

RWANDA / JUDGMENT

Re FEMINIST ACTION DEVELOPMENT AMBITION (FADA)

RLR V.2-2025

COURT

Supreme Court

DECIDED

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Re FEMINIST ACTION DEVELOPMENT AMBITION (FADA)

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Text

Page 1

Re FEMINIST ACTION DEVELOPMENT AMBITION (FADA) [Rwanda SUPREME COURT – RS/INCONST/SPEC00004/2023/SC (Mukamulisa, P.J, Cyanzayire, Hitiyaremye, Kalihangabo and Kazungu, J.) 26 April 2024 Constitution - Right to physical and mental integrity- In order for the violation of the right to physical and mental integrity to be characterized, there must have been any act that invades the human body with the intention of harming it and it is illegally done. Constitution – The petition seeking to declare a legal provision unconstitutional – In order for a petitioner to claim that a certain legal provision of the law is unconstitutional, he/she must first demonstrate before the court how he/she relates the contentious provision to the Constitution. Constitution – The petition seeking to declare a legal provision unconstitutional – The illegal practices of the law and its provisions, if any, are not rectified by declaring the law unconstitutional when the law itself is not contentious. Facts: Feminist Action Development Ambition (FADA) filed a petition before the Supreme Court seeking to declare Article 143 of Law N°68/2018 of 30/08/2018 determining offences and penalties in general as modified

Page 2

and completed to date, contrary to the Constitution of the Republic of Rwanda in its articles: Article 13 relating to inviolability of a human being, Article 15 relating to the equality before the law, and Article 16 which protects a person against any discrimination. That impugned article provides that anyone who commits public indecency is guilty of an offence. FADA alleges that it filed this petition because of the challenges it has been encountering in the law, whereby some girls and women in Rwanda face the problem of being prosecuted for the public indecency provided for in Article 143 of Law N°68/2018 of 30/08/2018 mentioned above, because they are female, while when such actions are committed by males, the latter are not prosecuted. This is contrary to the Constitution in its articles, 13, 15 and 16. Before considering its petition, the Court first examined whether FADA has an interest in the case and confirmed that it has an organization endowed with legal personality and has a duty to fight any kind of gender-based violence and discrimination. Regarding the issue that was first examined in this case, regarding the fact that the provisions of article 143 of the aforementioned Law are contrary to article 13 of the Constitution, FADA alleges that, when the provisions of those two articles are combined, it is worth realizing that punishing a person for committing public indecency due to the way she is dressed, infringes upon woman's rights, and it also violates her inviolability and the absolute right to physical freedom.

Page 3

FADA continues alleging that apart from the fact that this law is offensive due to the fact that it provides that committing public indecency is an offence, it did not define indecency scandal yet term is not clear. It also alleges that this makes certain actions to be considered offensive to some but not to others, causing uncertainty in the prosecution of the offence and violating the right to privacy. The Government of Rwanda in this case, contends that the claims of FADA are baseless because the Government of Rwanda is a country committed to the rule of law, based on the respect for human rights, freedom and the principle that all Rwandans are equal before the law, and equality between women and men as provided for in the Constitution. It further states that punishing the perpetrator of public indecency, does not mean that his/her inviolability is not respected when he/she is prosecuted in accordance with the law. Concerning FADA's statement that the law does not define what the term "indecency" is, the Government of Rwanda alleges that the most important element is that it is an act that threatens the public based on a certain culture of the country and is contrary to it, that no Rwandan would fail to know what " indecency" is. It concludes by stating that rights and freedoms have their beginning and end, that they should not harm others or go against the education and culture that characterizes Rwandans. No one has the right to go naked or to wear clothing that reveals nakedness in public in a way that interferes with the rights and freedoms of others.

Page 4

In respect of whether Article 143 of Law N°68/2018 of 30/08/2018 determining offences and penalties in general as modified and completed to date, is contrary to Articles 15 and 16 of the Constitution, the petitioner avers that when they consider the enforcement of that article, they find that among the people who have been prosecuted for the offence of public indecency, there are girls who were prosecuted based on how they are dressed in public more than men or boys, and it is found that, according to the article, women are the most targeted but should not be discriminated against by their brothers who have done the same thing. She gave an example alleging that a girl or a woman who removed her shirt from the upper part is punished, while a man who does the same is not punished. Therefore, she requests that such article should be repealed, as it punishes public indecency in this way, it is against the Constitution because, with reference to its enforcement, it does not equally treat men and women, nor safeguard their equality before the law. The Government of Rwanda sustains that the petitioner does not criticize Article 143 in its wording, but focuses on its enforcement, where they indicate that there are those who have been prosecuted based on that article, and those who have not been prosecuted. It also alleges that, in consideration of its wording, it finds that there is no discrimination between women and men, so it should not be repealed because it is not contrary to Article 15 of the Constitution. It provides that Rwanda is a country that abides by the law and is determined to fight any kind of discrimination as provided in its Constitution; therefore, it does not enact a law that discriminates between men and women, and the impugned article is not contrary to Article

