoing, the Court aligned itself with the position of the Respondent "that the violation of public policy as a reason for rejecting the registration of the proposed name of the association was not at large but rather has its bearing from constitutional and statutory provision." In the same vein, and based on the same reasoning, the Court dismissed the argument that the action of the Respondent breached the Applicant's right to freedom of expression.

The Court held further that the non-registration of the Applicant's name by the Respondent did not prevent the Applicant from associating, as the Applicant has "been operating the association and using it to express her views without any interference from the Respondent prior to the application for the association to be accorded a legal status in Nigeria which was subsequently denied", hence the non-registration does not breach the right to freedom of association of the Applicant.

The Court consequently resolved the issue against the Applicant and dismissed the suit stating that, "so far as the Same Sex Marriage (Prohibition) Act is still much operative in Nigeria and has not been repealed, the case of the Applicant must fail."

10. [Kasha Jacqueline v Rolling Stone & Another \(Misc. Cause No. 163 of 2010\)](#)  
[\(Uganda\)](#) (Dec 2010)

*The Applicants' names and images were published in a local magazine in an article about "known homosexuals" and, in some cases, the article featured detailed information, including of people's home addresses. The Court found in favour of the Applicants and held that their dignity had been infringed and made an order for compensation.*

### **Legal issues**

- Whether the publication threatened or tended to threaten the human dignity of gay persons and in particular the Applicants'.
- Whether the publication threatened or tended to threaten the right to privacy of person and home of the Applicants.

### **Relevant laws and jurisprudence**

#### *Domestic law*

- Constitution of Uganda, article 50(1) (Enforcement of Fundamental Rights).
- Penal Code Act, section 145 (Criminalizing carnal knowledge against the order of nature).

### **Judicial reasoning**

*(per Hon Justice VF Musoke-Kibuuka)*

The Applicants had originally filed this matter on several grounds, but the Court chose to restrict itself to only the rights to life and breach of privacy of the person and the home under article 27 of the Constitution.

In deciding the issue, the Court, agreeing with Applicants' counsel, considered that the motion "is neither about homosexuality as such nor is it an abstract application, as learned counsel 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." Furthermore, the Court emphasized the jurisdiction of the Court under article 50(1) of the Ugandan Constitution included not just infringed rights, but also threatened infringement of rights, and in both cases, the Court may give appropriate redress. The Court then held that the submissions of counsel for the Respondent to the effect that no evidence of an actual infringement had been presented to the Court "does not appear to be well founded".

On the issue whether the publication threatened or tended to threaten the human dignity of gay persons and in particular the Applicants, the Court employed an objective test in its determination. The Court concluded that, "by publishing the identities of the Applicants and exposing their homes 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.” The Court held further that “Clearly, the call to hang gays in dozens tends to tremendously threaten their right to human dignity.”

On the second issue, on the breach or threatened breach of the right to privacy of person and home, the Court applied the same objective test in arriving at the conclusion that the publication exposing the identities and homes of the Applicants for “anti-gay” purposes threatened the privacy of the person and homes of the Applicants.

The Court re-emphasized that the instant application was not about homosexuality per se but about the enforcement of fundamental rights and freedoms. It held that the Court did not agree “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.”

In view of the foregoing, the Court resolved the issues in favour of the Applicants and issued injunctive remedies against the Respondents and compensation to the Applicants.

11. [Jacqueline Nabagesera and Others v Attorney General and Another \(Miscellaneous Cause 33 of 2012\) \[2014\] UGHCCD 85 \(Uganda\) \(June 2014\)](#)

*An application seeking an order to declare the closure of a workshop unconstitutional and an infringement of the rights to freedom of assembly, speech and expression, association and equality before the law. The Court held that the workshop was illegal as it engaged in the direct and indirect promotion of same-sex practices, which was prohibited by the Penal Code Act, and that the closure of the workshop was to protect national security and public order and public interest. Accordingly, this did not violate the Applicants’ human rights and freedoms.*

**Background**

Jacqueline Kasha Nabagesera and a group called “Freedom and Roam Uganda” organized a workshop with the purpose of training LGBTI activists in project planning, advocacy and human rights. When informed of this workshop, the Ugandan Minister of Ethics and Integrity intervened and ordered the closure of the workshop. He alleged that the workshop was an illegal gathering of homosexuals prohibited by section 145 of the Ugandan Penal Code.

Nabagesera submitted that neither hosting nor attending the workshop constituted a criminal offence under the terms of section 145, which solely criminalized homosexual

acts. She and Freedom and Roam Uganda challenged the actions of the Minister for closing the workshop, submitting that the closure of the workshop constituted a violation of their human rights to freedom of expression, political participation, freedom of association, assembly and equality before the law.

### **Legal issue**

- Whether by organizing and attending the workshop, the Applicants were engaging in illegal and unlawful activities.
- Whether the Applicants' constitutional rights were unlawfully infringed when the Minister of Ethics and Integrity closed down their workshop.

### **Relevant laws and jurisprudence**

#### *Domestic law*

- Ugandan Constitution, 1995.
- Ugandan Penal Code Act, section 145.
- [Kasha Jacqueline v Rolling Stone Limited & another, Miscellaneous Cause 163 2010](#) - Held that "the scope of section 145 of the Penal Code Act is narrower than gaysim generally. That one has to commit an act under section 145 to be regarded as a criminal".
- [Charles Onyango Obbo and Another v Attorney General, Uganda Supreme Court Appeal, 2002](#) - The court found that a person's expression is not excluded from Constitutional protection simply because it is thought by others to be erroneous, controversial or unpleasant.
- [Thomas Kwoyelo alias Latoni v Uganda, Uganda Constitutional Court, 2011](#) - The applicant had been denied amnesty yet the same had been granted to 24,066 other people.

#### *Comparative law*

- [Law office of Ghazi Suleiman v Sudan, African Commission on Human and Peoples' Rights, Communication number 228/99, \(2003\)](#) - Mr. Ghazi was restricted from gathering to discuss (and promote) human rights. The State of Sudan claimed that it had restricted his speech because it was a threat to national security and public order and thus prejudicial to the public interest.
- [Civil Liberties Organizations v Nigeria, African Commission on Human and Peoples' Rights, Communication 151/96 \(1999\)](#) - The African Commission considered whether the composition and powers of a new governing body for the Nigerian Bar Association violated inter alia Nigerian Lawyers' right to freedom of association under article 10 of the African Charter.
- [Baczkowski and Others v Poland, European Court of Human Rights, 2007](#) - The European court of Human Rights held that the refusal to allow a pro-homosexuals group to assemble and promote their homosexual lifestyle was a violation of right of assembly.

### *International law*

- African Charter on Human Rights and Peoples' Rights, article 9 (freedom of expression) and article 27 (due regard to the rights of others, collective security, morality and common interest).
- Declaration on Human Rights Defenders, article 7 (guarantees everyone the right individually and in association with others to develop and discuss new human rights ideas and to advocate their acceptance).

