

UGANDA / JUDGMENT

Nabagesera & 3 ors v Attorney General & Anor (Misc. Cause No.033 of 2012) [2014] UGHCCD 85 (24 June 2014)

[2014] UGHCCD 85

COURT

HC: Civil Division (Uganda)

CASE / FILE NUMBER

Misc. Cause No.033 of 2012

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 033 OF 2012

1. JACQUELINE KASHA NABAGESERA
2. FRANK MUGISHA
3. JULIAN PEPE ONZIEMA ::::::::::::::: APPLICANT
4. GEOFFREY OGWARO

VERSUS

1. ATTORNEY GENERAL
2. REV. FR SIMON LOKODO ::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

Four applicants to wit; Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema and Geoffrey Ogwaro represented by M/s Onyango & Co. Advocates filed this application by way of Notice of Motion under Article 50 (1) of the Constitution and O. 52 rr 1 & 3 of the Civil Procedure Rules against the Attorney General and Rev. Fr. Simon Lokodo as respondents represented by the Attorney General's Chambers. The applicants sought for orders from this court that:-

1. The action of the second respondent on 14.02.2012 to order the closing of an ongoing workshop that the applicants organized and/or had been invited to and were attending constituted an infringement of the applicants and other participants' right to freedom of assembly guaranteed under Article 29 (1)(d) of the Constitution.
2. The action of the second respondent to order the closing of the workshop constituted an infringement of the applicants and the participants' right to freedom of speech and expression guaranteed under Article 29 (1)(a) of the Constitution.
3. The action of the second respondent to order the closing of the workshop constituted an infringement of the applicants and other participants' right to participate in peaceful activities to influence policies of government through civil organizations guaranteed under Article 38 (2) of the Constitution.
4. The action of the second respondent to order the closing of the workshop while no other workshop taking place at the same time, at the same venue was arbitrary and unjustified and constituted an infringement of the applicants' and other participants' rights to equal treatment before the law under Article 21 of the Constitution.
5. The first respondent is vicariously responsible for the actions of the second respondent since it was carried out in his official capacity as Minister for Ethics and Integrity.
6. The costs of the application be granted against the respondent.

The application is supported by the affidavits of the first, second and fourth applicant which set out the brief grounds as follows:-

1. That the first applicant was the organizer while the second, third and forth applicant were invited to attend the workshop on planning, Advocacy and leadership organized by Freedom and Roam Uganda (FARUG) at Imperial Resort Beach Hotel Entebbe scheduled for between 9th February 2012 until 16th February 2012.
2. The said workshop was to train and equip participants from various walks of life with project planning, advocacy, human rights, leadership and business skills.
3. The second respondent in his official capacity as Minister for Ethics and Integrity appeared at the workshop venue on 14th February 2012 and on allegation that the workshop was an illegal gathering of Homosexuals ordered the workshop closed and immediate dispersal of the applicants and other participants.
4. No other workshop taking place at Imperial Resort beach Hotel Entebbe on 14th February 2012 was ordered closed.
5. The closure of the workshop and the dispersal of the applicants and other participants was unjustified and constituted an infringement of their fundamental rights on freedoms.

Several affidavits in reply were filed deponed to by the second respondent, Rev. Fr. Simon Lokodo, George Oundo and one Abola Nicholas. The deponements are so elaborate that it is cumbersome to reproduce all of them in this ruling. I will however make reference to the same in making my ruling.

The agreed issues for resolution were as follows:

1. Whether by organizing and attending the workshop at Imperial Resort Beach Hotel, the applicants were engaging in illegal and unlawful activities.
2. Whether the applicants' Constitutional rights were unlawfully infringed when the second respondent closed down their workshop.
3. Whether the second respondent can be sued in his individual capacity.
4. Whether the applicants are entitled to the remedies prayed for.

This case proceeded on the basis of affidavit evidence in support and those against the application. Court allowed respective counsel to file written submissions in support of their respective cases.

I have considered the application as a whole and the law applicable and the able respective submissions by learned counsel. I will go ahead and resolve each issue as argued starting with issue 1.

Whether by organizing and attending the workshop at Imperial Resort Beach Hotel, the applicants were engaging in illegal or unlawful activities.