Page 5

16 of the Constitution because it does not imply any discrimination. Held: 1. In order for the violation of the right to physical and mental integrity to be characterized, there must have been any act that invades the human body with the intention of harming it and it is illegally done.

2. In order for a petitioner to claim that a certain legal provision of the law is unconstitutional, he/she must first demonstrate before the court how he/she relates the contentious provision to the Constitution. Therefore, FADA's petition lacks merit because it failed to prove before the Court how punishment for the crime of public indecency provided for in Article 143 of Law N°68/2018 of 30/08/2018 determining offences and penalties in general as modified and completed to date, is related to the right to physical and mental integrity provided for in Article 13 of the Constitution.
3. The legal practice contrary to the provisions of the law, if any, is not corrected by declaring the law unconstitutional when the law itself is not contended. Constitutional petition lacks merit. Statutory and legal instruments referred to: The Constitution of the Republic of Rwanda of 2003 amended to date, articles 13, 15 and 16. The United Nations Universal Declaration on Human Rights of 1948, Article 7.

Page 6

International Covenant on Civil and Political Rights (1966), Article 26 International Covenant on Civil and Political Rights, Articles 2 and 3. The International Convention on the Elimination of All Forms of Discrimination Against Women, 01 May 1980, ratified by Presidential Order No 431/16 of 10/11/1981, article 3. African Charter on Human and Peoples' Rights, Articles 4, 91 and 127. Law N°68/2018 of 30/08/2018 relating to offences and penalties in general, as modified and completed to date, article 143. Law No 30/2018 of 02/06/2018 determining the jurisdiction of courts, article 72. Cases referred to: RS/INCONST/SPEC 00001/2022/SC, Re Murangwa Edward, rendered by the Supreme Court on 16/12/2022. Case N° 13 of 2014 [2021] UGCC, Center for Domestic Violence Prevention and Others and the Attorney General of Uganda, rendered by the Supreme Court of Uganda on August 13, 2021. RS/SPEC/0001/16/CS, Re Akagera Business Group (ABG), rendered by the Supreme Court on 23/09/2016.

Judgment

Page 7

I. BRIEF BACKGROUND OF THE CASE

On 04/07/2023, Feminist Action Development Ambition, FADA in this case, filed a petition before the Supreme Court seeking to declare that Article 143 of Law N°68/2018 of 30/08/2018 Law determining offences and penalties in general as modified and completed to date is contrary to Articles 13, 15 and 16 of the Constitution of the Republic of Rwanda (the Constitution in this case).

FADA explains that, as a non-governmental organization, in its daily work, it is faced with legal challenges, whereby some girls and women in Rwanda encounter the problem of being prosecuted for public indecency, provided for by Article 143 of Law N°68/2018 of 30/08/2018 Law determining offences and penalties in general as modified and completed to date because they are female, while such acts when committed by males are not prosecuted as an offence. It is alleged that sometimes they are prosecuted for no reason due to the fact that the people keep an eye on clothing style.

It concludes by alleging that this is contrary to the Constitution in its article 13 concerning the inviolability of a human being, the article 15 concerning equality before the law, and article 16 protecting against any discrimination, that is the reason why it filed a petition seeking to declare unconstitutional article 143 of Law No 68/2018 of 30/08/2018 abovementioned.

