

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA
CONSTITUTIONAL PETITION NO. 001 OF 2009

5 ADRIAN JJUUKO ::: PETITIONER

V

ATTORNEY GENERAL ::: RESPONDENT

Coram:

- 1. Hon. Mr. Justice Richard Buteera, JCC
- 10 2. Hon. Lady Justice Solomy Balungi Bossa, JCC
- 3. Hon. Mr. Justice Kenneth Kakuru, JCC
- 4. Hon. Mr. Justice Barishaki Cheborion, JCC
- 5. Hon. Lady Justice Catherine Bamugemereire, JCC

15 **THE JUDGMENT OF COURT**

The Petitioner Adrian Jjuuko filed this petition under Article 2(1),
(2), 137(1), (3) of the Constitution of Uganda and r.3 of the
Constitution Court Petitions and References Rules SI of 91 of 05.

The Petitioner seeks declarations that :

- 20 (a) S.15(6) d for the Equal Opportunities Act is inconsistent
with the Constitution of the Republic of Uganda in as far as
it provides that social cultural minorities may be
discriminated against contrary to Art 20(1) of the
Constitution.

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25 (b) Art. 20(1) of the Equal Opportunities Commission Act is inconsistent with the Constitution in as far as it provides that social cultural minorities may be discriminated against contrary to;

30 i) Art. 20(1) of the Constitution which guarantees that fundamental human rights and freedoms are inherent and not granted by state;

35 ii) Art. 20(1) of the Constitution which enjoins all agents of government to respect, uphold and promote the fundamental human rights and freedoms of the individual;

iii) Art. 21(1) of the Constitution which guarantees equality of all persons before and under the law in all spheres of political, economic, social and cultural life;

40 iv) Art. 21(2) of the Constitution which prohibits discrimination that negates equal protection of the law;

v) Art. 28(1) of the Constitution which guarantees the right to a fair hearing before an impartial tribunal;

45 vi) Art. 36 of the Constitution which guarantees protection to minorities.

Wherefore the petitioner prays that this Court declare that Section 15(6)d of the Equal Opportunities Commission Act is unconstitutional.

50 (b) An order or further declaration that this Court may be pleased to grant.

(c) An order awarding costs to the petitioner. *BR* *BB*



The Petition is supported by the affidavit of Adrian Jjuuko which states as follows:-

- 1) That the respondent is the Attorney General of Uganda, and thus he is being sued in his representative capacity.
- 60 2) That during the course of my work as a human rights activist with Human Rights Awareness and Promotion Forum-Uganda (HRAPF), I came across the Equal Opportunities Commissions Act and took a particular interest in it for it showed a ray of hope for marginalized
65 persons in Uganda.
- 3) That I was greatly disappointed by the provisions of Section 15(6) (d) of the Act, which provision qualifies the matters that the Equal Opportunities Commission can investigate. The provision restricts the commission from
70 investigating "any matter involving behavior which is considered to be immoral and socially harmful, or unacceptable by the majority of the cultural and social communities in Uganda.
- 75 4) That by restricting the matters that the Commission can investigate, the Act is instead entrenching discrimination against the very people that the commission is intended to protect."

Representations

80 Learned Counsel Mr. Laudislas Rwakafuzi of Rwakafuzi and Co. Advocates represented the Petitioner. The Respondent/State was unrepresented.



Patricia Mutesi did not give a clear explanation as to why she did not attend representing the State. At one point the Court was
85 informed that she was on the way to Court.

Agreed Issues

The following issues were agreed in the agreed conferencing memorandum.

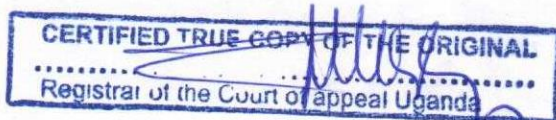
1. Whether the petition is competent in law.
- 90 2. Whether S.15(6) d of the Equal Opportunities Commission Act breaches the right to a fair hearing guaranteed in Art. 28 and Article 44 of the Constitution.
3. Whether S.15(6) d is acceptable and demonstrably justifiable in a free and democratic society.

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Submissions by Counsel for the Petitioner

Mr. Ladislaus Kiiza Rwakafuzi for the petitioner submitted that the Equal Opportunities Commission (EOC) is mandated to investigate and redress complaints of marginalization.