### **Judicial reasoning**

#### *Majority Opinion (per Justice Musota)*

Justice Stephen Musota delivered the opinion of the High Court of Uganda at Kampala. He acknowledged that article 43 of the Constitution of Uganda allowed certain constraints to be placed on human rights in favour of the public interest. The Court was of the view that these restrictions could be imposed as long as they "do[] not amount to political persecution and [are] justifiable [and] acceptable in a free democratic society". However, the Court did not interrogate what factors would make a restriction justifiable and acceptable. Instead, Justice Musota determined that, although the Applicants had been exercising their rights to freedom of expression, association, and assembly, they were still promoting prohibited and illegal acts. This promotion of expressly prohibited acts was determined to be prejudicial to the public interest. The Court also established that the "[p]romotion of morals is widely recognized as a legitimate aspect of public interest which can justify restrictions." In this instance, the Court did not consider what determined morals or whether only the morals of the majority matters, or the limits to which moral perspectives should interfere with the enjoyment of constitutional rights. Rather, the Court determined that the Ugandan laws prohibited such acts and, for this reason, the organizing of the workshop could not be deemed a valid exercise of the Applicants' rights to freedom of expression, association and assembly. Thus, the Applicants were engaged in an activity contrary to the public interest.

In support of its reasoning, the Court also made reference to article 9 of the African Charter on Human Rights and Peoples' Rights, which states that the expression of such rights, has to be exercised within the ambit of the law. The Court held that the Applicants had not exercised their rights within the law because they were engaged in the promotion of homosexual acts, which was an activity that was strictly prohibited by section 145 of the Ugandan Penal Code.

The Court also considered that the protection of unpleasant, controversial, false, or wrong speech is not extended to protecting the expression that promoted prohibited

and illegal acts. Musota concluded that the closing of the workshop by the Minister had not violated the Applicants' right to freedom of expression, and or association and assembly under the Ugandan Constitution.

The Court also reaffirmed the constitutionality and validity of section 145 of the Penal Code prohibiting homosexuality in Uganda. The Court also held that, under article 43 of the constitution, human rights could be limited in favour of the public interest which, in this case, was interpreted to reject homosexual minorities in Uganda.

12. [Attorney General of Botswana v Thuto Rammoqe & Ors. \[2016\] CACGB-128-14 \(Botswana\) \(March 2016\)](#)

*The Respondents, belonging to an organization called Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), had filed a case in the High Court to challenge the decision of the Minister of Labour and Home Affairs who had rejected the the registration of their organization, LEGABIBO. The High Court had set aside the Minister’s decision. The Attorney General had appealed against the High Court’s decision inthe Court of Appeal. In its judgment, the Court of Appeal declared that the organization was entitled to be registered.*

### **Background**

The Respondents had sought to register their organization, Lesbians, Gays and Bisexuals of Botswana (“LEGABIBO”), under the Botswana's Societies Act. However, their application was denied by the Director of the Department of Civil and National Registration on the grounds that Botswana’s Constitution did not recognize homosexuals, and that registration would violate section 7(2)(a) of the Societies Act, which states that the Registrar may refuse to register a society if any of the objects is unlawful or could be used for any unlawful purpose. The then Applicants appealed to the Minister of Labour and Home Affairs who upheld the decision of the Director. The case was subsequently brought by the then Applicants to appeal the decision of the Minister before the High Court. Following a High Court judgment favourable to the then Applicants, the Attorney General appealed to the Court of Appeal against the High Court’s decision.

### **Legal issue**

- Whether it was lawful for the Minister of Labour and Home Affairs to uphold the decision of the Director of the Department of Civil and National Registration to deny the registration of a society thus constituting a breach of the constitution in an administrative decision.

### **Relevant laws and jurisprudence**

#### *Domestic law*

- Societies Act, chapter 18:01.
- [Kanane v The State, Court of Appeal, Botswana, 2003](#) – The court held that there was nothing to prevent “gay men and lesbians” from associating with each other subject to the law.
- [Attorney General v Dow, Constitutional Appeal, 1992](#) - The court outlawed gender-based discrimination as unconstitutional.
- *Kobedi v State, 2005* - Complaints of a breach of criminal proceedings should be raised in those proceedings or on appeal.

### *Comparative law*

- [Attorney General of Trinidad and Tobago v Rammanoop \(2005\) UK PC](#) – The court has full discretion to grant or decline constitutional relief.
- [Patrick Reyes v The Queen, Belize, 2002](#) - The legislature is tasked with deciding what conduct constitutes criminal conduct for which persons can be liable.
- [Prince v The President, Law Society and Others, South African Constitutional Court, 2002](#) - The legislature has the power to enact legislation prohibiting conduct it deems to be anti-social, and where necessary, impose criminal sanctions.
- [R v Oakes, Supreme Court of Canada, 1986](#) - The onus of proving that a limit on the right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society, rests upon the party seeking to uphold the limitation.
- [Gitari v Non-Governmental Organisations Board Petition No 440 of 2013, High Court of Kenya, 2013](#) - The court found that, “the right to associate belongs to everyone”, and that, “it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups”.

### *International law*

- Universal Periodic Review 2009 – The Minister for Defence, Justice and Security of Botswana acknowledged that while Botswana criminalizes same-sex sexual activities, civil society organizations are free to advocate for change on this matter.

## **Judicial reasoning**

*(per Justice Kirby)*

The Court of Appeal, in the unanimous judgment delivered by Justice Kirby, started by reviewing the decision of the High Court over which Rannowane J had presided. Justice Rannowane had held that the objects of LEGABIBO were all lawful. He had stated that, “it was not correct that ‘the Constitution does not recognize homosexuals’” and that, “advocacy for the decriminalization of same sex sexual relationships could not be equated with encouraging the commission of criminal offences contrary to sections 164 and 167 Penal Code.”

Justice Rannowane had consequently held that the refusal to register LEGABIBO was “grossly unreasonable and stood to be set aside on review”. He had held that it was also unlawful under section 3, 12 and 13 of the Botswana Constitution relating to the equal protection of the law, freedom of expression and freedom of association.

The Court also considered the grounds of appeal by the *Attorney-General*, particularly the argument that the High Court had erred in:

- (i) failing to consider that a decision maker could have found the objects of LEGABIBO unlawful;
- (ii) finding that homosexual persons were included in the definition of 'person' in section 3 of the Botswana Constitution and other provisions relating to fundamental rights thus giving them access to these rights; and
- (iii) attempting to distinguish the decision in the *Kanane* case and should have considered itself bound by that decision and should have dismissed the application.

This Court of Appeal was required to determine what the proper approach to be adopted was when breaches of the Botswana Constitution were alleged in an administrative decision. The Court relied on *Attorney General of Trinidad and Tobago v Rammanoop (2005) UK PC*, where it was affirmed that a court has full discretion to grant or decline constitutional relief.

As Rammoge had not found that any provisions of the Societies Act were unconstitutional, the question before the appellate Court was whether the Minister's decision to refuse to register LEGABIBO was an unjustifiable infringement of the rights protected in the Constitution. The Court stated that the only constitutional provision that needed to be considered was section 13, which related to the protection of the right of freedom of assembly and association. Section 13 permitted limitations to the right when that limitation was "done under the authority of any law", was "reasonably required in the interests of [*inter alia*] public order [or] public morality" and was "reasonably justifiable in a democratic society".

The Societies Act made no reference to "public morality" so any reliance on issues of "public morality" by the Minister would "not be a valid exercise of discretion" accepted by the Court.

