



# LITIGATING ON THE RIGHTS OF LGBTI PERSONS IN UGANDA: SUCSESSES, SETBACKS, OUTCOMES AND LESSONS LEARNT

December 2017



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# **LITIGATING ON THE RIGHTS OF LGBTI PERSONS IN UGANDA: SUCSESSES, SETBACKS, OUTCOMES AND LESSONS LEARNT**

**December 2017**

A publication of Human Rights Awareness and Promotion Forum (HRAPF)

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## **ABOUT HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)**

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Human Rights Awareness and Promotion Forum (HRAPF) is an independent non-partisan NGO that works towards the protection of rights of marginalised communities in Uganda. HRAPF works to achieve its mission through the direct provision of legal aid services, legal and legislative advocacy, and through research and publications. HRAPF operates the only specialised legal aid clinic for LGBTI persons in Uganda and also engages in strategic litigation for LGBTI rights. It engages the police, the judiciary, and independent commissions on the protection of the rights of LGBTI persons. HRAPF sat on the Steering Committee of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) and chaired its Legal Committee, which spearheaded most of the strategic litigation efforts documented here.

## FOREWORD

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For the past decade, Uganda has been pursuing strategic litigation cases in order to secure the legal recognition of the rights of LGBTI persons. Between 2006 and 2017, LGBTI activists in Uganda have brought 11 cases before the courts of law and independent commissions on the rights of LGBT persons. These have been filed in courts of record in Uganda, the East African Court of Justice, a federal court in the United States of America, and before the Uganda Human Rights Commission. This has hoisted Ugandan activists as trailblazers in using strategic litigation for the realisation of the rights of LGBTI persons on the continent, but also as a case study on the successes, setbacks and challenges that come with using strategic litigation to realise the rights of a discriminated and criminalised community.

HRAPF has been at the centre of this litigation as chair of the Legal Committee of the Civil Society Coalition on Human Rights and Constitutional Law (the Coalition), responsible for developing the legal strategy and implementing it. It has also been part of the final decision making process that launched the cases, as part of the Steering Committee of the Coalition, and when its Executive Director was the coordinator of the Coalition. It has also been involved as a litigant in two of the cases, has provided supporting lawyers in almost all the cases, and is currently coordinating the pursuance of the pending cases in the courts of law as a continuation of part of the mandate of the Coalition.

This publication documents the road walked thus far; discusses the gains made, the setbacks experienced and the lessons learnt. We think it will be important to inform further strategic litigation in this field as well as the area of marginalisation generally.

The publication is intended for LGBTI persons seeking a simplified summary of the strategic litigation cases so far undertaken on LGBTI rights in Uganda; researchers and scholars in this field; and to all persons interested in LGBTI struggles.

HRAPF acknowledges the support of the Right Here Right Now Consortium in funding the publication of this work.

This publication is dedicated to all the members of the Coalition for the remarkable journey that we have walked together and the major victories that we have achieved in so short a time, including the nullification of the repressive Anti-Homosexuality Act, 2014. The unity, the diversity and the strength of the Coalition made it possible to achieve what we have achieved.

We hope you find this book inspiring and useful in your different capacities as we continue to strive to take human rights to all.

**Adrian Jjuuko**

Executive Director, HRAPF

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## LIST OF ACRONYMS

<b>ACHRP</b>	African Charter on Human and Peoples’ Rights
<b>AG</b>	Attorney General
<b>AHA</b>	Anti-Homosexuality Act
<b>APA</b>	Anti-Pornography Act
<b>CSCHRCL</b>	Civil Society Coalition on Human Rights and Constitutional Law
<b>EAC</b>	East African Community
<b>EACJ</b>	East African Court of Justice
<b>EOC</b>	Equal Opportunities Commission
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>LC</b>	Local Council
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender, and Intersex
<b>MP</b>	Member of Parliament
<b>NGO</b>	Non-Governmental Organisation
<b>RHRN</b>	Right Here Right Now- Uganda Platform
<b>SMUG</b>	Sexual Minorities Uganda
<b>SOGI</b>	Sexual Orientation and Gender Identity

## SECTION I: INTRODUCTION AND BACKGROUND

### 1.1 The meaning of strategic litigation and the enabling law

Strategic Litigation is a distinct form of Public Interest Litigation, which can be understood as the use of litigation, along with various other legal and non-legal means, to seek legal and social change.<sup>1</sup>

There are different legal avenues enabling strategic litigation that have been used by LGBTI activists to challenge various laws and actions.

