

# Nigerian Court denies lesbian group registration

*Pamela Adie v. Corporate Affairs Commission*

*Suit No. FHCI ABJICS182712018, Decision of November 16, 2018*

*Federal High Court of Nigeria (Abuja Judicial Division)* [Decision online](#).

## COURT HOLDING

The Court dismissed the case of the Applicant on the ground that the existing and operative Same Sex Marriage (Prohibition) Act (SSMPA) does not support such association and for as long as the Act has not been repealed, the case of the applicant failed.

## Summary of Facts

In October 2017, the Applicant founded an association with the name ‘Lesbian Equality and Empowerment Initiatives’ with the main objective of advocating for the rights of sexual minority women in Nigeria. The Applicant sought to register the name of the association with the Respondent, the Corporate Affairs Commission, but was refused registration on the ground that the proposed name violated section 30 of the Companies and Allied Matters Act (CAMA) for being misleading, offensive and contrary to public policy. Additionally, registration was refused on the basis that the association violated the SSMPA, which prohibits same sex marriages and associations in Nigeria. The Applicant undertook her right of appeal as provided in section 36(2) of CAMA by petitioning the Registrar General of the Corporate Affairs Commission to overrule the decision. The Registrar General declined to do so, making the rejection final.

Dissatisfied with the decision of the Corporate Affairs Commission, the Applicant applied to the Court seeking redress. The Applicant alleged that the refusal to register the association she created was a violation of her fundamental rights to freedom of expression and association as contained in section 39 and section 40 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (CFRN)<sup>1</sup> and Article 9(2) and 10(1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACHPRA) of 1986<sup>2</sup> respectively.

## Issues

The Applicant formulated the following three issues for determination:

1. Whether the Respondent's rejection of the registration/reservation of the Applicant's proposed name of an association is a violation of the Applicant's right to freedom of association;
2. Whether the Respondent's rejection of the registration/reservation of the Applicant's proposed name of an association is a violation of the Applicant's rights to freedom of expression; and

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<sup>1</sup> Constitution of the Federal Republic of Nigeria of 1999 Cap C23 Laws of the Federation of Nigeria 2004.

<sup>2</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACHPRA) of 1986 Cap A9 Laws of the Federation of Nigeria 2004 available at <https://www.lawyard.ng>

3. Whether the Applicant's proposed name of an association can be said to be misleading and contrary to public policy.

In response, the Respondent formulated the following four issues for determination:

1. Whether the proposed name of the Association is registrable within the purview of relevant legal frameworks and international instruments to which Nigeria is a signatory.
2. Whether the Respondent has discretionary power to determine registration of names under the law in which it was established; and therefore rightly declined the above name.
3. Whether the denial of the proposed name by the Respondent can be classified as an infringement of the Applicant's fundamental rights to freedom of association and expression and the right procedure to file this suit was followed.
4. Whether an order of mandamus can be invoked by the Court to compel the Respondent to carry out an action prohibited by law.

However, the Court was of the opinion that one sole issue would determine the matter and therefore formulated the issue as:

Whether, in the circumstances of this case, the Applicant is entitled to the reliefs sought.

### **Court's Analysis**

The Court first considered the arguments of the Applicant that the Respondent did not provide reasons for refusing the registration of the association and for categorising the proposed name of the association as being offensive and contrary to public policy, irrespective of the fact that the aim and objectives of the association were made known to the Respondent. It was the Applicant's submission that the acts of the Respondent violated her right to freedom of association and freedom to form an association for the protection of the applicant and her members. In response to the argument of the Applicant, the Court opined that the argument of the Applicant lacked merit as the Respondent's Exhibit 2 (Notice of Denial) and Exhibit 4 (Reply letter from the Respondent to the Applicant's counsel) stated clearly that registration was refused because the proposed name is misleading and contrary to public policy. The Court analysed section 30 of CAMA and concluded that the restriction in section 30 of CAMA is on both the name and the activities of the association sought to be registered. The Court relied on the decision in *African Newspapers (Nig.) Ltd v. Federal Republic of Nigeria*<sup>3</sup> to say that the proposed name of the association, as well as its aims and objectives, come under section 30(1)(c) of CAMA and therefore the Respondent acted within the limits of their powers in rejecting the application of the Applicant, based on the name of the association as well as its aims and objectives.

The Court stated that the Applicant has the right to form and belong to any association of her choice as provided in section 40 of CFRN in so far as the exercise of the right is not limited by

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<sup>3</sup> (1985) 2 NWLR (pt. 6) 137.

section 45(1)(a) of CFRN, which provides for situations under which rights to freedom of association may be limited. Section 45(1)(a) provides for the limitation of a right where the right is in conflict with public safety, public order and public morality. The Court supported its position with the case of *Salihu v. Gana & Ors*<sup>4</sup> where it was held that the exercise of fundamental rights is not absolute –these rights can be curtailed by relevant laws. The Court in this *Pamela Adie* case went further, stating that section 4 of the SSMPA is an example of the laws that prohibit the registration of same-sex associations in Nigeria.