The Court also ruled on the reliance placed on the Botswana case of *Kanane v State (2003)*, which featured in both parties' legal arguments. The Attorney General had argued that the case served as authority for the argument that "homosexual persons are not 'recognized' as such by the Constitution, and that they are accordingly not persons entitled to the fundamental rights conferred thereby." Rammoge had argued that the case "confirms the right of gays and lesbians to freely associate with one another, subject to the law". In that case, the court had held that the offence, which made same-sex sexual acts illegal, was constitutional, and that "the time had not yet arrived to treat gays and lesbians as a group deserving of inclusion in the [constitutional provision] in respect of which discrimination was unlawful". In the instant case, the Court distinguished the *Kanane* case and observed that even though the *Kanane* case had recognized the prohibition of same-sex sexual activity, it did not prevent gay and lesbian people from associating with one another.

The Court also referred to the discussion featured in the *Kanane* case on the developments around the world, namely, that same-sex consensual sexual conduct had begun to be decriminalized in other States. Kirby held that, although those developments were not directly relevant to the present case, they did “show a more tolerant and compassionate attitude towards previously taboo subjects throughout the world”. He held that Rammoge had been able to “lead compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights”.

The Court then considered whether the Minister’s decision infringed the rights to freedom of assembly and association. The Attorney General’s submission that the constitution “does not recognize homosexuals” was rejected. The Court held that “[t]here is no legislation in Botswana that prohibits anyone from being lesbian, gay or bisexual, and it would be difficult to formulate any logical basis for doing so”. The Court noted that the *Kanane* case did not “purport to exclude homosexuals from the ambit of ‘every person’ as referred to in ... the Constitution”

Upon examination of the Minister’s explanation for his refusal to register LEGABIBO, namely, that allowing the registration would enable the commission of unlawful acts, it was acknowledged that the Minister would be entitled to refuse the registration of LEGABIBO in line with the Societies Act. However, the Court noted that the objectives of LEGABIBO were not to pursue unlawful activity or encourage others to do so. The objectives were clearly “to advance the interests of gay, lesbian and trans-sexual persons in Botswana and generally to educate the public on human rights aspects of sexual orientation”. According to Justice Kirby, the “real question is whether there is anything unlawful or offensive about advocating for a change in these laws [criminalizing consensual same-sex sexual conduct] so as to decriminalize the forbidden aspects of same-sex relationships”. The Court held that advocating for legal change is “the democratic right of every citizen”. Accordingly, the Court of Appeal concurred with the prior findings of the High Court that it was “entirely unreasonable to refuse registration on the ground that LEGABIBO, in terms of its objects, was likely to be used for unlawful purposes”.

Regarding the constitutionality of the Minister’s decision, the Court held that the members of LEGABIBO sought to “register a society for the protection of their interests, so that they could freely assemble and associate with each other and with others who support their aims”, a goal that was specifically protected by section 13 of the Constitution guaranteeing the right of persons “to form or belong to trade unions or other associations for the protection of his or her interests.”

The Court also considered international law and noted that the human rights in question were protected by three international instruments to which Botswana is a signatory: the African Charter on Human and Peoples' Rights; the Universal Declaration of Human Rights; and the International Covenant on Civil and Political Rights.

The Court concluded that, "the Minister's decision interferes in the most fundamental way with the respondents' right to form an association to protect and promote their interests".

The Court referred to the Kenyan case of *Gitari v Non-Governmental Organisations Board Petition No 440 of 2013* in which the High Court of Kenya had found that, "the right to associate belongs to everyone" and that, "it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups".

The Court confirmed that the Botswana Constitution must be given a generous interpretation, and that the "test of what is reasonably justifiable in a democratic society is an objective one". A party seeking to justify a limitation to a fundamental right bears the onus of proving that the limitations within the Constitution apply directly to the specific limitation and furthers the development of the society.

On the limitation of rights, the Court made reference to the Canadian case of *R v Oakes* and held that the Attorney General would have to demonstrate that the action taken was proportional to the harm suffered by LEGABIBO as a result of the infringement of the right. The Court stated that it cannot "be said to be proportional if a society formed to pursue a number of honourable objectives, including advocacy, public health and education, was refused registration purely because, in the subjective view of the Registrar (or of the Minister), it was suspected of being likely to promote unlawful activities". In the absence of any evidential basis for such a belief the limitation to the right could not be permissible.

The Court held that the Minister's decision was unconstitutional and should be set aside and ordered the Registrar of Societies to register LEGABIBO in accordance with the Societies Act.

The significance of this case is in its confirmation that the right to freedom of assembly and association applies to everyone, irrespective of whether the views they are seeking to promote are accepted by society. The Court of Appeal clarified the stance of the Constitution on homosexual persons in Botswana - that the existence of sexual minorities itself is not in conflict with the values of the Botswana Constitution.

13. [Melusi Simelane N.O. and six others v The Minister of Commerce Industry and Trade, The Registrar of Companies, and the Attorney General \(34/2022\) \[2022\] SZSC 23 \(Eswatini\) \(June 2023\)](#)

*The Supreme Court of Eswatini overturned a High Court ruling that upheld the Registrar of Companies' refusal to register an association aimed at protecting the rights of LGBTIQ+ individuals. The Supreme Court found the Registrar's decision unlawful and in violation of the association's constitutional rights.*

## **Background**

The Appellants sought to register their association, Eswatini Sexual and Gender Minorities (ESGM), as a non-profit organization with the objective of protecting the human rights of LGBTIQ+ persons. The Registrar of Companies declined the registration, and the Appellants appealed this decision to the High Court, which dismissed their application by a majority ruling. The Appellants then appealed to the Supreme Court of Eswatini.

## **Legal issues**

- Whether the High Court committed a misdirection in dismissing the Applicants' application to review and set aside the decision of the Registrar.
- Whether the Registrar's actions comply with the elements of the law.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Companies Act No.8 of 2009, sections 4, 14, and 37.

## **Judicial reasoning**

### *(Per S.P. Dlamini)*

Concurring with the minority decision of the lower court, the Court began by examining the Registrar's decision to decline the registration of the Association. It found that the decision was null and void from the beginning due to a dereliction of duty. The Court analyzed the responsible functionaries for the registration of a company. The court considered that, while section 37 only makes mention of two functionaries where the registration of a company or an association is concerned namely, the Registrar and the Minister, the Registrar had improperly involved parties not empowered by the Act, namely the Attorney General and the Principal Secretary, which was legally fatal to the process. In the words of the Court "... it was not legally permissible for the Registrar to either perform this function in conjunction with persons not so empowered by the Act or delegate his powers to such persons." The

Court considered the Registrar's function under section 37 of the Act and determined that this function had judicial attributes, requiring a decision-making process akin to that of a court. The Registrar's referral of the matter to unempowered parties did not meet these legal requirements.

The Court also examined the Registrar's reasons for refusing to grant the application. It found that, "Additionally, on the one hand, the Registrar does not state in his letter which one of the objects [of the association] of ESGM he found to be offensive. On the other hand, the Registrar did not enquire if all or some of the Appellant's existence entitled him to decline the registration."

In conclusion, the Court declared the Registrar's decision to decline the re<sup>12</sup>gistration of the ESGM association as null and void from the outset. The Appellants' appeal was successful, leading to the setting aside of the previous judgment. The matter was then referred back to the Minister for a fresh consideration of the Appellants' application. The Court directed the Minister to advise the appellants of his decision in writing within a period of 60 days from the date of the judgment.<sup>13</sup>

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<sup>13</sup> Despite the decision, the government continued to refuse to register the association within the time specified and up to the date of this publication.

