



**A LEGAL AND HUMAN RIGHTS ANALYSIS OF THE JUDGEMENT OF THE COURT OF APPEAL IN THE CASE OF *JACQUELINE KASHA NABAGESERA, FRANK MUGISHA, PEPE JULIAN ONZIEMA AND GEOFFREY OGWARO V ATTORNEY GENERAL AND REV. FR. SIMON LOKODO*, CIVIL APPEAL NO. 195 OF 2014**

**Contents**

<b>1. Introduction</b> .....	1
<b>2. Background</b> .....	2
<b>3. Grounds of appeal</b> .....	2
<b>4. Resolution of the grounds of appeal</b> .....	3
<b>5. Decision of the Court</b> .....	5
<b>6. Legal and human rights implications of this judgment</b> .....	5
<b>7. Conclusion</b> .....	13

**1. Introduction**

On Friday, 30<sup>th</sup> January 2026, the Court of Appeal delivered judgment in Civil Appeal No. 195 of 2014, *Jacqueline Kasha Nabagesera and 3 Others v Attorney General and Rev. Fr. Simon Lokodo* (the Lokodo Appeal). This appeal arose out of the judgment of the High Court in Miscellaneous Cause No. 33 of 2012, which was delivered on 24<sup>th</sup> June 2014, and had been pending determination by the court for nearly 12 years. In disposing of the appeal, the Court of Appeal found, in a lead judgment issued by Byaruhanga Jesse Ruyyema, JA and with which the full bench concurred, that the appeal failed on all 6 grounds, lacked merit, and was therefore dismissed with costs. This is the second decision to be made by the Court of Appeal on LGBTQ+ rights, coming close on the heels of another related case, that concerning the denial of registration to Sexual Minorities Uganda<sup>1</sup> which was also decided against the appellants, again basing on the criminalisation of consensual same-sex relations under the Penal Code Act. This is HRAPF’s analysis of the legal and human rights implications of this decision, particularly on the operating space for civil society organisations working on LGBTQ+ issues and on LGBTQ+ persons in Uganda generally.

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<sup>1</sup> *Frank Mugisha, Dennis Wamala, & Ssenfuka Joanita Warry v Uganda Registration Services Bureau*, Civil Appeal No. 223 of 2018.

## **2. Background**

Between 9<sup>th</sup> and 16<sup>th</sup> February, 2012, Freedom and Roam Uganda (FARUG Limited) convened a workshop with leaders from the LGBTQ+ community in Entebbe, Uganda. The workshop aimed at building leadership capacities among leaders, developing entrepreneurial skills, supporting community economic empowerment and building the capacity of leaders within the movement to effectively engage in policy advocacy. The workshop was attended by 32 individuals and 7 facilitators. On 14<sup>th</sup> February, 2012, a one Abola Nicholas from the office of the Minister of Ethics and Integrity came to the workshop venue and requested access, which was denied by the organisers. The Minister later showed up in person and demanded an explanation about the workshop's objectives and participants, which the organisers endeavoured to do. The Minister however came to the conclusion that the meeting had been convened to encourage or engage in an illegality, to wit, same sex sexual relations. He therefore ordered for the meeting to be closed immediately, and for the first Applicant (Kasha Jacqueline Nabagesera) to be arrested, although she managed to leave the venue.

In the wake of this, the Applicants filed High Court Miscellaneous Cause No. 33 of 2012 under Article 50(1) of the 1995 Constitution of the Republic of Uganda for enforcement of their right to freedom of association and assembly. In this case, the Applicants sought a declaration that the actions of the then Minister of Ethics and Integrity, Rev. Fr. Simon Lokodo, had unlawfully infringed on their right to freedom of expression, association and assembly as guaranteed in Article 29 of the Constitution when he interrupted and shut down their workshop on the suspicion that the workshop was convened to 'promote and encourage the practice of homosexuality', as well as their right to equality and non-discrimination.

In determining this dispute, the High Court found that Rev. Fr. Lokodo could not be held liable in his personal capacity, and that he was in fact acting in the public interest by acting on a reasonable belief of a crime being committed or about to be committed (incitement to commit an offence under section 21 of the Penal Code Act; conspiracy to commit a felony contrary to section 392 of the PCA; unnatural offences under section 145 and acts of gross indecency/ indecent practices under section 148).

Being dissatisfied with this decision, the Applicants/ Appellants then filed Civil Appeal No. 195 of 2014, challenging this decision on the basis that the trial court had erred when it relied on speculation, conjecture and hearsay to determine that the workshop had in fact been held to promote or encourage homosexuality, and in concluding that the restriction imposed by Rev. Fr. Lokodo was a justifiable limitation on their freedom of expression, association and assembly.