Page 8

The case was heard in public on 11/03/2024, FADA was represented by Uwingabe Murenzi Assna assisted by Counsel Karangwa Olivier together with Counsel Umwari Sylvie, and the Government of Rwanda was represented by Counsel Batsinda Aline, and the Court first examined the issue of whether FADA has an interest in this case. Determine whether FADA has interest in the case

After hearing the explanations of the petitioner explaining the interest it has in the case and those of the State Attorney stating that the petitioner has no interest, the Court made a decision on the bench as follows :

- a. Article 72, paragraph one, of Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts as modified and complemented to date, provides that the Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare unconstitutional a law if they have any interest.
- b. In the provisional decision RS/INCONST/SPEC00001/2022/SC rendered by the Supreme Court on 16/12/2022, involving Murangwa Edward, the Court explained that in assessing the interest of the petitioner, the following conditions must be considered, the presence of one of which is sufficient for the Court to confirm that the petitioner has an interest : - If there is an impugned unconstitutional law relating to a petitioner or the category

Page 9

to which he/she belongs in such a way that he/she has a personal interest in filing a petition. An example is the Law regarding journalists, doctors, teachers, and others ; - If the law challenged to be unconstitutional concerns the entire population in such a way that it may affect their rights, which gives to any person who may be affected by it, the benefit of challenging it as unconstitutional ; - If the petitioner is an advocate, in the interest of justice, he/she is allowed to file a petition for the law development or the rights of those affected by the law, even if he/she personally has no interest in the application.

- c. Regarding this case, Article 4 of the Statutes of FADA, provides that one of its objectives is to fight any gender-based violence and discrimination. In its written submissions, FADA states that Article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, which provides for offences and sanctions in general, infringes upon women, and therefore it challenges it to be unconstitutional.
- d. The Court found that, as an organization endowed with legal personality and which is responsible for fighting any kind of gender-based violence and discrimination, FADA has an interest in this case because among other reasons it relies

Page 10

on to allege that Article 143 of Law N° 68/2018 of 30/08/2018 mentioned above is unconstitutional, there is the fact that it jeopardizes the rights of the people it fights for, ordering that the hearing proceeds.

Regarding the case on the merits, the Court considered the following issues: - Determine whether Article 143 of Law N° 68/2018 of 30/08/2018 Law determining offences and penalties in general as modified and complemented to date, is contrary to Articles 13 of the Constitution; - Determine whether Article 143 of the Law N° 68/2018 of 30/08/2018 Law determining offences and penalties in general as modified and complemented to date is contrary to Articles 15 and 16 of the Constitution. II. ANALYSIS OF LEGAL ISSUES OF THE CASE

2. Determine whether Article 143 of Law N° 68/2018 of 30/08/2018 Law determining offences and penalties in general as modified and complemented to date, is contrary to Article 13 of the Constitution

Uwingabe Murenzi Assna representing FADA, assisted by Counsel Karangwa Olivier and Counsel Umwari Sylvie, allege that if one relates the contents of

Page 11

article 143 of Law N° 68/2018 of 30/08/2018 Law determining offences and penalties in general as modified and complemented to date, and the provisions of article 13 of the Constitution, they realize that punishing a person for public indecency due to the clothing style violates the rights of the women. An example they give is to sentence someone to a penalty for wearing a transparent dress, for being short-dressed or tight-dressed. They allege that this violates their inviolability and the absolute right to physical freedom, and that Article 13 of the Constitution provides that the State has the duty to respect, protect and defend them.

They further state that, apart from the fact that this law brutalizes a person due to the fact that it criminalizes public indecency, it never provided a definition of what is meant by public indecency, the term is not clear. They add that this makes certain acts considered public indecency to some but not to others, causing uncertainty in the prosecution of the offence and violating the right to physical and mental integrity. They argue that this is questionable because, depending on the definition of what constitutes public indecency, one person can be prosecuted while another is not, which can be emotionally driven.

They also allege that the right to the inviolability of the human being is a basic human right protected by the Constitution, which is a right that protects people from physical or mental harm. They point out that punishing someone for what is called public indecency, even if it is not well defined, can violate this right in different ways.

Page 12

They also allege that laws punishing public indecency often criminalizes what people confuse with nakedness, due to the way they are dressed; yet a person has an inalienable right to the way they treat or dress one's body (Body Autonomy). They proceed to allege that criminalizing public indecency has a major impact on making a person be afraid of expressing themselves freely, because of the fear of being arrested because their clothes are too transparent for certain part of the body or are long to a certain extent. This is one of the reasons why some people are brought to court, as they are alleged to have committed public indecency.

They conclude by explaining that what is mentioned above is in line with what the Supreme Court of Uganda decided on August 13, 2021, in case No. 13 of 2014 [2021] UGCC 20 involving "Centre for Domestic Violence Prevention and Others" v State Attorney, where it held that the fact that there is a law punishing public indecency but does not define what indecent show means, is unconstitutional.