14. *The Registered Trustees of the Initiative for Equal Rights v Federal Republic of Nigeria & Anor* [FHC/L/CS/196/2020] (Nigeria)<sup>14</sup>

*The Federal High Court of Nigeria presided over an action brought by the Plaintiff to declare sections 4(1), 5(2), and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 to be in violation of sections 39(1) and 40 of the Constitution of the Federal Republic of Nigeria and articles 9, 10, 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004.*

## **Background**

The Plaintiff brought an action requesting the Federal High Court to declare sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 to be in violation of sections 39(1) and 40 of the Constitution of the Federal Republic of Nigeria and articles 9, 10 and 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004.

## **Legal issue**

- Whether sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 are in violation of sections 39(1) and 40 of the Constitution of the Federal Republic of Nigeria and of articles 9, 10 and 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of the Federal Republic of Nigeria, sections 37, 38, 39, 40, 41 and 45.
- Same Sex Marriage (Prohibition) Act 2014, sections 4(1), 5(2) and 5(3).
- *Ihim v Maduagwu*, Supreme Court of Nigeria, 2021 - Where both a federal and state High Court exist in a State, they have concurrent jurisdiction over a matter pertaining to enforcement of fundamental rights.
- *CBN v Interstellar Comm. Ltd*, Supreme Court of Nigeria, 2018 - A defendant who files a preliminary objection without a defence to the substantive claim is deemed to have conceded that all facts in the claim are correct.
- [DIN v. African Newspapers of Nig. Ltd, Supreme Court of Nigeria, 1990](#) - The right to freedom of expression and thought includes "freedom to hold opinion" and "pass information without interference".

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<sup>14</sup> An online link to this case is not available

## *International Law*

- African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004

## **Judicial reasoning**

*(Per Justice Lewis-Allagoa)*

The decision of the Court focused primarily on disposing of the preliminary objections filed by the Defendant against the Plaintiff's originating summons seeking a declaration that sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 were in violation of sections 39(1) and 40 of the Constitution of the Federal Republic of Nigeria and of articles 9, 10 and 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004 and, therefore, were null and void and should be declared as such.

Section 4(1) of the Same Sex Marriage (Prohibition) Act 2014 prohibits "registration of gay clubs, societies and organizations, their sustenance, processions and meetings". Section 5(2) provides that, "A person who registers, operates or participates in gay clubs, societies and organization, or directly or indirectly makes public show of same sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment", while section 5(3) imposes a term of 10 years' imprisonment for "A person or group of persons who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria".

The Defendants raised three preliminary objections, all of which were dismissed by the Court and the originating summons granted in favour of the Plaintiff. The first preliminary objection questioned the jurisdiction of the Court to entertain the originating summons on grounds that section 6 of the Same Sex Marriage (Prohibition) Act 2014 placed jurisdiction on all matters arising from the Act in the state high courts. However, the Court dismissed this argument and held that the jurisdiction clause in section 6 only applied to "breach of the provisions of the Act" and, since the current suit did not emanate from a breach of the Act, but rather was based on the enforcement of rights under the Constitution, the Federal High Court had jurisdiction.

The second preliminary objection was on the ground that the National Assembly should have been a party to this suit. The Court dismissed this objection by citing Order 9, Rule 14 of its civil procedure rules which provides that: "No proceeding shall be defeated by reason of misjoinder or non-misjoinder of parties..." The Court further noted that the National Assembly is not a necessary party in this instance, relying on

*ADC v. Bello* where a necessary party is defined as “that person whose presence is essential for the effectual and complete determination of the issues before the court. It is the person in the absence of whom the whole claim cannot be completely determined.”

The third preliminary objection raised by Defendant concerned the issue of *locus standi*. The Defendant alleged that the Plaintiff lacked the legal standing to bring the summons because the Same Sex Marriage (Prohibition) Act 2014 renders the Plaintiff’s organization illegal. The Court dismissed this objection and held that, not only had the Plaintiff satisfied its legal standing on the basis of the affidavit supporting their originating summons, but it would also be presumptuous on the part of the Defendant to ask the Court to determine the legal existence of the Plaintiff and declare it an illegal organization at the point of a preliminary objection. The Court noted that this “will be tantamount to a denial of fair hearing”.

The Court then proceeded to consider the arguments of the Plaintiff under the originating summons, first noting that Defendant did not file any counter affidavit to the originating summons but rather had only filed the preliminary objections. The Court highlighted the implication of this lack of a counter-affidavit, citing *CBN v. Interstellar Comm. Ltd* (2018) where it was held that: “A defendant who decides to challenge an action by way of a preliminary objection without filing a defence to the substantive claim is deemed to have conceded all of the questions of fact as contained in the statement of claim as correct”.

However, as the Defendant, in the course of arguing the preliminary objection, made arguments touching on the legal issues in the plaintiff’s originating summons, the Court considered some of these arguments. For instance, the Defendant argued that the rights under 39 and 40(1) (*freedom of expression and freedoms of association and assembly*) of the Constitution were not absolute, and that the issues in question were against a law established by the National Assembly in the form of Same Sex Marriage (Prohibition) Act 2014, which was adopted in the interest of public morality under the limitation clause in section 42 of the Constitution.

The Court held that, while it was true that the rights in sections 39(1) and 40 of the Constitution were not absolute, a restriction on a right was not the same as a prohibition of that right; and while these rights could be restricted, they could be prohibited. The Court, however, stated that when fundamental rights conflict with public morality or interest, the public interest outweighed the personal right. Accordingly, the Court agreed that the relevant sections of the Same Sex Marriage (Prohibition) Act 2014 were in consonance with the beliefs of the Nigerian people. Nevertheless, the Court considered that the “Plaintiffs are persons naturally predisposed to LGBTQI preferences as human beings out of choice of theirs,

criminalizing such natural disposition or totally prohibiting the same rather than restriction seems to be an overkill and excessive or disproportionate action by the law". Based on this reasoning, the Court granted the orders sought by the Plaintiffs and concluded its decision stating that "the rights and freedoms invoked by the Plaintiffs are universally recognized".

## IV. Trans Rights and Gender Identity/Expression

### Introduction

Legal gender recognition is important both in terms of personal identity and as a fundamental human right, critical for accessing various social, legal and medical services, among others. Even in progressive contexts, transgender and gender diverse persons continue to experience violence and discrimination. In the absence of protective and anti-discrimination legislation for transgender and gender diverse persons, the judiciary becomes a critical institution for articulating the human rights of transgender and gender diverse individuals and to provide redress for violence and discrimination against them. The cases in this section illustrate how the judiciary can play a transformative role in the legal recognition of trans and diverse gender identity and expression.

15. [\*Nathanson v Mteliso & Others \(HB 176/19, HC 1873/14\) \[2019\] ZWBHC 135 \(Zimbabwe\) \(Nov 2019\)\*](#)

*In this case, a transwoman had been arrested for criminal nuisance after using a female bathroom and resisting to pay a bribe to police officials. The court found in her favour and she was awarded damages.*

### Background

On the 16<sup>th</sup> of January 2014, the plaintiff was at the Palace Hotel in Bulawayo where she was scheduled to meet a business client. When she was in the bar of the hotel, she used a female toilet and a local politician present at the establishment sought to extort some money from her, which she refused. The politician then called the police. Six armed riot police officers arrived at the scene and arrested her. The police officers then bundled her onto an open truck and took her to the police headquarters where she was officially charged with the offence of criminal nuisance. The police officers coerced the plaintiff to undress in their presence in order to determine her gender. She was then exposed to slurs and other undignifying treatment and later taken to two emergency clinics for “gender verification” without her consent to the examination.

