

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,

Plaintiff,

v.

SCOTT LIVELY, individually and as
President of Abiding Truth Ministries,

Defendant.

CIVIL ACTION

NO. 3:12-CV-30051-MAP

DECLARATION OF FRANK MUGISHA

I, Frank Mugisha, hereby declare as follows:

1. I am Executive Director of Sexual Minorities Uganda (“SMUG”), the plaintiff in the above-captioned case.

2. SMUG brought this case to hold the defendant, Scott Lively, accountable for the significant role he has played in the widespread or systematic persecution of the lesbian, gay, bisexual, transgender and intersex (“LGBTI”) community in Uganda, including his efforts to deprive the Ugandan LGBTI community of our rights to freedom of expression, assembly and association, equality and non-discrimination.

3. Following the March 2009 anti-gay seminar described in paragraphs 75-89 of the First Amended Complaint (“the Complaint”), in which Mr. Lively actively participated, the Anti-Homosexuality Bill (“AHB”) emerged. In addition to proposing the death penalty for same-sex sexual conduct, the bill sought to criminalize SMUG and other LGBTI rights groups’ work and advocacy on behalf of LGBTI rights, by proposing prison sentences of up to seven years for those involved in “promotion” of homosexuality and those who “in any way abet[]

homosexuality and related practices.” A true and correct copy of the Anti-Homosexuality Bill of 2009 is attached hereto as Exhibit A.

4. Even before the bill became law, its provisions have been carried out at various times. For example, SMUG and its partners’ non-public meetings have been raided, as described in the First Amended Complaint at paragraphs 165-185, on the grounds that we were engaged in “promoting” homosexuality. The Minister of Ethics and Integrity Simon Lokodo raided an LGBTI rights workshop we held in February 2012 and was quoted in a news article as stating that our associations were illegal:

We found out the meeting was being organized by people from within and without. People from Europe and other African countries outside Uganda. They were recruiting people to go out and divulge the ideology of LGBT. In Uganda, the culture, tradition and laws do not support bestiality and lesbianism. They were illegally associating. [...]

You should not allow people to plan the destruction of your country. You cannot allow terrorists to organize to destroy your country.

A true and correct copy of this news article is attached hereto as Exhibit B.

5. I, along with my colleagues Jacqueline Kasha Nabagesera, Julian Pepe Onziema, and Geoffrey Ogwaro, filed a lawsuit against Minister Lokodo (“Lokodo case”) for violating our right to associate freely.

6. Minister Lokodo filed an affidavit in the Lokodo case testifying as follows:

That I know the 1st, 2nd and 3rd Applicants head and /or belong to organizations whose main objective is to encourage, support, promote, empower, finance and mobilize homosexual, lesbian and bisexual persons who are identified to be engaging in same sex practices. I also know that the said organizations also work in association with other local and international organizations which have the same objective.

He annexed to his affidavit documents describing the local and international organizations associating with SMUG.

7. On June 24, 2014, the High Court of Uganda at Kampala issued a judgment against the petitioners (my colleagues and me), affirming Minister Lokodo's understanding that an LGBTI rights advocacy workshop is illegal under Ugandan law. A true and correct copy of the judgment in the Lokodo case is attached hereto as Exhibit C. An appeal of the High Court ruling is pending.

8. In June 2012, a media outlet reported that the government "intercepted" the minutes of a meeting organized by the Civil Society Coalition on Human Rights and Constitutional Law ("CSCHRCL"), a coalition of organizations seeking to prevent the enactment of the Anti-Homosexuality Bill and of which SMUG is a member. According to the news report, the "intercepted" document reflected the names 41 people from 23 organizations, including "those that the government is threatening to ban because of their LGBT advocacy work." The report further quoted Minister Lokodo as saying: "We will support the [Anti-Homosexuality] bill. There is now sufficient evidence to move against these evil people. We'll punish them with a deterrent punishment. We are looking for a day when this law is going to take shape." A true and correct copy of this news article is attached hereto as Exhibit D.

9. In these circumstances, it has been difficult to maintain communications and coordination with our partners, supporters and affiliates who do not wish to be named in the media or subjected to government scrutiny for work that is in furtherance of basic human rights principles. Some of our allied organizations have backed away from us and work on these issues. For example, a number of organizations withdrew from the CSCHRCL following the media report described above in paragraph 8.

10. On December 20, 2013, the Ugandan Parliament passed the Anti-Homosexuality Bill, and on February 24, 2014, the Ugandan President signed it into law as the Anti-Homosexuality Act (“AHA”). As in the 2009 version of the legislation, the AHA sought to criminalize our work and advocacy on behalf of LGBTI rights, by proposing prison sentences of up to seven years for those involved in “promotion” of homosexuality and those who “in any way abet[] homosexuality and related practices.” A true and correct copy of the AHA as enacted is attached hereto as Exhibit E.

11. Since the introduction of the Anti-Homosexuality Bill, we have experienced a heightened hostile environment as evidenced by the increased frequency of highly inflammatory media reporting that has equated us with terrorism and cast us as a danger to children, and has repeatedly outed members of the LGBTI community and our allies.

12. For example, on November 15, 2010, Ugandan newspaper *Rolling Stone* published the headline *HOMO GENERALS PLOTTED KAMPALA TERROR ATTACKS*, blaming gay people for the July 2010 suicide bombings in Kampala. On February 24, 2013, Ugandan newspaper *Red Pepper* published the headline *BUSTED- HOW GAYS OPERATE IN UGANDA* and featured a picture of SMUG staff. On February 25, 2014, the day after the AHA was signed into law, the *Red Pepper* continued its media outings with the headline *EXPOSED! Uganda’s 200 Top Homos Named*. The issue featured photos, names, addresses and other identifying information on 200 people that the paper reported to be gay. True and correct copies of the pages of the *Rolling Stone* and the February 2013 *Red Pepper* issues, which were previously designated as Confidential under the terms of the Protective Order, are attached hereto as Exhibit F.

13. While the AHA was in existence, the government suspended the services of The Refugee Law Project (“RLP”), one of our allied organizations and host of the CSCHRCL,

claiming that RLP was “promoting” homosexuality. As a result of the government’s targeting, RLP could no longer host the CSCHRCL. The CSCHRCL secretariat was thus forced to disband, and our work together has been disrupted. This has also had a chilling effect on other organizations who might have considered hosting the CSCHRCL to allow us to continue coordinating our work and advocacy on LGBTI rights.

14. I, along with my colleague Pepe Onziema and several other petitioners, brought a case challenging the constitutionality of the Anti-Homosexuality Act. As a result of our efforts, the law was struck down on August 1, 2014, by the Constitutional Court of Uganda on technical grounds: it had been passed without a proper quorum in Parliament. A true and correct copy of the court judgment is attached hereto as Exhibit G.

15. Since then, I have seen news reports that 261 members of the Ugandan Parliament supported re-tabling the legislation. A true and correct copy of one of those reports is attached hereto as Exhibit H.

16. I have also seen news reports that a new version of the AHA, known as The Prohibition of Promotion of Unnatural Sexual Practices Bill, has been circulated and is expected to be introduced at some point during the current session of Parliament. The new bill would similarly criminalize our work and advocacy with a sentence of imprisonment for up to seven years. In addition, it reportedly includes a provision making it a criminal offense to fund or sponsor “promotion” with a sentence of imprisonment of up to seven years. A true and correct copy of a new report about the bill is attached hereto as Exhibit I.

17. If we are forced to disclose the identities of partners, donors and affiliates who have nothing to do with our claims in this litigation, particularly to someone like the Defendant, who has been in close contact with key persons in Uganda seeking to silence and criminalize us,

including leading anti-gay advocates and members of Parliament, it will deter others from remaining in contact with us and supporting our work. Along the same lines, if we are forced to disclose the e-mail addresses of the list-serves we use to communicate to our partners, donors and affiliates, it will deter others from remaining on or joining those list-serves to receive and share information on the persecution of the LGBTI community in Uganda and elsewhere around the world. The support of our partners, allies and affiliates, both within and outside Uganda, and our ability to communicate easily with them, is critical for us to be able to alert them to developments and to get their support and assistance when urgently needed.

18. Likewise, if we are forced to disclose the personal phone numbers of witnesses in this case for whom we have already provided phone numbers and addresses we are authorized to share, it will deter such persons from continuing to work with or be associated with SMUG.

19. Private businesses in Uganda, including hotels and radio shows, have provided space for us to conduct our educational efforts on the rights of LGBTI Ugandans. If their names are disclosed, they will be reluctant to provide such space to us in the future. Space for holding workshops and other educational events are critical to our organizational mission. In the past, businesses have stopped working with us because of threats they have felt as a result of appearing to support our work.

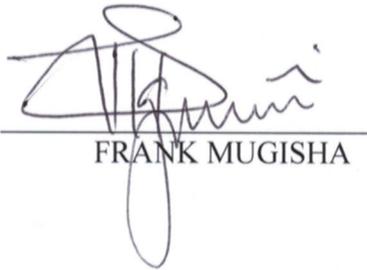
20. For the similar reasons, disclosure of certain of SMUG's projects and SMUG's internal operations, including our bank accounts and internal organizational processes, not related to any claims in this case would require us to change those operations after disclosure in order to remain effective in our work.