The Applicant alleged that section 4(1) of the SSMPA does not mention the word “lesbian”, but does use the word “gay,” thereby making the law not applicable to lesbians. The Court, relying on the case of *Buhari v. Yusuf*<sup>5</sup> stated that the intent of law makers should be taken into consideration when interpreting the law. The intent of the SSMPA, in accordance with its full name, is to prohibit the relationships and associations of same-sex persons.. In the *Pamela Adie* case, the Court stated that the intention of law makers to prohibit same sex unions is clear from the name of the SSMPA irrespective of the fact that only the word ‘gay’ was used in the body of the Act. Moreover, it was held that the word ‘gay’ has evolved to denote homosexuals, lesbians, bisexuals and transgender persons.

The Court concluded by supporting the submission of the Respondent that the refusal to register the proposed name of the association was in line with constitutional and statutory provisions like Section 45 of CFRN; Sections 1, 4(1) of SSMPA; Section 214 of the Criminal Code and Section 30 (1)(c) of CAMA and is therefore not a violation of the constitutional right of the Applicant.

The Applicant’s submission that the refusal to register the association is a violation of her freedom of expression was dismissed by the Court on the same grounds used to dismiss the claim relating to freedom of association. The Court acknowledged the right to freedom of expression of the Applicant while still holding that the Respondent, through the rejection of the proposed name of the association, has not violated the Applicant’s right to freedom of expression.

The Court held that the provision of section 30 of CAMA does not violate the CFRN, nor the ACHPRA regarding rights to freedom of association and freedom of expression.

## **Conclusion**

The case of the Applicant failed because the CFRN allows the overriding of established rights and the applicability of CAMA and SSMPA Act that is in force in Nigeria were deemed by the Court as acceptable ways to override established rights.

## **Significance**

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<sup>4</sup>(2014) LPELR-23069 (CA).

<sup>5</sup>(2003) 14 NWLR (Pt. 841) 446 @ 535.

In Africa, same sex relationships are frowned upon, and are often criminalized and punishable under various laws. Some African states have gone as far as enacting specific laws targeted at persons involved in same sex relationships, sometimes imposing capital punishment for those practicing same sex relationships. For example, in Mauritania, article 308 of the 1983 Criminal Code prescribes the death penalty for anyone found guilty of being in a same sex relationship. Sudan's Criminal Code Act of 1991, as amended in 2009, also provides the death penalty for same sex relationships. Under Uganda's Anti-Homosexuality Act of 2014, and Tanzania's Sexual Offences Special Provisions Act of 1998, same sex relationships are punishable with up to life imprisonment. However, there have also been movements that have sought to protect the human rights of LGBTI persons. In countries such as South Africa, Angola, Botswana, Cape Verde, Lesotho, Mozambique, Guinea-Bissau, same-sex relationships have been decriminalized.

Thabo Msibi, a renowned African scholar, has expressed dissatisfaction with the laws prohibiting same-sex relationships in Africa.<sup>6</sup> According to him, homophobia against homosexuals is expressed with the intention of imposing heteronormativity as the only legitimate sexuality in African societies. It can be argued that the reasoning of the Court in this case mirrors Msibi's theory. The Court reinforced heteronormativity in a manner that entrenches homophobia in Nigeria. The decision is also problematic as it is capable of exposing same-sex persons to various forms of discrimination if they express their true identity and also subject them to all forms of violence in the larger society.

The Court chose to remain within the confines of its Constitutional jurisprudence and its own previous jurisprudence that allows for the overriding of rights in certain circumstances as an acceptable limit on the human rights of Nigerians. In relying upon its own domestic interpretation of law, the Court arguably missed an opportunity to look more broadly into the realm of international law which could have helped give a purposive interpretation of section 45 of CFRN and section 30 of CAMA, perhaps leading to a more nuanced outcome in this case. Though the Court in *Pamela Adie* is a High Court that is bound by the precedent laid down by higher courts like the Court of Appeal and Supreme Court, the Court could have proposed that the Applicant apply for a judicial review of the decisions of the higher courts that are not giving opportunities for the High Court to make exceptions to the provision of section 45 of CFRN and section 30 of CAMA. The Applicant can also propose for a judicial review of the higher courts decisions with or without the High Court's encouragements.