On the 18<sup>th</sup> of January 2014, the plaintiff was then arraigned on charges of criminal nuisance and then released on bail. The allegations presented to the court was that she had entered a female toilet while she was a man. The charges against the plaintiff were terminated on 4<sup>th</sup> November 2015 with a refusal of remand by the presiding magistrate. The magistrate passed this order on the grounds that there did not seem to be a clear-cut offence disclosed on the facts recognizable under section 46 of the Criminal Law Codification and Reform Act. As a result of the treatment while in custody of the police officials, the plaintiff filed a suit before the High Court that she had been unlawfully arrested and maliciously prosecuted and subjected to the unlawful treatment which had caused her emotional distress.

## Legal issues

- Whether or not the Plaintiff was unlawfully arrested and maliciously prosecuted for her gender identity.
- Whether or not the Plaintiff was subjected to inhuman and degrading treatment due to her transgender gender identity.

## Relevant laws and jurisprudence

### *Domestic law*

- Criminal Law Codification and Reform Act, (chapter 9:23).
- Constitution of the Republic of Zimbabwe, section 50 (rights of arrested and detained persons), section 51 (right to dignity) and section 56 (the right to equality and non-discrimination).
- Criminal Procedure and Evidence Act (chapter 9:01).
- *Botha v Zvada and Another*, Supreme Court, Supreme Court of Zimbabwe, 1997 - For an arrest to be lawful the arresting officer has first to establish that he has reasonable grounds for suspecting that the appellant had committed the murder. But even where there are reasonable grounds for suggesting that the first schedule offence has been committed, the power of arrest, which is discretionary power, has to be exercised reasonably, where a person is arrested when it is not reasonable to arrest him, the arrest will still be unlawful.
- [Tafadzwa Mushunje v Tracy Sihle Hany and Minister of Home Affairs and Commissioner of Police and Prosecutor General, High Court of Zimbabwe, 2018](#) - An arrest is *prima facie* wrongful unless it is legally justified.

### *Comparative law*

- [Navtej Singh Johar & Others. v Union of India & Others, Indian Supreme Court, India, 2018](#) - Where the Court struck down sodomy laws as unconstitutional for breaching fundamental rights.
- [Relyant Trading \(Pvt\) Limited v Shongwe and Another, Supreme Court of South Africa, 2006](#) - Malicious prosecution consists in the wrongful and intentional assault of the dignity of a person including also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with 'malice'.

## Judicial reasoning

*(per Justice Bere J)*

The Court began its decision by making reference to the Indian Supreme Court Case *Navtej Singh Johar & Others v Union of India & Others* to explain the meaning of "transgender". In the *Navtej Singh Johar* case, a distinction was made specifically for discrimination based on sex in the Indian Constitution which recognizes that sex includes gender identity. Due to this, discrimination based on sex under the Indian Constitution had been interpreted as extending to discrimination against transgender

persons. Bere J, in this judgment applied the same principle used in the Navtej case to recognize the transgender identity of the plaintiff.

The Court reviewed evidence given by the Plaintiff and heard evidence from a psychiatric expert witness and a chief inspector of the police regarding her gender identity and experiences while being held by the police. It was found that the Plaintiff's evidence was consistent and reliable. The police did not file any summary evidence for review in Court, which meant the evidence of the Plaintiff was central.

The Court found that the Plaintiff was indeed subjected to degrading and inhuman treatment for the duration of her custody, and right from the events surrounding her arrest up until her release from police custody. The Court noted that the chief inspector of the police confirmed the Plaintiff's claim that she did not provide any consent to the invasive "gender verifying" medical examinations that she underwent under Police orders at the two clinics. During the cross examination of the chief inspector of the police, he changed his statement and stated that the Plaintiff had indeed given consent, however, he failed to provide any evidence supporting this statement.

The High Court then addressed whether the Plaintiff was lawfully arrested and whether her fundamental human rights were violated during her detention. The Third Schedule of the Criminal Law Codification Act, read in conjunction with section 46 of the Act, sets out the specific criminal nuisance charges with which the Plaintiff was charged. The conduct of the Plaintiff in using a female bathroom facility, instead of the bathroom facilities designated for male persons, was not listed as an offence in the Act. Due to this, the Magistrate Court ordered the release of the Plaintiff on 11 May 2014, and it appeared that she had not committed any offence under the Act.

The case, however, remained on hold for a number of months, but the police made no further effort to prosecute her. The Court noted that, "On 4 November 2015 the charges against the plaintiff were terminated with a refusal of further remand by the magistrate, on the grounds that there did not seem to be a clear cut offence disclosed on the facts cognizable under section 46 of the Criminal Law Codification and Reform Act [Chapter 9:23] as read with the third schedule. This case has never been resuscitated. It is this background that has prompted the plaintiff to file this suit."

The Court observed that section 49 of the Constitution of Zimbabwe provides for the right to personal liberty, and that one must not be held arbitrarily without just cause. Nathanson exercised her constitutional rights in bringing the case to the High Court in order to challenge the unlawful arrest and malicious prosecution which had led to her enduring inhuman and degrading treatment in detention. The Act requires that an arrested person must be made aware of the reasons of the arrest and be allowed to contact any person who they want to inform that they have been arrested, including a family member, a legal practitioner or a medical practitioner.

The Plaintiff was not provided with a reason for her arrest by the arresting police officers when she was arrested. The first respondent made a statement at her arrest that he wanted to "fix" her and "had connections in the office of the President."

Section 49(1) of the Criminal Law Codification and Reform Act requires that, where there is a finding that a person has been arrested unlawfully, they must be discharged as soon as it is found out. In this case, none of the police officers had adhered to this provision when it was found the Plaintiff had been unlawfully arrested and detained.

The Zimbabwe Constitution guarantees the right to dignity in section 51 and the right to equality and non-discrimination in section 56, which, in section 3, includes the right to be protected against discrimination based on sex and gender. The Plaintiff was discriminated against based on her transgender identity and subjected to inhuman and degrading treatment. This violation of her fundamental human rights was illustrated by the evidence of the Plaintiff, which showed that the defendants had resorted to malicious and excessive use of power against her with the intention to implicate her in the commission of a crime. The bill of rights in the Zimbabwe Constitution, together with section 46 of the Act, showed that the test for malicious prosecution had been met. The Court found in Nathanson's favour and awarded her damages.

The Court found the official conduct of the police to be "quite outrageous, because clearly, they abused their discretion in arresting her." The provisions of the Zimbabwean Constitution contained in sections 50, 51 and 53 are designed to protect fundamental human rights and prevent the kind of debasing treatment that Nathanson was subjected to. The Plaintiff, in this case, did not commit any offence in the eyes of law and such, her arrest and prosecution was found to be "both thoughtless and malicious."

The Court further held that "Transgender citizens are part of the Zimbabwean society. Their rights ought to be recognized like those of other citizens. Our constitution does not provide for their discrimination." As a result, the basic human rights of transgender persons should be regarded at the same level of other citizens. Further, the Zimbabwean Constitution is clear that it does not provide for any discrimination between its citizens. The High Court reaffirmed that illegal detention and malicious prosecution had taken place against the plaintiff and awarded her monetary compensation.

