# VI. GENDER, SEXUALITY, WOMEN AND DISCRIMINATION

This chapter contains a mix of interrelated issues under the umbrella of sexual rights. Sexual rights are human rights norms that apply to sexuality, and necessarily implicate gender relations. However, sexual rights are still a contested concept, and have usually been interpreted to advance heteronormative notions about sexuality.[77] The implications include that only heterosexuality is legitimate, sexual intercourse should only be within the marriage setting, and women are accorded the responsibility for preserving sexual morality. However, this ideological bias has continually been challenged, and this chapter reflects court advocacy to expand the application of human rights norms to diverse circumstances beyond the heteronormative imaginary.

Women have been discriminated against in various ways, such as when courts give out lenient sentences to perpetrators of sexual violence, as noted in Zimbabwean *Chirembwe* case. In the Ugandan case of *CEHURD & Iga Daniel*, the court found the derogatory statutory language in the Penal Code, which referred to a woman with mental disability as an "imbecile," to contravene the Constitution of Uganda.

Women constitute the majority of sex workers in Africa, and where sex work is criminalised, the rights of sex workers, and of women suspected of being sex workers, are often violated. They are stigmatised and discriminated against and labelled as those who infect others with HIV, as seen in the *Nyambura* case. In this case the Kenyan court failed to find that the By-laws that are primarily enforced on female sex workers for "loitering" are discriminatory on the basis of gender and therefore unconstitutional.

Kenyan courts were also approached to deal with the novel issue of intersex persons. In the *RM* case, the Court refused to accept the contention that persons with intersexuality are not recognised under the law. However, in the *Baby A* decision, the Court signalled a change in conceptualising human rights and the condition of intersexuality and agreed with the petitioner that there was a need to protect the constitutional rights of intersex persons.

This chapter also includes court decisions that reveal the resistance of governments and government agents to recognise diversity in sexual orientation, and gender identities. In *Thuto Rammoge* (Botswana) and *Eric Gitari* (Kenya) the courts found the refusal to register associations of LGBTI persons to be discriminatory as it infringes on the right to freedom of association and was therefore unconstitutional. In the *Kasonkomona* decision, the Zambian Court found that publicly advocating for homosexual rights was not a criminal offence, and was within the right to freedom of expression.

It remains clear that countries in Africa need to do much more to align their national laws with progressive constitutional provisions and to meet their commitments to the international and regional human rights instruments, including the duty to advance sexual rights beyond heteronormative constraints.

# RAPE

***S v. Chirembwe***
**[2015] ZWHHC 162, CRB No. R 1006/12**
**Zimbabwe, High Court**

## COURT HOLDING

It was appropriate to split rape charges from unlawful entry charges. However, the lower court erred in sentencing each count of unlawful entry separately from rape, because they arose out of the same transaction. The counts that arose out of the same transaction (i.e., unlawful entry leading to rape) then could be sentenced individually but made to run concurrently with those transactions that were similar in nature and closely linked in time (the aggravated unlawful entry counts).

## Summary of Facts

The accused was a burglar who broke into houses and also committed acts of rape. He was charged with a combined thirty counts of contravening s 131 (1) & 2 (unlawful entry) and s 65 (rape) of the Criminal law (Codification and Reform) Act [Chapter 9:23]. Of the total 30 counts, 13 were counts of rape whereby, after entering 10 domestic premises, the accused committed the rapes. He was convicted of 21 of the 30 counts. For those 21 counts, he received a total sentence of 290 years. Of these, the final 60 years were suspended for five years on condition he did not commit a crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature.

The magistrate had meted out the sentences cumulatively, with 10 years for each count of unlawful entry, plus 20 years for each count of rape, totalling 290 years.

The regional magistrate who handled the case referred the case to the High Court for review.

## Issue

Whether the splitting of the charges and the consequent sentence were appropriate.

## Court's Analysis

In the Court's opinion, the convictions were proper but the cumulative sentencing arrived at a ridiculous result, which did not serve any purpose except to shock people. The Court pointed to the probable influence of public sentiment, especially women's groups who perceived that courts were meting out lenient sentences to rapists. The Court acknowledged that magistrates usually gave sentences of between 15 to 20 years for rape cases, but they are later reduced on review.

The Court considered the views of Kamocha J in *S v. Ndlovu* 2012 (1) ZLR 393 that though life imprisonment is the maximum sentence permissible for rape under the criminal code, this should be reserved for the worst examples of the crime. According to Kamocha J, rape sentences should be between 5 and 10 years, and beyond 10 years for exceptional cases. He also discouraged giving out cumulative sentences when dealing with multiple counts.

Though the Court agreed with the views of Kamocha J in *S v. Ndlovu*, it expressed the view that this reasoning ignores the implications of sexual violence on the enjoyment of rights by women and girls. In the Court's opinion, sentencing must utilise an engendered approach and a constitutional and human rights perspective.

Sexual violence infringes the rights to bodily and psychological integrity, freedom from violence, and inherent dignity, and rape is "a particularly serious form of gender based violence against women and girls" which has an impact on the enjoyment of their human rights. These are rights guaranteed in the Constitution of Zimbabwe Amendment Act (No.20) Act 2013 (Constitution) and international human rights treaties. The Court recognised the pervasive nature of sexual violence and the reality that women and girls live in constant fear of sexual violence throughout their lives, and this impacts gender equality between women and men. The Court reasoned that it was the state's responsibility "not just to protect women against any such violations which encroach on their fundamental rights, but to also prosecute and punish appropriately as part of its exercise of due diligence."

Reviewing the sentence by the magistrate, the Court's opinion was that the lower court was generally right to sentence the rape charges separately from the unlawful entry charges. It however erred in sentencing each count excessively. Further, the lower court should have for the purposes of sentencing, treated each entry leading to rape as one transaction, sentenced individually but running concurrently.

## Conclusion

The Court resentenced the accused as follows:

For most of the counts involving unlawful entry under aggravated circumstances and rape on the same premises, the accused received ten years' imprisonment for each count, to run concurrently. For example, 10 years for Count 1 (unlawful entry) would run concurrently with 10 years with Count 2 (rape). For one of the charges of unlawful entry with rape, the Court did not explain the reduced sentence of 8 years. Finally, the accused was sentenced to 15 years for one unlawful entry with 3 rapes of the same complainant. By contrast, the five counts of unlawful entry and theft were sentenced to 3 years each, running concurrently with all previous sentences.

These totalled 73 years' imprisonment, of which the final 18 years was suspended for five years, on condition that the accused did not commit another crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature. This yielded an effective sentence of 55 years.

## Significance

This case was more than just about sentencing for rape but also provides some insight on the evolution in Southern Africa's judicial system's response to the prevalence of rape and the appropriate punishment for perpetrators. The Court took cognizance of public sentiments accusing courts of being lenient with rapists and its decision signaled some movement towards taking the impact of rape on girls and women seriously.

One particularly egregious court decision that devalued the impact of rape on the victim was *WB v. the State* (Case No. CA 352/2006, South Africa), where the Appellant had raped his six-year-old

daughter and the trial court had sentenced him to life imprisonment. On appeal however, the High Court reasoned that the trial court failed to take into account the mitigating factors that the Appellant was a "caring, and loving husband and father" and reduced the sentence to 15 years in prison. The Court had decided to ignore the impact of rape on the girl-child on the basis that the Appellant was a good father and husband.

While the courts alone may not solve the problem of sexual violence against women, they should not condone a culture of leniency in cases of sexual violence against women. By acknowledging the human (women's) rights dimension of sentencing, the Court signals a welcome change in judicial thinking about sexual violence, taking into account the life-altering impact of rape, not only on the victim, but on the group (girls and women) that disproportionally experiences pain and suffering.

# DISABILITY, SEXUALITY AND CRIMINAL LAW

## *Center for Health, Human Rights and Development and Iga Daniel v. Attorney General* (2015), Constitutional Petition No. 64 of 2011
## Uganda, Constitutional Court

### COURT HOLDING

The language of Section 45(5) of the Trial on Indictments Act is unconstitutional because it labels defendants with mental disabilities as "criminal lunatics" and therefore violates their dignity. It also treats persons with such disabilities differentially, which contravenes the principle of presumption of innocence, and infringes on their rights to liberty.

Section 82(6) of the Trial on Indictments Act required modification to ensure conformity with the Constitution, so that persons are not detained indefinitely for reasons of insanity.

The use of the words "idiot" and "imbecile" in Section 130 of the Penal Code Act, criminalizing attempts at sexual relations with mentally disabled females, is derogatory, dehumanizing, and degrading and therefore unconstitutional.

### Summary of Facts

The applicant, Center for Health, Human Rights and Development ("CEHURD"), filed a petition challenging the constitutionality of Sections 45(5) and 82(6) of the Trial on Indictments Act and Section 130 of the Penal Code Act. CEHURD alleged that the impugned provisions contained language that was derogatory and prejudicial to persons with mental disabilities, and therefore infringed on various constitutionally guaranteed rights including the rights to dignity, non-discrimination, liberty, and presumption of innocence.

### Issues

The issues before the Court were as follows:

1. Whether Sections 45(5) and 82(6) of the Trial on Indictments Act contravene the right to liberty and freedom from discrimination of the persons with mental disabilities guaranteed under articles 23 and 21 of the Constitution;

2. Whether Section 130 of the Penal Code Act contravenes the right to dignity of persons with mental disabilities guaranteed under Article 24 of the Constitution; and

3. Whether Section 130 of the Penal Code Act contravenes the right to freedom from discrimination guaranteed under Article 21 of the Constitution.

## Court's Analysis

The Court referenced a number of international and regional human rights treaties ratified by Uganda, including the International Covenant on Civil and Political Rights ("ICCPR"), the African Charter on Human and Peoples' Rights ("ACHPR"), and the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"), to highlight the fundamental rights to non-discrimination and equality before the law, liberty and security of the person, equality and dignity. It took cognizance of Article 35 of the Constitution of the Republic of Uganda, 1995 (the "Constitution"), which specifically entrenches the right to human dignity of persons with disabilities, and obligates the government to take appropriate measures to realise their full mental and physical potential. Further, Section 32 of the Persons with Disabilities Act, 2006, obliges all government departments and organs to respect, uphold, and protect constitutionally guaranteed rights of persons with disabilities.

The Court found that Section 45(5) of the Trial on Indictments Act empowers the Minister to order an accused person to be confined as a "criminal lunatic". It held that such language violates the principle of presumption of innocence and infringes on the dignity of persons with mental disabilities secured under Article 35 of the Constitution. It also infringes on their right to freedom from all forms of torture or cruel, inhuman or degrading treatment or punishment, as secured under Article 24 of the Constitution. The Court was persuaded by *Purohit and Moore v. The Gambia*, (Communication No. 241/2001 (2003)) in which the African Commission decided on a similar issue, and held the statute's use of derogatory language such as "criminal lunatic," and automatic confinement of persons with mental disabilities "for insanity" were contrary to their rights, including the rights to dignity and non-discrimination.

The Court found that the terms "idiot" and "imbecile" referring to women with disabilities in Section 130 of the Penal Code Act were derogatory and dehumanizing. Further, these derogatory terms detract from the dignity that should be accorded to all disabled persons under Article 24 of the Constitution. Section 130 of the Penal Code Act reads as follows:

> Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, commits a felony and is liable to imprisonment for fourteen years.

The Court was of the view that the remedy should not be to strike out the section as this would leave girls and women with mental disabilities unprotected from sexual abuse. Therefore, the Court

recommended that the section be modified so that it is aligned with Article 24 of the Constitution. It proposed that the words "idiot" and "imbecile" be struck off and replaced with the words "mentally ill or impaired", so that the modified Section 130 of the Penal Code would read as follows:

> Any person who, knowing a woman or girl to be mentally ill or impaired, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was mentally ill or impaired, commits a felony and is liable to imprisonment for fourteen years.