In his submissions, Mr. Onyango learned counsel for the applicants argued that S. 148 of the Penal Code Act only prohibits homosexual sex acts. That there are no related offences which are committed by aspersion, suggestion, innuendo or apparent association. Learned counsel argued that the affidavit of the Minister and Mr. Abola don't show that the workshop participants committed any criminal offence as described under S. 145 of the Penal Code Act. Further that since the participants were not found engaging in homosexual acts per se nor did they show intent to commit the acts, there was no crime committed under S. 145 of the Penal Code Act and therefore the closure of the workshop could not be construed as a legitimate attempt to prevent the commission of a criminal offence.

Ms Patricia Mutesi, learned counsel for the respondent submitted to the contrary that the Minister's affidavit states that he established that the workshop which was attended by homosexuals aimed to encourage participants to engage in and promote same sex practices. Further that it aimed to equip them with individual and organizational knowledge and skills to further their objective of promoting same sex practices. That the Minister closed the workshop on the ground that the applicants were using it to promote and encourage homosexual practices which was unacceptable and unjustifiable in a country whose laws prohibit such practices.

As rightly submitted by Ms Patricia Mutesi, it is a principle of criminal law that in addition to the substantive offence, it is also prohibited to directly or indirectly encourage or assist the commission of the offence or to conspire with others to commit it regardless of whether the offence is actually committed or not. In the laws of Uganda, S. 145 of the Penal Code Act prohibits homosexual acts. It provides that:-

“145. Un natural offences

Any *person who-*

a) has carnal knowledge of any person against the order of nature;

b) has carnal knowledge of an animal; or

c) permits a male person to have carnal knowledge of him or her against the order of nature commits an offence and is liable to imprisonment for life.”

Further to this, S.21 prohibits incitement where a person incites another person to commit an offence whether or not the offence is committed. It provides that such an offence is punishable by imprisonment for ten years. In the same vein, S. 390 and 391 of the Penal Code Act Laws of Uganda prohibit conspiracy where a person conspires with another to commit an offence. S. 392 (f) prohibits conspiracy to effect any unlawful purpose e.g promotion of an illegality. With the above provisions of the law which are still in force, I agree with the submission by learned counsel for the respondent that the applicants’ promotion of prohibited homosexual acts in the impugned workshop would thus amount to incitement to commit homosexual acts and conspiracy to effect an unlawful purpose which is unlawful.

The applicants relied on the finding of the court in **Kasha Jacqueline Vs Rolling Stone Limited & another, Misc. Cause 163 of 2010** to argue that:-

****“the scope of S. 145 of the Penal Code Act is narrower than gaysim generally. That one has to commit an act under S. 145 to be regarded as a criminal”.***

I agree with learned counsel for the respondent that the above case is distinguishable as it involved determining whether the publication of a news Article identifying persons perceived to be homosexuals and calling for them to be hanged, violated their rights. The cited interpretation in relation to the scope of S. 145 of the Penal Code Act was limited to whether in the absence of evidence of homosexual acts, persons “perceived” as homosexuals had committed any offence which would warrant such treatment by the Newspaper. In fact the above case did not involve any allegation of promotion of homosexual practices. Therefore the trial judge in that case was never called upon to consider other sections of the Penal Code Act relating to promotion or incitement of any offence. After consideration of the affidavit evidence on record, there is ample proof that the first, second and third applicants were members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community in Uganda which encourages same sex practices among homosexuals. This proof can be found in the affidavit of the Minister, the second respondent. The Minister’s affidavit was not rebutted by any of the applicants thus leaving the following

averments intact that:

* The first, second and third applicants' organizations (FARUG and SMUG) have previously organized workshops targeting homosexuals which were organized with LGBT organizations which encourage homosexuals and support or fund their projects. (see paragraph 5 of the affidavit).

