

***Ricky Nathanson v Farai Mteliso, The Officer in Charge Bulawayo Central Police Station,  
Commissioner of Police and the Minister of Home Affairs***

Case no. HB 176/19 HB 1873/14 [2019] ZWBHC 135

Zimbabwe, High Court [Decision online](#)

**COURT HOLDING**

The Plaintiff, a transgender woman, was awarded damages of 400,000 ZWD, approximately 1100 USD, for unlawful and malicious arrest during which she was subjected to inhuman and degrading treatment, which violated her fundamental and constitutional rights.

**Summary of facts**

The Plaintiff, a transgender woman, awaited a business client at the Palace Hotel bar when the first Respondent (1<sup>st</sup> Respondent) called her over to his table where he sat with a male companion. They had a bottle of whiskey on their table. The 1<sup>st</sup> Respondent told the Plaintiff that his friend was attached at the Office of the President, and didn't like what she was doing. The 1<sup>st</sup> Respondent then asked the Plaintiff for \$20 to let her go, which she declined. Her refusal enraged the 1<sup>st</sup> Respondent who "threatened to fix the plaintiff and immediately made a telephone call to a Mr Gora alleging that there was a man walking around in a woman's dress, who needed to be fixed"(para. 8). When the Plaintiff attempted to leave the hotel, she was prevented by the first defendant and his friend as threatened and subsequently detained for forty minutes until the arrival of the police.

She was then arrested at the Hotel by six armed Police officers, dressed in riot gear, and transported in an open truck to the Bulawayo Central Police Station. At the police station, the Plaintiff was ordered to take off her shoes and sit down on the floor at the charge office. Since she was presented by the police as a man who masqueraded as a woman, curious members of the public and the media who had taken an earlier interest in the incident at the Hotel took photographs of her.

An argument ensued between officers as to whether the Plaintiff was male or female. She was whisked to a side room to verify her gender. There, five male police officers asked her to lower her trousers, which she did, and the Police officers laughed, jeered and taunted her about her ambiguous genitalia. After this ordeal in the side room, the Plaintiff was taken back

to the charge room where she found the 1<sup>st</sup> Respondent giving an animated statement in support of her arrest.

Later on the day of her arrest, Plaintiff was subjected to a medical examination at the United Bulawayo Hospital (UBH) for gender verification. The doctor who examined her then referred her to a gynaecologist at Mpilo Central Hospital for further examination the next day. The doctor also recommended that the Plaintiff be imprisoned alone at the Police Station. The Plaintiff was detained for two nights at the Police Station, in appalling conditions. The gynaecologist deemed her a transgender person, though biologically male.

The Plaintiff was eventually charged under Section 46 of the Criminal Law Codification and Reform Act (Act), for criminal nuisance for using a female rather than a male toilet. The Magistrate Court found that there was no evidence that she committed any crime under the provisions of Section 46 of the Act. The Court remanded her out of custody. As she was released, the 1<sup>st</sup> Respondent furiously threatened her and the prosecutor outside court. Thus the Plaintiff, fearing for her life, went into hiding.

Upon her release from police custody the Plaintiff underwent therapy as a result of the abusive and traumatic treatment she had received. Businesswise, the Plaintiff ran a modelling agency, which folded when the media published the story of her arrest in various newspapers. That business had sustained her financially and losing it caused her pain and loss of income. Her relationship with her partner also ended because of what the Plaintiff was going through.

The Plaintiff sought the following remedies at the High Court as a result of the findings by the Lower Court that had discharged her of any criminal offence:

1. Payment of US \$100 000 for unlawful arrest;
2. Payment of US \$100 000 for unlawful detention;
3. Payment for US\$ 300 000 for emotional stress and contumelia;
4. Payment of US\$100 000 for exemplary damages; and
5. Legal interest on amount claimed from date of service of summons to date of full employment.

### **Issues**

The judge identified the following five issues for determination:

1. Whether or not the Plaintiff was unlawfully arrested and maliciously prosecuted.;
2. Whether or not the Plaintiff was subjected to the treatment which she stated in her summons and declaration;
3. Whether or not as a result of that conduct the Plaintiff suffered damages as summarized in her declaration and pre-trial minute.
4. Whether or not the Plaintiff is entitled to the damages as laid out under separate headings in her summons,
5. The quantum of such damages.<sup>1</sup>

### **Court Analysis**

The Court began its decision with explaining the meaning of transgender at length. It made reference to the Indian Supreme Court Case *Navtej in Singh Johar &Others v Union of India &Others*,<sup>2</sup> in which a distinction was made on discrimination based on sex in the Indian Constitution. The case highlighted that the Indian Constitution recognizes that sex includes gender identity thus including transgender persons in its interpretation. Bere J, in this judgement applied the same principle used in the *Navtej* case.

In the present case, the Court reviewed the evidence given by the Plaintiff, the psychiatric expert witness and a Chief Inspector of the police, and found that the Plaintiff's evidence was consistent and reliable. The Police did not file any summary evidence for review, and the Court thus relied largely on the evidence of the Plaintiff.