## Conclusion

The application succeeded, and the Court made the following orders:

- Section 45(5) of Trial on Indictments Act was declared unconstitutional.
- Section 82(6) of the Trial and Indictments Act was modified to include periodic review of detention.
- The words "idiot" and "imbecile" were struck out from Section 130 of the Penal Code Act, and the Court recommended alternative words to be used.
- Conditions of detention for all persons detained for reason of insanity must be reviewed in the light of the judgment, so that they are taken for appropriate care.
- The relevant provisions of the Trial on Indictment Act and the Penal Code Act must be reviewed and amended to clarify how persons with disabilities ought to be treated in compliance with the Constitution.

## Significance

Countries that were under British colonial rule adopted colonial legislation that uses such derogatory language against persons with disabilities. This is based on earlier conceptualizations of persons with disabilities as objects of charity and bio-medically defective. Further the sexual offences laws conceptualised women with mental disabilities as sexual objects to be protected from males, rather than as rights-holders able to exercise the full range of human rights, including their sexual rights.

The law, such as Section 130 of Uganda's Penal Code, plays an important constitutive role in shaping norms and behaviour in society. It indirectly influences the framework for norms, attitudes and expectations of members of the society.[78] These include professionals working with women with mental disabilities in the justice system and also health institutions. The existence of laws that maintain derogatory language for women with disabilities and conceptualise them as sexual objects devoid of any agency unwittingly creates an environment that perpetuates sexual abuse and violence against them.

It is notable that despite reconceptualization of disabilities from a human rights perspective, some countries such as Uganda and Malawi have retained provisions in legislation that are anachronistic in relation to constitutional developments and progressive legislation. This decision is significant because countries that maintain similar legislation—which is prejudicial, derogatory and contrary to

the dignity of women with mental disabilities and treats them as sexual objects, but also discriminates against persons with disabilities in general— do not need to reinvent the wheel. The Ugandan case exposes an issue that needs some transformative action. It is therefore important for the Court's pronouncements and directives in the case to be taken seriously, not only by the government of Uganda but also by other governments.

# WOMEN AND CRIMINAL LAW

***Lucy Nyambura & Another v. Town Clerk, Municipal Council of Mombasa & 2 Others***
**[2011] eKLR, Petition No. 286 of 2009**
**Kenya, High Court**

## COURT HOLDING

The petitioners had not demonstrated that Section 258(m) of the Mombasa Municipal Bye-laws violated their rights.

There was no basis for declaring that the said provision actually or potentially violated the rights and dignity of women.

The Court declined to make an order that the arrest, arraignment, and trial of the petitioner was an abuse of her constitutional rights. There was no basis for declaring the said provision to be unconstitutional.

The petitioners did not address the Court on how the international human rights instruments they relied upon in the application should be applied under the domestic law of Kenya. As such, the Court could not make any determination on whether the said provision contravened Kenya's obligations under the international human rights instruments.

## Summary of Facts

The petitioners were arrested and charged for the offence of "loitering in a public place for immoral purposes" (prostitution), under Section 258(m) of the Mombasa Municipal Bye-laws ("Bye-laws"). They brought this petition before the High Court challenging the interpretation and application of the Bye-laws as allegedly contravening their fundamental rights and freedoms guaranteed under the Constitution of Kenya 1969 (the "1969 Constitution") and other international instruments that Kenya has ratified, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW). They claimed that (i) the Bye-laws were therefore unconstitutional and (ii) their arrest and detention in custody was discriminatory, oppressive, and unconstitutional.

## Issues

The issues the Court was asked to determine can be summarised as follows:

1. Whether Section 258(m) of the Mombasa Municipal Bye-laws violated the rights of women as guaranteed under the Kenyan Constitution, including the right to dignity;
2. Whether the said Section 258(m) contravened Kenya's obligations under CEDAW, the African Charter on Human and Peoples' Rights, and the Maputo Protocol;
3. Whether the said Section 258(m) is discriminatory against women in its effect and purpose; and
4. Whether there should be an order declaring that Section 258(m) is unconstitutional.

## Court's Analysis

While the petition was based on the 1969 Constitution, the Court agreed to use both the 1969 and 2010 Constitutions to determine the matter after noting that the latter intended to build upon and not to detract from the rights and freedoms guaranteed in the former.

The Court then evaluated the evidence and arguments of the two sides. The petitioners relied upon a research study by the Federation of Women Lawyers (FIDA) in Kenya, reported in the publication *Documenting Human Rights Violations of Sex Workers in Kenya: A Report based on the Findings of a Study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi Towns in Kenya*, as evidence for the discriminatory application and impact of the Bye-laws. The report alleges that police officers would, in the evenings or nighttime, arrest women based on how they were dressed, talked, or walked, and charge them under the impugned provision if they could not account properly for being out at that time or place.

The petitioners argued further that the law in effect only targeted women and therefore its effect was discriminatory on the basis of sex and gender, contrary to Article 27(4) of the 2010 Constitution of Kenya. They further argued that the women were not arrested for the act of prostitution and that at the time of their arrest, there was no evidence they were "engaging in" prostitution, but rather, their arrest was a violation of their freedom of movement.

The respondents rebutted the discrimination argument by referring to the text of the Bye-laws which, they claimed, was not discriminatory but applicable to all. They further relied on public interest and limitation of rights arguments to justify the constitutionality of the Bye-laws. They claimed that the law was aimed at discouraging immoral conduct and, as a matter of public interest, protecting public decency, and that prostitution is a vice that contributes to the spread of AIDS and is a medium for sexual exploitation. They also claimed that the Bye-laws protect young women from being lured into prostitution. They raised the limitation of rights, relying upon the limitation clause in Article 70 of the 1969 Constitution and Article 24 of the 2010 Constitution, which provide for a "right or fundamental freedom in the Bill of Rights" not being limited by law except to the extent that it is reasonable and justifiable in an open democratic society and is based on a number of listed factors.

The Court agreed with the respondent's arguments that the Bye-laws were enacted in the observance of a balance between the guaranteed rights of individuals and the wider public interests. It also agreed with the argument that the Bye-Law was constitutional in light of Article 24 of the 2010 Constitution of Kenya, which envisages limitation of certain rights as lawful. The Court held that public interest justified the limitation of the rights of the petitioners.

## Conclusion

The petition failed in its entirety.

## Significance

The underlying debate in this particular case was about the legality of prostitution (street prostitution). However, the significance of this case can be analysed both in relation to the legality of prostitution and vagrancy, loitering, rogue, and vagabond laws ("Vagrancy Laws").

Vagrancy laws have been allegedly used by law enforcers when the law enforcers fail to find enough evidence to prosecute for bigger crimes. Arguably, vagrancy laws tend to catch the poor, the vulnerable, and the marginalised. Indeed, in the Malawi case of Mwanza & 12 others v. R (Confirmation Criminal Case no 1049 of 2007) where 13 women were picked up at 3 a.m. and brought to court under rogue and vagabond charges, the judge set aside the women's convictions and remarked that the law could not have been intended to criminalise mere poverty and homelessness. Yet, that was its effect in the cited case.

Vagrancy laws tend to be drafted in vague and overbroad language such as "being found loitering…." Law enforcers thus find themselves vested with wide discretionary powers to determine who is caught by the law. Demeanor is frequently cited as the means for identifying suspect groups that are then arrested for further investigation. This was the case with the petitioners who were arrested for being found in a street, looking, dressed or talking like they were selling sex.

Vagrancy or loitering laws have been struck down precisely because their vagueness makes them prone to abuse, in principle and in fact, by law enforcers. For instance, in the United States case of *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Supreme Court overturned the decision of a lower court and held a vagrancy ordinance void for vagueness on the ground that the ordinance failed to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden by the statute, and also because it encouraged arbitrary and erratic arrests and convictions.

The petitioners in the case under discussion were arrested based on their demeanor. They had dressed, appeared, and talked suspiciously, regardless of their actual intention for being on the street after dark.

In any case, the defendants argued that the limitation on the rights of these women was proportionate to public interest. They argued that at stake was the public need to be protected from AIDS. This limitation would also discourage those young girls who might otherwise be lured into sex work. This case could be compared with the Canadian case of *Canada (Attorney General) v. Bedford*, 2012 ONCA 186. That Court described three ways that a law can violate a principle of fundamental justice:

1) If the impact it has on people is "grossly disproportionate" to the purpose of the law;

2) If it is "overbroad" and catches too many unrelated activities or actions; or

3) If the law is "arbitrary", that is having no connection with the purpose of the law.

Given the broad application of the Mombasa Bye-laws, it is arguable that they are disproportionate and overbroad. Anybody could be arrested on the street, kept in a cell, and asked the following morning what they had been doing on the street the previous evening. This, according to the Court, was justified in order to protect public morals or spread of disease. The Court did not however require any evidence that there is a relationship between prostitution and the spread of AIDS or the luring of girls into prostitution.

It must be appreciated that the whole issue of the Bye-laws was linked to another politically charged subject: sex work. This is a contentious issue, not only on the African continent. As one scholar has said: "Prostitution continues to be endlessly political and tied to the most fundamental social processes that underpin structural power: gender hierarchies, heteronormativity, and the structural and ideological regulation of women's behaviour."[79]

The Court faulted the petitioners' evidence and arguments. However, allowing the petition to succeed could not only have affected vagrancy laws, but could have signaled women's empowerment with regard to transactional sex, something that Kenyan society had already decided against through its anti-prostitution laws.

As Dianne Grant has said about regulation of prostitution:

> Prostitution regulations are always political and their enforcement is equally contradictory. That is because sex work is paradoxical as police must find a balance between enforcing what is a relatively minor offence in criminal terms, to that of appeasing/catering to powerful interest groups, residency associations, municipal and provincial governments, in a given city.[80]

This captures precisely what was going on in the Kenyan Court. The Court sided with the Mombasa Municipal authorities and the police, perhaps in order to appease powerful interest groups, united by the ideologies that ensure that women who sell sex are kept disempowered. Therefore, despite the petitioners raising the argument that the application of the law had a discriminatory effect on women, and proffering research evidence to demonstrate this, the Court was dismissive.

The above analysis points to the predicament of the petitioners in the case. They may however have been pitted against socio-political interests that had far more influence over the Court than the arguments and evidence they were able to present. Perhaps ultimately, the significance of this case is that it makes us realise the difficulty of challenging vagrancy laws.

A successful challenge would require much more than invoking constitutional rights; it would likely require well thought-out legal and political advocacy strategies.

# LEGAL RECOGNITION OF INTERSEXUALITY

***Baby "A" (suing through her mother, E.A.) and The Cradle the Children Foundation v. Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths***
**[2014] eKLR, Petition No. 266 of 2013**
**Kenya, High Court (Constitutional and Human Rights Division)**

## COURT HOLDING

The petitioners in the case before the Court and in the *RM case* are different, and the facts also differ, so that matter is not *res judicata.*

Baby A has an intersex condition, but there is no evidence that the rights of Baby A or other people with intersex conditions were violated in any way because of Sections 2(a) and 7 of the Registration of Births and Deaths Act.

It is an anomaly that the current legal framework does not recognise people with intersex conditions. It is the duty of the government to protect the rights of babies and people with intersex conditions by providing a legal framework to address issues relating to them, including registration under the RBDA, medical examination and tests, and corrective surgeries.

## Summary of Facts

The petitioner, Baby A, was born with both female and male genitalia. Kenyatta National Hospital, the second respondent in the case, conducted medical tests on the petitioner. In one of the documents which captured the personal details of the petitioner, a question mark "?" was inserted in the column for indicating the sex of the person. Baby A had never been issued a birth certificate. The petitioner claimed that the entry of a question mark indicating the sex of the petitioner was a violation of the rights of the child to legal recognition, dignity, and freedom from inhuman and degrading treatment. These rights were guaranteed in Section 4 of the Children Act, 2001 (Children Act), and Articles 27, 28, and 29 of the Constitution of Kenya, 2010 (Constitution).

