

Nigerian High Court avoided constitutional scrutiny of anti-gay laws.

Mr. Teriah Joseph Ebah v. Federal Republic of Nigeria

SUIT NO. FHC/ABJ/CS/197/2014

Nigeria, Federal High Court

Decision of October 22, 2014 [Decision online](#).

COURT HOLDING

The Court held that the Applicant in this case has no legal standing to bring an action against the Nigerian Government on the constitutionality of the prohibition of same-sex conduct, marriages and associations, because the Applicant did not claim to be a homosexual. Furthermore, the Court held that the Applicant, who claims to have instituted the suit on behalf of the 'Gay Community in Nigeria',¹ had no legal standing to so institute the action because there is no such body or organization in Nigeria.

Summary of Facts

Prior to the year 2013, statutes in Nigeria criminalise 'offences against the order of nature',² which were interpreted to include same-sex conduct. In 2013, the Federal Republic of Nigeria, in an attempt to further clamp down on actual or perceived homosexuals, enacted the Same Sex Marriage (Prohibition) Act (SSMPA), an Act which confirms the criminalization of homosexual activities by expressly criminalizing marriages between homosexuals, as well as support for homosexuals or homosexual associations.³ The Applicant instituted this suit at the Federal High Court, Abuja Division, seeking answers as to whether the provisions of the SSMPA infringe the constitutionally guaranteed rights of members of the LGBT+ community to [1] freedom from discrimination on grounds of sex; [2] liberty; [3] freedom of association; [4] dignity;

¹ *Teriah Joseph Ebah v Federal Government of Nigeria Suit No. FHC/ABJ/CS/197/2014 (Teriah)* 9.

² Criminal Code Act of Nigeria of 1916 (Criminal Code) sec. 214; Penal Code Act of Nigeria of 1960 (Penal Code) secs. 284 & 405. The Criminal Code is applicable in states that used to form part of the Southern Region of Nigeria while the Penal Code is applicable in states that used to form part of the Northern Region of Nigeria.

³ The Same-Sex Marriage (Prohibition) Act of Nigeria of 2013 (SSMPA) secs. 4 & 5.

and [5] privacy and whether the provisions of the SSMPA are null and void to the extent of their inconsistency with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (The Constitution).

The Respondent (the Federal Government of Nigeria) opposed the suit and filed a preliminary objection to the suit on the ground that the Applicant lacked legal standing to institute the case because the Applicant failed to show that he is a gay person who is affected by the existence or application of the SSMPA.

The Court upheld the preliminary objection of the Respondent and held that since the Applicant failed to show that he is a homosexual, it follows that the Applicant failed to show, as required by Section 46(1) of the Constitution that any of his fundamental rights 'has been, is being or likely to be contravened'⁴ by the Defendant's actions which were founded on the provisions of the SSMPA. Therefore, the Applicant lacked legal standing to institute the case. According to the Court, only persons whose rights were violated or threatened could come to the court to enforce their rights.

Issues

The issues before the Court were the following:

1. Whether the Applicant has legal standing to institute the suit; and
2. Whether the provisions of the SSMPA, which confirm the criminalization of homosexual conduct and criminalized same-sex marriages and support for homosexual persons or associations, breach the constitutional rights of members of the LGBT+ community to [1] freedom from discrimination on grounds of sex; [2] liberty; [3] freedom of association; [4] dignity; and [5] privacy and are consequently unconstitutional and void.

⁴ The Constitution of the Federal Republic of Nigeria of 1999) (amended) (CFRN) sec 46(1).

Court Analysis

In determining the preliminary objection, the Court observed that, according to Section 46(1) of the Constitution, an applicant in a fundamental rights action must establish that his rights had been contravened or threatened. The Court conceded that it is aware of the fact that the Preamble to the Fundamental Rights Enforcement (Procedure) Rules, 2009 (FREP Rules) provide that ‘no human rights case may be dismissed or struck out for want of *locus standi* [legal standing]’.⁵ However, the Court concluded that this Preamble to the FREP Rules, which was written by the Chief Justice of Nigeria pursuant to Section 46(3) of the Constitution, is contrary to Section 46(1) of the Constitution and consequently void.⁶

The Court upheld the preliminary objection of the Respondent and held that since the Applicant failed to show that he is a homosexual, the Applicant lacks legal standing under Section 46(1) of the Constitution. The Court also held that the Applicant cannot be heard to claim that he represents the LGBT+ community because there is no person or association known to law in Nigeria as the LGBT+ community. Consequently, the Court made an order striking out the Applicant’s suit, without considering the merits of the suit.

Conclusion

The Applicant has no legal standing to institute the suit. The Court struck out the suit.

Significance

This is the first suit in a Nigerian court which specifically sought the protection of the rights of homosexuals. Although the Applicant was not successful, the suit led to increased discourse in many quarters, on the rights of the members of the LGBT+ community in Nigeria.

⁵ Fundamental Rights Enforcement (Procedure) Rules, 2009 (FREP Rules) Preamble 3(e).

⁶ Sec. 1(3) of the Constitution of the Federal republic of Nigeria 1999 (amended) provides that any law or action which is at variance with any of the provisions of the Constitution is void to the extent of its inconsistency.

Furthermore, the suit being the first of its kind, serves as a guide to future litigants seeking the protection of the rights of homosexuals in Nigeria. Lawyers prosecuting cases on the protection of the rights of homosexuals will ensure that the applicants fulfill the requirements of legal standing.