The first avenue is article 50(1) of the Constitution of the Republic of Uganda, 1995 which allows any person whose rights have been violated or threatened to be violated to bring an action to a competent court for redress. Article 50(2) allows any person or organisation to bring an action against the violation of another person or group's rights. This provision has done away with the common law requirement for standing which only allowed the person suffering the injury to bring a case before courts of law. This has become the foundation for an enabling environment for Public Interest Litigation in Uganda. Cases brought under article 50 go to a 'competent court', which is usually the High Court as it has original jurisdiction in all matters.

The second avenue is article 137(3) of the Constitution. This provision provides that a person alleging that an Act of Parliament; anything done under the authority of any law; or any act or omission by any person or authority, is inconsistent or in contravention with the Constitution may petition the Constitutional Court for a declaration to that effect. Petitions can thus be brought in order to challenge laws, policies, entrenched systems or actions of the executive which violate the provisions of the Constitution in order to bring about change in the status quo.

The third avenue is article 52(1)(a) of the Constitution which gives the Uganda Human Rights Commission (UHRC) powers to investigate and handle complaints on human rights violations.

The fourth avenue is using articles 23(1) and 27(1) of the Treaty for the Establishment of the East African Community (the East African Treaty). These give powers to the East African Court of Justice to interpret the East African Treaty. The Court can thus declare laws of member states to be inconsistent with the Treaty. Although the Court does not have jurisdiction over human rights violations,<sup>2</sup> it does have jurisdiction over State Parties' breaches of their obligations under articles 6(d), 7(2) and 8(1)(c) of the Treaty, which require partner states to govern their populace on the principles of good governance, democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.<sup>3</sup>

The final avenue that has been used by LGBTI activists in Uganda is the special jurisdiction granted to the federal courts in the USA to entertain actions of US citizens who commit

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<sup>1</sup> CC Barber 'Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations' (2012) 16 *The International Journal of Human Rights* 411-435, 412.

<sup>2</sup> See *Samuel Mukira Mohochi v Attorney General of Ugandan* (Ref. No 5 of 2011).

<sup>3</sup> See for example the cases of *Katabazi & 21 Others v Secretary General of the East African Community* (Ref No. 1 of 2007) and *Hon. Sitenda Sebalu v Secretary General of the East African Community* (Ref No. 8 of 2012).

crimes against humanity in other countries under the Alien Torts Statute.

## 1.2 Overview of Uganda’s Legal Framework on the Rights of LGBTI Persons

In 2015, HRAPF released its *Guide to the normative legal framework on the human rights of LGBTI persons in Uganda*,<sup>4</sup> which is an elaborate publication on the legal framework on LGBTI rights in the country. The most important pillars in this framework are the following:

Uganda’s supreme law is the Constitution of the Republic of Uganda. Any law, practice or custom that is inconsistent with its provisions is void to the extent of the inconsistency.<sup>5</sup> In its Chapter Four, the Constitution sets out the human rights framework which governs Uganda. These fundamental rights are inherent and not granted by the state.<sup>6</sup> The Constitution goes ahead to protect even those rights that are not expressly provided for in the Constitution.<sup>7</sup> None of the Constitutional provisions mention LGBTI issues, except by implication, article 31(2a) that prohibits marriages between persons of the same sex. However, article 21 provides that all persons are equal before and under the law and shall enjoy equal protection of the law. Therefore, while the Constitution has no express protection for LGBTI persons, it also has no express exclusion of LGBTI persons from enjoying the guarantees and protections provided therein, except for the right to marry. The Constitution protects different rights including the right to freedom from discrimination,<sup>8</sup> the right to freedom from inhuman and degrading treatment,<sup>9</sup> the right to privacy,<sup>10</sup> and the rights of minorities.<sup>11</sup> The High Court of Uganda has upheld these rights as applicable to LGBTI persons in a number of cases.<sup>12</sup>

It should be noted, however, that enjoyment of some of the above-mentioned rights is not absolute and can be limited in terms of article 43 of the Constitution. This provision in effect provides that the enjoyment of rights can be limited if such enjoyment prejudices the rights of other persons or the public interest. In interpreting the limitation clause, the Supreme Court regarded it as being ‘a limitation within a limitation,<sup>13</sup> as no political persecution, detention without trial or any limitation beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided for in the Constitution is allowed.<sup>14</sup> The Court made it clear that the right trumps the limitation.<sup>15</sup>

Uganda is also governed by statutes, which are laws enacted by the Parliament of Uganda. Similar to the Constitution, none of these statutes expressly mention LGBTI persons or even

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<sup>4</sup> Human Rights Awareness and Promotion Forum (HRAPF) *A Guide to the normative legal framework on the human rights of LGBTI persons in Uganda* October (2015).

<sup>5</sup> The Constitution of the Republic of Uganda 1995, art 2(2).

<sup>6</sup> n 5 above, art 20

<sup>7</sup> n 5 above art 45.