## **3. Grounds of appeal**

There were 6 grounds of the appeal:

1. That the Learned Trial Judge erred in law and fact in attempting to resolve on the basis of affidavit evidence the highly contentious question of whether the Appellants had committed a criminal offence when they organised the impugned workshop, hence leading to a miscarriage of justice.
2. That the Learned Trial Judge erred in law and fact when he relied on conjecture and speculation and reached a wrong conclusion that the Appellants' closed workshop was aimed at encouraging persons to engage in and/ or promote same sex practices, thereby leading to a miscarriage of justice.
3. That the Learned Trial Judge erred in law and fact when he turned an application for the enforcement of fundamental rights into a criminal trial, leading to a miscarriage of justice.
4. That the Learned Trial Judge erred in law and fact in concluding that the restriction of the Appellants' rights was justified on the basis that they were promoting an illegality in the exercise of their rights, which conclusion is erroneous and constitutes a miscarriage of justice.
5. That the Learned Trial Judge erred in law and fact when he concluded that the 2<sup>nd</sup> Respondent could not be sued in his individual capacity in the circumstances of the case.
6. That in the circumstances of the case, the findings of the Learned Trial Judge justifying the acts of the Minister in storming and closing the impugned workshop in public interest, and in view of the law were injudicious, unfair and inequitable, and constituted a miscarriage of justice.

#### **4. Resolution of the grounds of appeal**

##### *Resolution of Grounds 1, 2 and 3 - the trial judge's evaluation of evidence*

Grounds 1, 2 and 3 were determined together, as they all related to the issue of the evaluation of evidence. The main thrust of the Appellants' case was that the Trial Judge did not have sufficient evidence on which to base the finding that the workshop had indeed been convened for the purposes of engaging in or promoting same sex sexual acts; that the Trial Judge had wilfully ignored evidence presented by the Appellants indicating the objectives of the workshop and the workshop training materials themselves and instead relied on hearsay evidence from two individuals who were not part of the workshop in anyway, and who could therefore not authoritatively discuss the contents of the workshop. The Respondents argued that the Ministry of Ethics and Integrity had conducted investigations into the work of FARUG and SMUG and was aware that they held such workshops which were intended to promote homosexuality, which was against the laws of Uganda, and that this workshop was no different as it was hidden from public scrutiny. The Court of Appeal found that the Trial Judge did in fact have sufficient evidence for the finding that the workshop had been convened for the purposes of promoting or encouraging prohibited conduct.

The Court also noted that the workshop materials presented clearly supported the inference that the contents '...were clearly meant to encourage and strengthen the participants' resolve to engage in and

*promote homosexual/ same sex practices',<sup>2</sup> that '...during the workshop, there were preaching promises of a better future and improved quality of life in form of quick wealth, good health, satisfying jobs and traveling abroad of LGBT participants and recruits.'<sup>3</sup>*

The Court was convinced that the Respondents based on the doctrine of 'reasonable belief' that the Appellants had committed or were about to commit a criminal offence under the laws of Uganda to stop the workshop and that, although the concept of reasonable belief is not defined, it could be understood through judicial interpretation. Therefore, the actions of the appellants in concealing the workshop from the general public, not displaying signage about the workshop and not being willing to open up the workshop for inspection, coupled with the workshop materials, supported the inference that the workshop was held to '*...support, encourage same sex practices of homosexuals, lesbians and bisexuals.*'<sup>4</sup>

#### ***Ground of Appeal No. 4 - limitation of rights***

The Appellants relied on several decisions of the Constitutional Court<sup>5</sup> and Supreme Court<sup>6</sup> to argue that the limitation on the Appellants' rights was not justifiable, and that the High Court had erred in finding that the restriction was in fact necessary and reasonable. The Appellants argued that any restriction on human rights must be prescribed by law, serve a legitimate purpose and be necessary to achieve the prescribed purpose. The Respondent argued in response that the constitutional protection of freedom of association did not extend to illegal acts. In resolving this issue, the Court, having found that the workshop was indeed convened to promote and encourage same sex practices which are prohibited under the law, also found that the 2<sup>nd</sup> Respondent's actions were reasonable and justified. The Court endorsed the Respondents' argument that promotion of homosexuality was '*a likely offence under ss. 21, 145, 148 and 392 of the PCA [Penal Code Act]. Sections 21, 148, and 392 of the Penal Code Act when read together with S.145 that create other various offences to wit; indecent practice (S.148), other conspiracies to commit misdemeanor offences (S.392 PCA) and incitement to commit an offence (S.21 PCA).*'<sup>7</sup> The Court did not fault the finding of the Trial Judge that '*I agree with the submission by learned counsel for the Respondent that the Applicants' promotion of prohibited homosexual acts in the impugned workshop would amount to incitement to commit homosexual acts and conspiracy to effect an unlawful purpose, which is unlawful.*'<sup>8</sup>

The Court specifically addressed the issue of 'morals' being a limitation under human rights law, and in doing so rejected the concept of constitutional morality that was more espoused in the

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<sup>2</sup> Judgment of Byaruhanga Jesse Rugyema, Para 35.

