

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.