The petitioner also claimed that the failure of legislation such as the Registration of Births and Deaths Act (RBDA), Cap 149 of the Laws of Kenya, to recognise children with intersex conditions infringed on various rights of children guaranteed under the Constitution, and also under various international human rights treaties, including the Convention of the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR), and the International Covenant on Economic and Social and Cultural Rights (ICESCR).

## Issues

The Court identified the following issues for its determination:

1. Whether the matter raises facts already raised and determined (*res judicata*) in the earlier case of *RM v. Attorney General and Another*, Petition 705 of 2007 (*RM case*);

2. Whether Baby A is an intersex person and if so, whether the baby suffers lack of legal recognition because of Sections 2(a) and 7 of the Births and Deaths Registration Act and whether therefore these provisions are inconsistent with Article 27 of the Constitution;

3. Whether there is need for guidelines, rules and regulations for surgery on persons with intersex conditions; and

4. Whether there is a need to collect data on persons with intersex conditions in Kenya and if so, who is mandated to do so.

## Court's Analysis

The Court considered the *RM case* and the matter at hand to determine whether the issues raised had indeed been raised before and already settled by the Court in terms of Section 7 of the Civil Procedure Act. After reviewing precedent and instructive case law from other jurisdictions, the Court concluded that for *res judicata* to apply, "the issues in the matter before the Court must be directly and substantially in issue in the two suits and the parties must be the same or the parties under whom any of them claim or is litigating under, are the same."[81] First, the Court found that the parties in the two suits were not the same. Second, it determined that the facts in the two suits were different. The Court therefore held that the matter was not barred by *res judicata*.

The Court then dealt with the central claim of the petition, that Baby A suffered from lack of legal recognition due to having an intersex condition. First, the Court sought to determine whether Baby A was an intersex person. Using the definition of intersex from the *RM case*, the Court determined that Baby A was an intersex person based on the fact that a laboratory report/form indicated a question mark in the category of the sex of the child, showing that there was ambiguity about the sex of the child. Although the Notification of Birth form indicated that Baby A was male, the Court determined that that outcome was due to the societal expectation that babies be categorised as male or female.

After determining that Baby A was an intersex person, the Court evaluated the petitioner's argument with respect to lack of legal recognition as an intersex person. The petitioner claimed that failure of the RBDA to recognise persons with intersex conditions constituted an infringement of constitutional rights guaranteed under Article 27(4) of the Constitution, which prohibited discrimination against the person on any ground including sex. The Court followed the reasoning in the *RM case* where the Court had said that sex is fixed at the time of birth.

The Court went on to address the petitioner's argument that the term "sex" in various legislation, including the Constitution, be interpreted to include intersex. The Court relied upon the *RM case*, which was of the view that it was not the mandate of the Court to expand the meaning of sex in the Constitution to include intersex, and that this was for the Legislature.

Further, the Court found that no one, neither the petitioner nor anyone on her behalf, had in fact tried to register the birth on behalf of the underage petitioner. In addition, there were no facts alleged or evidence produced of violations of the petitioner's rights. It was on this basis that the Court refused to find infringement of rights.

The Court next considered the argument that it should issue guidelines on corrective surgeries for babies with intersex conditions. The Court was of the view that it was not within its mandate. However, the Court went on to say that it would nevertheless grant appropriate relief in accordance with Article 23(3) of the Constitution because the matter raised issues of a constitutional nature. The Court proposed that people with intersex conditions be recognised as such under the law, and that the failure of the RBDA or the Constitution to recognise them should not be interpreted to mean that their rights could be infringed. It made reference to two decisions of the Colombian Constitutional Court, Sentencia No.54-337/99 (the *Ramos* case) and Sentencia T 551/99 (the *Cruz* case), and concluded that the state had a duty to protect the rights of babies and persons with intersex conditions by putting in place a legal framework which would govern issues such as their registration, medical examinations, and corrective surgeries. The Court urged Parliament to enact the necessary legislative framework. In addition, the Court determined that data collection on intersex persons should be undertaken and that the Court would make an appropriate order to determine whose function it was to collect such data.

## Conclusion

The petitioner's rights were not violated, so the petition failed in that regard.

The Court ordered the Attorney General to bring before it, within 90 days of the judgment, the information related to the organ, agency, or institution responsible for collecting and keeping data related to persons with intersex conditions.

The Court also ordered the Attorney General to file a report before it within 90 days of the judgment, identifying the status of a statute regulating intersex as a sex category, and guidelines and regulations for any corrective surgery for persons with intersex conditions.

Finally, the Court ordered that the Petitioner move to make an application for registration of Baby A by the Registrar of Births and Deaths, and that a report of this be filed with the Court within 90 days of the judgment.

## Significance

This is the second case to be decided in the Kenyan courts concerning the rights of persons with intersex conditions. The first case was *RM v. The Hon. Attorney General and Four Others (RM case)*, Petition no 705 of 2007. The *Baby A case* further develops the jurisprudence in the *RM case*, and its significance is better appreciated when it is analysed in contrast to the *RM case*.

In the *RM case*, Justice Sitati, who authored the main judgment, had written that "The Kenyan society is predominantly a traditional African society in terms of social, moral and religious values. We have not reached the stage where such values involving matters of sexuality can be rationalised or compromised through science."[82] In contrast, Justice Lenaola in the present decision uses language such as: "… time is now ripe for the development of rules and guidelines on corrective surgeries for intersex children especially minors such as Baby A."[83] Elsewhere in the judgment, Justice Lenaola states that "The fact that the Births and Deaths Registration Act and the Constitution do not define

the term 'sex' does not mean that we should hide behind the traditional definition as we know it." These statements show progressive thinking about intersex conditions, as compared to the reasoning in the *RM Case.*

The most important way in which this Court differed in perspective from the *RM case* is that while the reasoning in the *RM case* was tantamount to erasing persons with intersex conditions by rigidly affirming the male/female binary, the Court in the *Baby A case* departed from this traditional understanding of the meaning of sex as only encompassing the male/female binary. It was therefore not surprising that the Court went on to recognise the existence of children and people with intersex conditions as a class. Although the issue of *locus standi* was not raised in this case, the Court on its own motion allowed Baby A to represent other persons with intersex conditions when it said that "The issues raised in the present Petition must be looked at in the wider context of the place of intersexuals in our society as opposed to the narrower and specific interests of Baby A who is only one such person in our Society."[84] In fact, this case turned upon the Court's recognition of persons with intersex conditions as a class whose rights needed protection. Therefore, though the conclusion of the case did appear to be unfavourable for Baby A as an individual, the petition was successful in raising awareness about the rights of persons with intersex conditions generally. Despite its apparent reliance on the reasoning in the *RM case*, which it quoted substantially, the Court arrived at a bolder and more just conclusion because the decision was in the end premised on Baby A's capacity to bring a representative suit on behalf of the interests of persons with intersex conditions. Further, while it agreed with the court in the *RM case* that it is the role of the Legislature to come up with laws that would recognise persons with intersex conditions, the Court assumed the duty to ask the Legislature to come up with a legal framework for them, and it proceeded to issue orders that would, if respected, facilitate realisation of their constitutional rights.

This case is therefore important because it broke fetters with cultural norms about sex and sexuality in relation to intersexuality. It forged new ground toward ensuring recognition and respect of the rights of persons with intersex conditions.

It would have been more enriching for Africa's jurisprudence if the Kenyan courts had addressed the issue of discrimination and lack of legal recognition of persons with intersex conditions, apart from addressing the issue of corrective surgery. In both cases, the Courts found that the petitioners had not brought evidence of discrimination, as neither petitioner had applied for a birth certificate or other identity documentation, and therefore they could not conclude that the petitioners had been discriminated against. This however does leave room for further public interest litigation if a petitioner could bring concrete evidence of how lack of legal recognition violates rights including the right to non-discrimination. Further, the Court in the *Baby A* case did issue orders relating to gathering data about persons with intersex conditions and the status of the law in relation to them, which, if respected by the Attorney General, would contribute towards development of a positive discourse on their rights, not only in Kenya but in the African region.

## *R.M. v. Attorney General & 4 Others*
## [2010] eKLR, Petition No. 705 of 2007
## Kenya, High Court

### COURT HOLDING

The petitioner did not present any data or facts to show that there was a definite number of intersex persons in Kenya as to form a class or body of persons in respect of whose interest the petitioner could bring a representative suit. Consequently, the petitioner had no *locus standi* to bring a representative suit on behalf of other intersex persons.

The petitioner as an intersex person was adequately covered by the law and, consequently, his constitutionally guaranteed rights and other rights were not infringed upon and he suffered no discrimination under the law on that basis.

The petitioner's right to protection against inhuman and degrading treatment as provided under Section 74 of the Constitution was violated by prison officials, and he was entitled to general damages of Kshs. 500,000 and 20% of his costs against the Attorney General and Commissioner of Prisons.

### Summary of Facts

The petitioner was born with both male and female genitalia, a condition known as intersex. His parents had raised him as male. He claimed that due to his condition, he could not obtain a birth certificate, a prerequisite to obtaining a national identity card. As a result of not having a birth certificate or national identity card, he could not enjoy citizenship rights, including the ability to register as a voter, obtain travel documents, acquire property and get employment. He dropped out of school at Class 3, and when he attempted to marry, the law did not recognise his marriage. He became secluded and later was charged with an offence of robbery with violence in 2005. While the petitioner was in prison remand, awaiting the determination of his case, the statutory prison search revealed that he had both male and female genital organs. The petitioner was taken to the hospital for verification of his gender, and the doctor's report confirmed that he had ambiguous genitalia. As a result, a court order was made to remand the petitioner to the police station during the pendency of his trial. The petitioner was tried, convicted and sentenced to death for robbery with violence. He was committed to a prison for male death row convicts, where he shared cells and facilities with male inmates. He claimed that he was exposed to abuse, mockery, ridicule, and inhuman treatment, as well as sexual molestation by other male inmates.

The petitioner claimed that due to the failure of the legal framework to recognise 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. He therefore relied on the Constitution of Kenya, 2010 (Constitution), and also the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

## Issues

The Court in its judgment enumerated a rather long list of issues for determination. However, the issues could be condensed into the following:

1. Whether the petition was a representative suit, and if so, whether the Court had jurisdiction under Section 84 of the Constitution to consider generally the rights and violations of rights of intersex persons;

2. Whether the petitioner was an intersex person, and if so, whether the petitioner, as an intersex person, suffered from a lack of legal recognition and protection under the Constitution and other applicable laws, resulting in violations of the petitioner's human rights, including, among others, the right of everyone to be recognised as a person before the law, the right to equality and non-discrimination as guaranteed under Section 82 of the Constitution, and the constitutionally guaranteed rights to life, liberty and security of the person; and

3. 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 Constitution.