<sup>3</sup> Above, Para 36.

<sup>4</sup> Above, Para 40.

<sup>5</sup> *Adrian Jjuuko v Attorney General*, Constitutional Petition No. 1 of 2009; *Muwanga Kivumbi v Attorney General*, Constitutional Petition No. 9 of 2005; *Charles Onyango Obbo and Anor v Attorney General*, Constitutional Petition No. 15 of 1997.

<sup>6</sup> *Charles Onyango Obbo and another vs Attorney General*, Constitutional Appeal No. 2 of 2002.

<sup>7</sup> Judgment of Byaruhanga JA, n 2 above, Para 24.

<sup>8</sup> As above.

Indian Supreme Court decision of *Navtej Singh Johar & Ors Vs Union of India Thr. Secretary Ministry of Law and Justice*.<sup>9</sup>

***Ground of Appeal No. 5 – whether the Minister could be sued in his personal capacity***

The Appellants' argument was that the second Respondent had gone over and above his duties as Minister of Ethics and Integrity when he personally closed the workshop, and as such he was liable in his personal capacity. The Court found that the 2<sup>nd</sup> Respondent had acted in his official capacity as Minister for Ethics and Integrity, that his actions were in the public interest, and that suing him in his individual capacity was therefore wrong.

***Ground of Appeal No. 6 – whether the findings of the Trial Judge that the actions of the Minister in storming and closing the impugned workshop in public interest, and in view of the law were injudicious, unfair, unfamiliar and inequitable and constituted a miscarriage of justice.***

The Appellants argued that the 2<sup>nd</sup> Respondent did not accord the Appellants a fair hearing before shutting down their workshop, and that the Trial Court's findings justifying this action were therefore unfair, injudicious and inequitable. That the Minister for Ethics and Integrity had acted as complainant, prosecutor, judge and executioner when he unilaterally shut down the workshop organised by the Appellants. The Court found that there was no miscarriage of justice because the 1<sup>st</sup> Appellant had fled the hotel shortly after the workshop had been shut down, and that the 2<sup>nd</sup> Respondent had summoned the 1<sup>st</sup> Appellant to his office following the workshop for the purpose of giving her a hearing and she had declined to show up. The Court concluded therefore that the Appellants were given the opportunity to be heard, but they chose not to avail themselves of this opportunity.

**5. Decision of the Court**

The Court of Appeal therefore confirmed the decision of the trial judge in its entirety, finding the appeal 'devoid of any merit'. The appeal was thus dismissed with costs against the respondents.

**6. Legal and human rights implications of this judgment**

This decision of the Court of Appeal is the latest in a string of lost cases concerning LGBTQ+ rights. It builds on the earlier cases and on the Anti-Homosexuality Act, Cap 117 to make it clear that it is not only consensual same-sex relations that are criminalised in Uganda, but the whole essence of belonging to a sexual orientation that is not heterosexual. This section discusses the implications of the decision in details:

***i) Providing more clarity on the offence of 'promotion of homosexuality' in the Anti-Homosexuality Act, Cap 117***

Section 11(a) of the Anti-Homosexuality Act Cap 117 (AHA) criminalises 'promotion of homosexuality' where the person 'encourages or persuades another person to perform a sexual

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<sup>9</sup> AIR 2018 SC 4321

act or to do any other act that constitutes an offence under this Act.’ Although the AHA was not mentioned as the events that gave rise to the appeal happened way before the AHA, it was clearly the elephant in the room. The offence of ‘promotion of homosexuality’, which the Trial Judge conjured up by adding different provisions of the Penal Code Act, including those on conspiracy and parties to offences, is now defined as an offence under the Act. As such, what the Court did amounts to interpretation of the extent of this offence. The Court was emphatic that, *‘The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community in Uganda. It is also not in dispute that members of LGBTQI encourage same sex among individuals...’*<sup>10</sup> The Court made it clear that prima facie, all LGBTQ+ persons promote homosexuality as they ‘encourage same sex among individuals.’ This paints every single LGBTQ+ person with the same brush and makes them ‘unapprehended felons’<sup>11</sup> for the offence of promotion of homosexuality, necessarily implying that being LGBTQ alone is enough to make one a promoter of homosexuality. Also, since it was the organising and attendance of a workshop that was at issue here, the Court made it clear that workshops organised by LGBTQ+ groups or persons are prima facie promotion of homosexuality. It now appears clear that under the law, any gatherings among LGBTQ+ persons are to be treated with inherent suspicion. Even if the Court did not at any point reference the Anti-Homosexuality Act, 2023, section 10 of the AHA, which creates the offence of promotion of homosexuality, when read together with this judgment and the judgment of the Court of Appeal in the SMUG registration appeal<sup>12</sup> now appear to create a complete bar against association, expression and assembly rights when exercised by LGBTQ+ persons.