100 Mr. Rwakafuzi further argued that the Equal Opportunities Commission Act was established on the basis of a policy which



sought to give equal opportunity to marginalized and discriminated groups.

105 Mr. Rwakafuzi further argued that S.15 (6)d of the Equal Opportunities Commission seeks to exclude certain sections of society from the benefits of the act and therefore goes against the spirit of the Act as stated in the long title. In its long title the Equal Opportunities Commission Act 2007 states that it is an act whose aim is to give effect to the States' Constitutional mandate to
110 eliminate discrimination and inequalities against any individual or group of persons on the grounds of sex, age, race, color, political opinion and any other reason created by history, tradition, custom for the purposes of redressing imbalances which exist against them and to provide for other related matters.

115 Mr. Rwakafuzi referred to the Articles of Constitution which he contends are inconsistent with Art 20(1) & (2) of the Constitution (1995) which are to the effect that fundamental rights and freedoms of the individual are inherent and not granted by State and that the rights and freedoms are to be respected and upheld by all state and
120 non-state actors.

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He further referred to Article 21(1) of the Constitution and submitted that all persons are equal before and under the law in all spheres of political, social, economic and cultural life and in every other aspect and shall enjoy equal protection of the law.

125 Mr. Rwakafuzi's argument was that the Act tends to exclude some people from equal protection and enjoyment of the law. It was the submission of Mr. Rwakafuzi that whereas the law does not have the concept of misfits s. 15(6)(d) creates a class of misfits and therefore contravenes the Constitution. He argued that the
130 Constitution prohibits discrimination whether in public or private office.

Rwakafuzi added that under Article 28 of the Constitution all persons are entitled to a fair hearing. He submitted that S.14 of the EOC Act which sets up the Equal Opportunities Tribunal gives it
135 power similar to that of a court of law that is, to summon witnesses and examine books of accounts, among others. Rwakafuzi further argued that Section 15(6) d of the EOC Act denies part of the population the right to be heard by curtailing the powers of the Commission to investigate matters that appear to involve persons
140 whose behavior is morally or culturally unacceptable. He referred



to the case of Onyango Obbo and Andrew Mwenda V Attorney
General Constitutional Appeal No. 2 of 2002 (Supreme Court)
Reported in 2004 KaLR 149 - in which the Supreme Court held
that the protection of the fundamental human rights is a primary
145 objective of every democratic constitution, and as such is an
essential characteristic of democracy.

Mr. Rwakafuzi further relied on the case of Eric Gitari v Non
Governmental Organizations Coordination Board and others.
Petition No. 440 of 2013 of the Constitutional and Judicial
150 Review Division (Kenya) arguing that a state which recognizes
differences does not mean a state without morality or does not
banish concepts of right and wrong nor envisage a world without
good and evil.

The finally submission by Rwakafuzi for the petitioner was a
155 prayer that court should not declare his client as one without moral
values but rather that the state should be neutral in the matter
because the parameters of judging moral issues should not be a
basis of adjudication of matters in the Constitutional Court.



We shall be analyzing the issues one by one in chronological order. We also delve slightly into the constitutional background of the formation of the EOC policy and Act in order to juxtapose the impugned section 15(6) d of the Act against the reasons for which
165 the Commission was formed.

1. Whether the petition is competent in law.

This petition is brought by one Adrian Jjuuko whose affidavit is attached to the petition. Adrian brings this petition based on the wording of S.15(6)d of the EOC Act in which he fears that by the
170 existence of this law on our books he would likely be discriminated against. Adrian Jjuuko therefore prayed that S.15(6)d of the Equal Opportunities Act be declared unconstitutional. In support of Adrian's petition and apparently upon earlier advice of this Court, several affidavits in support of the Petition were filed. We find
175 that the Petitioner could bring this action without any support under Article 50 of the Constitution which states as follows:

50. Enforcement of rights and freedoms by courts.

(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has



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been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

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(2) Any person or organisation may bring an action against the violation of another person's or group's human rights.

The Petition questions the constitutionality of an Act of Parliament.