## Court's Analysis

The Court addressed the issue of whether the petitioner could sue on behalf of the body of intersex persons in Kenya. The Court discussed the definition of "intersex" and concluded that it describes "an abnormal condition of varying degrees with regard to the sex constitution of a person."[85] Based on that definition, the Court determined from the facts provided that the petitioner was an intersex person. On inquiring into whether there was a body of intersex persons who had an interest in the outcome of the petition because it would have an impact on their welfare, the Court held that the petitioner, along with the interested parties and *amici curiae* who were joined in the matter to support the arguments of the petitioner with respect to other intersex persons, 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 he represented. 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 Court then delved into the issue of lack of legal recognition of and discrimination against the petitioner as an intersex person. The petitioner had submitted that the Birth and Deaths Registration Act only recognised male or female sexes but not intersex. He 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. To address the issue, the Court first of all inquired into the meaning of the term "sex". The Court sought a definition of the term in the 11th Edition of the *Concise Oxford English Dictionary* and also the *Black's Law Dictionary* (8th 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."[86] It was also persuaded by the English decision in *Corbett v. Corbett* ([1970]2 WLR 1306), as well as decisions from other jurisdictions, that a person's sex is fixed at birth. The Court therefore concluded that the Births and Deaths Registration Act did not in fact exclude the petitioner as an intersex person, since he was either male or female at birth, despite the

difficulty posed by the ambiguous genitalia, and thus his birth could have been registered under the Births and Deaths Registration Act if an application had been made. The Court rejected the argument that the term sex in Sections 70 and 82 of the 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, and also because the legislature in Kenya had not taken action to expand the meaning of the term sex. Similarly, the Court disagreed with the argument that intersex persons should be brought within the category of "other status" included in Article 2 of the UDHR and Article 26 of the ICCPR. It concluded that intersex persons "are adequately provided for within the Kenyan Constitution as per the ordinary and natural meaning of the term sex,"[87] 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 Court also considered the argument that the petitioner had been discriminated against and disadvantaged socially as a consequence of the alleged failure of his legal recognition as an intersex person. The Court indicated that the petitioner's failure to obtain legal documents including a birth certificate, identity card and voter's registration card was his own fault, as neither the petitioner nor his mother had made any efforts to obtain such documentation. The Court also determined that the petitioner had abandoned school because he could not see anything written on the blackboard, not because he was disadvantaged due to his intersex status, and that the petitioner's later inability to obtain employment was due to not having an educational background that would make him a stronger candidate for employment. Further, the social problems which he claimed were a result of lack of legal recognition, including inability to marry, were not due to the effect of discriminatory laws. Rather, based on the Court's determination that each person falls into one of the two categories of gender at birth, 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.

On whether the law should be reformed to allow the petitioner as an intersex person to determine his gender or define his sexual identity, the Court was of the opinion that the petitioner as an adult could do so, including through 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 also determined that the issues raised with respect to the ability of intersex persons to adopt children or parental responsibility for assigning gender to children were not properly brought in the case, as the petitioner had not sought to adopt a child and was beyond the age of maturity. Further, the Court determined that the issue that the petitioner raised regarding social stigma was not a legal issue, but rather a social issue to be addressed through openness and dissemination of appropriate information. 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 rationalised 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 the petitioner. With respect to the petitioner's criminal trial, the petitioner's detention in the police station was legal because the Court validly ordered his detention in that location taking into account his intersex status

and that there was no other appropriate location to remand him during his trial, and there were no other defects in the trial identified by the petitioner. In addition, 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, and it was not practical for the petitioner to expect a prison facility for himself alone with prison officers who are intersex or have training in that area, given that no such prison officers were known to exist.

Further, the Court found that the petitioner had not been denied the freedom of movement and association because his freedom of movement was lawfully limited after his arrest due to his alleged criminal activity and was limited prior to his arrest due to his own failure to obtain the necessary documentation. Similarly, the Court stated that the petitioner's right to privacy had not been violated because the limitations on petitioner's privacy were legally imposed due to the petitioner's conviction for a criminal offence.

The Court however found that the petitioner was treated in an inhuman and degrading manner by prison authorities who 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. The Court awarded damages of Kshs. 500,000 (about 5,000 USD) to the petitioner as redress for violation of his right to dignity and 20% of his costs against the Attorney General and the Commissioner of Prisons.

## Conclusion

The petitioner failed on the main claim that the legal framework did not recognise and discriminated against intersex persons.

The petitioner also failed on the claim that he could bring the petition on behalf of other intersex persons.

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.

## Significance

This case presented novel issues for the Kenyan Court. While intersexuality is lumped together with gay, lesbian, transgender/transsexual and bisexual identities in the collective term LGBTI, intersexuality presents unique legal and human rights challenges quite distinct from the other identities.

The Court defined intersex in a negative manner by characterising it as an abnormality. This was unfortunate because such language fuels stigma and shame about individuals' body. Rather, it should be recognised that some people are born with physical traits that do not fit neatly into the biological categories of male or female. Article 3 (d) of the Convention on the Rights of Persons with Disabilities (CRPD), on the general principle of respect for differences and acceptance of persons with disabilities, is instructive in this regard. Intersex conditions should be taken as part of human diversity and humanity, and differences should not be justification for discrimination.

Many people with intersex conditions have been subjected to "corrective surgery" or genital mutilation. The rationale behind these surgeries and related therapies is to manipulate the person's physical traits in order to make them fit into the male/female binary. This type of intervention is usually done at birth, when the person is not capable of consenting. In this petition, the Court did not address the question in depth because it was not in issue. Indeed, surgery may not be a huge concern in Africa because of the cost and unavailability of the technology and skilled personnel on the African continent. The discourse on intersex conditions and corrective surgeries has gained ground in the developed world, however. For instance, in its concluding observations on Germany, the United Nations Committee on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture) expressed concerns about "cases where gonads have been removed and cosmetic surgeries on reproductive organs have been performed that entail lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians."[88]

In his report of 2013, Juan E. Méndez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, called upon states to "repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned."[89]

While corrective surgery was not the gist of the petition, it is noteworthy that the reasoning of the Court was akin to the ideology behind corrective surgery which is to "normalise" the person and make them fit into the male/female binary. The Court suggested that every person is either male or female and therefore every person should be made to fit into either the male or female category. Because of this ideological construct, the Court did not find it a problem that laws did not recognise persons with intersex conditions. Everyone would be made to fit, even if uncomfortably, into a male or female category. Failure to recognise intersex persons is to erase, ignore, and make them invisible. The consequences however are not only physical; they are social and psychological, and include stigmatisation. By denying difference, society signals rejection of persons who do not conform to socially acceptable traits. One is either male, female, or nothing.

Making persons with intersex conditions disappear through ideological construction opens up space for violations of various human rights. For instance, if in sexuality education, students are not made aware of the existence of peers with intersex conditions, and socialised to accept differences, those peers become marked as "other" and objects of ridicule. To curb the risk of exposing persons with intersex conditions to human rights violations, it is necessary for public policy to recognise and accept them. By making them visible, it makes it necessary to protect their rights.

The Court expressed the opinion that "The Kenyan society is predominantly a traditional African society in terms of social, moral and religious values. We have not reached the stage where such values involving matters of sexuality can be rationalised or compromised through science."[90] This text of the judgment feels rather misplaced given that persons with intersex conditions are born with the condition. One explanation might be that the Court's sentiments were directed toward transgender persons rather than persons with intersex conditions. However, it raises suspicion that this had set the tone of the whole judgment, in which the Court did not accept them as worthy of recognition under the law.

The Court grappled with the issue of intersexual conditions and human rights, but by denying recognition of intersex as a category distinct from male or female, the Court failed to protect the rights of intersex persons. The Court could have shed human rights light into the spaces where intersex persons continue to search for affirmation of their humanity and of their rights. That could be a stepping stone for better jurisprudence regarding intersexuality and human rights on the African continent.

# GENDER IDENTITY

***Republic v. Kenya National Examinations Council & Another***
**[2014] eKLR, JR Case No. 147 of 2013**
**Kenya, High Court**

## COURT HOLDING

According to Rule 9(3) of the Kenya National Examinations Council Rules 2009 (Kenya Certificate of Secondary Education Examinations), the Kenya National Examinations Council (KNEC) may withdraw a certificate for amendment or for any other reason where it considers it necessary. If on being requested to perform its duty, the KNEC fails to do so, the High Court has the jurisdiction to issue orders compelling it to perform its duty.

The KNEC is not required by law to indicate a gender demarcation on all Certificates of Secondary Education, noting that although it is traditional to indicate such demarcation to assist in proper identification of a candidate, such tradition is not backed by law.

### Summary of Facts

This was an application before the High Court of Kenya for review of a decision of the Kenya National Examinations Council (KNEC) denying the applicant change of particulars of name on the applicant's Kenya Certificate of Secondary Education (KCSE), and removal of a gender mark on the same document.

The applicant was born with the physical characteristics of a male child, but has always inclined toward female gender. The applicant completed secondary school as a male, but following such time was diagnosed with Gender Identity Disorder (GID) and commenced treatment for gender reassignment to female.

The applicant applied to the KNEC to have his/her secondary school certificate re-issued to remove the gender demarcation and change the name. This request was denied, so the applicant sought a court order compelling the KNEC to re-issue the certificate.

### Issues

The issues put before the Court were the following:

1. Whether the change in name on a KCSE is allowed by law; and

2. Whether the law requires the KNEC to indicate a gender mark on the KCSE.

## Court's Analysis

The Court's determination hinged on the proper interpretation and application of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009 (Rules), especially Rule 9 which addresses the mandate of the KNEC with regard to what appears on the certificate. In the Court's opinion, the Rules do not require a gender mark to be indicated on the certificate. Further, the Rules allowed KNEC the discretion to withdraw the certificate for amendment or for any other reasons that it considered necessary.

The Court addressed the reason for which the applicant wanted the certificate to be re-issued with a change in the particulars of name, which included Gender Identity Disorder (GID). The Court found that the applicant demonstrated why the applicant should be treated differently to remove the gender demarcation. In so finding, the Court reviewed, in *obiter dicta*, several decisions from the UK, Kenya, India, and Nepal that consider the legal status of transgender and intersex gender categories (*Belinger v. Bellinger* [2003], UKHL 21, *Richard Muasya v. the Attorney General & Others*, Nairobi High Court, Petition No. 705 of 2007, *National Legal Services Authority v. Union of India and Others*, Civil Original Jurisdiction Writ Petition (Civil) No. 400 of 2012; Writ Petition (Civil) No. 604 of 2012 and *Sunil Babu Pant & Others v. Nepal Government*, Writ Petition No. 917 of 2007). The Court recognised the pain, trauma, and agony that persons with GID undergo, and quoted the opinion of the Supreme Court of India (*National Legal Services Authority* case) that "the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."

The Court also recognised that this was an issue about human dignity, and that it ought to apply Article 28 of the Constitution of the Republic of Kenya, 2010, which recognises this right, to the applicant's circumstances. It was its view that "Human dignity can be violated through humiliation, degradation or dehumanization," as was the case with the applicant.

Taking into account the Rules and the reasons for the applicant's requests, the Court held that by refusing the name-change and removal of the gender mark, KNEC had failed to discharge its obligations in accordance with the law. The Court therefore compelled KNEC to comply by re-issuing the applicant a certificate with the name-change and without a gender mark.

## Conclusion

The applicant was successful and the Court ordered KNEC to replace the applicant's certificate.

## Significance

The Court's review of the legal interpretation of the term "sex," although *obiter dicta*, is instructive. The Court referred to Article 10 of the Constitution of Kenya in identifying human dignity as a guiding principle to be applied in interpreting any law, and to Article 28 of the Constitution of Kenya which provides that such human dignity should be protected. The Court's emphasis on the value of human dignity was ultimately the reason that it used to overcome the respondents'

arguments, based on grounds of bureaucratic complexity, for not recognizing the applicant's special circumstances.

# SEXUAL ORIENTATION

## *Oloka-Onyango and 9 Others v. Attorney General*
## [2014] UGCC 14, Constitutional Petition No. 8 of 2014
## Uganda, Constitutional Court

### COURT HOLDING

The Court held that the Anti-Homosexuality Act 2014 (hereinafter "the Act") was invalid because the Parliament lacked a quorum as required by the Uganda Constitution when it voted to pass the Act.

### Summary of Facts

When the Act was put to a vote by the Parliament in December 2013, members of Parliament, most notably the Prime Minister, twice asserted that there was not a quorum present, as required under the Uganda Constitution. The Speaker of Parliament, who is responsible for determining whether a quorum exists, did not follow the required procedures for determining whether a quorum was present and put the Act to a vote, whereby the Act was passed by the members of Parliament present.

