

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.”<sup>79</sup>

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.<sup>80</sup>

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.