State Attorney Batsinda Aline, representing the Government of Rwanda, contends that the claim of the petitioner that Article 143 of Law N° 68/2018 of 30/08/2018 mentioned above is contrary to Article 13 of the Constitution, is irrelevant. She explains that Rwanda is a country committed to building a State governed by the rule of law, based on respect for human rights, freedom and the principle that all Rwandans are subject to the law, and equality between women and men as provided for in the Constitution. She also alleges that Rwanda is one of

Page 13

the signatories of Universal Declaration on Human Rights, and is committed to complying with it, and that even the laws that are enacted are in this line. She adds that Article 29 of that Declaration provides that a person has rights and freedoms, but also places responsibility upon the public, that her rights and freedoms require her to respect the rights and freedoms of others while respecting the culture and public order in a democratic country¹.

She further submits that she finds that punishing the perpetrator of the offence of public indecency, does not mean that their integrity is not respected when they are prosecuted in accordance with the law. Regarding the allegations that the law determining offences and penalties in general does not define public indecency, she contends that the most important element is that it is an act that infringes upon the public based on a certain culture of the country and is contrary to it, that no Rwandan would fail to detect what is public indecency. She alleges that, apart from that, the legal writer R. Garraud (3e éd. T.V, Paris 1924) explained that it is not easy to define the elements of the offence, that it must be left to the discretion of the judge, that it is not based on emotions as alleged by the petitioner.

1 Article 29 reminds that an individual exercises rights, enjoys freedoms, also has the duties to the community. Furthermore, those rights and freedoms are subject to such limitations for securing the rights and freedoms of others, or meeting the just requirements of morality, public order and the general welfare in a democratic society.

Page 14

She concludes by explaining that human rights and freedoms have their beginnings and ends, that they should not inconvenience others or go against education and culture that characterize Rwandans. She adds that no one has the right to be naked or to wear clothes that show nakedness in public in a way that threatens the rights and freedom of others, such fact could attract bad behavior to someone who is exposed to that clothing style, which is even likely to drag him/her into an offence. DETERMINATION OF THE COURT

Article 143 of N° 68/2018 of 30/08/2018 Law determining offences and penalties in general as modified and complemented to date provides that any person who performs an indecent act in public, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than six (6) months and not more than two

(2) years.

Article 13 of the Constitution provides that the human being is sacred and inviolable. The State has an obligation to respect, protect and defend the human being.

The petitioner criticizes the article which it challenges to be unconstitutional for two reasons : a. The fact that it violates the inviolability of the human being ;

Page 15

b. The fact that indecency is not defined by the law, which may deprive the accused of the right to inviolability. A. Regarding the inviolability of a human being

Regarding the definition of the inviolability of a human being, in the dictionary of legal terminology, legal scholars Serge Guinchard and Thierry Debard², explain that the inviolability of the human being is a principle according to which the human person cannot be harmed in his or her body. From this principle, expressing the sacred nature of the human being, arise in criminal law, offenses against persons (homicide, assault and battery, etc.) and in civil law, the obligation to repair bodily harm[...]³.

In the document titled “Inviolability and Privacy: The Castle, The Sanctuary, and The Body,” that the legal scholar Linda C. McClain wrote, she defined inviolability as a form of integrity, a form of being treated as sacred person that should not be insulted, victimized, or even abused. Taken together, these definitions imply that a person is sacred and needs to be protected. Common definitions of the quality of being inviolable are not to be violated, to be kept sacredly free from profanation, infraction, or assault, and impregnable to assault or trespass. Such definitions suggest both an association with

2 Serge Guinchard, Thierry Debard, *Lexique des termes juridiques*, Dalloz, 2020. 3 Serge Guinchard, Thierry Debard, *Lexique des termes juridiques*, Dalloz, 2020.

Page 16

sacredness and an association with security against violation or other incursions 4.

The elucidations that have just been mentioned above clearly show that it is an abomination to do something that hurts a person physically, that it is prohibited to invade a person's body with the intention of harming him/her, and the Government has the responsibility to protect it from happening. In order to comply with this responsibility, the governments, including that of Rwanda, take all measures to prevent it, including the enactment of criminal laws, which provide for all crimes that can be committed against the body of a person and their penalties as well as compensation for prospective victims. It is in this context, that Law N° 68/2018 of 30/08/2018 determining offences and penalties in general as modified and complemented to date, in Part II, Section 1, Chapters I and II, provides for crimes of genocide, crimes against humanity and war crimes, murder, assault and battery, torture and abortion⁵.

