

This is a very progressive statement coming from a tribunal in a region where homophobic attitudes are very prevalent. Gays and lesbians are discriminated against because of their sexual orientation. Indeed, the outrageous reasoning by counsel for the Appellants that homosexuals are not human beings worthy of respect of their fundamental rights and dignity is unfortunately common amongst societies in the African region. People are condemned for being homosexual when, as the Court recognised, homosexuality is not learned or imposed, but a natural attribute of being human.

This decision builds on the growing jurisprudence around LGBTI persons in the region. The Court referenced Kenyan decisions in similar circumstances when organisations were refused registration due to discrimination on the grounds of sexual orientation or gender. The Kenyan courts had also affirmed the human rights of LGBTI persons. It is indeed important for tribunals to protect and promote human rights especially of victimised groups such as LGBTI persons. This decision is to be savoured because it forcefully rejects irrational homophobic attitudes and affirms that everyone, including LGBTI persons, is worthy of human dignity, and their fundamental rights ought to be respected.

The People v. Paul Kasonkomona
[2015] HPA/53/2014
Zambia, High Court

COURT HOLDING

The respondent's actions of publicly advocating for homosexual rights did not infringe Section 178(g) (*Nuisances and Offences Against Health and Convenience - Idle and disorderly persons*) of the Penal Code Act. Rather, the accused's actions fell within his right to exercise his freedom of expression.

Summary of Facts

This case concerns an appeal to the Zambian High Court by the Appellant against the acquittal of the respondent by the Magistrate's Court. The respondent, a human rights activist, was invited to engage in a discussion on homosexual rights in Zambia in a television programme, "The Assignment," aired by Muvi Television Studios. The respondent was accused of "soliciting for immoral purposes," arrested, and subsequently charged with the offence of idle and disorderly conduct under Section 178(g) of the Penal Code, Cap. 87 of the Laws of Zambia.

The Magistrate's Court considered the three legal elements for an offence under Section 178(g) of the Penal Code and the evidence submitted by the Prosecution. The three elements were (1) definitions in regards to "soliciting," (2) "public space," and (3) "immoral purposes." The Magistrate's Court acquitted the respondent on the grounds that the Prosecution had failed to prove the offence.

The government appealed the Magistrate Court's decision on the following two grounds: (1) the trial magistrate erred in law and fact by limiting the term "soliciting" to a conduct that is persistence only, and (2) the trial magistrate erred in law by acquitting the accused when there was sufficient evidence to put him on defence, in accordance with Section 206 of the Criminal Procedure Code.

Issue

The issue before the High Court was whether the respondent's action of publicly discussing homosexual rights in Zambia, constituted "soliciting in a public place for immoral purposes," an offence under Section 178(g) of the Penal Code.

Court's Analysis

The Court dismissed the Appellant's two main grounds of appeal. The Court agreed with the trial magistrate that the respondent's conduct of participating in a debate advocating gay rights did not amount to soliciting for immoral purposes.

The Appellant argued that "immoral purposes" refers to some kind of sexual activity; hence the respondent's claims were immoral to the extent that sexual intercourse with a person of the same sex is prohibited under the Penal Code. This argument had been rejected by the Magistrate's Court on the basis that discussion of homosexuality and the safeguarding of the rights of those who practice it, are different issues.

In rejecting the appeal, the Court accepted the reasoning of the trial magistrate. The Court ruled that acts covered under Section 178(g) must be in a public place and involve solicitation i.e., to proposition, ask, entreat or entice someone to commit an immoral act or engage in immoral conduct. The Court accepted that the respondent did not entice or entreat anyone to engage in immoral conduct. The Court also agreed that the respondent's right to freedom of expression could not be limited in this instance.

Conclusion

The Court found no merit in the appeal brought against the respondent and dismissed it accordingly. The Court agreed that the respondent was exercising his right to freedom of expression.

Significance

Since the concept of sexual rights was popularised at the International Conference on Population and Development (ICPD), there has been increased advocacy to apply human rights norms to sexual orientation which has, in turn, attracted a great deal of resistance. Vague and overbroad vagrancy laws have frequently been used to discipline persons who are considered undesirable, such as sex workers and sexual minorities. In this instance, the government of Zambia had deployed criminal law to discipline an activist discussing homosexual rights because the government and its agents did not like the subject of homosexuality being openly discussed in public. However, before the Magistrate's Court, the case for the government had collapsed on the technical grounds that the alleged offence could not be proved.

During the trial, the respondent applied for constitutional review of the provisions under which he was charged (Section 178(g) of the Penal Code), for being vague and overbroad, and for potentially infringing on the right to freedom of expression secured under Article 20 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia (Zambian Constitution). The High Court ruled that it did not recognise any link between the Penal Code provision complained of and freedom of expression

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.