* In these workshops, homosexual participants were taught 'Human Rights' and Advocacy that it is a human right for persons to practice sex with members of the same sex and encouraged to develop self esteem and confidence about the practices. They were encouraged to train other homosexuals and to conceal the objectives of training activities from the public and law enforcement officers because the practices are prohibited by the law. (see para 6)

* Further to this, the Minister depones that participants in the workshops were trained to become more adept in same sex practices by distribution of same sex practice literature and information, and training on same sex among homosexuals. In paragraph 7, the Minister reveals that the participants were trained to similarly train other homosexuals and strengthen their LGBT organizations to achieve the objective of encouraging and supporting homosexuals. According to paragraph 8, participants were also encouraged to train other homosexuals in 'Human Rights and Advocacy training', 'project planning', 'Advocacy and leadership' with the aim to equipping homosexuals with the confidence, knowledge and skills to conduct and promote their same sex practice.

The evidence adduced by the second respondent was minutely corroborated by that of George Oundo, a former associate of the applicant. This evidence was equally not rebutted by the applicants. He avers that the first, second and third applicants are admitted homosexuals and head or belong to LGBT organizations that is FARUG and SMUG which conduct activities aimed at encouraging, supporting and promoting same sex practices among homosexuals in Uganda. This revelation is contained in Oundo's affidavit paragraphs 3, 4, 5 and 7.

In paragraph 17 thereof Mr. Oundo reveals that the applicants' organizations and a Swedish LGBT organization (RFSL) participated in project activities which encouraged homosexuals to accept, continue and improve their same sex practices including distributing homosexual literature/ videos, illustrating same sex techniques; training homosexual youths to safely engage in the same sex practices by distributing condoms and literature on safe gay sex which would effectively help them implement the project activities. (see para 20) According to Mr. Oundo in paragraph 21, workshops' participants were encouraged to share experiences of their homosexual practices.

Although the first applicant swore an affidavit in rejoinder, it only had general denials and was restricted to FARUG. There was no rebuttal of Mr. Oundo's detailed evidence that FARUG's project activities encouraged same sex and conducted training in project planning, advocacy and leadership with the aim of equipping homosexuals and members of LGBT organizations to effectively carry out such activities. All these activities amount to direct or indirect promotion of same sex practices.

Available evidence shows that the applicants' closed workshop was aimed at encouraging persons to engage in and or promote same sex practices in future. The organizers and participants were not willing to open their workshop activities to scrutiny. According to the affidavit of the Minister and Mr. Abola, unlike other workshops, the applicants' workshop was not displayed at the hotel. The first applicant refused Mr. Abola a government official to observe the workshop proceedings and by the time the Minister arrived to observe the proceedings, they had been halted and the participants were having a break. In view of the law cited above, it was reasonable and justified for the Minister to conclude that this workshop was engaging in direct and indirect promotion of same sex practices which is prohibited by S. 145 and 21 of the Penal Code Act.

I agree with learned counsel for the respondents that the Minister acted in public interest of Uganda to protect public moral standards which fall under his docket.

Issue 2: whether the applicants' Constitutional rights were unlawfully infringed when the second respondent closed the workshop.

The applicants allege that the Minister's actions violated their rights to freedom of expression, political participation, freedom of association, assembly and equality before the law.

On the other hand, the Minister states that he closed the workshop on the basis that it was aimed at encouraging and promoting homosexual practices which was unacceptable and unjustifiable in a country whose laws prohibit such practices. That his action was undertaken in public interest.

As rightly submitted by learned counsel for the respondent, Article 43 of the Constitution permits limitations of human rights in the public interest. Under the Constitution, these rights are guaranteed to all persons. However they don't fall within the category of non-derogable rights under Article 44. Therefore the exercise of such rights can be limited in certain instances.

Article 43 of the Constitution states that:

“1. In the* *enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the..... rights and freedom of others or public interest.*

2. Public interest under this Article shall not permit

a) Political persecution

b) Detention without trial

c) any limitation..... that is beyond what is acceptable and demonstrably justifiable in a free/ democratic society, or what is provided in this Constitution.”

My reading of the above provisions persuades me that it recognizes that the exercise of individual rights can be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable, acceptable in a free democratic society. Whereas the applicants were exercising their rights of expression, association, assembly etc, in so doing, they were promoting prohibited acts which amounted to action prejudicial to public

interest. Promotion of morals is widely recognized as a legitimate aspect of public interest which can justify restrictions.

International Human Rights Instruments reflect this aspect. For example Article 27 of the African Charter of Human and Peoples' Rights (ACHPR) states that:-

“*The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”*

ACHPR also recognizes that:-

“17(3). The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state.

