

Africa (Nigeria): ECOWAS Court challenges vagrancy laws that target women

Many thanks to Benson Chakaya, an M.Phil candidate in the LL.M./M.Phil (Sexual & Reproductive Rights in Africa) degree program at the Center for Human Rights, Faculty of Law, University of Pretoria. He also serves as National Coordinator for Right Here Right Now Kenya hosted by the Network for Adolescents and Youth of Africa. We thank him for abstracting and commenting on the significance of this case:

Dorothy Njemanze & 3 Ors V Federal Republic of Nigeria, Suit No.: ECW/CCJ/APP/17/14 (ECOWAS Court, Abuja, Nigeria) [Decision of October 12, 2017.](#)

Many countries in Africa have criminal law targeting sex workers, often accompanied by administrative law in many cases municipal bylaws against vagrancy that facilitate arbitrary arrests of women at night. Suspected sex workers (in many cases women) are rounded up by law enforcers and charged with non-criminal offenses such as loitering, vagrancy, congregating for the purposes of prostitution, public indecency, or disorderly behavior. The recent ruling by Economic Community of West African States (ECOWAS) Court of Justice in the case of *Dorothy Njemanze & 3 Ors v. Federal Republic of Nigeria*,^[1] is significant as it successfully mounts a challenge to vagrancy laws.

On different occasions, Dorothy Njemanze and three other women were abducted, assaulted sexually, physically and verbally, and unlawfully detained by Nigerian law enforcement officers. They were arrested and accused of being prostitutes on the grounds that they had been found on the streets at night. The four women, led by Njemanze, a Nollywood actress, filed a case at the West African Regional Court which centered on the violent, cruel, inhuman, degrading and discriminatory treatment the women suffered at the hands of law enforcement agents in Abuja, Nigeria.

The *Njemanze* case bears some similarities to the Kenyan High Court case of *Lucy Nyambura & Another v. Town Clerk, Municipal Council of Mombasa & 2 Others* (2011)^[2] in that the petitioners in the Kenyan case were also arrested and charged with the offence of “loitering in a public place for immoral purposes,” simply because they were found on the streets at night. The charges essentially criminalize any woman who ventures outdoors after dark. However, in the Kenyan case, the High Court failed to find the action of law enforcers as discriminatory and a violation of the petitioners’ rights.

By contrast, the ECOWAS Court found the arrest of the four petitioners to be unlawful and violated their rights to dignity and liberty, and their right to be free from cruel, inhuman or degrading treatment. The Court affirmed the provisions of the United Nations' Convention on Elimination All Forms of Discrimination Against Women (CEDAW), when it found that the action of Nigerian law enforcement officers constituted gender-based discrimination. The Court determined from the submissions showing that the operation was systematically directed against only the female gender an indication and evidence of discrimination. The finding is significant for women because it reiterates State Parties' obligation and responsibility as codified in CEDAW to adopt laws, administrative and policy measures to prevent gender based discrimination.

According to the Court, "Prostitution is claimed to be a crime in the laws of the Defendant. However, it takes two persons to engage in such criminal activity. There is no law that suggest[s] that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes. If it were so, it ought to apply to all persons irrespective of sex". In this quote, a blow to the discriminatory application of prostitution and vagrancy laws, the Court rejects the narrative, fostering gender inequality, that female commercial sex workers are directly criminally liable, while their male counterparts, if liable at all, can only be so indirectly as accomplices or conspirators. This narrative has often reinforced harmful social prejudices against women.

The judgment also affects commercial sex workers, especially those who work at night. Although the Court did not make a pronouncement on the legality or illegality of commercial sex work, it is significant that it found no crime in women being on the street at night, whether they are sex workers or not. The Court found the arrest a violation of the Plaintiffs' right to liberty or free movement which is a fundamental human right. The Court denounced the gender stereotyping of women found on the street at night as prostitutes and declared that such verbal abuses violated the right of these women to dignity. This denunciation unfortunately perpetuates the stigma that has traditionally been directed against sex workers.

In this context, the Court did not issue a direct order regarding existing laws prohibiting prostitution. In finding that the Defendant failed to provide sufficient evidence linking the Plaintiffs with prostitution, the Court exposes the difficulty of collecting evidence for the crime of prostitution. This suggests an opportunity to challenge the law on prostitution in the fact that the law violates the right to privacy. Given the intimate nature of sex, privacy is a major issue in criminalizing sex work. Collecting evidence to support sex-work-related charges often involves bedroom snooping and interfering with the privacy of the sex workers and their clients.

A significant milestone that sets the ECOWAS ruling apart is the pronouncement of a violation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), is indeed a first in an International Court. The Court found that there were multiple violations of article 2 calling on States to combat all forms of discrimination against women, article 3 that provides for the right to dignity and to the recognition and protection of women human and legal rights. There was further violation of article 4 on the Rights to Life, integrity and security of the person, article 5(d) on protection of women from being subjected violence, abuse and intolerance. The denial of access to justice and equal protection before the law and access to remedy was a violation of articles 8 and 25 respectively.

This ruling by the ECOWAS Court is important to judges, lawyers and law scholars as it sets the pace for challenging the often vague vagrancy laws. By finding the action of the law enforcement officers to have violated fundamental human rights, the Court in other words has questioned the legality of vagrancy laws. The ruling by ECOWAS Court, therefore, piles more pressure on African States to repeal the overly vague and overbroad vagrancy laws that harass and abuse women, including female sex workers. Already, the CEDAW Committee has called upon States Parties to take appropriate measures, including legislation, to suppress exploitation of women in sex work. Overall, the ECOWAS Court's ruling is a clear call to these States to respect fundamental rights of women to liberty, dignity and self-determination.

[1] *Dorothy Njemanze & 3 Ors V Federal Republic of Nigeria*: SUIT NO: ECW/CCJ/APP/17/14 (ECOWAS Court, Abuja, Nigeria) [Decision of October 12, 2017](#).

[2] *Lucy Nyambura & Another v. Town Clerk, Municipal Council of Mombasa & 2 Others* [2011] eKLR, Petition No. 286 of 2009 Kenya, High Court. [Decision online](#).
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Other African cases, summarized online:

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Courts (Pretoria, Pretoria University Law Press (PULP), 2017), and previous volumes.

Printed edition of Legal Grounds III [available from PULP](#).

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