The Court through its review of the previous case found that the Plaintiff was subjected to degrading and inhuman treatment from the events surrounding her arrest to the day that she was released from police custody. The Court noted that the Chief Inspector of the police confirmed the Plaintiff's claim that she did not consent to the invasive gender verifying medical examinations that she underwent under police orders. Under cross examination by

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<sup>1</sup> See Para 66, of the judgment.

<sup>2</sup> Writ Petition (Criminal.) No. 76 of 2016. Decision of 2018 that decriminalized consensual sex among adults, including homosexual acts.

the Plaintiff's attorney, the Chief Inspector changed his statement and stated that the Plaintiff gave consent and yet failed to support his averments with evidence.

In reaching the decision, the High Court assessed various issues, particularly whether the Plaintiff was lawfully arrested and whether her fundamental human rights were violated. Section 46 of the Criminal Law Codification Act (Act), sets out specific criminal charges against criminal nuisance which the Plaintiff was charged with, in the Third Schedule of the Act. The conduct of the Plaintiff in using female instead of male bathroom facilities is not listed as a crime; hence the Magistrate Court initially remanded the Plaintiff out of custody, and on 11 May 2014 declined to keep her on remand. The case remained on hold for almost two years, but police made no further effort to prosecute her. As the judge noted, "On 4 November 2015 the charges against the plaintiff were terminated with a refusal of further remand by the magistrate, on the grounds that there did not seem to be a clear cut offence disclosed on the facts cognizable under s 46 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] as read with the third schedule. This case has never been resuscitated. It is this background that has prompted the plaintiff to file this suit."

The Plaintiff exercised her constitutional rights in bringing the case to the High Court. Section 49 of the Constitution of Zimbabwe provides for the right to personal liberty and that one must not be held arbitrarily without just cause. Further, when an arrested person must be made aware of the reasons of the arrest and be allowed to contact any person who they want to inform that they have been arrested, that is; family, a legal practitioner or a medical practitioner. The Plaintiff was not given a reason for being arrested except that the 1<sup>st</sup> Respondent wanted to "fix" her since his friend worked in the office of the President. Section 49(1) requires that where there is a finding that a person has been arrested unlawfully, they must be discharged as soon as it is found out. In this case, none of the police officers, not even the Chief Inspector had adhered to the provision, as the Plaintiff was unlawfully arrested and detained. Hence the Magistrate refused to remand her in custody as she did not commit any crime under the provisions of the Act.

The Constitution further guarantees the right to dignity in Section 51 and the right to equality and non-discrimination in Section 56 which includes (in Section 3), the right to be protected against discrimination based on sex and gender. The Plaintiff was discriminated against based

on her gender and subjected to inhuman and degrading treatment in violation of her fundamental human rights.

The evidence of the Plaintiff showed that the defendants had resorted to malicious and excessive use of power against her with the intention to implicate her for committing a crime. She was unlawfully and maliciously arrested and prosecuted for a non-existent crime.

The reading of the provisions of the bill of rights in the Constitution together with Section 46 of the Act showed that the test for malicious prosecution has been met. The 1<sup>st</sup> Respondent had acted outside the confines of the law by detaining the Plaintiff and causing her to be unlawfully detained without just cause. After reviewing and assessing the evidence provided by the parties, the Court found in her favour and awarded her damages.

### **Conclusion**

The Court concluded that the Plaintiff was entitled to an award of damages for the abuse she suffered from the police relating to her unlawful arrest, violation of her rights while detained and for malicious prosecution as her constitutional rights were gravely violated.

### **Significance**

The Court applied the provisions of the Constitution in reaching its decision. Chapter 4 of the Constitution provides for fundamental human rights. Section 52(c) prohibits subsection to medical tests without a person's consent, as the Plaintiff was subjected to. The Plaintiff was also subjected to torture, or cruel and inhuman or degrading treatment and discrimination.<sup>3</sup> Sexual and gender minorities face challenges of discrimination and abuse<sup>4</sup> from their families, communities and state actors. The discrimination is exacerbated by lack of protective laws in some countries which can lead to systemic state-sponsored violations and exclusions of sexual and gender minorities.

There are international and regional treaties and instruments that promote and protect the rights of sexual minorities. The International Convention on Civil and Political Rights

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<sup>3</sup> Sections 53 and 56.

<sup>4</sup> See, e.g., DT Abaver & EN Cishe, 'Violence, abuse and discrimination: Key factors militating against control of HIV /AIDS among the LGBTI sector' (2018) 15 *Journal of Social Aspects of HIV/AIDS* 60, at 61.

(ICCPR)<sup>5</sup> affirms in its preamble the need for everyone to enjoy their civil and political rights as well as economic, social and cultural rights. It further contains a number of important rights such as the rights to life, dignity, liberty, security of person, and freedom from torture, or cruel, inhuman or degrading treatment or punishment.<sup>6</sup> The intersection of these articles requires States to promote, protect, respect and fulfil human rights for all, without discrimination. Zimbabwe has acceded to the International Covenant on Economic, Social and Cultural Rights<sup>7</sup> (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The provisions of both instruments, which are similar to the bill of rights in the Constitution, ascertain that transgender rights are human rights in Zimbabwe and that they must be equally protected.