29(7) every individual has a duty to preserve and strengthen positive African cultural values and to contribute to the moral well being of society”.

Under our domestic law, the heading to Chapter XIV of the Penal Code Act is “Offences Against Morality.” Under this chapter, several acts including homosexual acts are prohibited because they are contrary to Ugandan moral values.

I agree with Ms Patricia Mutesi that criminal law by its very nature is concerned with public interest and aims at safeguarding it. Indeed crime is recognized as an unlawful act against the public which is punished by the state for being contrary to order, peace and the well being of society. Because criminal law forbids and aims at prevention of conduct which threatens or inflicts substantial harm to the individuals or public interest, it can also create valid restrictions on the exercise of rights. Thus in order to maintain the well being of society, criminal law can restrict unlawful exercise of human rights.

In relation to the complaints by the applicants herein, their promotion of prohibited acts by the workshop organizers was unlawful, since such promotion in itself is prohibited by law as amounting to incitement and conspiracy to effect unlawful purposes. Since the applicants in the exercise of their rights acted in a manner prohibited by law, it was not a valid exercise of these rights. It was also prejudicial to public interest.

In trying to show that the applicants' rights were violated, learned counsel for the applicant cited the provisions of international Human Rights Instruments to elaborate the scope of those rights. The applicants complained that the Minister's actions violated their right to freedom of expression. Freedom of expression is guaranteed under Article 29 (1)(a) of the Constitution.

However, as I have stated herein above, under Article 43 this right is restricted in public interest. It is trite law that any rights must be exercised within or according to the existing law. The exercise of rights may be restricted by law itself. Therefore any expression is restricted in as far as it must be exercised according to the law. This is recognized under Article 9 (2) of the African Charter on Human and Peoples rights (ACHPR) which states that:

individuals have the right to express and disseminate opinion within the law

In order to prove that the applicants' freedom of expression was violated, learned counsel for the applicants referred to the case of **Law office Ghazi Suleiman Vs Sudan II (2003) AHRLR (ACHPR 2003)** in which Mr. Ghazi was restricted from gathering to discuss (and promote) human rights. The state of Sudan claimed that it had restricted his speech because it was a threat to national security and public order and thus prejudicial to the public interest.

The African Commission on Human Rights held that under Article 9 of the ACPHR, expression has to be exercised within the law although learned counsel for the applicants omitted to state this. It found that there was no evidence that Mr. Ghazi had acted outside the law since, his speech always advocated for peaceful action and had never caused any unrest. In other words Mr. Ghazi in exercising his speech and discussing human rights had acted within the law.

I therefore agree with Ms Patricia Mutesi that Ghazi's case is distinguishable from the applicant's case since Mr. Ghazi did not exercise his freedom of expression to promote any illegal acts. On the contrary the applicants herein were using the pretext of training in human rights advocacy to promote homosexual acts which are prohibited by the Ugandan laws.

According to the applicants the workshop was intended to train participants on how to advocate their human rights, build leadership and project planning skill as well as share experiences. However, there was no rebuttal of the evidence of the Minister and George Oundo that the training actually aimed at equipping participants to lead organizations which support homosexual acts and plan and implement projects which promote homosexual acts. I am therefore not persuaded on a balance of probabilities that the closing of the workshop stopped participants from discussing human rights and developmental topics thus violating their right to freedom of expression.

Learned counsel for the applicant submitted that even if the Hon. Lokodo's assertion that the applicants were gathered to promote homosexuality is correct, such a proposition would not justify any infringement on the right to freely express one's opinion. Learned counsel cited the holding in *Charles Onyango Obbo and anor Vs Attorney General SC Constitutional Appeal No.2 of 2002* that a person's expression is not excluded from Constitutional protection simply because it is thought by others to be erroneous, controversial or unpleasant.

In my considered view, protection of 'unpleasant' or controversial, false or wrong speech does not extend to protecting the expression that promotes illegal acts which in itself is prohibited and in fact amount to the offence of incitement or conspiracy to incite which I have alluded to earlier in this ruling.