A similar situation arose in Uganda Association of Uganda Female Lawyers and Others v Attorney General, Constitutional

Petition No. 2 of 2003. Members of the legal fraternity challenged

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several sections of the Divorce Act CAP 213. Similarly, ⁱⁿ that context

a social activist could question the Constitutionality of s.15(6) d of

the EOC Act. A petition can be validly filed by an individual who

is not necessarily aggrieved. In this case a concerned citizen seeks

to challenge an act of Parliament although it does not affect the

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person's private rights but is otherwise of concern to them. We

find that the Petition is competent in law both under Articles 50

and 137 of the Constitution of Uganda.

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2. Whether S.15(6) d of the EOC Act breaches the right to a fair hearing guaranteed in Art. 28 and 44 of the Constitution.

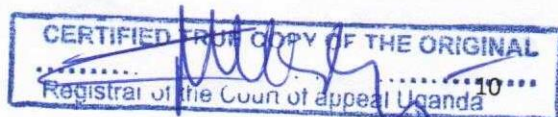
205 The right to a fair hearing is a fundamental right guaranteed by our Constitution under Article 28. Any person with a claim he or she believes they are entitled to which he seeks remedy has a right to seek that remedy. Article 28 states as follows:

28. Right to a fair hearing.

210 (1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

215 It was held in the case of Charles Harry Twagira v Uganda Constitutional Petition No.6 of 2007 that a right to a fair hearing could only be attained when a matter was fully heard and decided.

A right to a fair hearing is at the heart of the very foundation of the Equal Opportunities commission. The EOC is established under Article 38 of the Constitution 1995. Article 32(1) and (2) of the Constitution form the basis upon which the EOC was created.



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Article 32 of the Constitution states as follows:

225 "Notwithstanding anything in this Constitution, the
State shall take affirmative action in favour of groups
marginalised on the basis of gender, age, disability or
any other reason created by history, tradition or
custom, for the purpose of redressing imbalances
which exist against them.

230 (2) Parliament shall make relevant laws, including
laws for the
establishment of an equal opportunities commission,
for the purpose of giving full effect to clause (1) of
this article."

235 In line with Article 32 of the Constitution, Parliament passed the
EOC Act in 2007. It lays out over ten roles of the Commission
which fall under the roles to monitor, evaluate, investigate and
report discriminatory practices and tendencies. It was based on the
240 fact that discrimination against persons on account of age, sex and
other consideration has become pervasive and even subtle.

The Commission was formed pursuant to Article 32 of the
Constitution of the Republic of Uganda. Under the Section 2 of the
EOC Act was aimed at promoting equality of opportunities for all
245 persons in Uganda irrespective of gender, age, physical ability,
health status or geographical location.



The EOC is an Act whose policy basis was to be concerned with issues of marginalization, discrimination injustice, exclusion, unfairness and inequality in access to resources, services and
250 benefits.

Notably Mr. Rwakafuzi submitted, and rightly so in our view, that the Equal Opportunities Act was formed on the basis of a policy which stipulated that certain groups in the society were marginalized and discriminated against on the basis of gender,
255 age, disability or other reasons created by history, custom and other tributes. The overriding objective of the EOC Act was to give effect to the States' Constitutional mandate to eliminate discrimination and inequalities against any individual or group of persons on the grounds of sex, age, race, color, political opinion
260 and any other reason created by history, tradition and custom for purposes of redressing imbalances which exist.

Ideally s.15 (6) d of the EOC Act should be in conformity the Constitutional and policy objectives outlined above. Instead s.15 (6) d. Subsection 6 states as follows:

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(6) The Commission shall not investigate -

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- b.
- c.
- d. Any matter involving behavior which is considered to be -
 - i) Immoral and harmful or
 - ii) Unacceptable, by the majority of the cultural and social communities in Uganda.

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A close analysis of s. 15(6) d brings out that the broad mandate of the EOC excludes investigation into certain groups. Indeed s.15 (6) d specifically prohibits the EOC from investigating complaints of persons considered to be immoral, harmful or unacceptable. If the persons mentioned in s.15(6)d appeared before the Commission, they would likely be excluded from any form of hearing. This section clearly restricts the right to a fair hearing. The right to a fair hearing is a rule of universal application in administrative acts or decisions which affect the human rights of an accused or the individual against who such harm may occur: See the case of Ridge v Baldwin [1964] AC 40. A law that precludes a group of people from adjudication on violation of their rights and does not create an alternative forum to hear them out breaches the right to a fair hearing. We therefore conclude that

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290 s.15(d) impedes the right to a fair hearing for the category of whose
matters cannot be investigated. .