The provision related to the inviolability of the human being, is also found in article 4 of the African Charter on Human and Peoples' Rights, which provides that human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of

4 Linda C. McClain, *Inviolability and Privacy: The Castle, The Sanctuary, and The Body*, in 7 *Yale Journal of Law & The Humanities* 195 (1995). Boston University School of Law Scholarly Commons at Boston University School of Law. Available at: https://scholarship.law.bu.edu/faculty_scholarship/2889. Accessed on 19/04/2024 at 03:50. 5 See articles 91-127.

Page 17

his person. No one may be arbitrarily deprived of this right.

Among the acts that violate the rights referred to in Article 4 of the African Charter on Human and Peoples' Rights, in the document titled "Major African Legal Instruments" written by Sheila B Keetharuth⁶, based on various decisions taken by the African Commission on Human and People's Rights, highlighted the following:

- Shootings by police officers,
- Executions based on the authority of a defective trial,
- Denial of food and medicine attention, burning people in sand and subjecting them to torture,
- Killings, disappearances, assassination by unknown people, which the government did not attempt to prevent or investigate afterwards,

- Massacre of a large number of Rwandan villagers by the former Rwandan armed forces (Ex FAR) and the many reported extrajudicial executions for reasons of their membership of a particular ethnic group 7.

6 Sheila B Keetharuth, Major African legal instruments, P.175-176, <https://addis.unfpa.org/en/resources/major-african-legal-instruments>. Accessed on 17/04/2024 at 03 :50. 7 27/89, 46/91, 99/93, Organisation Mondiale contre la Torture and Association Internationale des Juristes Démocrates, Comité International des Juristes (CIJ), Union Interafricaine des Droits de l'Homme v Rwanda, 10th Annual Activity Report [in Compilation

Page 18

In this case, in order for the petitioner to allege that Article 143 of Law N° 68/2018 of 30/08/2018 mentioned above is contrary to Article 13 of the Constitution, it must clearly show how the article he is requesting to be repealed is in direct relation with the inviolability of the human being provided for in the aforementioned Article of the Constitution. This was also established by the Supreme Court of Canada (Bedford v. Canada (P.G.),

[2013] 3 R.C.S. 1101, paragraph 76) whereby it elucidated that the petitioner must show clearly how the impugned article is related to the loss suffered⁸.

The aforementioned elucidations indicate that there is violation of the right of inviolability of the human being, there must have been any act that invaded a person's body in a bid to harm it and illegally done, and the petitioner was required to prove to the Court how penalizing public indecency provided for by the contended articles (causal link) is in relation with the right

1994–2001, IHRDA, Banjul 2002, pp. 320–324]. “These communications were filed before the 1994 genocide [against Tutsi], but were decided afterwards, in 1996–1997”, cité par Sheila B Keetharuth, Major African legal instruments, p. 176. 8 “ The rule of the sufficient causal link does not require that the legislative or other measure alleged against the State be the sole or principal cause of the harm suffered by the petitioner, and if it is addressed by reasonable inference, on the balance of probabilities (Canada Prime Minister). “The requirement for a sufficient causal link takes context into account and focuses on the existence of a real, not hypothetical link [...]”.<https://decisions.scc-csc.ca/scc-csc/scc-csc/fr/item/13389/index.do>. visited on 25/05/2024 at 3:50.

Page 19

mentioned in Article 13 of the Constitution providing for the inviolability of a person, it failed to prove it. b. Regarding the vagueness of public indecency

[25] FADA filed a petition stating that Article 143 of Law N° 68/2018 of 30/08/2018 mentioned above is vague because the offence of public indecency is differently understood by everyone, causing some people to be prosecuted for that crime while others are not, which violates Article 13 of the Constitution. Given the definition of the inviolability of the human

being provided for in that article mentioned above, the Court finds that the petitioner does not demonstrate how the vagueness of the offence provided for in the contended article causes a person to be physically harmed or subjected to various other acts that threaten his/her inviolability.