Regarding the right to political participation, learned counsel for the applicants relied on Article 38(2) of the Constitution which guarantees persons the right to participate in peaceful activities to influence the policies of government through civic organizations. Whereas I doubt the relevancy of this submission to the case under consideration, like I have held above, the exercise of this right necessitates a conduct in accordance with the law. If the exercise of this right is contrary to the law then it becomes prejudicial to the public interest and there can be a valid restriction on the exercise of the right under Article 43.

Learned counsel for the applicants further cited Article 7 of the **UN Declaration on Protect of Human Rights** which guarantees everyone the right individually and in association with others to develop and discuss new human rights ideas and to advocate their acceptance. The same declaration however recognizes that people can be restricted in these activities in accordance with the law. Article 3 thereof and relied upon by learned counsel for the respondents brings this exception clearly out. It states that:-

“*domestic law is the framework within which human rights are enjoyed and in which human rights promotion activities should be conducted.”*

Regarding freedom of association and assembly, learned counsel for the applicant cited Article 29 (1)(d) and (e) of the Constitution which guarantees these rights. But as rightly put by learned counsel for the respondents these rights also have to have the corresponding duty and requirement that persons exercising them must act in accordance with the law. This is equally provided for under Article 10 of the ACHPR relied upon by both learned counsel.

Learned counsel for the applicants cited the case of **Civil Liberties Organizations Vs Nigeria, 101/93 [8th Annual Activity Report 1994 – 1995]** in which the commission considered whether the composition and powers of a new governing body for the Nigerian Bar Association violated *inter alia* Nigerian Lawyers’ right to freedom of association under Article 10 of the African Charter. This case related to Government interference with the formation of associations and restrictions on the capacity of citizens to join associations. The African Commission held that that the requirement that the majority of the membership of the Nigerian Bar Association be nominated by the Nigerian Government instead of the lawyers themselves was an interference with the right to free association of the Bar Association.

The instant case is distinguishable from the cited authority by learned counsel for the applicants. In the case under consideration, the Minister’s action was based on the agenda and activities of LGBT organizations in promoting homosexual acts. There was no interference in the formation of these organizations, their existence or membership. Their activities were only restricted when it was established that they were using the workshop to promote prohibited and illegal acts.

Learned counsel for the applicant cited Article 1 of the **UN General Assembly declaration on promotion of Human Rights** which states that persons shall have the right individually or in association with others to discuss and advocate for new human rights ideas and principles. But as I have already noted in this ruling, Article 3 of the same declaration provides that domestic law is the framework within which human rights are enjoyed and all activities shall be conducted.

Regarding freedom of assembly, learned counsel for the applicant cited a case of **Baczowski & ors versus Poland (Application No. 1543 of 06)**. He supplied a summary of the courts decision but he made a lengthy quotation of the court decision which I could not readily verify. However, the European court of Human Rights held that refusal to allow pro-homosexuals group to assemble and promote their homosexual lifestyle was a violation of right of assembly.

I however agree with the submission by learned counsel for the respondent that at the time of the said decision Poland had no law which prohibited homosexual acts since 1932 when they were recognized by the law. The cited case is therefore distinguishable from the instant because by the time of determining that case, homosexuals were legally entitled to promote their practices and there was no illegality arising from the exercise of their right to assemble. *(Refer to the Respondents' Document 1 on LGBT Rights in Poland*)

The European court of Human Rights correctly held that the refusal to grant them a permit to assemble could not be justified in the public interest and amounted to an unlawful restriction of their right to assemble.

Learned counsel for the applicant argued that the approach taken by the European Court on Human Rights is analogous and is a compelling basis for interpreting Article 29 of the Uganda Constitution. I don't agree with this preposition. That court's approach should be viewed in the context that there is no member country of the European community which prohibits homosexual acts which reflects the moral standards of Europe.