The Court also declared publications such as a paper titled, ‘The Power of Affirmations’; ‘Standing, sitting and sleeping: Unveiling the politics of sexuality and gender identity in Uganda’ by Prof. Sylvia Tamale and ‘Strategies for movement building: Tips from Jesus Christ and the Christian movement’ by Hope Chigudu to *‘...clearly comprise of same sex practice literature and information’*.<sup>13</sup> On Prof. Tamale’s paper specifically, the Court pointed out the part where it discussed Nelson Mandela’s changed position on homosexuality, and stated that *‘I find that the contents of the paper were clearly meant to encourage and strengthen the participants’ resolve to engage in and promote homosexual/ same sex practices.’*<sup>14</sup> Chigudu’s writings on Jesus’s movement were also found to be promoting homosexuality because *‘The context of the above biblical quotes is intended to radicalize the LGBT participants and recruits to brave whatever consequences they are to face in case of opposition.’*<sup>15</sup> This interpretation greatly widens the meaning of ‘LGBTQ+ literature’, because it suggests that literally no book, including the Bible, passes the test set by the Court, if it is being read by LGBTQ+ persons! Section 10(2) of the Anti-Homosexuality Act criminalises the

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<sup>10</sup> Judgment of Byaruhanga JA, n 2 above, Para 23 above.

<sup>11</sup> For how the law makes LGBTQ+ persons unapprehended felons, see for example E Cameron ‘Unapprehended Felons: Gays and Lesbians and the Law in South Africa’, in M. Gevisser and E. Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa*, 1995, 89–98.

<sup>12</sup> n1 above.

<sup>13</sup> Judgment of Byaruhanga JA, n 2 above, Para 39.

<sup>14</sup> Above, para 35.

<sup>15</sup> Above, para 39.

publication of ‘any material promoting or encouraging homosexuality or the commission of an offence under this Act.’ As such, any publication on LGBTQ+ persons that does not disparage or insult them may be regarded as promotion of homosexuality. Legally, it is clear that the second highest court in the country has set a precedent on interpreting the offence of ‘promotion of homosexuality’, which interpretation binds all the lower courts.

### *ii) Defining the scope of ‘reasonable belief’ under the criminal law*

Article 23(1)(c) provides an exception to the right to liberty that allows law enforcement to arrest a person upon ‘reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda.’ Referring to the English case of *Dallison Vs Caffery*,<sup>16</sup> the Court defined reasonable belief in the context of crimes to refer ‘to a standard used in law to determine whether an individual has a justifiable basis for believing that a crime has occurred or is about to occur. It requires facts that would lead a reasonable person to believe a crime is in progress, has been committed or is about to be committed and the standard of belief is higher than mere suspicion.’<sup>17</sup> The Court made it clear that ‘mere suspicion does not satisfy the legal threshold where liberty or rights are at stake.’ Although the court may be faulted on how it interpreted the specific facts, this makes the law clearer on what reasonable suspicion is. Not every suspicion makes the cut, and merely not displaying the name of the workshop and asking an uninvited stranger to leave a closed workshop does not make the meeting illegal as the Court seems to suggest, but rather private, not public. There is no law requiring the displaying of names of events at hotels. Nevertheless, the Court went ahead and clarified that the burden of proving reasonable suspicion lies on the Respondents, who would only discharge this burden by showing that ‘there was reasonable belief or cause for suspecting that the Applicants’ workshop and activities were aimed at encouraging the same sex practices of homosexuals e.t.c as alleged by adducing evidence to the satisfaction of court that the authority had reasonable belief that the Appellants had committed or were about to commit the offence.’<sup>18</sup> Usually, LGBTQ+ persons are arrested merely because a community member or police officer suspects that they are gay, which is not a criminal offence. Perhaps this clarity will reduce such incidences.