The Court did not align with international human rights standards that protect the rights of all persons, irrespective of gender identity or sexual orientation. The Court also did not take cognisance of the ACHPRA that was brought to the attention of the Court by the Applicant's counsel. The ACHPRA is the Nigerian version of the ACHPR that Nigeria ratified. If the Court had used international law as its legal basis in this case, it likely would have made the opposite determination. Nigeria ratified the International Covenant on Economic, Social and Cultural

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<sup>6</sup>T Msibi 'The lies we have been told: On (homo) sexuality in Africa' (2011) 58 *Africa Today* 55

Rights (ICESCR) in 1993 and is therefore bound by its provisions. General Comment 20 by the Committee on Economic, Social and Cultural Rights in 2009 prohibits all forms of discrimination on the enjoyment of socio-economic rights for all persons including persons in same sex relationships.<sup>7</sup> Nigeria also ratified the International Covenant on Civil and Political Rights (ICCPR) in 1993 and is therefore bound by its provisions and the decision of the Human Rights Committee in Communication No. 488/1992, *Nicholas Toonen v Australia* (31 March 1994), where the Committee held that laws criminalizing homosexual activity between consenting adults in private violates Article 17 of ICCPR. In the *Toonen* case, the Committee ordered the repeal of relevant sections of the Tasmanian Criminal Code which criminalized homosexual activities. The decision of the Committee in the *Toonen* case is also applicable to States that have ratified the ICCPR, therefore Nigeria is bound by the decision.

Also, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) which Nigeria ratified in 2004, requires States parties to take specific measures to combat violence against women, regardless of their sexual orientation or gender identity. The failure of the Court to allow the registration of the association has the tendency of further exposing sexual minority women to all forms of violence in the society as the public is given more reasons to stigmatize sexual minorities and thereby perpetuate acts of violence against them.

At the regional level, the African Commission on Human and Peoples' Rights took a great step that signifies a very positive and important change in the stigma and discrimination committed against LGBTI persons by adopting Resolution 275 which condemns all acts of violence against an individual on the basis of real or perceived sexual orientation or gender identity.<sup>8</sup> In particular, the Commission notes that acts of violence against an individual as a result of gender identity or sexual orientation violate the person's right to dignity and to be free from discrimination, as also provided in the ACHPR. The Resolution mentions goals that States should strive to achieve so as to be in line with current African human rights standards. The Courts are therefore called upon to align themselves with Resolution 275 which has a bearing on Africa as it is made by Africans, adopted by Africans and for the African people.

The Court also did not take cognizance of the fact that Nigeria has ratified the African Charter on Human and Peoples' Rights (ACHPR), its Maputo Protocol, ICESCR and ICCPR and should have used the case as an opportunity to advance the promotion and protection of the rights of sexual minorities in Nigeria. The Court's view of the contention at hand should not have been on the strict application of existing laws but on setting new jurisprudence for the advancement of the rights of sexual minorities. The Court ought to have used its powers to analyze the case from a human rights perspective and provide an opportunity for advocacy and repeal of the laws that violate the right to freedom of association and expression of sexual minorities in Nigeria. The Court ought to have

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<sup>7</sup>See Committee on Economic, Social and Cultural Rights General Comment 20 on Non-discrimination in the enjoyment of economic, social and cultural rights

<sup>8</sup>Adopted by the African Commission on Human and Peoples' Rights at its 55<sup>th</sup> Ordinary Session in Luanda, Angola April 2014.

used this opportunity to call for the implementation of the ACHPR, the Maputo Protocol, ICESCR and ICCPR. The decision of the Court should have called for the amendment of the CFRN to include rights of sexual minorities to register associations with the objective of promoting and protecting themselves as an exception to section 45 of CFRN. The Court should have also called for an amendment of CAMA to make registration of sexual minority associations an exception to section 30 of CAMA. The *Pamela Adie* case should have been used by the Court to call for the repeal of the SSMPA and promotion of international standards.

Irrespective of the great challenge posed by the laws and judicial precedents in Nigeria, sexual minorities' right can still be realised in Nigeria just as it was realised and legalised in Botswana through the case of *Letsweletse Motshidiemang v. Attorney General* (2019) MAHGB-000591-16. To achieve the realisation of human rights and legalisation of homosexuality in a country that is culturally rooted like Nigeria, advocacy efforts should focus on getting social acceptance from the customary leaders that command respect and have influence in their communities, policy makers, civil society organisations and the public. The gay community should also call for a judicial review of the decisions of the Court of Appeal and Supreme Court (such as *Amasike v. Registrar General*, C.A.C<sup>9</sup> where the Court held that the Corporate Affairs Commission can exercise its discretion in the approval of names. The review should propose that such discretion should not be used to discriminate against sexual minorities), that pose a challenge to High Courts that would ordinarily want to reverse some decisions of the higher courts.

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<sup>9</sup> (2006) 3 NWLR (Pt.968) Pg. 462