[26] Regarding the judgment rendered on 13/08/2021 by the Constitutional Court of Uganda in *Center for Domestic Violence Prevention and Others v Attorney General*⁹ that FADA provided in support of its petition, the Court finds that the judgment is irrelevant to the present petition for the following reason. In that case, the petitioner argued that Articles 210 and 131 of the Anti-

⁹ Constitutional petition n° 13 of 2014) [2021] UGCC 20. ¹⁰ “Pornography means any representation through publication, exhibition, cinematography, indecent show, information technology or by whatever means, of a person engaged in real or stimulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement”. ¹¹ “(1) A person shall not produce, traffic in, publish, broadcast, procure, import, export, sell or abet any form of pornography. (2) A

Page 20

Pornography Act is contrary to the Constitution of Uganda in article 28(12)¹² and article 44(c)¹³. In ruling that the contentious provisions were contrary to the Constitution of Uganda, the Court held that “The Act does not provide what amounts to ‘indecent show’ and the threshold over which an action can be measured to determine whether it falls within the ambit of ‘indecent show’. An imprecise statement of the prohibited conduct may lead to inconsistent enforcement of the law, uncertain application of the law or failure to preclude conduct that it was intended to prohibit”¹⁴. With reference to those elucidations, it held that these provisions are contrary to the Constitution of Uganda in its article 28(12) which provides that for an offence to exist and its penalty, it must be provided for by law (the principle of legality of offences and penalties), and article 44(c) which provides for the right to a fair trial.

As elucidated above, what has just been mentioned is different from what FADA is petitioning in this case, as it argues that the fact that the offence

person who produces or participates in the production of, or traffics in, publishes, broadcasts, procures, imports, exports or in any way abets pornography contrary to subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding five hundred currency points or imprisonment not exceeding ten years or both”. ¹² “Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law”. ¹³ “Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms— ...(c) the right to fair hearing”. ¹⁴ Constitutional petition N° 13 of 2014) [2021] UGCC 20, paragraph 53.

Page 21

provided for by Article 143 of Law N° 68/2018 of 30/08/2018 mentioned above is vague, it threatens the inviolability of a human being provided for in Article 13 of the Constitution.

Basing on the abovementioned elucidations, the Court finds that, in case the petitioner is unable to demonstrate to the Court how Article 143 of Law N° 68/2018 of 30/08/2018 mentioned above is contrary to Article 13 of the Constitution, his petition on this issue lacks merit.

1. Determine whether article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general as modified and complemented to date is contrary to articles 15 and 16 of the Constitution

Uwingabe Murenzi Assna representing FADA, assisted by Counsel Karangwa Olivier and Counsel Umwari Sylvie, argue that article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general punishes public indecency in violation of article 15 of the Constitution of the Republic of Rwanda, which provides that all human beings are equal before the law and enjoy equal protection of the law; because in the enforcement of article 143 mentioned above, the law punishes women more than men.

They explain that when they look at the application of that article, they realize that among the people who have been prosecuted for public indecency, girls were prosecuted based on their clothing style in

Page 22

public more than that was done to men or boys. They allege that this is a problem because this law does not treat people in the same way and yet they are equal before the law as provided for in Article 15 of the Constitution.

They argue that, based on this article of the law, a girl or a woman who is seen with her shirt off from the upper part of her body is punished, while a man who does the same is not punished. They give the example of Mugabekazi Liliane, who was seen wearing transparent clothes at a concert and was arrested and detained, and is now being prosecuted for this offence of public indecency, and they aver that this is discrimination against her and yet it is prohibited by Article 16 of the Constitution and the International Convention on the Elimination of All Forms of Discrimination against Women that Rwanda has ratified¹⁵.

In support of their arguments, they rely on the case of *Effie Krokos v. the City of Loveland, Colorado State*, who won \$50,000 in damages after being ejected from a stadium for removing her shirt and her breasts were exposed. They argue that the Court held that she should be compensated because her rights were violated when she was arrested and kicked out of the stadium because she took off her top as a girl, while the men took off their shirts and were left alone¹⁶.

15Convention on the Elimination of All Forms of Discrimination against Women of 01 May 1980 ratified by Presidential Order No 431/16 of 10/11/1981. 16<https://www.scribd.com/document/434016630/Effie-Krokos-Settlement-Agreement>

Page 23

They also submit that even though the issue started with Effie Krokos prosecuted for keeping her breasts naked and exposed, this issue made it clear that there is a lack of equality before the law for men and women when it comes to punishing crimes related to public indecency.