21. If SMUG were forced to produce documents containing information about our plans and strategies to prevent the passage of the Anti-Homosexuality Bill in this case, it would

prevent us and our partners and allies from continuing to implement similar strategies to prevent the passage of new legislation likely to be introduced in the future since such strategies would have already been disclosed to Defendant in this litigation. Moreover, disclosure would deter our partners and allies from collaborating with us any further after learning that we disclosed such highly confidential strategies to the very party we believe is responsible for such persecutory legislation.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 9 of July, 2015, at London, England.



FRANK MUGISHA

EXHIBIT A

BILLS SUPPLEMENT

to the Uganda Gazette No. 47 Volume CII dated 25th September, 2009.

Printed by UPPC, Entebbe by Order of the Government.

Bill No. 18

Anti Homosexuality Bill

2009

THE ANTI HOMOSEXUALITY BILL, 2009.

MEMORANDUM.

1.1. The principle

The object of this Bill is to establish a comprehensive consolidated legislation to protect the traditional family by prohibiting (i) any form of sexual relations between persons of the same sex; and (ii) the promotion or recognition of such sexual relations in public institutions and other places through or with the support of any Government entity in Uganda or any non governmental organization inside or outside the country.

This Bill aims at strengthening the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family.

This legislation further recognizes the fact that same sex attraction is not an innate and immutable characteristic.

The Bill further aims at providing a comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda, legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.

There is also need to protect the children and youths of Uganda who are made vulnerable to sexual abuse and deviation as a result of cultural changes, uncensored information technologies, parentless child developmental settings and increasing attempts by homosexuals to raise children in homosexual relationships through adoption, foster care, or otherwise.

This proposed legislation is designed to fill the gaps in the provisions of other laws in Uganda e.g. the Penal Code Act Cap. 120.

The Penal Code Act (Cap120) has no comprehensive provision catering for anti homosexuality. It focuses on unnatural offences under section 145 and lacks provisions for penalizing the procurement, promoting, disseminating literature and other pantographic materials concerning the offences of homosexuality hence the need for legislation to provide for charging, investigating, prosecuting, convicting and sentencing of offenders.

This legislation comes to complement and supplement the provisions of the Constitution of Uganda and the Penal Code Act Cap 120 by not only criminalizing same sex marriages but also same-sex sexual acts and other related acts.

3.0. The objectives of the Bill

The objectives of the Bill are to:

- (a) provide for marriage in Uganda as that contracted only between a man and a woman;
- (b) prohibit and penalize homosexual behavior and related practices in Uganda as they constitute a threat to the traditional family;
- (c) prohibit ratification of any international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act;
- (d) prohibit the licensing of organizations which promote homosexuality.

Part I of the Bill incorporating clause 1 provides for preliminary matters relating to interpretation of the words and phrases used in the Bill.

- 3.2. Part II of the Bill incorporating clause 2 to 6 prohibits homosexuality and related practices by introducing the offences of engaging in homosexuality, and the penalties of imprisonment upon conviction. This part also provides for protection, assistance and support for victims of homosexuality.**
- 3.3. Part III of the Bill incorporating clause 7 to clause 14 creates offences and penalties for acts that promote homosexuality, failure to report the offence and impose a duty on the community to report suspected cases of homosexuality.**
- 3.4. Part IV of the Bill incorporating clause 15 to clause 17 provides for the jurisdiction of Uganda Courts in case of Homosexuality, including extra territorial jurisdiction.**
- 3.5. Part V of the Bill incorporating clauses 18 and 19 provides for miscellaneous provisions on International Treaties, Protocols, Declarations and conventions and the Minister to make regulations to give effect to the Act.**

Schedule of the Bill gives the value of the currency point.

HON DAVID BAHATI,
Member of Parliament, Ndorwa County West, Kabale.

THE ANTI HOMOSEXUALITY BILL, 2009.

ARRANGEMENT OF CLAUSES.

PART I—PRELIMINARY.

Clause

1. Interpretation.

PART II—PROHIBITION OF HOMOSEXUALITY.

2. The offence of homosexuality.
3. Aggravated homosexuality.
4. Attempt to commit homosexuality.
5. Protection, assistance and payment of compensation to victims of homosexuality.
6. Confidentiality.

PART III—RELATED OFFENCES AND PENALTIES.

7. Aiding and abating homosexuality.
8. Conspiracy to engage in homosexuality.
9. Procuring homosexuality by threats, etc.
10. Detention with intent to commit homosexuality.
11. Brothels.
12. Same sex marriage.
13. Promotion of homosexuality.
14. Failure to disclose the offence.

PART IV—JURISDICTION.

15. Jurisdiction.
16. Extra- territorial Jurisdiction.
17. Extradition.

Clause

PART V—MISCELLANEOUS PROVISIONS.

18. International treaties.
19. Regulations.

Schedule

Currency point.

A BILL FOR AN ACT

ENTITLED

THE ANTI HOMOSEXUALITY ACT, 2009.

An Act to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters.

BE IT ENACTED by Parliament as follows:

PART I—PRELIMINARY.

1. Interpretation.

In this Act, unless the context otherwise requires—

“authority” means having power and control over other people because of your knowledge and official position; and shall include a person who exercises religious, political, economic or social authority;

“bisexual” means a person who is sexually attracted to both males and females;

“child” means a person below the age of 18 years;

“currency point” has the value assigned to it in the Schedule to this Act;

“disability” means a substantial limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation;

“felony” means an offence which is declared by law to be a felony or if not declared to be a misdemeanor is punishable without proof of previous conviction, with death or with imprisonment for 3 years or more;

“gay” means a male person who engages in sexual intimacy with another person of the same sex;

“gender” means male or female;

“HIV” means the Human Immunodeficiency Virus;

“homosexual” means a person who engages or attempts to engage in same gender sexual activity;

“homosexuality” means same gender or same sex sexual acts;

“lesbian” means a female who engages in sexual intimacy with another female;

“Minister” means the Minister responsible for ethics and integrity;

“misdemeanor” means any offence which is not a felony;

“serial offender” means a person who has previous convictions of the offence of homosexuality or related offences;

“sexual act” includes—

- (a) physical sexual activity that does not necessarily culminate in intercourse and may include the touching of another’s breast, vagina, penis or anus;
- (b) stimulation or penetration of a vagina or mouth or anus or any part of the body of any person, however slight by a sexual organ;

- (c) the unlawful use of any object or organ by a person on another person's sexual organ or anus or mouth;

“sexual organ” means a vagina, penis or any artificial sexual contraption;

“touching” includes touching—

- (a) with any part of the body;
- (b) with anything else;
- (c) through anything;

and in particular includes touching amounting to penetration of any sexual organ, anus or mouth.

“victim” includes a person who is involved in homosexual activities against his or her will.

PART II—HOMOSEXUALITY AND RELATED PRACTICES.

2. **The offence of homosexuality.**

(1) A person commits the offence of homosexuality if—

- (a) he penetrates the anus or mouth of another person of the same sex with his penis or any other sexual contraption;
- (b) he or she uses any object or sexual contraption to penetrate or stimulate sexual organ of a person of the same sex;
- (c) he or she touches another person with the intention of committing the act of homosexuality.

(2) A person who commits an offence under this section shall be liable on conviction to imprisonment for life.

3. Aggravated homosexuality.

(1) A person commits the offence of aggravated homosexuality where the—

- (a) person against whom the offence is committed is below the age of 18 years;
- (b) offender is a person living with HIV;
- (c) offender is a parent or guardian of the person against whom the offence is committed;
- (d) offender is a person in authority over the person against whom the offence is committed;
- (e) victim of the offence is a person with disability;
- (f) offender is a serial offender; or
- (g) offender applies, administers or causes to be used by any man or woman any drug, matter or thing with intent to stupefy or overpower him or her so as to there by enable any person to have unlawful carnal connection with any person of the same sex.

(2) A person who commits the offence of aggravated homosexuality shall be liable on conviction to suffer death.

(3) Where a person is charged with the offence under this section, that person shall undergo a medical examination to ascertain his or her HIV status.

4. Attempt to commit homosexuality.

(1) A person who attempts to commit the offence of homosexuality commits a felony and is liable on conviction to imprisonment for seven years.

(2) A person who attempts to commit the offence of aggravated homosexuality commits an offense and is liable on conviction to imprisonment for life.

5. Protection, assistance and payment of compensation to victims of homosexuality.

(1) A victim of homosexuality shall not be penalized for any crime committed as a direct result of his or her involvement in homosexuality.

(2) A victim of homosexuality shall be assisted to enable his or her views and concerns to be presented and considered at the appropriate stages of the criminal proceedings.

(3) Where a person is convicted of homosexuality or aggravated homosexuality under sections 2 and 3 of this Act, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual or psychological harm caused to the victim by the offence.

(4) The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence.

6. Confidentiality.

(1) At any stage of the investigation or trial of an offence under this Act, law enforcement officers, prosecutors, judicial officers and medical practitioners, as well as parties to the case, shall recognize the right to privacy of the victim.

(2) For the purpose of subsection (1), in cases involving children and other cases where the court considers it appropriate, proceedings of the court shall be conducted in camera, outside the presence of the media.

(3) Any editor, publisher, reporter or columnist in case of printed materials, announcer or producer in case of television and radio, producer or director of a film in case of the movie industry, or any person utilizing trimedia facilities or information technology who publishes or causes the publicity of the names and personal circumstances or any other information tending to establish the victim's identity without authority of court, commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty currency points.

PART III—RELATED OFFENCES AND PENALTIES.