### *iii) Narrowing the scope of freedom of association*

In the judgment, the Court of Appeal used the refusal of the organisers to allow an uninvited person to attend the workshop as evidence that the meeting was closed to other people.<sup>19</sup> Freedom of association is protected in Article 29(1)(e), which includes ‘...the freedom to form and join associations or unions, including trade unions and political and other civic organisations.’ For organisations, the right means a constitutional right to operate without interference. Freedom of association has to be with persons that one wants to associate with and not everyone – it thus

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<sup>16</sup> [1965] 1QB 348.

<sup>17</sup> Judgment of Byaruhanga JA, n 2 above, Para 27.

<sup>18</sup> Above, Para 29.

<sup>19</sup> Above, Para 40.

includes the freedom to refuse association.<sup>20</sup> Just because a person identifies themselves as a public officer does not give them the right to attend a workshop that was not intended for them, and denying such person attendance or stopping the meeting and taking a break if the person refuses to leave, as happened in this case, would be a legitimate exercise of freedom of association. This decision clearly disregarded this tenet, and thus creates a further block against enjoyment of the freedom of association for LGBTQ+ persons at a time when the legal environment has shifted further to make it illegal or at least questionable for LGBTQ persons to gather or engage in advocacy for the protection of LGBTQ rights (section 10 of the AHA 2023). Coming shortly after the Court of Appeal decision in the SMUG registration appeal case, this decision now forms part of the plethora of legal barriers to civil society organising for LGBTQ persons in Uganda.

*iv) Reopening the conversation as to whether LGBTQ+ persons are entitled to equal protection under the law*

The decisions of both the High Court and the Court of Appeal was based on the 2<sup>nd</sup> Respondent's identification of the Appellants as LGBTQ+ persons, and thus taking steps to prevent them from associating on that ground. It has been noted that the Constitutional Court has repeatedly upheld the right to equality and freedom from discrimination, even for LGBTQ persons. However, this latest decision of the Court of Appeal suggests that it is acceptable to deny LGBTQ+ persons certain rights simply because of their SOGIE, a principle that runs counter to the spirit of the Constitution and even that of the AHA's sections 2(5) and 3(5) which provide that '*For the avoidance of doubt, a person who is alleged or suspected of being a homosexual, who has not committed a sexual act with another person of the same sex, does not commit the offence of homosexuality under this section.*' The right to equality and freedom from discrimination of all persons, including those regarded as undesirable was already confirmed in the Constitutional Court decision in the *Adrian Jjuuko* case where the Court in nullifying a provision of the Equal Opportunities Act that barred the Equal Opportunities Commission from investigating matters regarded as immoral or unacceptable by the majority of the cultural groupings in Uganda, held that it violated among others the right to freedom from discrimination as it '*legislated the discrimination of persons said to be immoral, harmful and unacceptable.*'<sup>21</sup> Since this precedent was neither overturned or distinguished, and given that the Constitutional Court is the Court tasked with interpretation of the Constitution under Article 137(3), it remains to be seen whether this decision leads to the overturning of the Constitutional court's decision. It clearly puts into question the earlier High Court decisions in *Victor Mukasa & Yvonne Oyoo v Attorney General*<sup>22</sup> where Arach Amoko J held that raiding the house of suspected lesbians was a violation of the right to privacy, and dignity; *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rolling Stone Newspaper*<sup>23</sup> which Musoke Kibuuka J held that a newspaper's call for LGBT persons to be lynched amount to a violation of the right to dignity, as well as that section 145 only criminalised particular acts and not the whole status of being gay;<sup>76</sup> and most recently in *Henry Mukiibi & 20 Others v Attorney*

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<sup>20</sup> See, S White 'Freedom of association and the right to exclude' *Journal of Political Philosophy* 5 (4):373-391 (1997).

<sup>21</sup> *Adrian Jjuuko* case, n5 above, Line 370 - 380.

<sup>22</sup> Misc. Cause No. 247 of 2006, (2008) AHRLR 248.

<sup>23</sup> Miscellaneous Cause No. 163 of 2010

*General*,<sup>24</sup> decided in 2024 where the Justice Singiza found the then Kyengera Town Council Mayor, Hajj Abdul Kiyimba and Kyengera Town Council liable for the violations of the human rights of 20 youths who were arrested during the COVID-19 lockdown in 2020. In the present appeal, the fact that no other meeting at the same venue was raided or closed, was a clear sign of discrimination. By the Court upholding such a decision, it sets a dangerous precedent that LGBTQ+ persons are not entitled to the same protections under the law, like all other persons, just because of a criminal law provision.