Sexual and gender minorities face severe exclusion in societies by discriminatory and punitive laws. Article 26 of the ICESCR provides for the protection and promotion of human rights of all people. While it is not specific to sex and gender, it provides for ‘other status’ which explains that the list is not exhaustive and that it can be interpreted to include groups that were not specified. Therefore, it can be broadly interpreted to include transgender persons and to include protection from discrimination based on sexual orientation or gender identity. In November 2011, the Office of the United Nations High Commissioner for Human Rights published a report which outlines States’ obligations towards Lesbian, Gay, Bisexual, Transgender, Queer and Intersex persons (LGBTQI) under international human rights law.<sup>8</sup> States are under obligation to protect transgender persons and mainly to enact laws that are specific to the protection and promotion of LGBTQI persons as members of gender minorities who have been historically discriminated against.

Additionally, the Yogyakarta Principles, which were drafted by experts in the LGBTQI field, affirm the need to promote and protect human rights on the basis of sexual orientation and gender identity.<sup>9</sup> These Principles were drafted to add to various existing international law instruments that encourage States to protect and promote the rights of gender and sexual

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<sup>5</sup> GA Res 2200A (XXI) 21 UN GAOR Supp (No 16) 52, UN Doc A/ 6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

<sup>6</sup> ICCPR, Arts 6, 9, and 7.

<sup>7</sup> ICESCR, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (Accessed 7 March 2020).

<sup>8</sup> Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity U.N. Doc. A/HRC/19/41 (Nov. 17, 2011)

<sup>9</sup> The Yogyakarta Principles The application of human rights law in relation to Sexual Orientation and Gender Identity 2006 <https://yogyakartaprinciples.org/> (Accessed 29 March 2020)

minorities. Principle 30 of the Yogyakarta Principles encourages States to protect sexual and gender minorities from violence and harm which may be perpetrated by State or non-State actors.

At a regional level, Article 2 of the African Charter on Human and Peoples' Rights (ACHPR)<sup>10</sup> prohibits discrimination on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status. As in ICESCR, the use of the phrase 'other status' in Article 2 of ACHPR can be interpreted broadly to include protection from discrimination based on sexual orientation or gender identity. Furthermore, Article 3 provides that every individual is equal before the law.<sup>11</sup> Another important instrument of which Zimbabwe is a signatory is Resolution 275<sup>12</sup> on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their real or imputed Sexual Orientation or Gender Identity, which was agreed to by member states in 2014, and which should be used by member states to protect sexual and gender minorities. The Resolution promotes equality and non-discrimination of all people. It is an inclusive Resolution which notes the difficulties and challenges faced by LGBTQI persons and encourages member state and non-state actors to end all violence and abuse of LGBTQI persons.

A Report on HIV Law and Human Rights in Africa by the African Commission on Human and Peoples' Rights<sup>13</sup> highlights the inequalities that sexual minorities suffer in Africa and recommends that African countries need to protect them from such inequalities, and from violence and inhuman and degrading treatment. It asserts that inequalities and crimes against sexual minorities do not conform to international law. Additionally, the provisions of the African Commission's General Comment No. 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5 of the African Charter) are particularly useful for the protection of the rights of the LGBTQI.

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<sup>10</sup>African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev, 1520 UNTS 217.

<sup>11</sup> See R Murray and F Viljoen 'Towards Non-Discrimination on the basis of Sexual Orientation: The Normative basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86-111.

<sup>12</sup> ACHPR/Res.275(LV) 2014 <https://www.achpr.org/sessions/resolutions?id=322>

<sup>13</sup> HIV, the Law and Human Rights in the Human Rights System: Key challenges and opportunities for Rights-Based Responses Report on the study of the African Commission on Human and People's Rights 87.

The Zimbabwean High Court should be commended for taking the Plaintiff's civil suit as an opportunity to pronounce that the rights of transgender persons are protected by the Constitution and that their individuality must be respected. Thus, the Court warned and cautioned those that are transphobic of the consequences of discriminating against transgender people in Zimbabwe.

The decision sets an important precedent for transgender rights in Zimbabwe and also in the African region, affirming that Courts are ready to protect human rights of every individual without discrimination, using domestic, regional and international law. In retrospect, the Court should have also taken the opportunity to directly caution law enforcement authorities that they must use their powers to promote and protect the rights of all people, including transgender persons and refrain from perpetuating stigma against sexual and gender minorities.

This decision sets a good precedent not only for LGBTQI people in Zimbabwe but also in Southern Africa for LGBTQI persons in asserting their fundamental human rights in courts. It is a persuasive authority that can be used as an advocacy tool to pursue policy and law reform for transgender persons in other countries. The Court in this case buttresses the individuality and the constitutional rights of transgender persons in Zimbabwe, and it is a needed jurisprudence in protecting and promoting transgender rights. Overall, the case is an addition to the progress and improvement of transgender persons' rights, albeit slow, in the African continent.

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