7. Aiding and abating homosexuality.

A person who aids, abets, counsels or procures another to engage in acts of homosexuality commits an offence and is liable on conviction to imprisonment for seven years.

8. Conspiracy to engage in homosexuality.

A person who conspires with another to induce another person of the same sex by any means of false pretence or other fraudulent means to permit any person of the same sex to have unlawful carnal knowledge of him or her commits an offence and is liable on conviction to imprisonment for seven years.

9. Procuring homosexuality by threats, etc.

(1) A person who—

- (a) by threats or intimidation procures or attempts to procure any woman or man to have any unlawful carnal knowledge with any person of the same sex, either in Uganda or elsewhere;
- (b) by false pretences or false representations procures any woman or man to have any unlawful carnal connection with any person of the same sex, either in Uganda or elsewhere; or

(2) A person shall not be convicted of an offence under this section upon the evidence of one witness only, unless that witness is corroborated in some material particular by evidence implicating the accused.

10. Detention with intent to commit homosexuality.

A person who detains another person with the intention to commit acts of homosexuality with him or herself or with any other person commits an offence and is liable on conviction to imprisonment for seven years.

11. Brothels.

(1) A person who keeps a house, room, set of rooms or place of any kind for purposes of homosexuality commits an offence and is liable on conviction to imprisonment for seven years.

(2) A person being the owner or occupier of premises or having or acting or assisting in the management or control of the premises, induces or knowingly suffers any man or woman to resort to or be upon such premises for the purpose of being unlawfully and carnally known by any man or woman of the same sex whether such carnal knowledge is intended to be with any particular man or woman generally, commits a felony and is liable on conviction to imprisonment for five years.

12. Same sex marriage.

A person who purports to contract a marriage with another person of the same sex commits the offence of homosexuality and shall be liable on conviction to imprisonment for life.

13. Promotion of homosexuality.

(1) A person who—

- (a) participates in production, procuring, marketing, broadcasting, disseminating, publishing pornographic materials for purposes of promoting homosexuality;
- (b) funds or sponsors homosexuality or other related activities;
- (c) offers premises and other related fixed or movable assets for purposes of homosexuality or promoting homosexuality;
- (d) uses electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality and;
- (e) who acts as an accomplice or attempts to promote or in any way abets homosexuality and related practices;

commits an offence and is liable on conviction to a fine of five thousand currency points or imprisonment of a minimum of five years and a maximum of seven years or both fine and imprisonment.

(2) Where the offender is a corporate body or a business or an association or a non-governmental organization, on conviction its certificate of registration shall be cancelled and the director or proprietor or promoter shall be liable on conviction to imprisonment for seven years.

14. Failure to disclose the offence.

A person in authority, who being aware of the commission of any offence under this Act, omits to report the offence to the relevant authorities within twenty-four hours of having first had that knowledge, commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding three years.

PART IV—JURISDICTION.

15. Jurisdiction.

Save for aggravated homosexuality that shall be tried by the High Court, the magistrates courts shall have jurisdiction to try the other offences under this Act.

16. Extra- Territorial Jurisdiction.

This Act shall apply to offences committed outside Uganda where—

- (a) a person who, while being a citizen of or permanently residing in Uganda, commits an act outside Uganda, which act would constitute an offence under this Act had it been committed in Uganda; or
- (b) the offence was committed partly outside and or partly in Uganda.

17. Extradition.

A person charged with an offence under this Act shall be liable to extradition under the existing extradition laws.

PART V—MISCELLANEOUS.

18. Nullification of inconsistent international treaties, protocols, declarations and conventions.

(1) Any international legal instrument whose provisions are contradictory to the spirit and provisions enshrined in this Act, are null and void to the extent of their inconsistency.

(2) Definitions of “sexual orientation”, “sexual rights”, “sexual minorities”, “gender identity” shall not be used in anyway to legitimize homosexuality, gender identity disorders and related practices in Uganda.

19. Regulations.

The Minister may, by statutory instrument, make regulations generally for better carrying out the provisions of this Act.

SCHEDULE

s.1.

One currency point is equivalent to twenty thousand shillings.

EXHIBIT B

Ugandan minister shuts down gay rights conference

Simon Lokodo said LGBT activists were illegally associating and urged arrest of organiser he claimed had insulted him

David Smith in Johannesburg

Wednesday 15 February 2012 09.59 EST

A Ugandan cabinet minister has raided a gay rights conference and demanded that one of the organisers be arrested for insulting him.

Simon Lokodo, the minister for ethics and integrity, was accompanied by police to a hotel where he told activists their workshop was an "illegal assembly" and ordered them out.

Defending his actions later, Lokodo told the Guardian: "You should not allow people to plan the destruction of your country. You cannot allow terrorists to organise to destroy your country."

The swoop came days after a widely condemned anti-homosexuality bill was re-tabled in the Ugandan parliament, albeit with references to the death penalty omitted.

Lesbian, gay, bisexual and transgender activists are reportedly referring to the shutting down of Tuesday's workshop at the Imperial Resort Beach Hotel in Entebbe as a "Valentine's massacre".

But Lokodo expressed no regrets. "It was an illegal meeting because we were not informed," he said. "We found out the meeting was being organised by people from within and without. People from Europe and other African countries outside Uganda.

"They were recruiting people to go out and divulge the ideology of LGBT. In Uganda, the culture, tradition and laws do not support bestiality and lesbianism. They were illegally associating."

He added: "We tolerate them, we give them liberty and freedom to do their business, but we don't like them to organise and associate."

The minister also tried to order the arrest of Kasha Jacqueline Nabagesera, a prominent LGBT rights activist. The winner of the 2011 Martin Ennals award for human rights defenders was forced to flee the hotel.

"I wanted to arrest a lady who was abusing me and calling me a liar," Lokodo said. "I want

to subject her to a court of law. She must be arrested. This is hooliganism. You cannot be insulted in this country. We must be a civilised country. This particular one was talking like she came from the bush."

The disruption of the event, organised by the group Freedom and Roam Uganda for around 30 delegates, was condemned by human rights organisations. Amnesty International called on the Ugandan government to end its harassment of law-abiding citizens.

"This is an outrageous attempt to prevent lawful and peaceful activities of human rights defenders in Uganda," said Salil Shetty, Amnesty's secretary general. "The government of Uganda must protect all people against threats, violence and harassment irrespective of their real or perceived sexual orientation or gender identity."

The anti-homosexuality bill has been widely criticised outside Uganda - Barack Obama branded it "odious" - but it has strong support inside the country.

David Bahati, the politician who reintroduced the bill, says it no longer contains a provision for the death penalty and proposes reduced proposed prison sentences for homosexual acts instead of a life sentence.

In a statement last week, the Ugandan government defended its right to debate the bill but said the draft legislation did not have official backing.

Shetty added: "The government's claimed opposition to the bill needs to be supported through their actions. The Ugandan government must allow legitimate, peaceful gatherings of human rights defenders, including those working on LGBT rights."

Amnesty warns that if the bill becomes law, it would violate international human rights law and lead to further human rights violations.

Both the UK and US recently urged developing countries to respect gay rights or risk losing aid.

More news

Topics

Uganda

Africa

LGBT rights

Human rights

Sexuality

EXHIBIT C

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
4. GEOFFREY OGWARO

} **APPLICANT**

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:-

- (a) 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.

- (b) 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.
- (c) 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.
- (d) 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.
- (e) 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.
- (f) 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:-

- (i) That the first applicant was the organizer while the second, third and fourth 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.
- (ii) The said workshop was to train and equip participants from various walks of life with project planning, advocacy, human rights, leadership and business skills.
- (iii) 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.

- (iv) No other workshop taking place at Imperial Resort beach Hotel Entebbe on 14th February 2012 was ordered closed.
- (v) 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 proposition. 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

EXHIBIT D

NGOs' gay plans leak, govt furious

Written by Observer Media Ltd (/component/contact/contact/4)

Last Updated: 27 June 2012

[Print](#)



A Gay hides from the public during one of their recent conferences

The government says it has intercepted minutes of a recent meeting that discussed wide-ranging strategies on how to promote the rights of lesbian, gay, bisexual and transgender (LGBT) people in Uganda.

These strategies include how to raise funds and recruit 'friendly' journalists into the cause of fighting for homosexual rights in Uganda. Some sources have told The Observer that security operatives infiltrated gay groups and managed to get a document containing minutes of the meeting.

The unsigned document, a copy of which we have seen, names 41 people, from 23 NGOs, as having attended the meeting on May 4, 2012, under the coordination of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL).

The organisations in attendance, we have been told, are among those that the government is threatening to ban because of their LGBT advocacy work. The document shows that this was the 7th such strategy general meeting.

Icebreakers Uganda, which hosted the meeting, is a community-based organisation that supports the rights of LGBT people in the country. The NGOs discussed, among others, "developing a media strategy and strategic arguments against all the sexual bills and for decriminalisation" with a view to "changing opinions and convincing the public".

This strategy involves "mapping out friendly journalists, as well as hostile and ignorant ones" with the objective of "identifying trainable journalists to become allies and objective reporters on sexual minority and gender identity issues".

The plan is to raise a list of "40 journalists of a mixture of friendly, hostile and ignorant". The strategy, whose aim is "gaining acceptance for the sexual minority groups", with a time frame of June 2012 to June 2013, lists among its activities, workshops, talk-shows, barazas and parliamentary advocacy programmes for legislators.