This verdict makes an important contribution to the ongoing public discourse about the use of public bathrooms by transgender persons. The court held that the usage of a bathroom of your choice, as a transgender person, is not an offence in Zimbabwe and remarked that "To avoid the recurrence of what happened to the plaintiff in this case, it might be prudent to construct unisex toilets as an addition to the resting rooms in public places."

16. [September v Subramoney NO and Others \(EC10/2016\) \[2019\] ZAEQC 4; \[2019\] 4 All SA 927 \(WCC\) \(South Africa\) \(Sept 2019\)](#)

*An incarcerated trans woman brought an application to be allowed to express her gender identity while in prison. The court held that until the applicant has undergone gender reassignment treatment, the respondents are directed to take reasonable steps to give effect to the applicant's constitutional rights by allowing her to express her gender identity and separating her from male cellmates by either providing a single cell for her or transferring her to a single cell in a women's correctional facility.*

## **Background**

The Applicant is a transgender woman who was convicted of murder and theft in 2013 by the Cape Town Regional Court where she was sentenced to 15 years' imprisonment. September's Identity Documentation indicated that she was male and had been serving her sentence in all-male correctional facilities.

During her incarceration, she was allowed to express her gender identity by wearing braids and being addressed as a woman by correctional services officials in the first facility she was remanded in. However, when she was temporarily transferred to Brandvlei Correctional Centre, her make-up and female underwear were confiscated by officials. Upon return to the Helderstroom correctional facility, she had an altercation with the head of the correctional facility. September informed him that she intended to transition and the respondent resisted, saying that he "would not have" her "looking like a woman" because she was a man.

September alleged that after this altercation, she was segregated from other inmates and placed in solitary confinement for a period of 17 days. She was forced to cut her hair and sign a warning stating that if she committed any more infractions, such as wearing make-up, she would lose her Group A status. This status is conferred to prisoners who are considered to have good behaviour and was an important factor when considering early parole. September was later transferred to Malmesbury Correctional Centre.

## **Legal issue**

- Whether the refusal to allow a transgender prisoner to express their gender identity while in detention violates their right to be protected from discrimination on the basis of gender identity.

## Relevant laws and jurisprudence

### *Domestic law*

- Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA).
- The Constitution of the Republic of South Africa, 1996.
- Correctional Services Act 111 of 1998.
- Alteration of Sex Description and Sex Status Act No 49 of 2003.
- Identification Act 68 of 1997, section 7 (assignment of identity numbers) and section 8 (particulars to be included in population register).
- Births and Deaths Registration Act 52 of 1992.
- [MEC for Education: KwaZulu-Natal and Others v Pillay, South African Constitutional Court, 2008](#) - The Equality Act is clearly the legislation contemplated in section 9(4) and gives further content to the prohibition on unfair discrimination.

### *International law*

- Yogyakarta Principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity) and Yogyakarta Principles Plus 10.
- International Covenant on Economic, Social and Cultural Rights, article 2 ("other status" can be interpreted to include sexual orientation").
- Basic Principles for the Treatment of Prisoners, General Assembly Resolution 45/111 of 14 December 1990, principle 4 (The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society).

## Judicial reasoning

### *Majority Opinion (per Justice Fortuin)*

The applicant sought relief from the High Court for the violation of her fundamental constitutional rights to equality and human dignity, including an order that the respondents permit her to express her gender, and that her gender identity be respected and protected for the duration of her incarceration.

The Court held that refusal to allow a transgender person to express their gender identity amounted to unfair discrimination in violation of both the right to equality as envisaged in the South African Constitution and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act. The Court highlighted the links between the right to equality and the right to freedom of expression. The Court found that the applicant had been denied her personal freedom to develop and express her gender identity, which violated her right to freedom of expression as protected in the fundamental rights guaranteed by the Constitution. The Court stressed that the

infringement of freedom of expression was particularly severe when it is connected to other rights.

The Court made reference to international law principles by recognizing the applicability of the Yogyakarta Principles and Yogyakarta Principles Plus 10 to the South African human rights context, recognizing “the obligation on the State to ‘repeal any law that prohibits or criminalizes the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity’”. The Court also emphasized the right to treatment with humanity while in detention, as found in principle 9 of the Yogyakarta Principles, which holds that the State must “ensure that placement in detention avoids further marginalizing persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse”.

The Court ordered correctional facility officials to allow the applicant to wear female underwear, grow her hair long and wear make-up if she so wished to do so. It also ordered officials to address her as a woman through the use of the female pronouns when referring to her. The Department of Correctional Services was also ordered to introduce transgender sensitivity training for current and new employees, particularly those that interact directly with remanded persons.

The Court held that the incarceration of a person does not in any way excuse the State from fulfilling the obligation to respect, protect, promote and fulfil the human rights of the applicant and others similarly placed. The Court emphasized the importance of the right to equality and how it related with the ability to express one’s gender identity. The rights to dignity, freedom of expression and dignified detention conditions were an important factor in this case. Interpreting the right to equality in this context necessitated the consideration of unique challenges specifically faced by incarcerated persons identifying as transgender. The Court held that the recognition of, and respect for, the unique identity and expression of each individual, therefore, includes the right to express one’s gender identity.

## V. The Human Rights of Intersex Persons

### Introduction

Intersex individuals, who are often overlooked in the broader discourse on sexual orientation and gender identity, face specific legal challenges that very few national legal systems have addressed. This section underscores the importance of acknowledging the human rights of intersex individuals, focusing, in particular, on the right to bodily integrity, autonomy and the avoidance of unnecessary, non-consensual medical interventions. In the African context, the Kenyan judiciary has been most progressive, providing pivotal decisions that not only recognize the human rights of intersex children to recognition and protection against unnecessary medical surgeries but also emphasizing the need for legislative frameworks to protect intersex persons.

17. [Petition 266 of 2013- Baby 'A' \(Suing through the Mother E A\) & another v Attorney General & 6 others \[2014\] eKLR \(Kenya\) \(Dec 2014\)](#)

*The Petitioners claimed that the gap in the registration process for intersex babies denies them the right to legal recognition, the right to be registered immediately after birth and have a name under domestic and international law. They also claimed that corrective surgery violates the rights of the child to physical integrity and self-determination. The court held that there had been no discrimination or violation of the child's rights and that it could not make rules on corrective surgery. It, however, directed the State to resolve the gaps in the regulatory process for intersex babies.*

### Background

Baby A was born intersex with both male and female genitalia visible to birth attendants. The hospital marked Baby A's sex as "?" on the legal paperwork, which led to a birth certificate not being obtained for Baby A. The Registrar of Births and Deaths can only issue a birth certificate once a determinate sex has been established and the birth certificate form only includes male or female as options for sex.

