

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. In 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.