

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