



Plot 390 Prof. Apolo Nsibambi Road, Namirembe, Kampala.

P. O. Box 25603, Kampala.

Tel: +256-414-530683/+256-312-530683

Email: info@hrapf.org. Website: www.hrapf.org

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THE COMPUTER MISUSE ACT SHOULD NOT BE MISUSED TO GAG FREE EXPRESSION IN UGANDA

On the night of 7th April 2017, Makerere University researcher Dr. Stella Nyanzi was kidnapped by state agents who after driving her around the city for hours eventually took her to Kiira Police Division where she was detained. She was then produced before the Buganda Road Chief Magistrate on 10th April, and charges of cyber harassment and offensive communications under sections 24(1) and (2)(a), and 25 of the Computer Misuse Act of 2011 respectively were read to her. She pleaded not guilty to both charges, and was remanded to Luzira Prison until 25th April 2015.

Dr. Nyanzi's arrest and prosecution arises from her posts on the social media site Facebook, in which she used colourful and poetic language with sexual metaphors to criticise the President, his wife and the government for misrule, and for failed pledges. This attracted the offensive communications charge. Her 28th January 2017 post in which she referred to the President as a 'pair of buttocks' was specifically pointed out and used as the basis for the offensive communications charge.

The Computer Misuse Act, 2011 was enacted partly to ensure the 'safety and security of electronic transactions and information systems' and to prevent 'abuse or misuse of information systems including computers' which are both noble objectives. However, section 24(1) and (2)(4) and section 25 are being misused. Section 24(1) criminalises cyber harassment which is in part defined in section 24(2)(a) as 'making any request, suggestion or proposal which is obscene, lewd, lascivious or indecent'. These provisions are becoming increasingly popular to deal with any behaviour regarded as morally inappropriate. Since the Act came into force, HRAPF has recorded two cases where these provisions were used against people regarded as 'immoral' because of their behaviour, work, sexual orientation or gender identity. The Constitution, which is Uganda's supreme law in Article 29(1)(a) guarantees the freedom of speech and expression which includes freedom of the press and other media. According to the Supreme Court of Uganda, the speech and expression protected extends to that which offend, shock and disturb. Indeed, the Constitution provides for a limitation on all rights including the right to freedom of expression. Article 43(5) provides that 'no person shall prejudice the fundamental or other human rights and

freedoms of others or the public interest.’ However, article 43(6) provides that the public interest shall not permit, among others: political persecution, and any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society. In interpreting this provision, the Supreme Court found that it was a ‘limitation within a limitation’ and that it is the right that had to be given prominence. Therefore, speech that involves discussion of sex, sexual orientation or gender identity or sexual acts should not necessarily be limited simply because it is regarded by the majority as being ‘obscene, lewd, lascivious or indecent.’ Again, these statements were made by a self-declared supporter of the political opposition in the context of criticising government decisions. All the messages mentioned in the charge contain legitimate political concerns despite the choice of language. Therefore arresting her for such speech amounts to political persecution. This provision therefore falls short of constitutional standards, and ought to be repealed.

Section 25 criminalises the wilful and repeated use of ‘electronic communication to disturb or attempts to disturb the peace, quiet or right of privacy of any person without purpose of legitimate communication.’ The facts of Dr. Nyanzi’s case do not support such a charge. The statement cannot be said to have disturbed the ‘peace, quiet or right of privacy’ of any person and more so the President. The President is in a position where criticism and public discussion of all aspects of his personal and political life can be expected. The communication was clearly made with a purpose of political comment, and so cannot be said to have been made ‘without purpose.’

Therefore the Computer Misuse Act, which has such good intentions, is now becoming the new legal basis for policing morals and sacrificing the gem of freedom of expression. Usually, issues of defamation are dealt with under the realm of tort law. A person who feels that he or she has been harassed or defamed is free to institute civil proceedings against the perpetrator. Using the criminal law to fight political battles and to save face by public figures is an abuse of court process and a waste of scarce state resources. Nothing stops the President from bringing a civil action against Dr. Nyanzi if he feels insulted and defamed.

HRAPF therefore calls upon the state to:

1. Stop the misuse of the Computer Misuse Act by applying it only where it is appropriate and not for harassing political opponents and unpopular minorities.
2. Review section 24(2)(a) of the Computer Misuse Act which only restricts speech and expression on the basis that it is ‘obscene, lewd, lascivious or indecent’; something that limits freedom of speech beyond the constitutional parameters.
3. Drop the unconstitutional and trumped up charges against Dr. Stella Nyanzi.

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