The Petitioners sued the government, claiming that a quorum did not exist at the time the Act was voted on, and that the enactment of the Act without quorum was in contravention of Articles 2(1) and (2), 88 and 94(1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedure. Further, the substantive provisions of the Act were impugned for violating legal principles and constitutionally guaranteed rights, including as follows:

- By criminalising consensual same-sex/gender sexual activity among adults in private, it contravened the right to equality before the law, freedom from discrimination and the right to privacy;
- By criminalising consensual touching by persons of the same-sex, it created an offence that was overly broad;
- By imposing a maximum life imprisonment sentence, it created disproportionate punishment in contravention of the right to equality, and freedom from cruel, inhuman and degrading punishment;
- By criminalising consensual same-sex/gender activity among adults in which one is living with HIV or has a disability, it contravened the right to freedom from discrimination and the right to dignity; and,

- In classifying houses and rooms as brothels merely on the basis of occupation by homosexuals, it created an offence which was overbroad and contravened the principle of legality, and rights to property and privacy.

Further, the Petitioners claimed that the criminalisation of consensual same-sex/gender sexual activity among adults contravened Uganda's obligations with regard to the rights guaranteed under international human rights instruments, including the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the UN Covenant on Civil and Political Rights, and the UN Covenant on Economic, Social and Cultural Rights.

## Issues

When the issues were laid out before the Court, the Court refrained from determining whether the Act violated constitutionally guaranteed fundamental rights or contravened Uganda's obligations with regard to the rights guaranteed under international human rights instruments. Instead, the Court opted to determine the procedural issue regarding any irregularity of the enactment process. Therefore, the issue the Court determined was whether the Act was passed without a quorum, in contravention of Articles 2(1) and (2), 88 and 94(1) of the Constitution of the Republic of Uganda, and Rule 23 of the Parliamentary Rules of Procedure.

## Court's Analysis

The Court affirmed the provisions of the Constitution regarding the procedure of enacting laws in the legislative assembly, including Article 79 of the Constitution, which empowered Parliament to make laws, and Article 88, which deals with quorum prescribed by the rules of procedure under Article 94 of the Constitution.

According to Rule 23 of the Parliamentary Rules of Procedure, the Speaker of Parliament is supposed to ascertain whether the members of Parliament form a quorum before calling for a Bill to be voted upon. The petitioners argued that when some members of Parliament raised the issue of quorum, the Speaker had not followed procedure to ascertain the quorum. The respondents did not rebut this, but asked the Petitioners to prove the absence of quorum.

The Court's opinion was that the Petitioners had alleged a fact which the respondents did not deny and it was therefore presumed that they accepted the fact. Therefore, when the Petitioners alleged that when some members of Parliament had raised the issue of quorum, the Speaker failed to follow procedure to ascertain quorum, and this was not denied by the respondents, then the Petitioners had proved their case.

The Court held that therefore the Speaker had acted illegally. Failure to obey the law rendered the whole process a nullity, so the Act was invalid.

## Conclusion

The Anti-Homosexually Act, 2014 was enacted when there was no quorum. This was unconstitutional and it rendered the Act null and void.

## Significance

Many countries in Africa have maintained laws that criminalise same-sex sexual conduct that date back to colonial times and originated from the colonial masters. In *Banana v. State*, (2000) 4 LRC 621, by a majority of 3 to 2, the Supreme Court of Zimbabwe ruled to maintain anti-sodomy provisions. In *Kanane v. the State* 2003 (2) BLR 67, the Botswana Court of Appeal upheld anti-sodomy provisions. Both the Zimbabwe and Botswana Courts based their decisions on morality and opined that the society was not ready for same-sex sexual conduct to be decriminalised. The Botswana Court, for instance, went on to say that homosexual practices should not be decriminalised because gays and lesbians were not groups protected by the Constitution.

Such decisions, which affirm stigmatisation of non-heterosexual sexuality, can have the effect of exacerbating homophobia, perpetuating discrimination and violence against persons of homosexual orientation. Lesbian, gay, and transgender people are significantly more likely than the general population to be targeted for violence and harassment, to contract HIV, and to be at risk for mental health concerns such as depression and suicide. Further, they may be deterred from seeking health services out of fear of being arrested and prosecuted.[91]

This case was therefore important for advocacy as it brought or would have brought the impugned laws under the scrutiny of human rights. An opportunity was therefore missed when the Court avoided determining the substantive human rights issues. Its decision on this would have created further opportunities to bring the matter before regional or international tribunals or courts, depending on the outcome in the national court. Nevertheless, the judgment obtained before the Uganda Court was a legal victory and is of symbolic importance for the Lesbian, Gay, Bisexual, Transsexual, Intersex (LGBTI) community, especially since the legislation was annulled.

### *C.O.L. & G.M.N. v. Resident Magistrate Kwale Court & Others*
### Petition No. 51 of 2015
### Kenya, High Court (Constitutional and Judicial Review Division)

## COURT HOLDING

The requirement for the accused to provide samples for purposes of proving an offence, as provided under the Sexual Offences Act, did not infringe on the petitioner's rights.

The right not to self-incriminate secured under the right to a fair trial recognised in Article 50 of the Constitution of Kenya does not envisage excluding an accused from providing medical samples for purposes of proving an offence. Rather, it pertains to oral and documentary evidence against oneself.

## Summary of Facts

The petitioners were arrested on suspicion of being homosexuals. While under investigation, the petitioners refused to undergo medical examination. Following their being charged before the 1st respondent, the petitioners were, by court order, compelled to undergo medical examinations

including anal examination. The petitioners claimed that forcible medical examination to ascertain their sexual behaviour violated various rights under the Constitution of Kenya including the right not to be treated in a cruel, inhuman or degrading manner (Article 29); the right to privacy (Article 31); the right to non-discrimination (Article 27); and the right to dignity (Article 28). The petitioners also contended that this means of getting evidence, i.e., non-consensual medical examination, contradicted their rights to a fair trial guaranteed under Article 50 of the Constitution.

## Issues

The Court isolated the following issues for determination:

1. Whether the medical examination was a violation of the petitioners' rights to privacy; non-discrimination; torture and cruel, inhuman or degrading treatment or punishment; and human dignity and security of the person; and

2. Whether the medical examination violated the right not to be compelled to make any confessions or admissions that would be used in evidence against the accused.

## Court's Analysis

The Court considered the implications of Section 26 of the Sexual Offences Act (Cap. 62 A of the Laws of Kenya) which criminalises deliberate transmission of HIV, and Section 36 which provides that a court may direct collection of evidence of a medical, forensic, or scientific nature for the purpose of ascertaining whether an accused committed an offence under the Sexual Offences Act. It also referred to Section 42 of the Sexual Offences Act which stipulates consent requirements on providing samples for evidence, and also the Sexual Offences (Medical Treatment) Regulations 2012 (Regulations), and in particular, Regulation 5 which provides that a court may order collection of a sample from an accused on conditions which the court may specify. When a person declines to provide a sample, the prosecution can apply for a court order under Section 36(1) of the Sexual Offences Act to compel the person to provide a sample.

The Court noted that, on record, the petitioners appeared to have consented to the medical examination, and did not appeal against the decision or order to undergo medical examination. The Court therefore found and held that the petitioners consented to the medical examination.

In the view of the Court, the right to fair trial secured under Article 50 did not mean that an accused should be excluded from medical examination. It referenced *R v. Kithyulu* (2013), in which a Kenyan Court held that the right not to self-incriminate pertains to oral or documentary evidence against oneself but does not extend to taking of medical samples to prove some fact. Therefore, according to the Court, the petitioners could not rely on constitutional rights to exclude themselves from undertaking the medical examinations in accordance with the law. The Court therefore held that the rights of the accused to a fair trial were not infringed by the requirements of the law to provide samples for purposes of evidence.

## Conclusion

The petition failed. The medical examination was done in accordance with the law.

### Significance

On one hand, the Court's decision was within the confines of the law in that the applicable law provides for compelling homosexuals to anal examination for purposes of proving the offence of sodomy. This is apparent in the reasoning of the court, which in a nutshell is that the law requires subjection to anal examination to prove the offence of sodomy, and therefore there was nothing illegal in compelling the petitioners to endure such a test.

The Court's reasoning is however not entirely sound. Though the Court seemed very certain about its analysis of the rationale for undertaking anal examinations, especially in paragraph 51 of the judgment, it is not at all certain whether indeed anal examination can prove the offence of sodomy. Further, the unanswered question remains as to whether in order to prove the offence, it is necessary to subject persons to humiliating anal examinations.

The main issue however is not the legality or illegality of conducting anal examinations to ascertain sexual behaviour, which might fall one way or the other depending on the national legal framework. A more fundamental question is whether the body of laws that allows such examinations is ethical in accordance with the rights to human dignity and equality, which many constitutions, including Kenya's, extol.

In this Kenyan case, the Court did not attempt to subject the state's action to human rights scrutiny, especially to question whether the state's practice of forcible anal examinations was in accordance with human rights norms. Instead, it took for granted that the state's practice of anal examinations would definitely prove some specific sexual behaviour. At least, the Court could not have been so certain about evidentiary veracity of such anal examinations.

## RECOGNITION OF LGBTIQ ADVOCACY AND GROUPS

***Eric Gitari v. Non-Governmental Organizations Co-Ordination Board & 4 Others***
**[2015] eKLR, Petition No. 440 of 2013**
**Kenya, High Court**

### COURT HOLDING

The words "every person" in Article 36 of the Constitution include all persons living within the republic of Kenya, regardless of their sexual orientation.

The respondents contravened the provisions of Articles 36 of the constitution in failing to allow gay and lesbian persons living in Kenya to register an association of their choice.

The petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.

## Summary of Facts

The petitioner sought to register a nongovernmental organisation ("NGO") with the 1st respondent, the Non-Governmental Organisations Coordination Board ("NGO Board"), a body corporate established under the provisions of the Non-Governmental Organisations Co-Ordination Act, Cap 19 of the Laws of Kenya ("NGO Act"). The NGO aimed to further the equality of lesbian, gay, bisexual, transgender, intersex, and queer ("LGBTIQ") persons in Kenya. The NGO Board refused to accept the names proposed by the petitioner because they all contained the terms "gay" and "lesbian." The NGO Board cited Sections 162, 163, and 165 of the Penal Code which criminalise gay and lesbian liaisons, and Regulation 8(3)(b) of the NGO Regulations of 1992 (the "Regulations") as the basis for rejecting the request. The referenced Regulation provides that the Director of the NGO Board can reject an application if "such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable."

In a letter stating its reasons for refusal, the NGO Board also expressed the opinion that sexual orientation was not listed as a prohibited ground of discrimination in Article 27(4) of the Constitution of Kenya, 2010 (the "Constitution"); nor was same-sex marriage permitted in the Constitution whilst heterosexual relationships are expressly protected in Article 45(2).

## Issues

The central issue in this case is whether persons who belong to LGBTIQ groups have the right to freedom of association, non-discrimination, and equality before the law. In particular:

1. Whether such persons have a right to form associations in accordance with the law; and
2. If the answer is in the affirmative, whether the decision of the Board not to allow the registration of the proposed NGO because of the choice of name was a violation of the rights of the petitioner under Articles 36 and 27 of the Constitution.

## Court's Analysis

The Court affirmed that Article 36 of the Constitution grants "every person" the right to freedom of association, and that any limitation to the right ought to be reasonable and justifiable under the law. "Person" is defined under Article 260 of the Constitution to include a company, association, or other body of persons whether incorporated or unincorporated. The Court therefore found that Article 36 does not exclude homosexuals.