<sup>8</sup> n 5 above art 21(2).

<sup>9</sup> n 5 above, art 24.

<sup>10</sup> n 5 above, art 27.

<sup>11</sup> n 5 above, art 32.

<sup>12</sup> All the cases will be discussed in detail in subsequent sections of this book.

<sup>13</sup> This concept is developed in the case of *Charles Onyango Obbo & Another v Attorney General*.

<sup>14</sup> The Constitution (n 5 above) art 43(2)(c).

<sup>15</sup> *Charles Onyango Obbo* case, above.

same sex conduct. They have, however, been interpreted and enforced in a manner that extends their application to LGBTI persons. The most important of these statutes is the Penal Code Act of Uganda,<sup>16</sup> which is Uganda's cardinal penal legislation. In its section 145, the Penal Code Act criminalises having 'carnal knowledge against the order of nature' - wording that is not properly defined, but which has been used to charge persons suspected of being LGBTI.<sup>17</sup> Actual or suspected LGBTI persons are subjected to arrests and numerous human rights violations based on this provision.<sup>18</sup> It is the provision that has been used by courts and law enforcers to 'limit' the enjoyment of rights of LGBTI persons in Uganda. The Penal Code Act also creates the offences of being idle and disorderly<sup>19</sup> and being a rogue and vagabond<sup>20</sup> which are routinely enforced against LGBTI persons leading to their constant arrest and detention.<sup>21</sup> The criminal law against having 'carnal knowledge against the order of nature' has been upheld by the High Court as a legitimate limitation to the rights of LGBTI persons in a case concerning a skills training workshop for LGBTI persons.<sup>22</sup> This decision is currently the subject of an appeal.<sup>23</sup>

There are other laws which have been used to limit the enjoyment of rights by LGBTI persons. These include the NGO Act, 2016 and the Companies Act, 2012 which govern the incorporation and registration of NGOs. These laws have been used to refuse organisations with an overt or implicit intention of working with LGBTI persons incorporation and registration<sup>24</sup> and to deny LGBTI organisations the option of opening bank accounts.<sup>25</sup> The Public Order Management Act, 2013 has also been used to prevent LGBTI persons and organisations from holding the Queer Kampala International Film Festival (QKIFF)<sup>26</sup> and annual Gay Pride events for the past

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<sup>16</sup> Penal Code Act Cap 120.

<sup>17</sup> See generally Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) and Human Rights Awareness and Promotion Forum (HRAPF) 'Protecting "morals" by dehumanizing LGBTI persons? A critique of the enforcement of the laws criminalizing same-sex conduct in Uganda' 2013. <http://hrapf.org/?mdocs-file=1619&mdocs-url=false>. (accessed 17 November 2017).

<sup>18</sup> Human Rights Awareness and Promotion Forum releases annual reports on the violation of human rights based on sexual orientation and gender identity. These reports are available at [www.hrapf.org/resources](http://www.hrapf.org/resources).

<sup>19</sup> Penal Code (n 16 above) sec 167.

<sup>20</sup> Above sec 168.

<sup>21</sup> Human Rights Awareness and Promotion Forum (HRAPF) 'The implications of the enforcement of 'Idle and Disorderly' laws on the human rights of marginalized persons' (2016).

<sup>22</sup> In *Kasha Jacqueline Nabagesera, Frank Mugisha, Julian Onziema, Geoffrey Ogwaro v AG and Rev. Fr Simon Lokodo* Miscellaneous Cause No. 033 of 2012.

<sup>23</sup> *Jacqueline Kasha Nabagesera and 3 Others v Attorney General* Civil Appeal 195 of 2014.

<sup>24</sup> HRAPF has handled various cases where the reservation of a name and eventual registration of an organisation is refused because of their possible connection to LGBTI persons. Such organisations have included Sexual Minorities Uganda, Born This Way Uganda, Men of the Night and Action for Transgender Rights Initiative among others.

<sup>25</sup> The legal aid clinic at HRAPF registered two cases in which LGBTI organisations could not open up bank accounts as the banks demand for NGO permits yet the organisations are registered as companies limited by guarantee.

<sup>26</sup> See Human Rights Watch 'Uganda: Police Raid Queer Kampala Film Festival' <https://www.hrw.org/news/2017/12/15/uganda-police-raid-queer-kampala-film-festival> (accessed 17 January 2018). Also see Pink News 'Uganda police raid and shut down Queer Film Festival' <http://www.pinknews.co.uk/2017/12/10/ugandan-police-raid-and-shut-down-queer-film-festival/> (Accessed 17 January 2017).

two years.<sup>27</sup> It is important to note that none of these laws explicitly mention LGBTI persons, but are rather interpreted and enforced in a prohibitive and restrictive manner.

