

Significance

Many countries in Africa have maintained laws that criminalise same-sex sexual conduct that date back to colonial times and originated from the colonial masters. In *Banana v. State*, (2000) 4 LRC 621, by a majority of 3 to 2, the Supreme Court of Zimbabwe ruled to maintain anti-sodomy provisions. In *Kanane v. the State* 2003 (2) BLR 67, the Botswana Court of Appeal upheld anti-sodomy provisions. Both the Zimbabwe and Botswana Courts based their decisions on morality and opined that the society was not ready for same-sex sexual conduct to be decriminalised. The Botswana Court, for instance, went on to say that homosexual practices should not be decriminalised because gays and lesbians were not groups protected by the Constitution.

Such decisions, which affirm stigmatisation of non-heterosexual sexuality, can have the effect of exacerbating homophobia, perpetuating discrimination and violence against persons of homosexual orientation. Lesbian, gay, and transgender people are significantly more likely than the general population to be targeted for violence and harassment, to contract HIV, and to be at risk for mental health concerns such as depression and suicide. Further, they may be deterred from seeking health services out of fear of being arrested and prosecuted.⁹¹

This case was therefore important for advocacy as it brought or would have brought the impugned laws under the scrutiny of human rights. An opportunity was therefore missed when the Court avoided determining the substantive human rights issues. Its decision on this would have created further opportunities to bring the matter before regional or international tribunals or courts, depending on the outcome in the national court. Nevertheless, the judgment obtained before the Uganda Court was a legal victory and is of symbolic importance for the Lesbian, Gay, Bisexual, Transsexual, Intersex (LGBTI) community, especially since the legislation was annulled.

C.O.L. & G.M.N. v. Resident Magistrate Kwale Court & Others **Petition No. 51 of 2015** **Kenya, High Court (Constitutional and Judicial Review Division)**

COURT HOLDING

The requirement for the accused to provide samples for purposes of proving an offence, as provided under the Sexual Offences Act, did not infringe on the petitioner's rights.

The right not to self-incriminate secured under the right to a fair trial recognised in Article 50 of the Constitution of Kenya does not envisage excluding an accused from providing medical samples for purposes of proving an offence. Rather, it pertains to oral and documentary evidence against oneself.

Summary of Facts

The petitioners were arrested on suspicion of being homosexuals. While under investigation, the petitioners refused to undergo medical examination. Following their being charged before the 1st respondent, the petitioners were, by court order, compelled to undergo medical examinations

including anal examination. The petitioners claimed that forcible medical examination to ascertain their sexual behaviour violated various rights under the Constitution of Kenya including the right not to be treated in a cruel, inhuman or degrading manner (Article 29); the right to privacy (Article 31); the right to non-discrimination (Article 27); and the right to dignity (Article 28). The petitioners also contended that this means of getting evidence, i.e., non-consensual medical examination, contradicted their rights to a fair trial guaranteed under Article 50 of the Constitution.

Issues

The Court isolated the following issues for determination:

1. Whether the medical examination was a violation of the petitioners' rights to privacy; non-discrimination; torture and cruel, inhuman or degrading treatment or punishment; and human dignity and security of the person; and
2. Whether the medical examination violated the right not to be compelled to make any confessions or admissions that would be used in evidence against the accused.

Court's Analysis

The Court considered the implications of Section 26 of the Sexual Offences Act (Cap. 62 A of the Laws of Kenya) which criminalises deliberate transmission of HIV, and Section 36 which provides that a court may direct collection of evidence of a medical, forensic, or scientific nature for the purpose of ascertaining whether an accused committed an offence under the Sexual Offences Act. It also referred to Section 42 of the Sexual Offences Act which stipulates consent requirements on providing samples for evidence, and also the Sexual Offences (Medical Treatment) Regulations 2012 (Regulations), and in particular, Regulation 5 which provides that a court may order collection of a sample from an accused on conditions which the court may specify. When a person declines to provide a sample, the prosecution can apply for a court order under Section 36(1) of the Sexual Offences Act to compel the person to provide a sample.

The Court noted that, on record, the petitioners appeared to have consented to the medical examination, and did not appeal against the decision or order to undergo medical examination. The Court therefore found and held that the petitioners consented to the medical examination.

In the view of the Court, the right to fair trial secured under Article 50 did not mean that an accused should be excluded from medical examination. It referenced *R v. Kithyulu* (2013), in which a Kenyan Court held that the right not to self-incriminate pertains to oral or documentary evidence against oneself but does not extend to taking of medical samples to prove some fact. Therefore, according to the Court, the petitioners could not rely on constitutional rights to exclude themselves from undertaking the medical examinations in accordance with the law. The Court therefore held that the rights of the accused to a fair trial were not infringed by the requirements of the law to provide samples for purposes of evidence.

Conclusion

The petition failed. The medical examination was done in accordance with the law.

Significance

On one hand, the Court's decision was within the confines of the law in that the applicable law provides for compelling homosexuals to anal examination for purposes of proving the offence of sodomy. This is apparent in the reasoning of the court, which in a nutshell is that the law requires subjection to anal examination to prove the offence of sodomy, and therefore there was nothing illegal in compelling the petitioners to endure such a test.

The Court's reasoning is however not entirely sound. Though the Court seemed very certain about its analysis of the rationale for undertaking anal examinations, especially in paragraph 51 of the judgment, it is not at all certain whether indeed anal examination can prove the offence of sodomy. Further, the unanswered question remains as to whether in order to prove the offence, it is necessary to subject persons to humiliating anal examinations.

The main issue however is not the legality or illegality of conducting anal examinations to ascertain sexual behaviour, which might fall one way or the other depending on the national legal framework. A more fundamental question is whether the body of laws that allows such examinations is ethical in accordance with the rights to human dignity and equality, which many constitutions, including Kenya's, extol.

In this Kenyan case, the Court did not attempt to subject the state's action to human rights scrutiny, especially to question whether the state's practice of forcible anal examinations was in accordance with human rights norms. Instead, it took for granted that the state's practice of anal examinations would definitely prove some specific sexual behaviour. At least, the Court could not have been so certain about evidentiary veracity of such anal examinations.

RECOGNITION OF LGBTIQ ADVOCACY AND GROUPS

Eric Gitari v. Non-Governmental Organizations Co-Ordination Board & 4 Others
[2015] eKLR, Petition No. 440 of 2013
Kenya, High Court

COURT HOLDING

The words "every person" in Article 36 of the Constitution include all persons living within the republic of Kenya, regardless of their sexual orientation.

The respondents contravened the provisions of Articles 36 of the constitution in failing to allow gay and lesbian persons living in Kenya to register an association of their choice.

The petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.