The plan is to roll out implementation of the strategy through civil society groups spread throughout the country. There is also a well laid-out plan to lobby the national, regional and international community to pile pressure on the Uganda government to abandon the Anti-Homosexuality bill and any other laws hostile to homosexuals.

Lokodo excited

The document has reportedly given Rev Simon Lokodo, the minister in charge of Ethics and Integrity, ammunition to go after gay activists with renewed zeal. Shortly before leaving for an official trip abroad last week, an excited Lokodo, upon seeing the document, said he had finally obtained the information he needed to fight homosexuality in Uganda.

"These people are disruptive; they are promoting a negative culture contrary to the laws of this country. They are promoting homosexuality and lesbianism as an acceptable culture, and this is ruining our lives," Lokodo said.

Case 3:12-cv-00511-MAP Document 200-4 Filed 07/09/15 Page 3 of 4
He added: "This is not sufficient to punish these evil people. We'll punish them with a deterrent punishment. We are looking for a day when this law is going to take shape."

Last Wednesday, Lokodo announced that the government would ban 38 NGOs deemed sympathetic to activities of LGBT people in the country. He said he had passed the list of the NGOs to the Internal Affairs minister to get all of them deregistered, as they were engaging in an illegal activity. Lokodo told journalists that the NGOs were receiving support from abroad and "recruiting" young children into the vice.

"We found that, on the pretext of humanitarian concerns, these organisations are being used to promote negative cultures. They are encouraging homosexuality as if it is the best form of sexual behaviour," he said.

The previous day, the police had halted a workshop of gay rights activists at Esella country hotel in Najjeera, in the outskirts of Kampala, and briefly detained some participants and staff members of the East and Horn of Africa Human Rights Defenders Project (EHAHRDP), one of the organisers of the event.

Njoroge Njenga, a programme officer with Freedom House, an American NGO, while admitting knowing some of the names of participants at the strategy May 4 meeting, said he was not aware of the specific details of that meeting, because he had only recently arrived in Uganda.

Neil Blazevic, one of the activists detained together with Njenga last Tuesday, is named as participant number 29 on the attendance list of the May 4 NGOs' meeting at Ice Breakers Uganda.

Gay Bill

Article 31 (2a) of the constitution, as well as provisions of the Ugandan Penal Code Act, prohibit same sex relationships. Two years ago, Ndorwa West MP, David Bahati, moved a private member's bill, the Anti-Homosexuality Bill 2009, seeking to impose tougher punishment for promotion of, and involvement in, homosexuality.

Although the bill enjoys ample support across Uganda, western governments have piled pressure on Kampala to stop the legislation on human rights grounds. Last week, Bahati, while commenting on the latest campaign against gay activists, said his bill intended "to stop the promotion, recruitment, funding and same sex marriages".

He insists that Uganda must stand firm and reject attempts by people who want to promote activities of LGBT people, adding that homosexuality is not a human rights issue in Uganda because it is illegal.

When told about the meeting minutes that Lokodo's people had found, Bahati said: "If it is true that such a document has been [obtained], it serves to strengthen what we have been talking about; that these people are deliberately recruiting followers and promoting their actions, taking advantage of a weak law. We now need to move and strengthen the legal regime and make the punishment more stringent."

However, organisers of the now controversial meeting are defiant. Jeff Ogwaro, the national coordinator of CSCHRCL, told The Observer yesterday that the NGOs had been meeting monthly for about six months. He, however, denied any wrongdoing.

"I am surprised that government does not know its own laws," Ogwaro said. "We are promoting human rights, just like those promoting children's rights... but we don't have a curriculum that teaches people how to have [gay] sex. Lokodo needs to be educated. He is ignorant."

List of NGOs facing ban

- Civil Society Coalition on Human Rights and Constitutional Law
- Refugee Law Project
- Rainbow and Diversity Organisation
- Angel Support Group
- Trans Equality Uganda

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EXHIBIT E

THE ANTI-HOMOSEXUALITY ACT, 2014.

ARRANGEMENT OF SECTIONS.

PART I—PRELIMINARY.

Section

1. Interpretation.

PART II—PROHIBITION OF HOMOSEXUALITY.

2. The offence of homosexuality.
3. Aggravated homosexuality.
4. Attempt to commit homosexuality.
5. Protection, assistance and payment of compensation to victims of homosexuality.
6. Confidentiality.

PART III—RELATED OFFENCES AND PENALTIES.

7. Aiding and abetting homosexuality.
8. Conspiracy to engage in homosexuality.
9. Procuring homosexuality by threats, etc.
10. Detention with intent to commit homosexuality.
11. Brothels.
12. Same sex marriage.
13. Promotion of homosexuality.

PART IV—MISCELLANEOUS PROVISIONS.

14. Extradition.
15. Regulations.

Schedule

Currency point.

THE ANTI-HOMOSEXUALITY ACT, 2014.

An Act to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters.

DATE OF ASSENT:

Date of Commencement:

BE IT ENACTED by Parliament as follows:

PART I—PRELIMINARY.

1. Interpretation.

In this Act, unless the context otherwise requires—

“authority” means having power and control over other people because of your knowledge and official position; and shall include a person who exercises religious, political, economic or social authority;

“child” means a person below the age of eighteen years;

“court” means a chief magistrates court;

“currency point” has the value assigned to it in the Schedule to this Act;

“disability” means a substantial limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation;

“felony” means an offence which is declared by law to be a felony or if not declared to be a misdemeanor is punishable without proof of previous conviction, with death or with imprisonment for three years or more;

“HIV” means the Human Immunodeficiency Virus;

“homosexual” means a person who engages or attempts to engage in same gender sexual activity;

“homosexuality” means same gender or same sex sexual acts;

“Minister” means the Minister responsible for ethics and integrity;

“misdemeanor” means any offence which is not a felony;

“serial offender” means a person who has previous convictions of the offence of homosexuality or related offences;

“sexual act” includes—

- (a) physical sexual activity that does not necessarily culminate in intercourse and may include the touching of another’s breast, vagina, penis or anus;
- (b) stimulation or penetration of a vagina or mouth or anus or any part of the body of any person, however slight by a sexual organ;
- (c) the unlawful use of any object or organ by a person on another person’s sexual organ or anus or mouth;

“sexual organ” means a vagina, penis or any artificial sexual contraption;

“touching” includes touching—

(a) with any part of the body;

(b) with anything else;

(c) through anything;

and in particular includes touching amounting to penetration of any sexual organ, anus or mouth.

“victim” includes a person who is involved in homosexual activities against his or her will.

PART II—HOMOSEXUALITY AND RELATED PRACTICES.

2. The offence of homosexuality.

(1) A person commits the offence of homosexuality if—

(a) he penetrates the anus or mouth of another person of the same sex with his penis or any other sexual contraption;

(b) he or she uses any object or sexual contraption to penetrate or stimulate sexual organ of a person of the same sex;

(c) he or she touches another person with the intention of committing the act of homosexuality.

(2) A person who commits an offence under this section shall be liable, on conviction, to imprisonment for life.

3. Aggravated homosexuality.

(1) A person commits the offence of aggravated homosexuality where the—

(a) person against whom the offence is committed is below the age of eighteen years;

(b) offender is a person living with HIV;

- (c) offender is a parent or guardian of the person against whom the offence is committed;
- (d) offender is a person in authority over the person against whom the offence is committed;
- (e) victim of the offence is a person with disability;
- (f) offender is a serial offender; or
- (g) offender applies, administers or causes to be used by any man or woman any drug, matter or thing with intent to stupefy or overpower him or her so as to enable any person to have unlawful carnal connection with any person of the same sex.

(2) A person who commits the offence of aggravated homosexuality shall be liable, on conviction, to imprisonment for life.

(3) Where a person is charged with the offence under this section, that person shall undergo a medical examination to ascertain his or her HIV status.

4. Attempt to commit homosexuality.

(1) A person who attempts to commit the offence of homosexuality commits a felony and is liable, on conviction, to imprisonment for seven years.

(2) A person who attempts to commit the offence of aggravated homosexuality commits an offense and is liable, on conviction, to imprisonment for life.

5. Protection, assistance and payment of compensation to victims of homosexuality.

(1) A victim of homosexuality shall not be penalized for any crime committed as a direct result of his or her involvement in homosexuality.

(2) A victim of homosexuality shall be assisted to enable his or her views and concerns to be presented and considered at the appropriate stages of the criminal proceedings.

(3) Where a person is convicted of homosexuality or aggravated homosexuality under sections 2 and 3 of this Act, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual or psychological harm caused to the victim by the offence.

(4) The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence.

6. Confidentiality.

(1) At any stage of the investigation or trial of an offence under this Act, law enforcement officer, prosecutor, judicial officer and medical practitioner, and any party to the case, shall recognize the right to privacy of the victim.

(2) For the purpose of subsection (1), in cases involving children and other cases where the court considers it appropriate, proceedings of the court shall be conducted in camera.

(3) Any editor, publisher, reporter or columnist in case of printed materials, announcer or producer in case of television and radio, producer or director of a film in case of the movie industry, or any person utilizing trimedia facilities or information technology who publishes or causes the publicity of the names and personal circumstances or any other information tending to establish the victim's identity without authority of the victim or court, commits an offence and is liable, on conviction, to a fine not exceeding two hundred and fifty currency points.

PART III—RELATED OFFENCES AND PENALTIES.

7. Aiding and abetting homosexuality.

A person who aids, abets, counsels or procures another to engage in acts of homosexuality commits an offence and is liable, on conviction, to imprisonment for seven years.