The Petitioners claimed that the entry of a question mark in the medical notes denies intersex children like Baby A the right to legal recognition and the right to be registered immediately after birth and have a name under article 7<sup>15</sup> of the Convention on the Rights of the Child (CRC). The petitioners argued that not having a birth certificate severely limits Baby A's ability to enjoy other rights because a birth certificate is required for medical care, school admission, the issuance of a passport

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<sup>15</sup> Article 7 CRC guarantees every child's right to: (1) be registered immediately after birth; (2) acquire a nationality; and (3) know and be cared for by their parents, subject to domestic laws and best interests of the child under Article 3 CRC. This provision establishes foundational identity rights and state obligations to prevent statelessness (see also Article 8 CRC on identity preservation).

or national identification card and employment. Another issue raised was that intersex children are often forced to undergo corrective surgery in order to establish a determinate sex, which violates their rights to physical integrity and self-determination. The petition asked the Court to direct that such surgery should be done only when the child can make an informed decision and to establish guidelines for providing consent for corrective surgery following article 19(2) of the CRC.<sup>16</sup>

## **Legal issues**

- Whether there was a violation of Baby A's rights regarding the lack of recognition of intersex children in birth registration.
- Whether the Court had the power to create a third "intersex" category on birth certificates.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of the Republic of Kenya, 2010.
- Children Act (Chapter 141).
- Birth and Deaths Registration Act (Chapter 149).
- National Gender Equality Act of 2011.

### *International law*

- African Charter on the Rights and Welfare of the Child.
- Convention on the Rights of the Child - article 7 (rights to registration, name and nationality), article 19(2) (protective measures and support for childcare).

## **Judicial reasoning**

*(per Justice Isaac Lenaola)*

The Court found that the question mark on Baby A's medical records indicated that Baby A was intersex but did not find that there was evidence that Baby A had actually experienced discrimination. The Court stated that Baby A and other intersex children must be registered by the Registrar of Births and Deaths to prevent any potential future discrimination. The Court ordered an expedited registration for Baby A. The Court held that Baby A must be registered and issued with a birth certificate within 90 days of the judgment being handed down.<sup>17</sup>

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<sup>16</sup> Article 19(2) CRC requires States Parties to establish "appropriate measures" to implement the protections against child maltreatment outlined in Article 19(1), including: (a) preventive programs; (b) identification, reporting, and investigation of abuse; (c) judicial intervention; (d) post-harm support services; and (e) educational campaigns. These measures must be "socially and culturally adapted" to the child's context while maintaining proportionality to the risks (see also Articles 3 [best interests], 34 [sexual exploitation], and 39 [rehabilitation]).

<sup>17</sup> Kenya has since taken steps to integrate intersex legal recognition including census taking, birth certification, and consideration of a comprehensive intersex persons bill in parliament.

Regarding the registration of intersex children, section 2(a) of the Births and Deaths Registration Act was interpreted to mean that “sex” in the Act meant only male or female. Although the Court recognized the need for a third category of sex to capture intersex children, it held the view that it did not have the power to create such a category. The duty laid with the legislature and as such, intersex children must be registered as either male or female in terms of the Births and Deaths Registration Act.

Regarding the request for additional guidelines on intersex persons, the Court found that there was a lack of guidelines and regulations governing how hospitals and parents determine what medical procedures or corrective surgery an intersex child needed or not. Although the Court recognized that the State had a duty to protect intersex children under the Kenyan Constitution, it determined that it was not in a position to create any such guidelines. The Court directed the State to begin creating guidelines to protect intersex children by regulating medical examinations and corrective surgery in accordance with internationally acceptable guidelines.

18. [Petition 705 of 2007 - RM v Attorney General & 4 Others \[2010\] eKLR\(Kenya\)](#) (Dec 2010)

*The Petitioner claiming that the lack of a legal framework to recognize intersex persons violated his fundamental rights, including dignity, freedom from inhuman treatment, freedom from discrimination on the basis of sex, freedom of movement, freedom of association, the right to a fair hearing and the right to protection under the law. The Petitioner contended that when he was arrested and charged for the offence of robbery, during incarceration, the petitioner's intersex status was discovered, prompting judicial and medical intervention. Despite medical confirmation of his intersex condition, prison authorities unlawfully detained him in male facilities, subjecting him to abuse, sexual violence, and degrading treatment in violation of the Prisons Act and constitutional rights. The petitioner's petition alleges violations of fundamental rights, including freedom from inhuman treatment (Article 25, Constitution of Kenya), non-discrimination (Article 27), and dignity (Article 28). The Petitioner failed on the main claim that the legal framework discriminated against intersex persons but succeeded in the claim that prison officials had treated him in a manner that was cruel and degrading.*

## **Background**

The Petitioner, who was born intersex with both male and female genitalia, brought a petition claiming that, due to the failure of the legal framework to recognize intersex persons, his fundamental rights were infringed, including dignity, freedom from inhuman treatment, freedom from discrimination on the basis of sex, freedom of movement, freedom of association, the right to a fair hearing and the right to protection under the law.

## **Legal issues**

- Whether the Court had jurisdiction under section 84 of the Kenyan Constitution to consider generally the rights and violations of rights of intersex persons.
- Whether intersex persons suffered from a lack of legal recognition and protection under the Constitution and other applicable laws, resulting in violations of the human rights of intersex persons.
- Whether the petitioner suffered violation of his fundamental right to be free from torture, cruel, inhuman, or degrading treatment provided under section 74 of the Kenyan Constitution.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Constitution of the Republic of Kenya, 2010.
- Birth and Deaths Registration Act (Chapter 149).

### *Comparative law*

- [Corbett v Corbett, United Kingdom, 1970](#) – The case set out a detailed set of criteria by which a very small minority of transgender people, those born intersex, could change their legal sex in the United Kingdom.

### *International law*

- Universal Declaration of Human Rights, article 2 (freedom from discrimination).
- International Covenant on Civil and Political Rights, article 26 (freedom from discrimination).

## **Judicial reasoning**

*(Per a panel of judges: H. M. Okwengu, G. Dulu and R. N. Sitati)*

The Court first addressed the issue of whether the Petitioner could sue on behalf of the body of intersex persons in Kenya by determining the definition of “intersex” as describing “an abnormal condition of varying degrees with regard to the sex constitution of a person.” The Court determined from the evidence provided that the Petitioner was an intersex person.

However, the Court found that the Petitioner had failed to provide any evidence that there was a definite number of intersex people in Kenya to form a body of people whose interests were required to be represented before the Court. The Petitioner’s *locus standi* with respect to a representative suit was therefore denied, and all reference to other intersex persons was struck out of the petition. The Petitioner failed on the claim that he could bring the petition on behalf of other intersex persons.

Regarding the issue of the lack of legal recognition of and discrimination against the Petitioner as an intersex person, evidence had been submitted that the Birth and Deaths Registration Act only recognized male or female categories of sex but made no provision for intersex as a category. The Petitioner argued that the law therefore did not provide legal recognition of him as an intersex person and did not afford him the rights protected by the Constitution.

The Court consulted dictionaries to confirm the meaning of the term “sex”. The Court sought a definition of the term in the 11<sup>th</sup> Edition of the Concise Oxford English Dictionary and also in the Black’s Law Dictionary (8<sup>th</sup> Edition), and found that, “sex simply refers to the categorization of persons into male and female on the basis of their biological differences as evidenced by their reproductive organs.”

The Court referred to the English decision in *Corbett v Corbett* to determine that a person’s sex is fixed at birth. The Court concluded that the Births and Deaths Registration Act did not exclude the petitioner from being registered under the Births and Deaths Registration Act if an application had been made. The Court ascertained that despite the difficulty posed by the ambiguous genitalia, an intersex person was either male or female at birth.

The Court rejected the argument that the term “sex” in sections 70 and 82 of the Kenyan Constitution should be interpreted to include intersex as a third category of gender because the Court read the term “sex” in those sections to encompass the two categories of male and female only.