The first set of anti-gay laws in Nigeria were enacted by the British colonial government.⁷ Even though homosexual activities are not illegal in Britain today, Nigeria continues to cling to anti-gay laws, citing moral and religious reasons.⁸ There is widespread homophobia in Nigeria. This results in actions that breach the rights of homosexuals by government and individuals alike.⁹ The existence of anti-gay laws entrench breaches of the rights of homosexuals. Law enforcement agencies arbitrarily arrest and brutalize persons perceived to be homosexuals.¹⁰ Furthermore, homosexuals whose rights have been breached cannot seek redress due to fear of prosecution and punishment under anti-gay laws.

The decision of the Court suggests that it was influenced by the moral and cultural sentiments against homosexuals in Nigeria. The decision of the Court was not only against the Preamble to the FREP Rules but was also incompatible with decisions of appellate courts, on legal standing, delivered prior and also subsequent to the suit. The Supreme Court of Nigeria had, since 1987 made the point that courts need to allow a broader interpretation of the legal standing provisions of the Constitution in order to allow for public interest litigation.¹¹ In a 2018 decision, the Court of Appeal of Nigeria

⁷ Criminal Code Act of Nigeria of 1916 (Criminal Code) sec 214; Penal Code Act of Nigeria of 1960 (Penal Code) secs 284 & 405.

⁸ AT Adebajo 'Culture, morality and the law: Nigeria's anti-gay law in perspective' (2015) 15 *International Journal on Discrimination and the Law* 256 at 259-260.

⁹ AMSHeR et al 'The violations of human rights on the basis of sexual orientation and gender identity in the Federal Republic of Nigeria under the African Charter of Human and Peoples' Rights' *A shadow Report presented at the 50th Ordinary Session of the African Commission in October/November 2011, in response to the Periodic Report of the Federal Republic of Nigeria* 10.

¹⁰ B Nwafor 'Police arrests 57 suspected homosexuals in Lagos' Vanguard News, 27 August 2018 <https://www.vanguardngr.com/2018/08/police-arrests-57-suspected-homosexuals-in-lagos/> (accessed 4 March 2019).

¹¹ For example, *Fawehinmi v Akilu* (1987) 4 NWLR (Pt. 67) 797 at 846 – 848 paras. A-H.

upheld the Preamble to the FREP Rules and held that courts should allow individuals or organizations to institute fundamental rights enforcement actions on behalf of others.¹²

The Constitution as well as the African Charter on Human and Peoples' Rights (The African Charter) provide that all individuals are entitled to, amongst others, the rights to freedom from discrimination, liberty, freedom of association, dignity, and privacy. Furthermore, Article 2 of the African Charter stipulates that the rights contained in the African Charter belong to everyone and that no one should be discriminated against on grounds, including grounds of sex or sexual orientation.

In its efforts to ensure the protection of the rights of homosexuals, the African Commission on Human and Peoples' Rights (The African Commission) adopted Resolution 275,¹³ where it resolved to protect all persons against violence and other human rights violations on the grounds of sexual orientation and gender identity (SOGI). Protection of persons against violence based on SOGI encompasses the protection of LGBT+ persons from violence based on their SOGI. Resolution 275 was made a few months after the commencement of the SSMPA and therefore could not influence arguments made by legislators in the process of the enactment of the SSMPA.¹⁴ Resolution 275 is a good starting point for the recognition and protection of the rights of LGBT+ persons by the apex human rights body in Africa and it could help ensure a progressive recognition and protection of the rights of homosexuals in Africa.

The African Commission could, through the system of states' periodic reporting on their human rights situation, follow up with states and ensure that they are held accountable for the violation of the rights of homosexuals. Furthermore, the African Commission could receive Communications by individuals and human rights organizations, complaining of violation of the rights of homosexuals and seeking redress. Where such Communications are found to be meritorious, the African Commission could issue

¹² Babalola v. A.G. Federation & Anor. (2018) LPELR-43808(CA) Pp. 12-14, Paras. D-B.

¹³ African Commission on Human and Peoples' Rights *Resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity* adopted at the 55th Ordinary Session held in Luanda, Angola, from 28th April to 12th May 2014.

¹⁴ The SSMPA came into force on 7th January 2014, the Resolution was made in April/May 2014.

Recommendations to the relevant state. In addition, the decisions and Recommendations of the African Commission on such Communications could, by raising public awareness of SOGI human rights, positively influence domestic courts to deliver judgments that protect the rights of homosexuals by setting aside laws that criminalise homosexual activities.

Sadly, a recent decision shows that Nigerian Courts are not willing to change their negative disposition towards the protection of the rights of homosexuals. The Applicant in a 2018 case¹⁵ applied to register an association of lesbians but her application was refused by the Corporate Affairs Commission. The Court upheld the action of the Corporate Affairs Commission and held that that Applicant's rights to freedom of association and liberty under the constitution were not breached by the Corporate Affairs Commission because the objective of the proposed association—lesbianism—is prohibited by the SSMPA.

It is hoped that through continuous sensitization and awareness campaigns, Nigerian courts will realize and remedy the error made in previous cases which sought the protection of the rights of homosexuals.

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<https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/nigeria-2014-

¹⁵ Pamela Adie v Corporate Affairs Commission (Pamela's case), Suit No. FHC/ABJ/CS/827/2018.