8. Conspiracy to engage in homosexuality.

A person who conspires with another to induce another person of the same sex by any means of false pretence or other fraudulent means to permit any person of the same sex to have unlawful carnal knowledge of him or her commits an offence and is liable, on conviction, to imprisonment for seven years.

9. Procuring homosexuality by threats.

(1) A person who—

- (a) by threats or intimidation procures or attempts to procure any woman or man to have any unlawful carnal knowledge with any person of the same sex; or
- (b) by false pretences or false representations procures any woman or man to have any unlawful carnal connection with any person of the same sex;

commits an offence and is liable on conviction to imprisonment for seven years

(2) A person shall not be convicted of an offence under this section upon the evidence of one witness only, unless that witness is corroborated in some material particular by evidence implicating the accused.

10. Detention with intent to commit homosexuality.

A person who detains another person with the intention to commit acts of homosexuality with him or her or with any other person commits an offence and is liable, on conviction, to imprisonment for seven years.

11. Brothels.

(1) A person who keeps a house, room, set of rooms or place of any kind for purposes of homosexuality commits an offence and is liable, on conviction, to imprisonment for seven years.

(2) A person being the owner or occupier of premises or having or acting or assisting in the management or control of the premises, induces or knowingly suffers any man or woman to resort to or be upon such premises for the purpose of being unlawfully and carnally known by any man or woman of the same sex whether such carnal knowledge is intended to be with any particular man or woman generally, commits a felony and is liable, on conviction, to imprisonment for five years.

12. Same sex marriage.

(1) A person who purports to contract a marriage with another person of the same sex commits the offence of homosexuality and shall be liable, on conviction, to imprisonment for life.

(2) A person or institution commits an offence if that person or institution conducts a marriage ceremony between persons of the same sex and shall, on conviction, be liable to imprisonment for a maximum of seven years for individuals or cancellation of licence for an institution.

13. Promotion of homosexuality.

(1) A person who—

- (a) participates in production, procuring, marketing, broadcasting, disseminating, publishing of pornographic materials for purposes of promoting homosexuality;
- (b) funds or sponsors homosexuality or other related activities;
- (c) offers premises and other related fixed or movable assets for purposes of homosexuality or promoting homosexuality;
- (d) uses electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality; or

- (e) who acts as an accomplice or attempts to promote or in any way abets homosexuality and related practices;

commits an offence and is liable, on conviction, to a fine of five thousand currency points or imprisonment of a minimum of five years and a maximum of seven years or both fine and imprisonment.

(2) Where the offender is a corporate body or a business or an association or a non-governmental organization, on conviction its certificate of registration shall be cancelled and the director, proprietor or promoter shall be liable, on conviction, to imprisonment for seven years.

PART IV—MISCELLANEOUS.

14. Extradition.

A person charged with an offence under this Act shall be liable to extradition under the existing extradition laws.

15. Regulations.

The Minister may, by statutory instrument, make regulations generally for better carrying out the provisions of this Act.

SCHEDULE

s.1.

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EXHIBIT F

EXHIBIT H

AFRICA REVIEW

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Uganda MPs to pass anti-gay bill as 'Christmas gift'

By ISAAC IMAKA in Kampala | Friday, December 5 2014 at 10:34

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Anti-gay supporters in Uganda rejoicing when President Yoweri Museveni signed the anti-homosexuality Bill in February 2014. PHOTO | FILE

Ugandan Members of Parliament have reignited the push for the reintroduction and passing of the Anti-homosexual Bill, with calls to pass it as a Christmas gift for the people of Uganda.

Latif Ssebagala — who described himself as a chief mobiliser of MPs who cherish Ugandan values, norms and religious beliefs — said the legislators are ready to pass the Bill before the House adjourns for Christmas.

He challenged the Speaker of Parliament to explain to the House the stage at which the Bill is and what became of the committee that was set up to harmonise its contents.

“What can we do to restart the Bill so that we assure our people that we have never backtracked? I have 256 signatures and I have kept them long enough. I want to lay them on table so that they become the property of this Parliament,” Mr Ssebagala said.

“The ultimate problem is for us to go for the recess without handling this Bill. It is us MPs who did not do our work. Since we are nearing Christmas and the New Year, we can as well give it as a gift to the people,” he said.

The number shot to 261 after five legislators requested the Speaker that they be allowed to sign from the clerks table in the House because, “they were away when the signature book was being passed around”.

Unnatural sex

In contrast to the nullified Act, the new Bill that the MPs want to table, a copy of which *Daily Monitor* has seen, avoids any explicit references to homosexuality, but seems to co-opt sections of the Penal Code, which prescribe, among others, a life sentence for “unnatural sexual practices.”

Unnatural sexual practices are defined in the draft Bill as a sexual act between persons of the same sex, or with or between transsexual persons, a sexual act with an animal and anal sex.

The proposed legislation also expands the definition of “promotion of unnatural sexual practices” and proposes a prison sentence of up to seven years for the promotion of homosexuality.

This is the second time in Uganda to legalise punishment for homosexuals. Parliament passed a Bill in 2013 which mandated 10-year jail sentences for homosexuals.

Amid heavy Western and donor pressure, a court overturned the law earlier this year.

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EXHIBIT I


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Africa

Uganda planning new anti-gay law despite opposition

10 November 2014 | [Africa](#)



Many Ugandans hold conservative religious beliefs

Uganda plans to introduce a new anti-gay law that will withstand any legal challenge, a government minister has told the BBC.

It will not explicitly refer to homosexuality, but will rely on the penal code which prescribes a life sentence for "unnatural acts", he said.

Activists say the plan is more draconian than anti-gay legislation annulled by the courts in August.

The US and other donors cut funding to Uganda in protest against the law.

Uganda is a deeply conservative society where homosexual acts are already illegal.

New legislation against gay people will increase the government's popularity, says the BBC's Catherine Byaruhanga in the capital, Kampala.



This year, they celebrated the striking down of the anti-gay law

However, many political observers wonder whether the bill, known as The Prohibition of Promotion of Unnatural Sexual Practices Bill, will see the light of day because of the huge pressure the government is facing from Western governments not to further criminalise gay people, she says.

'Language twisted'

The minister, who spoke on condition of anonymity, said the proposed legislation will be a streamlined version of the annulled Anti-Homosexuality Act.

It will clarify what constitutes the promotion and funding of "unnatural" acts, he said.

This could affect the financial support gay rights groups receive from donors, our correspondent says.

Gay-rights activist Frank Mugisha said a leaked copy of the bill suggested that it would be harsher than the previous legislation.

"They have just twisted the language but it is the same thing. It's actually worse because the 'promotion' part is harsher and it will punish the funding of LGBT [lesbian, gay, bisexual, and transgender] and human rights groups," **Mr Mugisha was quoted by the UK's Guardian newspaper as saying**



Some gay Ugandans have fled the country, saying they are being persecuted

Ugandan human rights lawyer Nicholas Opiyo told the BBC he was confident the proposed law would be defeated in court.

The Anti-Homosexuality Act was annulled by the Constitutional Court, which ruled that parliament lacked a quorum when it was passed.

US President Barack Obama denounced the legislation as odious, and the US cut aid to Uganda - a key ally in its campaign against militant Islamists in the region.

The US did not reinstate the aid, even after the Constitutional Court annulled the legislation, our reporter says.

Foreign donors are watching to see what happens next, she adds.

The new bill has been drawn up by MPs from the governing National Resistance Movement, and had not yet been approved by the cabinet, the minister said.

The scrapped legislation allowed for life imprisonment for "aggravated homosexuality" and for entering into a same-sex marriage.

It also proposed a prison sentence of up to seven years or a fine or both for the promotion of homosexuality.

The original draft of the bill called for the death penalty for "aggravated homosexuality".

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EXHIBIT G

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL PETITION NO. 08 OF 2014.

- 1. PROF. J OLOKA-ONYANGO
- 2. HON. FOX ODOI-OYWELOWO
- 3. ANDREW M. MWENDA
- 4. PROF. MORIS OGENGA-LATIGO
- 5. DR. PAUL NSUBUGA SEMUGOMA
- 6. JACQUELINE KASHA NABAGESERA ::: PETITIONERS.
- 7. JULIAN PEPE ONZIEMA
- 8. FRANK MUGISHA
- 9. HUMAN RIGHTS AWARENESS & PROMOTION FORUM (HRAPF)
- 10. CENTRE FOR HEALTH HUMAN RIGHTS & DEVELOPMENT(CEHURD)

VS

ATTORNEY GENERAL :::RESPONDENT

Coram: Hon. Mr. Justice S.B.Kavuma, Ag. DCJ Hon. J Mr. Justice A.S
 Nshimye, JA/CC Hon. |Mr. Justice Eldad Mwangusya, JA/CC
 Hon. Mr. Justice Rubby Aweri Opio, JA/CC Hon. lady Justice
 Solomy Balungi Bossa, JA/CC

*PETITION BROUGHT UNDER ARTICLES 137(1) & (3)(A) AND (B),(4) OF THE
 CONSTITUTION OF UGANDA AND THE CONSTITUTIONAL COURT (PETITIONS AND
 REFERENCES) RULES, SI 91/2005)*

JUDGMENT OF THE COURT

The above 10 petitioners moved this Court by petition under the above mentioned provisions of the Constitution alleging;

- (a) That the enactment of the Anti-Homosexuality Act 2014 by the 9th Parliament on 20th December 2013, without quorum in the house

5

was in contravention of Articles 2(1) & (2), 88 and 94(1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedure;

(b) That Sections 1,2, and 4 of the Anti Homosexuality Act 2014, in defining the criminalising consensual same sex/gender sexual activity among adults in private, are in contravention of the right to equality before the law without any discrimination and the right to privacy guaranteed under Articles 2(1) & (2), 21(1),(2) & (4) and 27 of the Constitution of the Republic of Uganda respectively;

(c)That Section 2(1)(c) of the Anti-Homosexuality Act 2014, in criminalising touching by persons of the same sex creates an offence that is overly broad and is in contravention of the principle of legality under Articles 2(1) & (2), 28(1), (3b), (12), 42 and 44(c) of the Constitution of the Republic of Uganda;

(d) That Section 2, of the Anti-Homosexuality Act 2014, in imposing a maximum life sentence for Homosexuality provides for a disproportionate punishment for the offence in contravention of the right to equality and freedom from cruel, inhuman and degrading punishment guaranteed under Articles 2(1) &(2), 24 and 44(a) of the Constitution of the Republic of Uganda.