The Court also referenced Article 20 of the Universal Declaration of Human Rights (UDHR), Article 22 of the International Covenant on Civil and Political Rights (ICCPR), and Article 10 of the African Charter on Human and Peoples' Rights (ACHPR), which recognise the right to freedom of association and noted that they were inclusive of all natural persons and did not exclude any person.

The Court recognised the right to freedom of association as an important and powerful right, and is also critical to the enjoyment of other rights. The importance of this right has been recognised by other tribunals which the Court referenced including the African Court of Human and Peoples' Rights in *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000), the African Commission on Human

and Peoples' Rights in *Civil Liberties Organisation v. Nigeria*, Communication No 101/93, and the Ugandan Court of Appeal in *Kivumbi v. Attorney-General* [2008] 1 EA 174.

The Court found that the basis of the decision by the NGO Board, which was that the group held unpopular views which were unacceptable to others outside the group, contradicted the rights advanced by the Constitution. The Court rejected the NGO Board's judgmental attitude, and referenced the Privy Council's decision in *Patrick Reyes v. The Queen,* Privy Council Appeal No. 64 of 2001, which held that a tribunal or decision-making body should not read its "own predilections and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue ..." The Court also cited the South African case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 to agree with its holding that even if the Constitution allowed persons to hold and articulate their views and beliefs against homosexual conduct, it did not allow the state to then turn these beliefs into dogma imposed on the whole of the society.

In the Court's opinion, the aims and objectives of the proposed NGO, which were to advance human rights issues relevant to the gay and lesbian communities living in Kenya, were not illegal. The Court therefore held that the decision of the Board not to accept the name of the NGO infringed on the right to freedom of association secured under Article 36 of the Constitution.

The Court noted that the NGO Board justified the limitation of the right under Article 36 of the Constitution based on the Penal Code's criminalisation of sexual conduct "against the order of nature," and also acts of "gross indecency between males." However, the Court rejected this view. In the Court's view, the Penal Code does not criminalise the state of being a homosexual or homosexuality. Further, the Penal Code does not criminalise the right of association of people based on their sexual orientation.

The Court rejected the NGO Board's argument that sexual orientation was not a listed ground for prohibition of discrimination under Article 27(4) of the Constitution. The Court found this argument flawed because the absence of sexual orientation did not then mean that the state was free to discriminate on this basis. Second, the burden was on the NGO Board to prove by citing relevant law that the limitation was allowed under that law. The Court found that the NGO Board had failed to discharge this burden. The Court therefore found that the acts of the Board in rejecting the petitioner's name for the proposed NGO, and by implication its refusal to register the proposed NGO, was a limitation of the petitioner's right to freedom of association under Article 36 of the Constitution. Further, the Board failed to justify the limitation in accordance with the requirements under Article 24 of Constitution.

The Court then inquired whether the NGO Board's decision infringed on Article 27 of the Constitution which prohibited discrimination. In the Court's opinion, while Article 27(4) does not explicitly state that sexual orientation is a prohibited ground of discrimination, it prohibits discrimination both directly and indirectly against any person on any ground. Further, the listed grounds are not exhaustive; the language used when stipulating the grounds is "including" which according to 259(4)(b) of the Constitution means "includes, but is not limited to." Furthermore, when the Court considered the Constitution holistically, it concluded that the Constitution was committed to promoting the values of human dignity, equality, and freedom. In the Court's view, to allow discrimination on the basis of sexual orientation was to contradict these constitutional values. The Court therefore held that the NGO Board's decision also contravened Article 27 of the Constitution.

## Conclusion

The petition succeeded. The Court issued orders including an order of *mandamus* directing the Board to strictly comply with its constitutional duty under Articles 27 and 36 of the Constitution and the relevant provisions of the Non-Governmental Organizations Co-ordination Act.

## Significance

This is one of the cases of "recognition of LGBTIQ organisations" that have appeared in Kenya and Botswana, and may reflect naming compromises being made by LGBT advocacy organizations in other African countries. Perhaps the significance of this case could be discerned from this dictum of the Court:

> There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation [under a very different name] but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups. (para. 149)

Political recognition as citizens of a particular identity is the heart of the issue for both the NGO and the NGO Board. It is interesting that in both the Kenya and the Botswana cases, the contention of the government representatives was that LGBTIQ persons are somehow not citizens and that their Constitutions should not recognise LGBTIQ people as persons. In some countries, LGBTIQ organisations have been registered under non-controversial names, and governments have tolerated their carrying out of their objectives to advance rights of LGBTIQ persons. Indeed, "what's in a name?" Perhaps the petitioners in this case and the Botswana LEGABIBO cases would respond, "Everything." This could be an area of reflection for advocacy organisations: the significance of seeking such recognition rather than accepting a compromise.

# *Thuto Rammoge & 19 Others v. The Attorney General of Botswana*
**[2014] MAHGB-000175-13**
**Botswana, High Court**

## COURT HOLDING

The refusal of the government to recognise and register an organization founded to lobby for equal rights and decriminalisation of same-sex relationships violated constitutional rights to equal protection before the law, and freedom of expression, association and assembly, guaranteed under Sections 3, 12, and 13 of the Constitution, and was therefore unjustifiable under the Constitution.

## Summary of Facts

The Applicants, belonging to an organisation called Lesbians, Gays and Bi-sexuals of Botswana ("LEGABIBO"), filed this application to challenge the decision of the Minister of Labour and Home Affairs ("Minister") who rejected the Applicants' registration of their organisation, LEGABIBO. The

Applicants first brought the application for registration before the Director of the Department of Civic and National Registration ("Director"), who rejected the application on two grounds: first, that Botswana's Constitution ("Constitution") did not recognise homosexuals, and second that it would violate Section 7(2)(a) of the Societies Act ("Act"). Section 7(2)(a) of the Act says that:

> The Registrar shall refuse to register and shall not exempt from registration a local society where . . . it appears to him that any of the objects of the Society is, or is likely to be used for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare or good order in Botswana.

The Applicants appealed the decision to the Minister, who upheld the decision of the Director. The Applicants based their application to the High Court on several grounds including that it infringed on their constitutional rights to equal protection before the law, freedom of expression, and freedom of assembly and association.

## Issues

The issues for the Court to determine were as follows:

1. Whether in light of the objectives of LEGABIBO, the decision of the Minister rejecting registration of LEGABIBO on the grounds that its objectives were unlawful or its purposes incompatible with peace, welfare, and good order was justifiable under section 7(2)(a) of the Act; and

2. Whether the other ground for refusal for registration, which was stated as the assertion that the Constitution does not recognise homosexuals, could be sustained.

## Court's Analysis

The Court first dealt with the procedural issue of whether this was a judicial review or an application under Section 18 of the Constitution. Judicial review is a common law remedy which gives the courts the power to review the lawfulness of a decision or action of a public authority. Section 18 of the Constitution allows any person who alleges that constitutional rights have been infringed to make an application before the High Court without prejudice to any other action with respect to the same matter which is lawfully available. The Court decided to determine the matter under both mechanisms, i.e. judicial review and enforcement of constitutional rights.

The Court considered laws under which the Minister based his decision. First, the Director purported to base his refusal to register LEGABIBO, pursuant to Section 7(2)(a) of the Act, on the grounds that it appeared to him that the objectives of LEGABIBO were likely to be for an unlawful purpose, or any purpose prejudicial to, or incompatible with, peace, welfare, or good order in Botswana. Second, the Director based his decision on the assertion that the Constitution does not recognise homosexuals.

The Court examined the objectives of LEGABIBO to determine whether they were indeed designed to achieve an unlawful purpose. The Court held that none of the objectives appeared to have such a design. For avoidance of doubt, the Court highlighted the objective which, it opined, influenced most the decision of the Director and this was: to carry out political lobbying for equal rights and

decriminalisation of same-sex relationships. The Court ruled that there was nothing inherently unlawful in lobbying or advocating for legislative reform to decriminalise same-sex sexual conduct, and neither was this incompatible with peace, welfare, and good order.

The Court then examined the second ground for refusal to register LEGABIBO, which was that homosexuals were not recognised under the Constitution. First, it noted that nowhere in the Constitution was it expressly stated that homosexuals or heterosexuals were not recognised. It further noted that homosexuality is to do with being sexually attracted toward same-sex persons and that this had nothing to do with the Constitution. The Court then stated that one's sexual orientation does not in itself constitute a crime, so that no one is a criminal for being gay. The Court faulted the decision of the Minister as it was made on the assumption that the objectives of LEGABIBO were to engage in homosexual relationships which was not what any of the objectives stated. The Court therefore held that the decision of the Minister to deny registration of LEGABIBO was unreasonable in law and would be reviewed.

The Court proceeded to review the issue under Section 18 of the Constitution. It first examined if the decision was contrary to Section 3 of the Constitution, which guarantees every person in Botswana fundamental rights without discrimination regarding race, place of origin, political opinion, colour, creed, or sex. The Court reminded itself that the Constitution is the supreme law of the land and that any administrative decision ought to be subject to the Constitution. Further, it referred to the case of *Att. Gen. v. Moagi* 1982 (2) BLR 124 and *Att. Gen. v. Dow* 1997 BLR 119 to emphasise that the language of the Constitution should be construed broadly and not be unduly restricted. Since Section 3 applies to every person, the Court stated that this applied to all persons equally, including homosexual and bi-sexual persons.

The Court also said that lobbying and advocacy are protected by the right to freedom of expression and freedom of association. Denying homosexual or bi-sexual persons the right to register to carry out advocacy and lobbying, the purposes of which are not intrinsically unlawful, was contrary to Section 3, which guarantees everyone the right to freedom of expression, assembly and association, and also infringed Sections 12 and 13 of the Constitution.

The Court then considered the argument of the respondents. The first was that the judicial review proceedings were instituted irregularly and ought to have been struck out. The Court agreed with the respondents about the irregularity. However, the Court ruled that it would proceed to hear the merits of the case despite the irregularity because this concerned allegations of infringement of constitutional rights, which the Court felt obligated to attend to in spite of the procedural irregularity. Further, the Court had recourse to Order 5 Rule 2(1) of the Rules of the High Court, which allowed it to continue to hear the merits of the case notwithstanding irregularity of procedure.

The second argument of the respondents was that homosexual persons were inclined to commit unnatural offences and indecent practices between persons, contrary to Sections 164 and 167 of the Penal Code respectively. The Court ruled that this argument could not be sustained as it presupposed that people should be punished for what they were capable of doing and not what they have actually done. Further, this was contrary to the principle that one is innocent unless proven guilty.

In their final argument, the respondents relied on *Kanane v. The State*, 2003 2 BLR 67, where the Court of Appeal was asked to declare Sections 164 and 167 of the Penal Code, which criminalise consensual homosexual sexual conduct, unconstitutional for contravening rights guaranteed under Section 3 of the Constitution. The Court of Appeal had rejected the petition. In the instant case, the respondents argued by analogy that the Director's decision to reject LEGABIBO's application for registration was therefore lawful. The Court rejected this reasoning and noted that the issues were dissimilar. It noted that the respondents' argument was based on conflating homosexual orientation and homosexual sexual conduct. It reiterated what it had stated earlier in its ruling, that being homosexual and engaging in advocacy and lobbying to make homosexual conduct legal was not in itself unlawful. It therefore upheld its ruling that the Director's decision was unconstitutional for infringing on the constitutional rights of the Applicants.

## Conclusion

The decision of the Minister was set aside, and the Court declared that the Applicants were entitled to register LEGABIBO as a Society.