As rightly submitted by learned counsel for the respondents, Ugandan circumstances are different because homosexual acts are offences against morality and culture and their promotion is prohibited by law making it prejudicial to public interest. Uganda and Europe have different laws and moral values and accordingly define their public interests differently. As rightly put by learned counsel for the respondents, Uganda is not signatory to the European Convention on Human Rights. Therefore its precedents are not binding but must be read in a manner consistent with Ugandan laws and norms. The suggestion by learned counsel for the applicants that the European standard should be applied while considering Uganda's obligation under the African Charter to which it is signatory is misconceived. Article 61 of the Charter states that the African Commission is obliged to take into consideration international conventions which lay down rules expressly recognized by Member States of the OAU. It must also consider African practices consistent with international norms, customs generally accepted as law and principles of law recognized by African states as well as legal precedents and doctrine. As rightly argued by the respondents, international jurisprudence is considered as a legal precedent depending on whether the cited rules and legal principles are expressly recognized by African states and reflect African practices. This court takes note that the recognition of homosexuals as a Minority whose acts are legitimately protected is not a principle of law and norm generally recognized by all African states nor are homosexual acts recognized as an accepted African practice. Its promotion is an unlawful exercise of the right to association and assembly which is prejudicial to Uganda's public interest.

Learned counsel for the applicant also submitted regarding equality under the law saying that the actions of the second respondent treated the applicants differently from other Ugandans who were holding workshops at the same hotel on the same day and thus violated the right to equal treatment before and under the law. He cited Article 21 (1) of the Constitution which provides that:-

“*all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.”*

Learned counsel also cited the case of **Thomas Kwoyelo Vs Attorney General Constitutional Reference No. 36 of 2011** where the applicant had been denied amnesty yet the same had been granted to 24,066 other people. Court held that the DPP had not given any objective and reasonable explanation why he did not sanction the amnesty application of the applicant which was inconsistent with Article 21 (1) of the Constitution.

It is my considered view and I agree with learned counsel for the respondent that the ordinary meaning of persons being equal before and ‘under the law’ in that Article is that all persons must always be equal subject to the existing law even when exercising their rights. Where the law prohibits homosexual acts and persons knowingly promote those acts, they are acting contrary to the law. Such persons cannot allege that the actions taken to prevent their breach of the law amount to denial of ‘equal protection’ of the law because the law abiding people were not equally restricted. There is no evidence adduced by the applicants to show that the other workshops which were not stopped also organized and were attended by homosexuals and members of LGBT organizations or that they had the same agenda.

Since the applicants were engaging in the promotion of acts contrary to the law which law has not yet been declared unconstitutional they could not enjoy the same protection of the law persons who were acting in accordance with the law were enjoying. Had the applicants acted otherwise their workshop would have proceeded like the other workshops. The case of Thomas Kwoyelo (supra) is distinguishable because what he sought is provided by the law. The court found that it was discriminatory that Kwoyelo was denied amnesty which had been granted to other rebels for the same acts of rebellion and under the same Act and the DPP had not given any objective explanation for the difference in treatment.

Learned counsel for the applicants referred in his submissions to permissible limitations of rights sighting Article 43 of the Constitution. He submitted that no person shall prejudice the public interest or permit political persecution, detention without trial beyond what is acceptable and demonstrably justifiable in a free and democratic society. He further submitted that Article 43 reflects what he called the **Siracusa Principles UN Doc E/CN.4/1984/4 (1984)**.

As I have already held, the restriction of the applicants’ rights was done on the basis that they were promoting illegality in the exercise of their rights. It is trite law that the prevention of promotion of illegal acts is clearly acceptable and justifiable in any free and democratic society because it is based on the law. All democratic countries are founded on the rule of law. This court cannot determine whether the law prohibiting homosexual acts, that is, S. 145 of the Penal Code Act or their incitement is justifiable or acceptable in democratic countries, because this would necessitate interpretation of the Constitution as to whether the law is consistent with Article 43 of the Constitution.

It is the Constitutional Court which is mandated to do so. It is therefore irregular for learned counsel for the applicants to raise the issue in an application for enforcement of rights in the High Court. I can only note that limitation or restriction on rights can be acceptable and demonstrably justifiable if it is not so wide as to put the right itself in jeopardy see: **Onyango Obbo Vs Attorney General** (supra).

I am of the considered view that in the circumstances of the case under consideration, the essence of the rights to expression, association, assembly, political participation and equality under the law were not jeopardized and the rights remain available to the applicants. The actions of the second respondent were permissible limitation of the applicants' rights.