(e)That Section 31(b) of the Anti-Homosexuality Act 2014, in criminalising consensual same sex/gender sexual activity among adults in which one is a person living with HIV is in contravention of the freedom from discrimination guaranteed under Articles 2(1) & (2) and 21(1) & (2) of the Constitution of the Republic of

Uganda 1995.

(f) That Section 3(1)(e) of the Anti Homosexuality Act 2014, in criminalising consensual same sex/gender sexual activity among adults in which one is a person with disability is in contravention of the freedom from discrimination and the right to dignity of persons with disabilities guaranteed under Articles 2(1) &(2), 21(1), (2) & (4c) and 35 of the Constitution.

(g) That Section 3(3) of the Anti-Homosexuality Act 2014, in subjecting persons charged with aggravated homosexuality to a compulsory HIV test, is in contravention of the freedom from discrimination, the right to privacy, freedom from cruel, inhuman and degrading treatment and the right to the presumption of innocence guaranteed under Articles 2(1) & (2), 21, 24, 27, 28, 44 and 45 of the Constitution of the Republic of Uganda;

(h) That Section 4(2) of the Anti-Homosexuality Act 2014 in imposing a maximum life sentence for attempted aggravated homosexuality, provides for a disproportionate punishment for the offence in contravention of the right to equality, and the freedom from cruel, inhuman and degrading punishment guaranteed under Articles 2(1) &(2), 21, 24 and 44(a) of the Constitution of the Republic of Uganda 1995;

(i) That Sections 7 and 13(1) & (2) of the Anti- Homosexuality Act 2014, in criminalising aiding, abetting, counseling, procuring and promotion of homosexuality, create offences that are overly

broad, penalise, legitimate debate, professional counsel, HIV related service provision and access to health services, in contravention of the principle of legality, the freedoms of expression, thought, assembly and association, and the right to civic participation guaranteed under Principle XIV of the National objectives and Directive Principles of State Policy, Articles 2(1)

&(2), 8A, 28(1), (3b), & 12, 29(1), 36, 38(2), 42 and 44(c) of the Constitution of the Republic of Uganda.

(j) That Section 8 of the Anti-Homosexuality Act 2014, criminalising conspiracy by any means of false pretence or other fraudulent means, is vague, uncertain and ambiguous and in contravention of the principle of legality under Articles 2(1) & 2, 28(1), & (3b), 42, 44(c) 28(12) of the Constitution of the Republic of Uganda 1995.

(k) That Section 11 of the Anti-Homosexuality Act, 2014, in classifying houses or rooms as brothels merely on the basis of occupation by homosexuals, creates an offence that is overly broad and in contravention of the principle of legality guaranteed under Article 28(12) of the Constitution; and is further in contravention of the rights to property and privacy guaranteed under Articles 2(1) & (2) , 21,26,27 and 28 (12) of the Constitution of the Republic of Uganda 1995;

(l) That the spirit of the Anti-Homosexuality Act 2014, by promoting and encouraging homophobia, amounts to institutionalised promotion of a culture of hatred and constitutes a contravention of the right to dignity and is inconsistent with and in contravention

of the National Objectives and Directive Principles of State Policy especially objection NO. III, V, VI and XIV and Articles 2(1) & (2), 8A, 24 and 44(a) of the Constitution of the Republic of Uganda of 1995;

(m) That the Anti- Homosexuality Act 2014, by encouraging homophobia and stigmatisation, is in contravention of the duty of the government to respect, protect and promote the rights and freedoms of persons likely to be affected by the Act as stipulated under Articles 2(1) & (2), 20(2), 21(1), 32(1) and (2) of the Constitution.

(n) That the Anti Homosexuality Act 2014 in criminalising consensual same sex/gender sexual activity among adults, is in contravention of obligations with regards to the rights guaranteed under international Human Rights instruments ratified or acceded by Uganda, including the African Charter on Human and People's Rights, the Protocol to the African Charter on Human and Peoples' Rights, Rights on the Rights of Women in African, the UN Covenant on Civil and Political rights; and the UN Covenant on Economic, social and Cultural rights; and in contravention of Objectives XIV, XXXVIII(i) (b) of the National Objectives and Directive Principles of State Policy, Articles 2(1) & (2), 8A, 20 45 and 287 of the Constitution; (sic)

Counsel Rwakafuzi L, Alaka Caleb, Nicholas Opiyo, John Francis Onyango and Fredah Mutetsi represented the petitioners while the Attorney General was represented by Ms Patricia Mutesi, a Principal State Attorney and Bafilawala Elisha, a Senior State Attorney from the Attorney General's Chambers.

Eleven issues were framed to be resolved by this Court. However, at the commencement of the hearing, counsel for both parties agreed with Court that it should first hear them on the first issue which could dispose of the whole petition, namely;

" Whether the Anti-Homosexuality Act 2014, was enacted without quorum in the House in a manner that is inconsistent with and in

contravention of Articles 2(1) & (2) and 88 of the Constitution of the Republic of Uganda 1995 and Rule 23 of the Parliamentary Rules of Procedure."

The case for the Petitioners.

Counsel Nicholas Opiyo submitted that the gist of the above issue was that the process, procedure, and manner of the enactment of the Anti Homosexuality Act, particularly the proceedings of the 9th Parliament on December 20th 2013, was in contravention of and inconsistent with the provisions of Articles 88 (1), 94 of the Constitution of the Republic of Uganda and in violation of Rule 23 of the Rules of Procedure of the 9th Parliament.

He argued that the doctrine of legislative sovereignty is crafted in Article 79 (1) of the Constitution giving powers to Parliament to enact laws for the peace, order and good governance of Uganda and to exercise it alongside the provisions of Articles 91 and 79 of the Constitution.

According to counsel, legislative sovereignty must be exercised in accordance with the provisions of the Constitution. The rationale was to preserve the principle of Constitutional supremacy entrenched in Article 2 (1) of the Constitution. In his view, Parliament was accordingly expected to be guided by the provisions of the Constitution. He cited the decision of this court in the case of *Twinobusingye Severino Vs. the Attorney General*, Constitutional Petition Number 47 of 2011 to fortify his submissions on Constitutional supremacy.

Counsel pointed out the particular acts of violation complained of which are contained in the affidavits, particularly of Professor Maurice Ogenga Latigo, the former leader of opposition in the 8th Parliament and that of Hon. Fox Odoi, who was the Chairperson of the Parliamentary Committee on Rules and Privileges.

In brief, they are that on 20th December, 2013 when the Anti Homosexuality Act was

being put to vote before Parliament, a procedural question as to the quorum in the House was raised by none other than the Rt Hon. Prime Minister of this country Amama John Patrick Mbabazi who is also the leader of Government business in Parliament as recorded in the certified Hansard of Parliament Vol. 1 at pages 168 and 177 annexed to the affidavit of the 2nd petitioner. The Prime Minister said;

"Madam Chair I rise on a point of procedure because I wasn't aware, you should be very careful that if you pass this law it must be with Coram. Please these are not joking matters, Therefore I would like to raise that point and to say that certainly I would like to see a Coram realized in this house to pass this bill therefore rise on a point of procedure one on consultations and the second on Coram."

The Prime Minister raised this point twice. According to counsel, the concern was also supported by Hon. Betty Aol Ochan who said that the house should only pass the law if there was corum. Counsel pointed out that Rule 23 of the Rules of Procedure of the 9th Parliament particularly Rule 23 requires that when a procedural question is raised about coram, the question has to be determined. The Speaker of the House should suspend proceedings of the House for an interval of 15 minutes and have a bell rang. On resumption of the proceedings after the expiry of the 15 minutes, if the number of Members present is still less than the required Coram for voting, the Speaker should proceed with other business or suspend the sitting of the House or adjourn the House without putting the question and the Speaker or Chairperson shall adjourn the committee as he case may be.

To counsel, it was a fundamental provision to protect the integrity of Parliament and to ensure that Parliament is not turned into a cocoon of people conniving to pass laws without Coram. Counsel contended that this procedure was ignored by the Hon. Speaker of the House who went ahead to put the question to a vote. Counsel referred to the affidavit of Hon. Fox Odoi,

particularly in paragraphs 7-11, which highlights what happened in the House on the mentioned date. He further relied on the affidavit of the Hon. Professor Maurice Ogenga Latigo which elaborates on the mandate of Rt. Hon. Speaker to determine the business of the House under the Rules of Procedure. She has got to follow the law, and the Rules of Parliament and the dictates of the Constitution.