Whether S.15(6)d is acceptable and demonstrably justifiable in a
free and democratic society.

295 Article 43 of the Constitution which provides:-

300 "(1) In the enjoyment of the rights and freedoms
prescribed in this Chapter, no person shall
prejudice the fundamental or other human
rights and freedoms of others or the public
interest.

(2) Public interest under this article shall not
permit:-

(a) Political prosecution;

(b) Detention without trial;

305 (c) 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, or
what is provided in this constitution."

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The onus of proving that a limit on a right or freedom guaranteed
by the charter is reasonable and demonstrably justified in a free
and democratic society rests upon the party seeking to uphold the
limitation. It is clear from the text of article 43 of the Constitution
315 that the limit on the rights and freedoms enumerated are
exceptions to their general guarantee. The presumption is that the
rights and freedoms are guaranteed unless the party invoking



Article 43 can bring itself within the exception criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which indicates that the onus of justification is on the party seeking to limit. It is important that courts take a purposive approach to deciding when a right to a fair hearing arises. 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. As Lord Hope observed in Secretary of State for the Home Department v AF and others (no 3) [2009] 3 WLR 74 at [76] strictly in the context of control orders designed to protect the public from the possible future actions of those who may be capable of terrorist acts:

"This case brings into sharp focus once again the acute tension that exists between the urgent need to protect the public And the fundamental rights of the individual The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. It is the duty of the court to do all that it can to respect and uphold that principle. But the

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340 court has another duty too. It is to protect and safeguard the lives of the individual".

The right in issue here is a procedural requirement of a person's right to a fair hearing before an impartial tribunal. This is a right that belongs to everyone.

345 We have carefully considered the petition filed by Adrian Jjuuko, a concerned citizen challenging the constitutionality of S.15 (6)d of the EOC Act 2007. We are agree that s.15(6)d of the EOC Act prohibits the EOC from giving redress to a section of the society considered socially unacceptable. Purpose and effect are relevant
350 to determine constitutionality of a legislation. This was held by the Supreme Court of Uganda in Attorney General vs Salvatori Abuki Constitutional Appeal No 1 of 1996.

Similarly, in the case of Paul Ssemogerere and others vs. Attorney General, Constitution Appeal No. 1 of 2002 it was held
355 thus,

360 "If an Act of Parliament has the effect of adding to, varying or repealing any provision of the Constitution then the Act is said to have amended the affected article of the Constitution. There is no difference whether the Act is an ordinary Act of Parliament or an Act intended to amend the



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Constitution. The amendment may be effected expressly, by- implication or by infection, as long as the result is to add to, vary or repeal a provision of the Constitution. It is not material whether the amending Act states categorically that the Act is intended to affect a specified provision of the Constitution. It is the effect of the amendment that matters."

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Having cautiously examined the S.15(6)d of the EOC Act as against Articles 20, 21, 28 and 43 of the Constitution (1995), we find that the impugned section indeed contravenes Articles 20, 21, 28 and 43 of the Constitution of Uganda by

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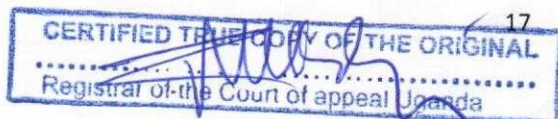
1) Creating a class of social misfits who are referred to as immoral, harmful and unacceptable.

2) Legislating the discrimination of persons said to be immoral, harmful and unacceptable.

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3) Denies access of Justice to that class/section of people by prohibiting the Equal Opportunities Commission from investigating persons who it adjudges immoral, socially harmful and unacceptable.

Article 2(2) of the Constitution states as follows:



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“If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.”

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This Court therefore declares that S.15(6)(d) of the Equal Opportunities Act is inconsistent with Art. 2(2) the Constitution of the Republic of Uganda and is to that thus void.

390 Signed and dated in Kampala this ^{10th}..... day of ^{Nov.} May 2016.

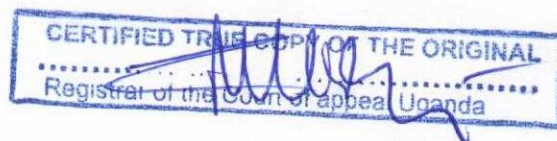
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405 Hon. Mr. Justice Kenneth Kakuru, JCC

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Besting judgment read in open court.

DAIR.