## Significance

Gays and lesbians in Africa continue to face discrimination and violence for their non-heterosexual sexual orientation. For instance, students have been suspended from schools merely on the suspicion that they are homosexual. The respondents' arguments in this case reflect how societies tend to conflate homosexual orientation with homosexual sexual conduct. Erasing this distinction has the effect that was clearly illustrated in the instant case; persons are condemned for being who they are, for being homosexual. This is an important distinction because persons who identify as homosexual have been discriminated against for this reason, including being denied employment when sexual orientation has nothing to do with their capacity to undertake that particular employment. Registration of a society was rejected not because there was anything wrong with the objectives, but merely because the persons who wanted to form the society were of homosexual orientation.

This case also shows the powerful influence of the so-called "anti-sodomy" provisions that proscribe consensual same-sex sexual conduct. In referring to the *Kanane* decision to argue that registration of the society should fail because the Court of Appeal in *Kanane* upheld the constitutionality of anti-sodomy provisions, the respondents actually demonstrated the logical conclusion of maintaining such laws in criminal codes. The respondents were implying that if homosexual conduct was lawfully proscribed, then it logically followed that every homosexual be treated with suspicion, lawfully. Much as the Court had faulted the reasoning that homosexuals were condemned before proven guilty, the continued presence of such legislation operates to sustain prejudice against persons of homosexual orientation. The Court appeared intent on dealing with the substance of the case, sidestepping a procedural irregularity that could have been a barrier to addressing the substantive issues in the judicial review. For instance, in *Oloka-Onyango and Nine others v. Attorney General*, Petition no. 08 of 2014, the Constitutional Court of Uganda had avoided delving into the allegations of human rights violations and preferred to constrain itself to the procedural question. In contrast, the Botswana Court was not dissuaded by claims of procedural irregularity when the matter raised allegations of human rights violations.

This was also an important decision for Botswana, considering that a previous decision of the Court of Appeal, in *Kanane*, had failed to apply human rights principles to the question of consensual same-sex conduct. Rather, the Court of Appeal had decided to side with popular anti-homosexuality sentiments. The *Rammoge* decision is progressive because it subjected discriminatory administrative action to human rights scrutiny, and in the process addressed the prejudicial thinking against homosexual persons. It went a long way toward affirming persons with same-sex orientation as subjects of law and human rights, on equal terms to everyone else.

Furthermore, apart from just allowing that LEGABIBO to be registered, the Court affirmed the lawfulness of advocating and lobbying to decriminalise sodomy laws. Arguably, the *Kanane* decision must have had a chilling effect on advocacy when it pronounced that society was not ready to reform anti-sodomy laws. In contrast, the *Rammoge* decision is a positive development in the struggle to reform laws that criminalise same-sex relationships and discriminate against persons with a same-sex orientation.

Finally, it is noteworthy that the Court confined itself to national laws and did not refer to any international human rights instrument or comparative jurisprudence. In a way, it is rare that the Court could rely only on its national laws to arrive at the decision it did.

## *Attorney General of Botswana v. Thuto Rammoge & 19 Others*
## [2016] CACGB-128-14
## Botswana, Court of Appeal

### COURT HOLDING

The refusal of the Minister to allow the registration of LGBTI organisation LEGABIBO was unconstitutional as it infringed on the respondents' right to freedom of assembly and association.

The refusal of the Minister to register LEGABIBO was illegal as it had no basis in law.

### Summary of Facts

The 20 respondents had initiated proceedings in the High Court of Botswana (*Thuto Rammoge & 19 Others v. The Attorney General of Botswana* [2014] MAHGB-000175-13) against the Minister of Labour and Home Affairs (the "Minister") who upheld the decision of the Director of the Department of Civil and National Registration (the "Director") to refuse the registration, as a society, of the Lesbians, Gays, and Bisexuals of Botswana ("LEGABIBO") under the Societies Act, Cap 18: 01 (the "Act"). The High Court overturned the decision of the Minister and ordered that LEGABIBO be registered. The decision, *Thuto Rammoge & 19 Others v. The Attorney General of Botswana*, is summarised above. The Attorney General of Botswana raised several grounds of appeal including procedural and substantive grounds. Only the substantive grounds are recounted here. These were:

- The lower court erred in failing to have found that the objectives of LEGABIBO were unlawful in terms of Section 7(2)(a) of the Act as being contrary to good order, and also

under Section 7(2)(e) of the Act as potentially promoting acts criminalised by Sections 164 and 167 of the Penal Code of Botswana (the "Penal Code");

- The lower court erred in holding that homosexual persons were included in the definition of the word "person" in section 3 of the fundamental rights in the Constitution of the Republic of Botswana (the "Constitution"), and were thus entitled to enjoy such fundamental rights;
- Even if the lower court had found that the respondents were entitled to such fundamental rights, the lower court had erred in finding that the Minister's decision was not a justifiable limitation on those rights; and
- The lower court erred when it distinguished the decision in *Kanane v. The State* 2003 (2) BLR 67 (CA) (*Kanane*) when it should have been bound by it.

## Issue

Whether the decision to refuse registration of LEGABIBO was unconstitutional, as it unjustifiably infringed on the right to freedom of association and assembly protected under Section 13 of the Constitution.

## Court's Analysis

The Court restated the law on review of administrative action and affirmed that administrative action may be reviewed on the grounds of illegality, irrationality, and procedural impropriety. It further stated that the ground of illegality encompassed the doctrine of *ultra vires* (exceeding powers granted by the law) and the principle of unconstitutionality. If an administrative decision was shown to be unconstitutional, it would also be unlawful against the legislation that granted the administrative powers to the decision-making authority.

The Court reviewed the relevant sections of the Act, and amongst others referenced Section 6(2)(a), which obligates the registering authority (the "Registrar") to register a local society applying for registration unless there were valid reasons not to do so. The Act places the onus on the Registrar (or the Minister) to justify reasons for refusal. According to Section 7(2)(a) of the Act, the Registrar could refuse registration of a local society where the objects of the society were or were likely to be used for any unlawful purpose. Section 7(2)(e) empowers the Registrar to refuse registration if the constitution, rules or regulations, or bye-laws of the society were repugnant to or inconsistent with any written law.

The Court observed that the Minister refused registration in terms of Section 7(2)(a) but did not state the reasons. The Court however noted that the letter of rejection contained the following statement:

> Heterosexual activity between consenting adults is not an offence in this country but subjects of your appeal will commit an offence even if their sexual act involves consenting adults.

Apart from noting that this reasoning was flawed, the Court addressed the Registrar's anxiety by reminding him that the Act provided for cancellation of registration of a society if it were found to be pursuing unlawful objectives subsequent to its registration.

Turning to the respondent's claim that constitutional rights were infringed, the Court preferred to focus on Section 13 which recognises and secures freedom of assembly and association, which the respondents claimed was infringed upon by the administrative action of the Minister when he refused registration of LEGABIBO. Section 13(2) provides for lawful limitation to the right to assembly and association which should be provided under relevant law. The Court noted that Section 7 of the Act did not include public morality as a ground for refusing registration, and was of the opinion that public morality alone would not be a valid exercise of discretion.

While the Court recognised that failure of registration infringed upon other interrelated rights, such as freedom of expression, the right to non-discrimination and equality, it decided to base its decision on whether the Minister's decision was reviewable on the grounds of irrationality or illegality contrary to Section 13 of the Constitution.

The Court then addressed the Attorney General's contention that the lower court should have been bound by the decision in *Kanane*. After reviewing the *Kanane* case, the Court observed that attitudes toward gay and lesbian rights were softening. It noted that Parliament itself had amended the Employment Act, Cap 47:07, to prohibit termination of an employee's contract on the grounds of sexual orientation; national policies acknowledged and addressed issues amongst the gay and lesbian population; and organisations have been registered in Botswana that openly campaign for gay and lesbian rights. The Court further noted that despite strong dissenting views about gay and lesbian rights, prominent politicians had begun speaking out in support of gay and lesbian rights.

The Court found the Appellant's reliance on *Kanane* to support its position that the Constitution did not recognise homosexuals to be ill-conceived because there was no mention of homosexuals or heterosexuals in the Constitution. The Court did not find any legislation in Botswana that prohibited anyone from being lesbian, gay, or bisexual. The Court referenced the definition of sexual orientation in the Preamble to the Yogyakarta Principles[92] and accepted the position that sexual orientation could not be learnt or imposed, and that it was a natural attribute of every human being.

The Court refused to accept the reasoning that the *Kanane* case had purported to exclude homosexuals from Section 3 of the Constitution, so the wording "every person in Botswana" in the constitutional provision included everyone and excluded no one.

The Court also noted that fundamental rights and freedoms are accorded specifically to individuals and not groups or classes. The Court therefore found that the Minister was irrational in holding that the Constitution did not recognise homosexuals, and in using that argument as the basis to refuse registration of LEGABIBO.

The Court also found the argument that a homosexual person does not enjoy fundamental rights to be totally unacceptable and irrational. It affirmed the position that fundamental rights are enjoyed by all persons, and that to deny any person their fundamental rights emasculated their dignity, the protection of which is the core objective of Chapter 3 of the Constitution.

The Court affirmed that members of the gay, lesbian, and transgender community form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.

The Court then addressed the second reason the Minister gave for refusing registration which was that the objects of LEGABIBO run counter to the provisions of Section 7(2)(a) of the Act. The Court noted that the Minister gave no reason for this conclusion save the reference to criminalisation of same-sex sexual conduct under Sections 164 and 167 of the Penal Code. The Court further noted that the Minister was under the belief that the objectives of LEGABIBO included to promote unlawful acts. The Court, like the lower court, found nothing unlawful about the objectives of LEGABIBO. It found that the Minister's suspicion that offences may be committed lacked evidence and were unfounded.

The Court then addressed the question of whether the High Court erred in finding that the Minister's decision was illegal or unlawful and contrary to Section 13 of the Constitution. The Court affirmed that Section 13 of the Constitution protects the right of every person to freely assemble and associate. The Court also referenced Article 10 of the African Charter on Human and Peoples' Rights, Article 20 of the Universal Declaration of Human Rights, and Articles 21 and 22 of the International Covenant on Civil and Political Rights to buttress the rights under Section 13 of the Constitution. The Court found that the Minister's decision interfered in the most fundamental way with the respondents' right to form an association and to protect and promote their interests. His decision would therefore be unlawful in terms of Section 7 of the Act unless it was justifiable as a limitation under Section 13 of the Constitution. The Court also reminded the Minister that the onus was on him to justify the limitation of the rights of the respondents under Section 13 of the Constitution.

The Court reiterated its finding that the Minister refused registration based on suspicion that LEGABIBO would promote unlawful objectives. There was no evidence for this conclusion. As far as the Court was concerned, the Minister did not proffer any legitimate grounds in law for the limitation of the rights under Section 13 to refuse registration of LEGABIBO. It therefore held that the refusal of the Minister to allow the registration of LEGABIBO was unconstitutional, and would therefore be reviewed and set aside on that ground as well as the ground of illegality.

The Court however differed from the lower court in that it did not think it proper to make constitutional declarations. It therefore restricted itself to orders setting aside the Minister's decision and facilitating the registration of LEGABIBO.

## Conclusion

The appeal was denied and dismissed. The order of the High Court was replaced by an order setting aside the decision of the Minister. The Court also ordered the Registrar to take the necessary steps to register LEGABIBO in terms of the Act.

## Significance

In the Court's words:

> Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.

This is a very progressive statement coming from a tribunal in a region where homophobic attitudes are very prevalent. Gays and lesbians are discriminated against because of their sexual orientation. Indeed, the outrageous reasoning by counsel for the Appellants that homosexuals are not human beings worthy of respect of their fundamental rights and dignity is unfortunately common amongst societies in the African region. People are condemned for being homosexual when, as the Court recognised, homosexuality is not learned or imposed, but a natural attribute of being human.