*iv) Subjecting human rights to criminal law enforcement*

In interpreting the limitation clause in Article 43 of the Constitution, the Court stated that, ‘*The court will be required to balance the interest of society with those of individuals and groups.*’<sup>25</sup> The Supreme Court, whose decisions bind the Court of Appeal, settled the issue of balancing of rights and the limitation in the case of *Charles Onyango Obbo v Attorney General*<sup>26</sup> by making it clear that the rights are more important than the limitation, and that the limitation of human rights in ‘public interest’ is a ‘limitation within a limitation.’ However, the Court ignored this long-established precedent and essentially equal balanced the rights and the limitations. Indeed, the court came to the conclusion that criminal law trumped constitutional rights when it observed that:

*In this country, an action taken in enforcement of the law and prevention of crime is in alignment with the values, norms and aspirations of the people of Uganda and therefore, such action is deemed to have been taken in public interest unless it is proved otherwise.*<sup>27</sup>

This pronouncement makes human rights considerations secondary to enforcement of the law and prevention of crime. The presumption is that all actions taken in enforcement of the criminal law and prevention of crime are justified regardless of which rights are violated in the process. This sets a dangerous precedent as limitations to human rights have hitherto been clearly delineated. The Constitutional Court has emphasised the critical importance of protecting the rights of all individuals, and of exercising caution in the process of limiting rights in the public interest. The Court disregarded the Constitutional Court’s 2016 decision addressing the conflict between laws intended to protect persons from future harm and human rights protections where the Court had this to say,

*In a society governed by the rule of law and according to human rights principles, steps to protect the public from potential future harm – no matter how potentially serious it may be, should always take place within a framework which also protects the human rights of the individual whom it is feared may be capable of doing such harm.*<sup>28</sup>

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<sup>24</sup> Miscellaneous Cause No. 179 of 2020.

<sup>25</sup> Judgment of Byaruhanga JA, n2 above, above, Para 42.

<sup>26</sup> *Charles Onyango Obbo* case, n1 above.

<sup>27</sup> Judgment of Byaruhanga JA, n2 above, Para 45.

<sup>28</sup> *Adrian Jjuuko* case, n 1 Above.

***iv) Opening the conversation on constitutional morality versus popular morality***

The decision of the Court in this case has created an interesting implication, that Uganda's limitation clause's reference to morals means social morality rather than constitutional morality. The concept of constitutional morality has been developing over time and has taken root in many countries, and is to the effect that morality as protected in the Constitution does not refer to the morals of the majority in society, but rather to ensuring constitutional protections for all. The Supreme Court of India in the *Johar* case stated that,

*Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time.*

That Court therefore decided that constitutional morality, which is rooted in dignity, liberty, and equality, must prevail over social or popular morality, which is based on tradition or majority opinion. Uganda seems to have clearly decided to take a different view, deciding that social morality prevails over constitutional morality, a view that would have a lot of implications in other cases. This continues the trend that the Constitutional Court started in *Fox Odoi Owyelowo & 19 others v Attorney General*,<sup>29</sup> which challenged the constitutionality of the Anti-Homosexuality Act, 2023 where it held that '*Societal norms and aspirations are demarcated as another unique facet of Uganda's constitutional morality*,'<sup>30</sup> and that,

*Individual autonomy or the exercise of sexual autonomy ought not to over-ride the national interest as set out in national laws that are anchored in non-repugnant socio-cultural sensitivities, as this would delegitimise any resultant law and give way to unnecessary social unrest and disregard for the letter of the law.*<sup>31</sup>

It is yet to be seen where this will lead.

***v) Watering down the principle of individual responsibility for human rights violations***

The Appellants relied on Article 20(2), which provides that the rights and freedoms of the individual and groups enshrined in the Constitution shall be respected, upheld and promoted by all organs and agencies of Government and by all persons, as well Article 17(1)(b), which provides

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<sup>29</sup> Hon. Fox Odoi-Oyweelowo, Frank Mugisha, Pepe Onziema, Jackline Kemigisa, Andrew Mwenda, Linda Mutesi, Kintu Nyago, Jane Nasimbwa, Prof Sylvia Tamale, Dr. Busingye Kabumba, Solome Nakaweesi Kimbugwe, Kasha Jacqueline Nabagesera, Richard Smith Lusimbo, Eric Ndawula, Williams Apako, Human Rights Awareness & Promotion Forum (HRAPF), Rutaro Robert, Musiime Alex Martin, Mutebi Edward, Nabuyanda John Solomon, Let's Walk Uganda Ltd & Bishop James Lubega Banda v Attorney General, Pastor Martin Sempa, Eng. Stephen Langa, Family Life Network Limited and The Secretariat Of The Joint United Nations Programme on HIV/AIDS (UNAIDS) (*Amicus Curiae*) v Attorney General, Consolidated, Constitutional Petitions No. 14, 15, 16 and 85 of 2023.

