IN THE HIGH COURT FOR ZAMBIA **HPA/53/2014**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE **APPELLANT**

VERSUS

PAUL KASONKOMONA **RESPONDENT**

Before the Honourable Mrs. Justice J. Z. Mulongoti

on the 15th day of May, 2015

For the Appellant : Mrs. M.M. Bah Matandala, Senior State Advocate
National Prosecution Authority

For the Respondent : Mr. S.B. Nkonde, SC, of SBN Legal Practitioners

J U D G M E N T

Cases referred to:

1. HKSAR v. Cen Zhi Cheng (2008) HKCFI 142
2. Sara Longwe v. Intercontinental Hotel
3. Hutt v. The Queen (19878) 2 SCR 476
4. Mwewa Murono v. The People SCZ Judgment No. 25 of 2004
5. Faustine Mwenya Kabwe and one v. Enerst Sakala and Others SCZ Judgment No. 25 of 2012
6. Chimakure v. Attorney General of Zimbabwe (2014) JOL 32639 (ZH)
7. Jean Paul Labaye v. The Queen (2006) 136 CRR 92d
8. Joseph Mulenga & Another v. The People (2008) ZR Vol. 2, p1

Legislation referred to:

1. The Constitution, chapter 1 of the Laws of Zambia
2. The Penal Code, chapter 87 of the Laws of Zambia

This is an appeal against the acquittal of the respondent, who was found with no case to answer by the trial magistrate. The respondent was charged with the offence of idle and disorderly conduct contrary to section 178(g) of the Penal Code.

The particulars of the offence were that the respondent on 7th April 2013, being in a public place namely Muvi Television Studios, on a programme called "The Assignment" did solicit for immoral purposes for homosexual rights to be respected in Zambia.

The prosecution led evidence from six witnesses. The trial magistrate analysed the evidence and he found that the offence had three ingredients. Firstly 'soliciting' and several definitions were quoted. The learned trial magistrate also cited foreign cases such as **HKSAR v. Cen Zhi Cheng (1)**. He observed that having watched the programme in question and considering the evidence of PW1 and PW5 that the respondent was an invited guest on the programme and he went on the programme to give his views. Accordingly that it was imperative that for the court to feel safe to convict, it 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. The trial magistrate then reasoned 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 as provided for under Article 20 of the Constitution..."

In addition that from the evidence, there was no element of persistent importunation on the part of the respondent. And that the fact that he was speaking on a topic that was repulsive to many that in itself does not mean that he was soliciting, under the ambit of the section in question.

The second ingredient of the offence according to the trial magistrate was 'public place'. Citing section 4 of the Criminal Procedure Code (CPC) and the case of **Sara Longwe v. Intercontinental Hotel (2)**, the magistrate found that the appearance on Muvi Television was an act that engaged the public and would qualify for purposes of section 178(g) of the Penal Code.

The third and final ingredient was "immoral purposes," citing the case of HKSAR v. Cen Zhi Cheng, he found that "immoral purpose must refer to some kind of sexual activity". And that the topic the respondent was discussing was immoral to the extent that sexual intercourse with the same sex is prohibited. In addition that homosexuality was frowned upon by most people in Zambia. However, that from the evidence, the respondent was not engaging anyone to practice homosexuality but

advocating for the rights of those already practicing it to be protected. Accordingly, that the prosecution failed to prove the first and third ingredients of the offence, the respondent was acquitted.

The appellant raised two grounds of appeal. According to ground one the learned trial magistrate erred in law and fact by limiting the definition of the word 'soliciting' to a conduct that is persistence only. In ground two it is contended that the learned trial magistrate erred in law by acquitting the accused at defence stage when there was sufficient evidence to put him on defence, in accordance with section 206 of the Criminal Procedure Code.

In its appellant's heads of arguments the learned senior state advocate, argued that freedoms of expression under Article 20 of the Constitution, are not completely harmless. She cited sub Article 3 of Article 20 and argued further that seeking and imparting information that is immoral cannot be tolerated in our society as it contravened section 178(g) of the Penal Code. The appellant further contended that the learned trial magistrate erred in law when he limited the meaning of the word "soliciting" to a conduct that is persistence only. According to the appellant the respondent was not merely discussing homosexuality as found by the trial court, but was actually advocating for the rights of

people practicing homosexuality to be protected. And it is illegal to practice homosexuality.