This decision builds on the growing jurisprudence around LGBTI persons in the region. The Court referenced Kenyan decisions in similar circumstances when organisations were refused registration due to discrimination on the grounds of sexual orientation or gender. The Kenyan courts had also affirmed the human rights of LGBTI persons. It is indeed important for tribunals to protect and promote human rights especially of victimised groups such as LGBTI persons. This decision is to be savoured because it forcefully rejects irrational homophobic attitudes and affirms that everyone, including LGBTI persons, is worthy of human dignity, and their fundamental rights ought to be respected.

## *The People v. Paul Kasonkomona*
## [2015] HPA/53/2014
## Zambia, High Court

### COURT HOLDING

The respondent's actions of publicly advocating for homosexual rights did not infringe Section 178(g) (*Nuisances and Offences Against Health and Convenience - Idle and disorderly persons)* of the Penal Code Act. Rather, the accused's actions fell within his right to exercise his freedom of expression.

### Summary of Facts

This case concerns an appeal to the Zambian High Court by the Appellant against the acquittal of the respondent by the Magistrate's Court. The respondent, a human rights activist, was invited to engage in a discussion on homosexual rights in Zambia in a television programme, "The Assignment," aired by Muvi Television Studios. The respondent 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, Cap. 87 of the Laws of Zambia.

The Magistrate's Court considered the three legal elements for an offence under Section 178(g) of the Penal Code and the evidence submitted by the Prosecution. The three elements were (1) definitions in regards to "soliciting," (2) "public space," and (3) "immoral purposes." The Magistrate's Court acquitted the respondent on the grounds that the Prosecution had failed to prove the offence.

The government appealed the Magistrate Court's decision on the following two grounds: (1) the trial magistrate erred in law and fact by limiting the term "soliciting" to a conduct that is persistence only, and (2) the trial magistrate erred in law by acquitting the accused when there was sufficient evidence to put him on defence, in accordance with Section 206 of the Criminal Procedure Code.

## Issue

The issue before the High Court was whether the respondent's action of publicly discussing homosexual rights in Zambia, constituted "soliciting in a public place for immoral purposes," an offence under Section 178(g) of the Penal Code.

## Court's Analysis

The Court dismissed the Appellant's two main grounds of appeal. The Court agreed with the trial magistrate that the respondent's conduct of participating in a debate advocating gay rights did not amount to soliciting for immoral purposes.

The Appellant argued that "immoral purposes" refers to some kind of sexual activity; hence the respondent's claims were immoral to the extent that sexual intercourse with a person of the same sex is prohibited under the Penal Code. This argument had been rejected by the Magistrate's Court on the basis that discussion of homosexuality and the safeguarding of the rights of those who practice it, are different issues.

In rejecting the appeal, the Court accepted the reasoning of the trial magistrate. The Court ruled that acts covered under Section 178(g) must be in a public place and involve solicitation i.e., to proposition, ask, entreat or entice someone to commit an immoral act or engage in immoral conduct. The Court accepted that the respondent did not entice or entreat anyone to engage in immoral conduct. The Court also agreed that the respondent's right to freedom of expression could not be limited in this instance.

## Conclusion

The Court found no merit in the appeal brought against the respondent and dismissed it accordingly. The Court agreed that the respondent was exercising his right to freedom of expression.

## Significance

Since the concept of sexual rights was popularised at the International Conference on Population and Development (ICPD), there has been increased advocacy to apply human rights norms to sexual orientation which has, in turn, attracted a great deal of resistance. Vague and overbroad vagrancy laws have frequently been used to discipline persons who are considered undesirable, such as sex workers and sexual minorities. In this instance, the government of Zambia had deployed criminal law to discipline an activist discussing homosexual rights because the government and its agents did not like the subject of homosexuality being openly discussed in public. However, before the Magistrate's Court, the case for the government had collapsed on the technical grounds that the alleged offence could not be proved.

During the trial, the respondent applied for constitutional review of the provisions under which he was charged (Section 178(g) of the Penal Code), for being vague and overbroad, and for potentially infringing on the right to freedom of expression secured under Article 20 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia (Zambian Constitution). The High Court ruled that it did not recognise any link between the Penal Code provision complained of and freedom of expression

recognised in Article 20 of the Zambian Constitution. This reflects the persistent tension between vagrancy laws and human rights norms that courts, in a number of cases, have been tasked to address (e.g., the *Nyambura* case in Kenya).

The High Court did agree with the Magistrate's Court that the government's case could not hold. The High Court, which had previously ruled that there was no connection between Article 20 of the Zambian Constitution and Section 178(g) of the Penal Code, did not discuss the issue of human rights much further than just agreeing with the Magistrate's Court that the respondent had the right to freedom of expression, which the state had not proved should be limited.

## *Republic v. Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 Others*
## [2014] eKLR, JR Miscellaneous Application No. 308a of 2013
## Kenya, High Court

### COURT HOLDING

The reasons advanced by the Non-Governmental Organisations Coordination Board for not registering the applicants' NGO, which focused on transgender issues, had no basis in law and were unreasonable.

### Summary of Facts

In this application, the applicants belonging to an association known as Transgender Education and Advocacy sought a court order compelling the Non-Governmental Organisations Coordination Board (NGO-CB) to register it as a non-governmental organisation (NGO), in accordance with the Non-Governmental Coordination Act, Cap 134, Laws of Kenya (the NGC Act).

The applicants believed they had satisfied all the requirements for the application to register as an NGO, in accordance with the NGC Act, and that the NGO-CB failed to register it. The applicants argued that the NGO-CB failed to discharge its statutory obligations in accordance with the NGC Act. They claimed that this was unfair to the applicants and contravened the rules of natural justice.

The gist of first respondent's argument was that it postponed registration of the applicants' NGO because there was a court matter pending regarding change of name and gender of one of the applicants. Its view was therefore to wait until the issue was resolved.

The NGO-CB also denied it had refused to register the organisation, because according to the NGC Act and the regulations under it, refusal to register must be clearly stated, including reasons for the refusal. It this case, the NGO-CB claimed that it had not refused to register the applicants' NGO.

The applicants submitted that the reasons advanced by the respondents for failing to register the organisation had no basis in the NGC Act and were therefore not valid grounds in law. They contended that the Court should therefore issue an order compelling the NGO-CB to register their NGO.

## Issues

The issue before the Court was whether the NGO-CB had exercised its discretion in accordance with the law when it failed to register the applicants' NGO.

## Court's Analysis

Making reference to a decision of the Kenyan Court of Appeal in *Kenya National Examinations Council v. Republic Ex parte Geoffrey Gathenji Njoroge* (Civil Appeal No. 266 of 1996), the Court reminded itself of the remedy of *mandamus* that the applicants sought. The Court affirmed that an order of *mandamus* is issued against a public body to compel it to perform a duty imposed on it by statute, where the person or body on whom the duty is imposed fails or refuses to perform the duty.

It also referenced Article 47(1) of the Constitution of Kenya, 2010, which provides for the right of every person to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, and Article 47(2) which provides for the right of any person to be given reasons in writing where a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action.

The Court reminded the NGO-CB that it could exercise its discretion only in accordance with the law that set out its mandate. The Court referred to Section 10(3) of the NGC Act which sets the application requirements for registration of an NGO. The Court made reference to a decision of the Kenyan High Court in *Keroche Industries Limited v. Kenya Revenue Authority and Five Others* (HCMA No. 743 of 2006) that expressed the view that the discretion of a public body in exercise of its duty is not unfettered. Rather, a public body ought to act reasonably, in good faith, and upon lawful and relevant grounds of public interest.

The Court affirmed its duty to intervene, even when a public body has exercised its discretion, including; (1) when there is an abuse of discretion; (2) when the decision-maker exercises discretion for an improper purpose; (3) when the decision-maker is in breach of the duty to act fairly; (4) when the decision-maker has failed to exercise statutory discretion reasonably; (5) when the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) when the decision-maker fetters the discretion given; (7) when the decision-maker fails to exercise discretion; or (8) when the decision-maker is irrational and unreasonable.

The Court agreed with the applicants that the grounds on which the respondent NGO-CB purported to have exercised its discretion were not provided for in the law. Further, the Court expressed the view that the reasons for failing to register Transgender Education and Advocacy amounted to discrimination against the applicants because it denied them freedom of association on the basis of gender or sex, and was therefore clearly unconstitutional as it contravened Article 27(4) of the Constitution.

The Court therefore held that the reasons advanced by NGO-CB for not registering Transgender Education and Advocacy had no legal basis and were unreasonable.

## Conclusion

The Court granted the order compelling NGO-CB to act in accordance with the NGC Act and register the applicants' NGO.

## Significance

One way in which public authorities have been trying to limit advancement of LGBTI rights is by frustrating registration of organisations that aim at promoting rights of LGBTI persons. This case is similar to *Thuto Rammoge and Others v. The Attorney General of Botswana*, MAHGB-000175-13 (High Court of Botswana), wherein the public authority in Botswana refused to register an association that aimed to work toward the decriminalisation of same-sex relationships. This attitude of public authorities not only infringes on the freedom of assembly of individuals, but reflects a culture that opposes LGBTI rights.

It is encouraging, however, that the decision of the Kenyan Court, just like the Botswana Court, upheld and defended the rights of people to form associations for advancing LGBTI rights. The Kenyan Court recognised that when the public authority said it could not proceed because of the gender identity of one of the applicants, it demonstrated that its decision or lack of decision was motivated by a discriminatory attitude against persons on the basis of gender and sex. This was an important aspect of the decision because it affirmed the rights of transgender persons. The Court held that this was unconstitutional discrimination, therefore indicating that the rights of transgender persons are protected under the Constitution.

**HIGHLIGHT**

## TOWARDS RESPECT FOR HUMAN DIVERSITY

Human rights are built on two fundamental values: human dignity and equality of all human beings. The worth of human beings is not determined by any other person, but by the very fact of being human. Human beings are also diverse in nature: in sexual orientation, gender identity, and expression. Human rights should therefore apply to all humans, irrespective of their sexual orientation, gender identity, or expression. However, this is a claim that has yet to be realised for many people who continue to be discriminated against because they do not conform to rigid categorizations of sexuality and gender.

Governments are supposed to protect human rights. Many governments have adopted constitutions that recognise human dignity and equality. Yet in *The Attorney General of Botswana v. Thuto Rammoge and 19 Others*, the Attorney General of Botswana tried to argue that the Constitution of Botswana did not apply to persons of non-heterosexual orientation. This reflects a pervasive attitude in governments driven by politicians who do not believe in the human dignity and equality stipulated by their own constitutions.

Persons of non-heterosexual orientation, or whose gender identity and expression does not conform to some traditional gender notions, continue to face government-sponsored hate and victimization. Sometimes this has been indirect, for instance through a refusal to recognise the rights to association and expression such as in the *Rammoge* cases in Botswana, the *Gitari* case and *Ex-parte Transgender Education and Advocacy* case in Kenya, and the *Kasonkomona* case in Zambia. Apart from criminalizing sexual conduct, governments deploy other laws to prevent LGBTI persons from enjoying their right to association and expression. In the *Kasonkomona* case, the government used vagrancy laws to try and deny persons the right to talk freely about LGBTI rights.

In all the above mentioned cases, the courts applied human rights norms to the issues raised before them and vindicated the claims that LGBTI persons are deserving of human rights because they are in the first place, human beings. However, the case of *C.O.L. & G.M.N.,* where the Kenyan Court upheld the constitutionality of the law compelling anal examinations in order to prove homosexual behaviour, indicates that there is a great deal that has to be done to secure enjoyment of rights of all persons including decriminalization of sexual conduct involving non-heterosexual intimacy, and also recognition of gender diversity.[93] The victories in these cases are significant as they are beacons of light in the midst of pervasive discrimination against LGBTI persons. The positive judgments refresh the obligations of governments to be faithful to their own constitutions to respect the fundamental values of human dignity and equality of all persons, regardless of sexual orientation, gender identity and expression. This negative judgement, though, calls for vigilance to realise human rights for everyone.