<sup>29</sup> Prof. J. Oloka Onyango and others v Attorney General, Constitutional Petition No. 8 of 2014 [2014] UGCC 14.

<sup>30</sup> Above, Para 261.

<sup>31</sup> Above, Para 263.

that it is the duty of every citizen to respect the rights and freedoms of others, to seek to hold the Minister personally liable for his actions. This principle has now been firmly established in Uganda's law through section 10 of the Human Rights Enforcement Act. The section provides that a public official who, individually or in association with others, violates or participates in the violation of a person's rights or freedoms shall be held personally liable for the violation, notwithstanding the state being held vicariously liable as well. Although this law came into force 4 years after the appeal had been filed in this case, and may therefore not have been a substantive consideration at the filing of the initial case or even the appeal, it had been in force for six years by the time the appeal was decided. Criminal law enforcement is primarily the role of the police, and the Minister had access to the police and could have used them to enforce arrests under Article 23(4) of the Constitution if he thought a crime was being committed. Instead, he decided to personally stop the meeting and attempted to arrest the organisers. This was clearly excessive and would bring individual responsibility into action. In the *Henry Mukiibi* case,<sup>32</sup> the Mayor of Kyengera Town Council was found personally liable for violating of the right to freedom from torture, inhuman and degrading treatment of suspected LGBTQ youth when he personally raided a shelter, beat up residents and tied them up with ropes before matching them to the police. The decision of the High Court in the case preceded the appeal, and yet the Justice did not reference it at all, or similar cases in which state officials have been held liable for excessive actions.<sup>33</sup> This creates more impunity as regards LGBTQ+ persons as state officials know that they can do as they please with this category of people.

*vi. Unjustifiable departure from rule against hearsay evidence*

It is a trite part of the law of evidence that oral evidence must in all cases be direct, that is, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it, with the exception of the opinions of experts expressed in a treatise.<sup>34</sup> However, without addressing this rule or the exceptions thereto, the Court confirmed the Trial Judge's accepting of affidavit evidence by persons who were neither organisers or participants at the workshop on the nature of the workshop. On materials used in the workshop, the Court drew the inference that these materials were all about encouraging sex among persons of the same sex, despite being informed by the Appellants that the materials were used in discussions of human rights, leadership and movement building, advocacy engagements, mental health and wellness and economic empowerment for LGBTQ persons. This complete disregard for the evidence provided and the reliance on hearsay evidence represent a departure from established rules of evidence, and the Court's willingness to stretch and read into innocuous academic papers the intent to promote homosexuality on the part of both the authors and the workshop organisers opens a wide scope of speculative interpretation that could view any teaching material as potential recruitment or promotion propaganda as long as it is being shared with or taught to real or presumed LGBTQ+ persons.

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<sup>32</sup> HCMC No. 179 of 2020.

<sup>33</sup> As discussed in iv above.

<sup>34</sup> Evidence Act Cap 8, section 59.

vi) *Continuing the culture of judicial dishonesty by ignoring earlier decisions of the Constitutional Court and the Supreme Court and citing overturned decisions*

In determining this case, the Court of Appeal ignored earlier decisions of the Constitutional Court that contradict its position. Just like the Constitutional Court did in the *Fox Odoi* case, the Court of Appeal conveniently ignored the decision in the *Adrian Jjuuko* case,<sup>35</sup> where the Constitutional Court went to great lengths to emphasise that all persons, are entitled to equality and equal protection before and under the law, despite majority sentiments and opinions. The Court also conveniently ignores the *Charles Onyango Obbo* case and instead cites the overturned Constitutional Court decision, quickly cites the Constitutional Court decision and quickly states that the proportionality test to be applied 'will vary depending on the circumstances of each case.' At the Constitutional Court,<sup>36</sup> the majority of the justices simply balanced the rights with the limitation and found in favour of the limitation. It is only Twinomujuni JA, who dissented and applied the proportionality test, which approach found favour with the Supreme Court. However, the Supreme Court decision takes the approach much further. Mulenga JSC criticised the decision of Berko JA with which the majority the Constitutional Court had agreed on the basis that,

*... the learned Justice of Appeal omitted to consider if section 50 was within the parameters of Article 43(2)(c). He only focused on rationalising the need for limitation on the freedom of expression by law, and was content to hold that section 50 was a necessary legal limitation. However, the appellants' case in the Constitutional Court, as in this Court, was not that the freedom of expression is absolute. They acknowledge that the enjoyment of the freedom of expression is subject to Article 43, which provides for general limitation on the enjoyment of human rights and freedoms prescribed in the Constitution. Their contention is that section 50 is inconsistent with the Constitution because the limitation it imposes on the enjoyment of the right to freedom of expression, is beyond what is permitted under Article 43.<sup>37</sup>*