Counsel Alaka, associated himself with the submissions of his colleague, Nicholas Opiyo. He reminded Court of the basic principles of Constitutional interpretation such as interpreting the constitution as a whole, the rule of harmony, completeness and exhaustiveness. He relied on the authority of *John Livingstone Okello Okello and others Vs. Attorney General Constitutional Petition Number 4 of 2005*.

He submitted that Article 79 of the Constitution of the Republic of Uganda empowers Parliament to make laws on any matter for the peace, order, development and good governance of Uganda. Article 88 of the 15 Constitution deals with Coram of Parliament which shall be prescribed by the Rules of Procedure of Parliament made under Article 94 of the Constitution. Article 89 of the Constitution deals with voting in Parliament. Article 94 of the Constitution provides that Parliament may make rules to regulate its own procedure including the procedure of the Committees. The Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda and if any other law is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail and that other law shall to the extent of its inconsistency be null and void to the extent of inconsistency. See Article 2(2) of the Constitution.

Counsel referred to the speech of Mr. Katoto in the debate appearing on page 177 of the Hansard where he was recorded to have said;

“Madam chair we passed several bills yesterday and he was around (referring to the Prime Minister) why didn’t he stop us on the basis that there was no Coram, we passed several bills why are you stopping this one madam chair we should continue and pass this bill to save the people of Uganda, what is your worry about this”

Counsel cited the authorities of Paul K. Ssemwogerere and Zackary Olum Vs. Attorney General Constitutional Appeal N0. 1 of 2002 (SC) and P.K Ssemwogerere and others Vs Attorney General Constitutional Petition N0. 7 of 2000 in which court has pronounced itself on Acts passed without a Coram.

In that Petition the issue, was about the passing of the Referendum and other Provisions Act of 1999. The Supreme Court held that the concern of Coram is very fundamental. In that case, the Speaker resorted to the register of attendance of Members to determine whether there was a Coram and the Supreme Court held that it was a contentious matter as to whether any or all the Members allegedly registered and being somewhere in the Parliament building or precincts of Parliament are proved to have been present in the chamber of the House and able to vote in accordance with the provision of Article 89 of the Constitution so as to satisfy the requirement of a Coram within the meaning of Article 88. In Constitutional Petition N0. 7 of 2000 (supra), the Constitutional Court 25 held that any Act or any bill which is passed without Coram is null and void. Counsel invited us to look at the affidavits of Hon. Fox Odoi, Professor Maurice Ogenga Latigo and that of Professor J. Oloka Onyango and the Hansard;

Counsel submitted that the answer to the Petition by the Attorney General in paragraph 4 does not in any way rebut or answer the question of the Bill being passed without a Coram.

Equally, according to him, in the affidavit of Dennis Bireije, the Commissioner

for Civil Litigation, Attorney General's chambers, there is no single denial or mention about Coram. He kept quiet about it so there was no evidence to rebut the assertion which was ably raised on the floor of Parliament and which the Speaker ignored.

In his conclusion, counsel submitted that it was crystal clear from the Petitioner's' affidavit evidence, and Hansard, that that evidence has not been rebutted and ought to be accepted and Court should find that that Bill or the Act was passed without a Coram and it contravened and was inconsistent with or in contravention of *Articles 2 (2) of the Constitution, 88, 94 and 79 of the Constitution and Rule 23 of the Rules of Procedure of the 9th Parliament*. He prayed that on that basis alone, the Petition be allowed.

CASE FOR THE RESPONDENT

In reply, learned counsel Mutesi opposed the petition and relied on the answer to the Petition and the supporting affidavit of Mr. Dennis Bireije. According to her, the only issue in respect of passing of the Act is pleaded in paragraph 12 of the 2nd petitioner which states that the enactment of the Anti-Homosexuality Act by the 9th Parliament on 20th December 2013 without Coram in the House was in contravention of the stated Articles and the Parliamentary Rules of Procedure.

The key aspect to this petition according to her, was an allegation that 30 Parliament in passing that Act without a Coram, violated the Constitution, and so the key issue arising from the pleadings is; "the absence of Coram". She wondered how Court would determine either the existence, or absence of Coram as alleged by the petitioners. She contended that it is very clear that it is a matter of fact and it requires evidence and that when an allegation of fact is made in any court of law, it can only be proved by evidence. She referred us to the evidence of the

petitioners that was filed and said that the only relevant affidavits in respect to the passing of the Act was that of Hon Fox Odoi and Hon. Prof. Ogenga Latigo.

She argued further that Hon. Prof. Ogenga Latigo is not a Member of the 9th Parliament. His affidavit clearly states that he was a Member of the 8th Parliament and he never alleged to have been present when the Act was passed. In the affidavit of Hon. Fox Odoi, the relevant provisions are paragraphs 7-13, where he stated that during the proceedings in plenary on that date when the Bill was being put to vote, the Rt. Hon. Prime Minister raised a procedural question as to Coram. The Hon. Speaker ignored the matter of Coram and in complete violation of Articles 88 and 94 of the Constitution and Rule 23. That in accordance with Rule 23(3), the Speaker is required to ascertain whether the Members of Parliament present in the House form a Coram and on that day, the Speaker did not ascertain the number in the House. She ignored the Rules and decided that the Bill be voted upon.

Counsel highlighted the averments in paragraphs 10 to 13. In summary, the witness stated the laid down procedure that was followed in passing the Anti-Homosexuality Act. According to her, the entire affidavit adduced evidence to shows that the Speaker did not follow the Rules of Parliament. She did not act in accordance with Rule 23 by not ascertaining Coram and that her act was contrary to the law; the Constitution and the Rules of Parliament.

She reiterated that the pleadings before this Court is that the Act was passed without Coram and re-emphasized that paragraph 9, mentions that Rt. Hon. Speaker ignored the Rules and decided that the Bill be voted upon when there was no Coram. According to her, there is no evidence on record on the alleged fact on the absence of Coram.

She argued further that the fact of absence of Coram is what is alleged to have

made the Act inconsistent with the Constitution. The two deponents did not state what is the required number of Coram in the present Parliament. Maybe going by Rule 23, she wondered what was the equivalent of one third. She cited the case of Paul K. Semwogerere and others Vs Attorney Constitutional Petition NO. 7 of 2000 General in which there was a specific allegation that there were less than 93 MPs. It was a matter of fact which cannot be wished away.

Counsel contended further that there was no single allegation by any of the deponents that they know the number of MPs who were in chambers and that they were below the required one third. There was equally no allegation that anybody ascertained from the register or from those in the chamber so as to be able to know that there was no Coram. She emphasized that there was nothing in the pleadings which alleges that the failure of the Speaker to act in accordance with Rule 23 is inconsistent with the Constitution. In her view, counsel for the Petitioners was arguing a hypothetical case that was not before Court. What was before Court was that an Act was passed without Coram which omission is inconsistent with the Constitution?

Counsel submitted that the Hansard is a record of what was spoken in Parliament, and not a record of the numbers of MPs who were in the chambers. To her, it is well known that not every Member in the chamber has to speak, it is only a record of anybody who spoke.

She explained that the challenge by the Hon. Prime Minister was not evidence of the existence or absence of Coram. His statement according to counsel was evidence that he raised a challenge about Coram and that is all.

Counsel referred us to the statement of Hon. Aol, the last paragraph where she stated;

“Madam chair you know one of us must be serious, when we don’t come here we should not blame this house, the house should just move on especially right now if there is Coram we should move on, I believe since you have raised that point of procedure if we tried to check may be we have the Coram”.

Counsel argued that both those statements cannot be relied on to ascertain as a matter of fact, whether or not there was Coram. There was only evidence that certain Members were of the opinion that may be there was no Coram. It could only be ascertained on the basis of the evidence presented. She asserted that the two deponents did not produce factual evidence to establish the alleged fact of the absence of Coram.

On the burden of proof, Counsel Mutesi asserted that the burden of proof that there was no Coram was upon the Petitioners which burden they had failed to discharge. Counsel relied on the lead Judgment of Hon, Justice A. Twinomujuni, (RIP) in Paul Kawanga Ssemwogerere and Zachary Olum Vs Attorney General
30 Constitutional Petition NO. 3/1999.

Counsel contended that on the basis of the Semwogerere case, (supra) the petitioners failed to establish a prima facie case that the Act was enacted without

Coram.

She contended further that the allegations of fact contained in the Petition's paragraph 12(a) which is the only paragraph challenging the passing of the Act required to be proved in accordance with the Evidence 15 Act because they are only allegations of fact. She drew our attention to Article 126 of this Constitution which enjoins this Court to exercise its judicial power in accordance with the law which includes the law of evidence. The evidence adduced by the Petitioners that the Speaker did not comply with Rule 23 by failing to ascertain Coram is not in itself evidence of the absence of Coram.

Lastly, she cited the case of Legal Brains Trust (LBT) Ltd Vs The Attorney General of Uganda EACJ Appeal NO. 10 of 2011 to the effect that it is a cardinal principle that a Court of law will not adjudicate hypothetical questions, a Court will not hear a case in the abstract, one which is purely academic or speculative in nature about which there is no underlying facts in contention and that the reason for this doctrine is to avoid the scenario of the Court engaging its efforts to apply a specific law to a set of speculative facts.

She prayed that we dismiss the Petition with costs to the Attorney General.