It was further submitted that in light of the provision under which the respondent was charged, it would be discerned that the test for the offence of soliciting for an immoral purpose in relation to homosexuality is not actual but potential harm to public morality. Thus any attempt to promote or funding or sponsoring in any way homosexuality and related practices is an offence.

The respondent counsel filed the heads of arguments on 12th May 2015. Mr. Nkonde, SC, argued that any interpretation of section 178(g) of the Penal Code must ensure that it complies with the rights entrenched in the Constitution. In addition that the appellant's submissions do not meet the test for a justifiable limitation of the right to freedom of expression.

It is counsel's submission that the state did not present prima facie evidence on all the elements of the offence of soliciting for immoral purposes as found by the trial magistrate. Accordingly, the respondent was entitled to an acquittal in accordance with section 206 of the Criminal Procedure Code. The case of **Mwewa Murono v. The People (4)** was relied on that "*A submission that there is no case to answer may properly be made and upheld; (a) when there has been no evidence to*

prove an essential element in the alleged offences (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."

That the state, in its heads of arguments discarded the evidence of its own witnesses, an indication that it was discredited and that no reasonable court could safely convict on it. That the state now seeks to prove its case by quoting statements made by the accused during the television programme. The state did not produce witnesses to attest that they felt that the accused was persuading them to engage in prohibited acts during the television programme.

It was submitted that the magistrate's finding that "homosexuality is immoral in Zambia, but to discuss it is something else" struck the correct balance because whilst the Penal Code prohibits same sex conduct, it does not prohibit discussion of decriminalisation of same sex sexual conduct.

Mr. Nkonde, SC, also submitted that the trial magistrate did not limit the term 'soliciting' as he looked at a range of conduct within the definition of soliciting, which were in line with the general principles of interpretation.

It was further submitted that the state's interpretation of section 178(g) infringes on the right to freedom of expression as enshrined in Article 20 (1) of the Constitution. The case of **Faustine Mwenya Kabwe and Another v. Enerst Sakala and Others (5)** was cited, where the Supreme Court held that "*The provisions conferring the rights and freedoms should not narrowly be construed but stretched in favour of the individual so as to ensure that the rights and freedoms so conferred are not diluted. The individual must enjoy the full measure and benefits of the rights so conferred and in this respect, any derogations to the rights will usually be narrowly or strictly construed.*"

Counsel also quoted Article 19 of the International Covenant on Civil and Political Rights, which he argued the courts in Zambia and the region have looked to in interpreting the right to freedom of expression.

He acknowledged that Article 20 (3) of the Constitution limits the freedom of expression but that it requires the court to embark on a limitations analysis which involved three questions like "*Is the right limited by law of general application*?" And all the three questions must be answered in the affirmative for a limitation to reasonably and justifiably limit the right to freedom of expression.

Regarding the state's submission that freedom of expression is only protected when "*conduct is completely harmless" and that the offence of soliciting for immoral purpose can be used in cases where there is "not actual but potential harm to the public*", it was argued that it appears the state seeks to redress the gap in its own evidence on the harm caused by the accused's expression of his opinions.

Citing the case of **Chimakure v. Attorney General of Zimbabwe (6),** the learned state counsel submits that there is an acknowledgement that the free expression of ideas may cause harm but that only serious harm can lead to a limitation of the right. Further, that the Supreme Court of Canada in **Jean Paul Labaye v. The Queen (7),** which dealt with the offence of criminal indecency held that "*in order to establish indecency the crown must prove beyond reasonable doubt that the conduct at issue causes harm or significant risk of harm to individuals or society in a manner that undermines or threatens to undermine the values reflected in and formally endorsed through the Constitution or similar fundamental laws. The crown must then prove beyond reasonable doubt that harm or risk of harm is a degree that is incompatible with proper functioning of society...*"

It was contended that in casu, the prosecution did not show that any harm resulted from the accused's statements. In conclusion, counsel

submitted that this case is about freedom of expression. The state, using section 178(g) seeks to punish the respondent for expressing his opinion about the human rights of homosexual minority groups. That this is inappropriate as it seeks to apply an offence to conduct which currently does not fall foul of any offence in the Penal Code and which was never the target of section 178(g).