As such, the correct precedent to cite would have been the Supreme Court decision and not the Constitutional court one, and its correct application would take the justices beyond merely balancing rights. The Court did not do the 'limitation within a limitation' analysis of public interest that is required by the Supreme Court in the *Charles Onyango Obbo* case. By conveniently ignoring these precedents, the Court engaged in judicial dishonesty. As Kabumba points out as regards the Constitutional court decision in the *Fox Odoi* case, 'On account of the long-held principle of *stare decisis*, the Constitutional court in *Fox Odoi* was duty bound to refer to, and rely upon, the decision and rationale in *Adrian Jjuuko*, especially since this case had been explicitly referred to in the proceedings.'<sup>38</sup> This judicial dishonesty intended to please majoritarian sentiments therefore further undermines the legitimacy of the Court.

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<sup>35</sup> *Adrian Jjuuko* case, n 5 above.

<sup>36</sup> Constitutional Petition No.15 of 1997.

<sup>37</sup> Judgment of Mulenga JSC, page 7 - 8.

<sup>38</sup> B Kabumba 'Part 5: *Fox Odoi* & others v AG & lack of fidelity to Constitutional court precedents' *Observer*, 12 June 2024.

*vii) Unjustified departure from the rules governing costs in public interest cases*

Finally, the Court awarded costs against the Applicants – essentially awarding costs to the state as against private individuals bringing a matter in public interest. It is a feature of public interest litigation that the rule on costs is relaxed and usually each party settles its own costs.<sup>39</sup> This is because imposing costs on persons acting in the public interest discourages more such actions for fear of paying costs.<sup>40</sup> The Supreme Court in *Muwanga Kivumbi v Attorney General*<sup>41</sup> defined Public Interest Litigation as litigation for the protection of Public Interest, noting that ‘... it is not required that for the exercise of the court’s jurisdiction, it is the person whose rights have been violated that brings the complaint to court.’ The judge stated that ‘[t]he salient ingredient of Public Interest Litigation is that the suit is brought for and in the interest of the Public.’<sup>42</sup> As such, despite the Applicants having been affected parties, the case was nevertheless brought in public interest as it addressed issues of public importance. In such cases, the principle is that ‘as a general rule, unsuccessful parties in constitutional litigation should not be ordered to pay costs, except where the case was vexatious and frivolous or where there was ‘conduct on the part of the litigant that deserves censure.’<sup>43</sup> The Court in the *Muwanga Kivumbi* case<sup>44</sup> observed that the principle is that,

*‘costs in Public Interest Litigation cases should only be awarded in rare cases, that a court must balance the need to compensate the successful litigant on the one hand with the value(s) underlying Public Interest Litigation such as growth of constitutional jurisprudence, which would be stifled if potential litigants know that there is a possibility of being saddled with costs in the event of the case being dismissed.’*

The Court in the present appeal did not address any extraneous factor that led to the departure from this rule, thus condemning public interest litigants in costs, something that sets a negative precedent.

## **7. Conclusion**

The judgment of the Court of Appeal represents a significant step back for LGBTIQ+ rights advocacy in Uganda, as well as for civil society organising for LGBTIQ+ persons in Uganda in particular. It builds on the adverse judgment of the Court in the SMUG Registration Appeal and of the Constitutional Court in the *Fox Odoi* case. As such the legacy of the Anti-Homosexuality Act Cap 117 continues as it essentially underlines the prohibition on meetings and engagements by LGBTQ organisations/ with LGBTQ persons, which the Court has now defined as recruitment

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<sup>39</sup> *Biowatch Trust v Registrar Genetic Resources & Others*, (2009) ZACC 14

<sup>40</sup> See C Tollefson, ‘When the ‘public interest’ loses: The liability of public interest litigants for adverse costs awards’ (1995) 29 *University of British Columbia Law Review* 303. Also see G Mayeda ‘Access to justice: The impact of injunctions, contempt of court proceedings, and costs awards on environmental protestors and first nations’ (2010) 6 *McGill International Journal of Sustainable Development Law & Policy* 143.

<sup>41</sup> Constitutional Appeal No. 6 of 2011.

<sup>42</sup> Above.

<sup>43</sup> *Biowatch* n 40 above, para 21.

<sup>44</sup> n5 above.

and promotion engagements/ avenues for encouraging people to engage in same sex sexual practices, and all LGBTQ+ persons have essentially been declared 'promoters' of homosexuality. The legal and human rights implications of the judgment will continue to reverberate throughout Uganda's LGBTQ+ community and beyond.