The Court rejected the argument that intersex persons should be brought within the category of “other status” included in article 2 of the Universal Declaration of Human Rights and article 26 of the ICCPR. The Court concluded that intersex persons “are adequately provided for within the Kenyan Constitution as per the ordinary and natural meaning of the term sex,”. The Court based its judgment on the notion that it would be contrary to the intention of the legislature, and society might not have been ready for a third category of gender at that time.

The Petitioner’s claim that he had been discriminated against and disadvantaged socially, as a consequence of the alleged failure of his legal recognition as an intersex person, was similarly rejected by the court. The Court indicated that the Petitioner’s failure to obtain legal documents, including a birth certificate, identity card and voter’s registration card, was due to his own fault, as neither the Petitioner nor his mother had made any efforts to obtain such documentation.

In reference to the social problems the Petitioner argued were a result of lack of legal recognition, including inability to marry, the Court found this was not due to the effect of discriminatory laws. The Court determined that the Petitioner was not prevented from marrying due to his intersex status, and instead, his biological make-up is what prevented him from being able to marry, as his physiology would not permit him to consummate the marriage as a male.

The Court commented that the Petitioner as an adult could determine his gender or define his sexual identity, including through undergoing corrective surgery, but that the government was not at fault for failing to provide the necessary facilities as there was no justification for giving corrective surgery economic priority over other government-funded initiatives.

The Court held the view that, “Due to the traditional nature of Kenyan society, the Court believed that Kenyan society had not reached a stage where matters of sexuality could be rationalized through science, and that in any case, it was the Legislature’s mandate to take up such issues.”

The Court also rejected the Petitioner’s claims that his rights were violated during his criminal trial or that the provisions of The Prisons Act or The Prisons Rules were discriminatory against intersex persons. In the criminal trial, the Petitioner’s detention in the police station was found valid, as there was no other appropriate location to remand him during his trial. The Court determined that holding the Petitioner in a male prison was not a violation of his rights because The Prisons Act allows people of separate genders to be housed in different parts of the same prison. The practicality of a separate prison facility for the Petitioner alone with prison officers who are intersex or have training in that area was considered impractical.

The Court found that the Petitioner was treated in an inhuman and degrading manner by prison authorities, who had conducted strip searches of the petitioner in front of other inmates with the intention of humiliating him for his intersex condition. The Court therefore found that such actions were a violation of section 74 of the Constitution and awarded damages in respect of this.

The Petitioner failed on the main claim that the legal framework did not recognize and discriminated against intersex persons. The Court often conflated issues of biological sex characteristics with gender identity issues. The Petitioner succeeded in the claim that prison officials treated him in a manner that was cruel and degrading, and he was awarded damages for violation of the right to dignity.

## VI. Other Issues: Labour & Employment; Immigration; Marriage

### Introduction

There are many other areas of intersection between the enjoyment of human rights and protection from discrimination and LGBTIQ+ identity. Due to this, specific cases that have not been thematically organized in this volume are dealt with in this section to provide a greater understanding of how equal protection and non-discrimination can be adjudicated in the Courts. As such, this section reviews legal decisions related to labour and employment, immigration and marriage in respect of LGBTIQ+ people in Africa. The cases highlight how these areas of law intersect with SOGIE and human rights and the pivotal role of judicial decisions in shaping these intersections. For instance, issues of discrimination in the workplace require decisions that promote inclusive workplace policies and anti-discrimination protections, emphasizing the need for legal recognition of the human rights of LGBTIQ+ people in the labour market. On immigration, LGBTIQ+ persons continue to face unique risks as refugees and asylum seekers, including the legal hurdles they encounter when navigation marriage or adopting a child outside their domestic legal system, or fleeing persecution based on their sexual orientation or gender identity. The question of marriage equality has also become more prominent in progressive legal contexts, and the case book reviews significant decisions that have either advanced or restricted same-sex marriage and marriage equality in general.

### [19. Minister of Home Affairs and Immigration v P L \(SA 96/2021\) 2023 NASC 3 \(Namibia\)](#) (March 2023)

*The Supreme Court of Namibia overturned a High Court ruling granting Namibian citizenship to a child born through surrogacy to a same-sex couple. The Court emphasized that registering the child's birth at a Namibian diplomatic mission or within Namibia is required for citizenship by descent.*

### Background

The case revolves around the refusal by the Minister of Home Affairs and Immigration to grant Namibian citizenship by descent to a minor child born in South Africa through a surrogacy arrangement. The Respondent, a Namibian citizen, is in a same-sex marriage with a Mexican national. The High Court of Namibia had previously ruled in favour of the Respondent, declaring the minor child a Namibian citizen by descent

and dismissing the Minister's counter application demanding a DNA test to establish paternity.

## **Legal issues**

- Whether the Respondent was required, as a matter of law, to comply with the provision of section 2(2) of the Citizenship Act – and as a precondition for claiming citizenship by descent on behalf of YDL.

## **Relevant laws and jurisprudence**

### *Domestic law*

- Namibian Constitution, article 8 (Dignity), article 10 (Equality and Freedom from Discrimination), and article 4(2) (Citizenship by descent)
- Citizenship Act 14 of 1990, section 2 (Registration of birth at a Namibian diplomatic mission or within Namibia)
- [\*Thoro v Minister of Home Affairs, High Court of Namibia, 2008\*](#) - Where the court described different categories of citizenship under the Namibian Constitution.

## **Judicial reasoning**

*(Per Damaseb DCJ)*

The Court began by examining the statutory framework for granting citizenship in Namibia provided by the Citizenship Act 14 of 1990, particularly section 2, which mandates the registration of a child's birth at a Namibian diplomatic mission or within Namibia for the purpose of conferring citizenship by descent. The Court emphasized that, "The scheme created by Art 4(2) of the Constitution and s 2(2) of the Citizenship Act makes it clear that it is a precondition for registration of citizenship by descent that the birth of a child born to a Namibian citizen outside Namibia must be registered in terms of either s 2(2)(a)(i) or (ii). Ms Katjipuka's contention to the contrary is not supported by the law." The Court found that the Respondent had failed to meet this requirement, as it was an uncontroverted fact that the child's birth was registered in South Africa without adhering to the prescribed Namibian procedures.

The Respondent argued in the High Court that the Minister's refusal to grant citizenship and the demand for DNA testing were discriminatory, particularly given the context of his same-sex marriage. The High Court had dismissed the Minister's requirement for a DNA test, relying instead on the surrogacy agreement and the South African birth certificate as adequate proof of paternity. The Supreme Court, did not look into this issue stating that, "Since the birth of YDL was not registered in terms of section 2(2)(a)(i) or (ii) of the Citizenship Act, it was not competent for the

High Court to grant the relief it did to the Respondent. The application should have been dismissed on that basis alone and it was not necessary for the court *a quo* to deal with the minister's counter application."

In reinforcing its decision, the Court referred to the case of *Tlhoru v Minister of Home Affairs*, which described the various cadre of citizenship and the requirement of attaining same. Consequently, the Court set aside the High Court's order, affirming that the Minister's refusal to grant citizenship was justified and lawful.

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International  
Commission  
of Jurists

P.O. Box 1740  
Rue des Bains 3  
CH 1211 Geneva 1  
Switzerland

**t** +41 22 979 38 00

**f** +41 22 979 38 01

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