They sustain that, based on that statement, the provision of the law that punishes public indecency in this way, is contrary to the Constitution because during its enforcement, it does not treat men and women in the same way, or they are not equal before the law when it is being enforced, so they request that it should be abolished because it violates human rights in terms of equality before the law and non-discrimination.

State Attorney Batsinda Aline, representing the Government of Rwanda, alleges that FADA does not criticize article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general in its phrasing compared to article 15 of the Constitution, that instead what they focus on is its enforcement, where they indicate that there are those who were prosecuted based on that article, and those who were not. She states that, in consideration of the article phrasing, she realizes that there is no inequality between women and men, so she finds that it should not be repealed because it is not contrary to Article 15 of the Constitution.

She also maintains that Rwanda is a State governed by the rule of law and which is committed to fighting any kind of discrimination as provided for in its Constitution, and that Rwanda is one of the countries that ratified the International Covenant on Civil and Political

Page 24

Rights, this Covenant, in its articles 2.1 and 3, explains that the State parties are committed to respecting all the rights provided under it for all its people without any discrimination, and are committed to respecting the equality between men and women¹⁷; therefore, it cannot enact a law that differently treats men and women, so the contended provision does not violate Article 16 of the Constitution because it does not imply any discrimination.

Regarding the case of Mugabekazi Liliane, who was spotted wearing transparent clothes at a concert and who was arrested and detained and is currently being prosecuted for public indecency, State Attorney Batsinda Aline alleges that girl's clothing style itself was shameful, that is why all people kept commenting on her photos.

She concludes by sustaining that, based on the elucidations she provided, she realizes that Article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general as modified and complemented to date, is not contrary to the Constitution of the Republic of Rwanda in its articles, 13, 15 and 16 so that it should be repealed.

17Article 2.1: “ Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”Article 3 provides: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.

Page 25

DETERMINATION OF THE COURT

Article 15 of the Constitution provides that all human beings are equal before the law and enjoy equal protection of the law. And Article 16 provides that all Rwandans are born and remain equal in rights and freedoms. That article also provides that any form of or propaganda for discrimination, including on the basis of ethnicity, family or descent, clan, skin, colour, sex, region, social status, religion or belief, opinion, wealth, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law.

The article to be repealed as sought by the petitioner sustaining that it is contrary to the aforementioned articles of the Constitution, is Article 143 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general as modified and complemented to date, which provides that any person who performs an indecent act in public, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than six (6) months and not more than two (2) years.

In order to find out whether this article contains inequality before the law and discrimination based on gender, thus conflicting with articles 15 and 16 of the Constitution according to the petitioner, it is important to first explain how these articles are construed. As elucidated in the judgment RS/SPEC/0001/16/CS

Page 26

rendered by this Court on 23/09/2016 involving Akagera Business Group (ABG) 18, Articles 15 and 16 of the Constitution are so interrelated that it is difficult to explain what they mean when read separately. As explained in that case, Article 15 states that all people are equal before the law and enjoy the same protection of the law. This means that there should not be any discrimination that prevents people from being protected in the same way or deprive them of the rights in case they are entitled to them. Article 16 provides that dividing is considered discriminatory and is not allowed by the Constitution. Both articles would be considered to contain the same principle of non-discrimination between people in what they are entitled to or prohibited to do in order to keep some of them away from what they are legally entitled to.

The principle of equality before the law and non- discrimination can be found in the International Treaties that Rwanda ratified, including the following: i. Universal Declaration of Human Rights of 1948, its Article 7 provides that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination”. ii. International Covenant on Civil and Political Rights, 1966, its article 26 provides that “All

18 Rwanda Law Reports, V. 2, 2017, P.1.

Page 27

persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status". Particularly with regard to equality between men and women, Article 3 stipulates that “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”. iii. Convention on the Elimination of All Forms of Discrimination against Women, in its article 1, it provides that “for the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”, Article 15.1. of that convention

Page 28

provides that “States Parties shall accord to women equality with men before the law”¹⁹. iv. Maputo Protocol provides in its article 8 (f) that “women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: ... (f): reform of existing discriminatory laws and practices in order to promote and protect the rights of women” ²⁰.

As mentioned above, the principle of equality before the law means that people are equally treated before the law, without any inequality or discrimination, and that the law in force equally treats those within its scope. Given the articles 15 and 16 of the Constitution and the aforementioned International Conventions, it is obvious that Rwanda is determined to abide by that principle.