It was submitted the appellant's arguments have no merit and that the grounds of appeal ought to be dismissed.

I carefully analysed the ruling of the court below. I also perused the record of appeal and the arguments by both counsel. It is clear that the respondent was charged for soliciting in a public place for immoral purposes under section 178(g) of the Penal Code when he appeared on Muvi Television on the Assignment Programme where he discussed gay rights in Zambia. The trial magistrate found that the prosecution had failed to prove two ingredients of the offence under section 178(g) that is soliciting and for immoral purposes. He found that the respondent was merely exercising his freedom of expression when he appeared on Muvi Television to discuss gay rights.

The appellant submitted that the magistrate erred in limiting the definition of the word soliciting to a conduct that is persistence only. I

note that though the appellant has quoted the American Heritage Dictionary for the definition of soliciting, it was not proved or shown that the respondent's action of advocating for or discussing gay rights amounted to soliciting for immoral purposes. It is trite law that what is required of the prosecution is to adduce evidence to prove all material particulars of the offence charged beyond reasonable doubt. The trial magistrate cited the case of **Hutt v. The Queen (3)**, where the Supreme Court of Canada found that the word solicit carried with it an element of persistence and pressure. He then found that from the evidence on record there was no evidence of persistence importunation on the part of the accused. And that there was no evidence that the accused was enticing or persuading anyone to engage in immoral conduct.

I find 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. As argued by the learned state counsel, Nkonde, the trial magistrate looked at a range of conduct within the definition of soliciting as the record shows at pages R5 and R6 of his ruling. I am thus not persuaded by the appellant's arguments on ground one, which is accordingly dismissed.

Regarding ground two, as aforementioned it was for the appellant to adduce evidence to prove all material particulars of the offence charged, beyond reasonable doubt and in a fair manner as held by the Supreme Court in **Joseph Mulenga & Another v. The People (4)** and also **Mwewa Murono** cited by Mr. Nkonde SC. The trial magistrate found that the prosecution failed to prove two ingredients of the offence the respondent was charged with, that is 'soliciting' and for 'immoral purposes'. He reasoned that immoral purposes must refer to some kind of sexual activity. And that the topic the accused (respondent) was discussing was immoral to the extent that sexual intercourse with the same sex is prohibited. However, that to discuss homosexuality is something else. In addition that the accused was not engaging any one to practice homosexuality but advocating for the rights of those practicing it to be protected. Accordingly, that the offence was not proved. He found the respondent with no case to answer and acquitted him. The appellant have contended that it can be discerned from section 178(g) that the test for the offence of soliciting for immoral purposes, in relation to homosexuality is not actual but potential harm to the public morality therefore, any attempt to promote or funding or sponsoring in any way homosexuality and related practices is an offence. The respondent's counsel contends that the prosecution did not show that any harm resulted from the accused's statements.

I must state that I am inclined to accept the reasoning by the trial magistrate. My understanding of 178(g) is that the accused must be in a public place and solicit i.e. proposition, ask, entreat or entice someone to commit an immoral act or engage in immoral conduct. As reasoned by the trial magistrate the respondent did not entice or entreat anyone to commit or engagein immoral conduct. To the contrary, he stated that it was a fact there were lots of homosexuals in Zambia whose rights needed to be protected. The respondent was exercising his right to freedom of expression as found by the magistrate and canvassed by his counsel. I am also persuaded by Mr. Nkonde'es arguments on when this freedom can be limited. I find that the trial magistrate was on firm ground when he found that the offence had not been proved beyond reasonable doubt and properly found the respondent with no case to answer.

I therefore, find no merit in this appeal and I accordingly dismiss it. Informed of the right to appeal.

Delivered in Open Court this 15th day of May 2015.

J. Z. MULONGOTI
HIGH COURT JUDGE