Case in rejoinder

In rejoinder, Counsel Alaka Caleb clarified that the enactment of the Anti-Homosexuality Act 2014, by the 9th Parliament on 20th December 2013 without Coram in the house was in contravention of Articles 2(1) and (2), 88 and 94 (1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedure. The affidavit evidence of Hon. Fox Odoi brought out the fact clearly.

Rule 23(1) which is made pursuant to Article 94 of Constitution imposes on the Speaker a Constitutional command to ascertain that there is a Coram. According to

the evidence adduced, she disobeyed that command.

Counsel adopted the definition of "ascertainment" from the case of Ssemwogerere (supra) cited by learned Principal State Attorney Mutesi Patricia where it was stated to mean; "*find out with certainty, to make certain or definite.* "

Counsel Alaka did not agree with counsel Mutesi who submitted that this was a hypothetical case. He asserted that there was a real dispute as to whether in passing the Anti-Homosexuality Act, the Speaker of Parliament flouted Article 88 of the Constitution and Rule 23 of the Parliamentary Rules of Procedure and that this was a live dispute and not academic or hypothetical.

He submitted further that failure to comply with Rule 23 of the Rules of 30 Procedure was an illegality. Once an illegality is brought to the attention of Court, it overrides all questions of pleadings and It becomes immaterial whether that was pleaded or not. He cited the celebrated case of Makula International Vs His Eminence Cardinal Nsubuga & another [1982].

Counsel John Francis Onyango supplemented by submitting that our Parliament has no power to ignore the conditions of the law making process that are imposed by the Constitution. He prayed that a declaration that the act of Parliament in passing into law and enacting the Anti Homosexuality bill without Coram is inconsistent and in contravention of Articles 2, 88, 94 of the Constitution and Rules 23 of the Parliamentary Rules of Procedure and that the Act ought to be declared null and void.

Counsel Nicolas Opio also supplemented what his colleagues submitted with four brief points.

(1) That the Hansard is a record of proceedings and

Includes more than just words spoken on the floor of Parliament and the entire proceedings should be looked at.

That the enactment of a law is not an event but a process. He submitted that the Affidavits of the Rt. Hon. Moses Latigo and Fox Odoi describe that entire process of enactment of the Act in detail and includes ignoring the determination of the question on the 25 Coram. It includes the willful violation of Rule 23 of the Rules of Procedure of this Parliament.

That on the question of illegality, the case of Makula International Vs Emmanuel Nsubuga (supra) is to the point.

On burden of proof, counsel submitted that the facts being alleged are within the knowledge of the learned Attorney General who sits in Parliament, and advises government. If they allege that there was Coram, the burden is on them to show that there was indeed coram.

Counsel reiterated their earlier prayer that the issue be decided in their favour and that the declaration sought be granted with costs.

Decision of the Court.

We have heard and considered the useful submissions made by both counsel and we are highly indebted to them. Though much has been said, two simple questions emerge for our answer on issue one.

1. Was the Anti Homosexuality Act passed in accordance with the law?
2. Whether the petitioners had proved that during the enacting process of the Anti Homosexuality Act, the Rt. Hon Speaker ignored to invoke Rule 23 when the Prime Minister and Hon. Betty Aol raised an objection that there was no quorum at the time the Bill was put to vote at the 2nd and 3rd

5 reading as alleged?

Answer to question one

The petitioners in their petition and evidence allege that the Anti Homosexuality Act was not passed in accordance with the Law. On the other hand, the respondent states that there is no evidence to prove that there was no Coram and that the burden to prove that fact rested with the Petitioners.

We agree with learned counsel Mutesi Patricia that the burden of proof of that fact rested with the Petitioners who alleged the violation of the various provisions of the Constitution and Rule 23 of the Rules of Procedure of Parliament.

An exception to the above Rule is that where one has alleged a fact and the person against whom the fact is alleged, does not deny, he is presumed to have accepted that fact. The respondent was served with the Petition and the accompanying affidavits of Hon. Fox Odoi and Professor Ogenga Latigo, among others, alleging violation of the Constitution and Rules of Procedure in the process of passing of the Anti-Homosexuality Act.

In his reply, and the accompanying affidavit of Mr. Bireije, Commissioner for Civil Litigation, the respondent did not specifically deny the said allegations of violation and lack of Coram.

The law applicable to determine what happens when there is no specific denial is the Civil Procedure Act, cap 71 and the Civil Procedure Rules, S.I 71-1. Rule 23 of the Constitutional Court (Petitions and References) Rules, S.I 91 of 2005 empowers this court to apply the Civil Procedure Act and Rules there under to regulate the Practice and procedure in Petitions and References with such modifications as the Court may consider necessary in the interest of Justice.

Order VIII Rule 3 of the Civil procedure rules provides;

“Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted except as against a person under disability but the court may in

its discretion require any facts so admitted to be proved otherwise than by that admission”.

In view of the above Rule and in the absence of a specific denial by the respondent in his pleadings with regard to issue one, we are unable to accept the submission of learned counsel Patricia Mutesi that the petitioners had a burden to do more than what they did. The evidence contained in the affidavit (including the annexure of the Hansard), of Hon. Fox Odoi stood strong and unchallenged. In the case of H.G. Gandesha & another Vs G.J Lutaya SCCA NO. 14 of 1989, Court observed that where facts are sworn to an affidavit, the burden to deny them is on the other party. Failure to do that, they are presumed to have been accepted.

It is clear from that evidence, that at least three Members of Parliament including the Prime Minister expressed concern about the issue of lack of Coram.

Court is enjoined under Section 56 of the Evidence Act to take judicial notice of the following fact;

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“(a).....

(b)

5 (c) The course of Proceeding of Parliament and of councils or other authorities for the purpose of making laws and Regulations

published under any law for the time being relating thereto.

(d)

(e)

(f) The accession to office, names, titles, functions and signatures of the persons filling for the time being of any public

office in any part of Uganda if the fact the their appointment to

that office is notified in the gazette" (underlining is ours).

Coram is defined in the Rules of Procedure of Parliament to mean at least a third of all the members entitled to vote. As indicated above, Court may take judicial notice of the Uganda Gazette where Members of Parliament representing different Constituencies are published and Court may easily ascertain what a third of the eligible voting members is equal to.

It is our decision that the respondent having been presumed to have admitted the allegations of the Petitioners in the petition that there was no Coram, we find that on the balance of probabilities, the Petitioners have proved that at the time the Prime Minister (twice) and Hon. Betty Aol, raised the objection that there was no Coram and Coram was never established, and that was in contravention of the Constitution and the Rules.

Answer to question 2.

We find that the respondent in his pleadings and submissions did not even attempt to suggest that the Rt. Hon. Speaker responded in any way to the objection raised that there was no Coram.

Rule 23 of the Parliamentary Rules of Procedure require the Speaker, even without prompting by any Member of Parliament to ensure that Coram exists before a law is passed. We note that the Speaker was prompted three times

by Hon. Mbabazi and Hon. Aol to the effect that there was no Coram in the house. The speaker was obliged to ensure compliance with the provisions of Rule 23 of the Rules of Procedure of Parliament. She did not.

Parliament as a law making body should set standards for compliance with the Constitutional provisions and with its own Rules. The Speaker ignored the Law and proceeded with the passing of the Act. We agree with Counsel Opiyo that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it.

We have therefore no hesitation in holding that there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of Coram.

We come to the conclusion that she acted illegally. Following the decision of *Makula International Vs Cardinal Emmanuel Nsubuga*, supra failure to obey the Law (Rules) rendered the whole enacting process a nullity. It is an illegality that this Court cannot sanction.

In the result, we uphold issue one in favour of the petitioners and grant them the following declarations under prayer (e).

(i) That the act of the 9th Parliament in enacting the Anti-Homosexuality Act 2014 on 20 December 2013 without quorum in the House is inconsistent with and in contravention of Articles 2(1) and (2) and 88 of the Constitution of the Republic of Uganda 1995 and Rule 23 of the Parliamentary Rules of Procedure and thus null and void.

⁵ (ii) That the act of the Rt. Hon. Speaker of not entertaining the objection that there was no Corm was an illegality under Rule 23 of the Rules of Procedure which tainted the enacting process and rendered it a nullity. The Act itself so enacted by this reason is

unconstitutional. The issue therefore disposes of the whole petition.

Having found in the affirmative on Issue 1, we find that that has the effect of resolving the entire Petition. The Petition is, therefore, hereby allowed.

We award the petitioners 50% of the taxed costs.

That aside, in the course of the hearing, the respondent was aggrieved by our decision not to grant counsel for the respondent adjournment to enable her to correct further evidence. She indicated that the respondent intended to appeal against our decision and sought stay of the hearing under Rule 2(2) of the Rules of this Court pending the said intended appeal.

We declined to give the said stay and he promised to give our reasons in this judgment. The above Rule talks of inherent powers of this court. In the absence of evidence that the appeal process had been commenced, we refused to invoke the said inherent powers.

Dated at Kampala this...01stday of...August....2014.

HON. MR. JUSTICE S.B.K KAVUMA,
ACTING. DCJ

HON. MR. JUSTICE A.S NSHIMYE,
JUSTICE OF APPEAL
HON. | MR. JUSTICE ELDAD MWANGUSYA, JUSTICE OF APPEAL

HON. MR. JUSTICE RUBBY AWERI OPIO,
JUSTICE OF APPEAL

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HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JUSTICE OF APPEAL

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