In his submission, learned counsel for the applicants acknowledged that under Article 27 of the African Charter morality is recognized as a legitimate interest justifying the restriction of rights yet on the other hand he argued that the Minister's attempt to prevent the promotion of homosexuality on the basis of traditions, culture and morality in Uganda is not a permissible restriction on rights. He cited the case of **Re Futyu Hostel, Tokyo HC Civil 4th Division Japan of 1997** but did not supply that authority but the case is indicated in Annexure 12. In the said case, learned counsel submitted that the Japanese Court held that the possibility of same sex activity was not a justifiable reason to deny homosexuals from using a public hostel facility and amounted to undue restriction on their right. However, as rightly argued by learned counsel for the respondent the said case is distinguishable because Japan has not had laws prohibiting homosexual acts since the year 1980 as per the respondents' Document No.3 on LGBT Rights in Japan. As such there was no legitimate basis to restrict same sex activity in Japan.

Learned counsel for the applicant also relied on the fact that the UN Human Rights Committee (UNHRC) criticized the use of protection of public morals as a basis for derogating from rights in relation to homosexuality. However, these were views or observations of the UNHRC which are not legally bidding on the UN member states and are unenforceable against the involved state party. In Uganda, the only forum which can determine if protection of public morals is justifiable as a basis for limiting homosexual rights under Article 43 or if legal restrictions such as S.145 of the Penal Code Act is inconsistent with Uganda's obligations under International Law are our National Courts. Decisions from South Africa, Indian and Hong Kong which learned counsel for the applicants relied on reflect what those national courts have determined as to what amounts to public interest of those countries and as such are not bidding on Uganda. Since public interest is defined by a country's fundamental values, it differs between countries.

In as far as there is no legal challenge to the validity of S. 145 of the Penal Code Act, it is still valid and bidding on all courts in Uganda, regardless of whether there are foreign precedents stating that prohibition of homosexual acts as offences against morals is unjustified restriction on rights if the homosexuals.

Issue 3: whether the second respondent can be sued in his individual capacity.

In his submission on this issue, learned counsel for the applicants argues that Article 20 (2) and 17 (1)(b) of the Constitution imposes a duty on all organs of Government and all persons, including the Minister to respect, uphold and promote individual rights and freedoms and therefore he can be sued in his individual capacity. That Hon. Lokodo cannot violate human rights and hide behind the cover of the Attorney General. That the Constitution imposes a positive duty on him to respect, uphold and promote the rights of individuals. That all agencies are equally obliged and enjoined to respect, uphold and promote the rights of individuals. Therefore suing the Attorney General and an individual is not mutually exclusive.

Learned counsel for the respondent submitted to the contrary and I agree. Any suit can only be brought in accordance with the law. Whereas it is not disputed that the Minister has the Constitutional duty alluded to by learned counsel for the applicants subject to Article 43, the challenged actions were not undertaken for his personal benefit. He acted in the performance of his duties as a government Minister of Ethics and Integrity. Thus, under the well established principle of vicarious liability he is not personally liable for his official actions which were alleged to have infringed on human rights. The Attorney General is vicariously liable for the official actions of the Minister. From the facts I have gathered while considering this suit and the evidence available, it was not proper to have sued the second respondent for his official actions as Minister for Ethics and Integrity. All suits for and/or against government have to be instituted against the Attorney General. Therefore the suit against the second applicant was incompetent in law. It would accordingly be struck out with costs.

Issue 4: whether the applicants are entitled to the remedies prayed for.

In my ruling I have endeavored to come to conclusions that while the applicants enjoyed the rights they cited, they had an obligation to exercise them in accordance with the law. I have also concluded that in exercising their rights they participated in promoting homosexual practices which are offences against morality. This perpetuation of illegality was unlawful and prejudicial to public interest. The limitation on the applicants' rights was thus effected in the public interest specifically to protect moral values. The limitation fitted well within the scope of valid restrictions under Article 43 of the Constitution.

Since the applicants did not on a balance of probabilities prove any unlawful infringement of their rights, they are not entitled to any compensation. They cannot benefit from an illegality.

The applicants also prayed for declarations that the actions of the Minister amounted to a breach of their Constitutional rights. From my conclusions, the applicants are not entitled to these declarations. The prayer for an injunction cannot be granted since it was not pleaded in the application. Consequently this application is hereby dismissed with costs to the respondent.

Stephen Musota

J U D G E

24.06.2014

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