FADA which filed a petition, states that article 143 of the abovementioned Law N° 68/2018 of 30/08/2018 does not comply with that principle, because the offence of public indecency is prosecuted against women only, whereas it is not prosecuted when committed by males, therefore it realizes that there is no equal protection between men and women in this article, and that the article incorporates discrimination against women, that is why it requests that it should be repealed.

19 Rwanda adopted this Convention on 02/03/1981. 20 Rwanda adopted this Convention on 25/06/2004.

Page 29

Regarding the criteria for repealing the law, in the case RS/INCONST/SPEC00001/2022/SC, Murangwa Edward v State Attorney, this Court explained that the practice which is inconsistent with the provisions of the law and is not corrected by declaring the law unconstitutional when the law itself is not contended²¹.

Regarding the fact that the law is not repealed based on the way it is enforced, that rather its provisions are considered, in the case decided by the Supreme Court of India in "The Collector of Customs, Madras v Nathella Sampathu Chetty and another", the Court held that "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise, invalid as being unreasonable cannot be saved by its being administered in a reasonable manner"²².

In this regard, in the case decided by the High Court of Tanzania, Rev. Christopher Mtikila v. Attorney General, 1995 TLR 31, the Court held that "In order to determine whether a particular law is repugnant or inconsistent with the fundamental right, it is the provision of the Act that must be looked at and not the manner in which the power under the provision is actually exercised. Inconsistency or repugnancy does not depend upon the

²¹RS/INCONST/SPEC00001/2022/SC rendered on 22/12/2023, paragraph 110. ²²The Collector of Customs, Madras vs Nathella Sampathu Chetty and Others, on 25 September, 1961, p. 25. <https://indiankanoon.org/doc/1193965/>, accessed on 18/04/2024 à 10h00.

Page 30

exercise of the power by virtue of the provisions in the Act but on the nature of the provisions themselves"²³.

In respect of this case, what the petitioner criticizes about article 143 of the abovementioned Law No. 68/2018 of 30/08/2018, is that in its enforcement there is discrimination between men and women, where the offence of public indecency is prosecuted for women but men are not prosecuted, and it states that there is no equality, that instead it is discrimination against women.

The Court finds that the wording of that article does not imply any discrimination because it provides that anyone who commits public indecency commits an offence. This means that the offence can be prosecuted for a woman as it would be prosecuted for a man. The fact that it is in its enforcement that the petitioner finds a problem, that does not make it to request that it should be repealed alleging that it is contrary to the Constitution as established in the aforementioned cases; apart from the fact that it did not produce any evidence to the Court proving that there is any male person alleged to have committed public indecency who was not prosecuted simply because he is male.

An example of a law that discriminates between men and women is Article 354 of Law N° 21/77 of 23Rev. Christopher Mtikila vs Attorney General [1995] TLR 31. Cited in Raymond Paul Kanegene and Bob Chacha Wangwe vs The Attorney General, p. 20. <https://tanzlii.org/akn/tz/judgment/tzhc/2020/4032/eng@2020-11-26/source.pdf>. Accessed on 25/04/2024 at 2:00.

Page 31

18/08/1977, which established the penal code that was in force in Rwanda, which provided that a woman convicted of adultery will incur a range of sentence from one month to one year in prison, while a man convicted of the same crime will incur a range of sentence from one month in prison to six months and a fine of one thousand francs or only one of these penalties. In that law, it is clear that there is discrimination and discrimination between men and women, because if they committed the same crime, the woman was given a heavy punishment, but the man was given a lenient one. A petition against that article was filed to the Supreme Court which found it unconstitutional. 24

Basing on the aforementioned elucidations, the Court finds that neither the letter nor the spirit of Article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general as modified and complemented to date, is not contrary to Article 15 and Article 16 of the Constitution, and as a result, the petition filed by FADA is unfounded. III. DECISION OF THE COURT

Holds that the petition filed by Feminist Action Development Ambition (FADA) seeking to declare that Article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general as modified and complemented to date is contrary to the Constitution of the Republic of Rwanda; is unfounded.

24See judgment n° RS/Inconst/Pén.0001/08/CS rendered on 26/09/2008, Re Murorunkwere Spéciose

Page 32

Holds that Article 143 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general as modified and complemented to date, is not contrary to Articles 13, 15 and 16 of the Constitution of the Republic of Rwanda.

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