Uganda is also party to various regional and international human rights instruments that have been interpreted and enforced in a manner that overtly protects and promotes the rights of LGBTI persons. These instruments include the International Covenant on Civil and Political Rights (ICCPR)<sup>28</sup> and the African Charter on Human and Peoples' Rights.<sup>29</sup>

From the above discussion, it is apparent that while the letter of the law does not explicitly discriminate against LGBTI persons except on the right to marry, the atmosphere of discrimination and stigma, that is often explained away by such factors as religion and morals, has continued to breed homophobia and systemic repression of LGBTI persons. This has resulted in a situation where all laws and policies are interpreted as criminalising homosexuality and prohibiting any 'related activities', despite the fact that the law only criminalises having 'carnal knowledge against the order of nature'. It is for this reason that LGBTI persons in Uganda are often denied their basic rights, and it is this that in turn makes strategic litigation important.

### 1.3 An overview of LGBTI strategic litigation in Uganda

Litigation on LGBTI rights has a history that stretches back to 2006 when the first case aimed at enforcing the rights of LGBTI persons was filed.<sup>30</sup> Since then, ten other cases on LGBTI rights have been brought before the courts of law in Uganda, at the East African Court of Justice and in a federal court in the United States of America. These cases are: a challenge to the constitutionality of section 15(6)(d) of the Equal Opportunities Commission Act;<sup>31</sup> a challenge against a tabloid that published faces and addresses of actual and perceived LGBTI persons and called for their hanging;<sup>32</sup> a challenge of the actions of the Minister of Ethics and Integrity in closing down a skills training workshop for LGBTI persons;<sup>33</sup> an appeal against the High Court's decision upholding the minister's closure of the skills training workshop;<sup>34</sup> a challenge of the hate speech campaign propagated by US evangelical pastor Scott Lively which led to the tabling of the Anti-Homosexuality Bill in Uganda;<sup>35</sup> two cases

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<sup>27</sup> The annual Pride celebrations were raided in 2016 where 16 persons, including a HRAPF lawyer, activists and organisers were forcibly arrested and the 2017 Pride celebrations were cancelled as the Minister of Ethics and Integrity intervened and said they could not be held.

<sup>28</sup> The case of *Toonen v Australia* Communication No. 488/1992.

<sup>29</sup> African Commission on Human and Peoples' Rights Resolution 275: *Resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity*, 55<sup>th</sup> Ordinary Session from 28 April to 12 May 2014, Luanda, Angola.

<sup>30</sup> This was the case of *Victor Mukasa and Yvonne Oyo v Attorney General* Miscellaneous Cause No 24/06.

<sup>31</sup> *Adrian Jjuuko v Attorney General* Constitutional Petition No. 1 of 2009 (The *Equal Opportunities Commission Act* case).

<sup>32</sup> *Kasha Jacqueline, David Kato Kisule, Onziema Patience v Rolling Stone Newspaper and Giles Muhame*, Miscellaneous Cause No. 163 of 2010 (The *Rolling Stone* case).

<sup>33</sup> *Kasha Nabagesera, Frank Mugisha, Julian Onziema, Geoffrey Ogwaro v Attorney General and Rev. Fr Simon Lokodo*, Miscellaneous Cause No. 33 of 2012 (The *Lokodo* case).

<sup>34</sup> The *Lokodo* case (n 23 above).

<sup>35</sup> *Sexual Minorities Uganda v Scott Lively* C.A. No. 12-cv-30051-MAP in the District Court of Massachusetts (The *Scott Lively* case).

challenging the Anti-Homosexuality Act, one in Uganda's Constitutional Court<sup>36</sup> and the other at the East African Court of Justice;<sup>37</sup> a challenge against the refusal to register an LGBTI organisation, Sexual Minorities Uganda before the High Court;<sup>38</sup> a challenge of the actions of the police in violently breaking up a 2016 Pride event<sup>39</sup> and a challenge to the arbitrary arrest and abuse of the human rights of two LGBTI persons who had been arrested by the police,<sup>40</sup> which were both filed at the UHRC.

Of the 11 cases so far recorded, four have been successful with victories in favour of LGBTI persons. These are the *Victor Mukasa* case where the court declared that breaking into a lesbian's house and humiliating the guest found there were violations of the rights to property and freedom from inhuman and degrading treatment; the *Rolling Stone* case where the court found that publishing personal details of LGBTI persons and calling for them to be hanged threatened their rights to privacy and dignity; the *Anti-Homosexuality Act* case where the court found the Anti-Homosexuality Act unconstitutional as it was passed without the quorum required by the Constitution; and finally the *Equal Opportunities Commission Act* case where the court found that a law stopping minorities from accessing the Equal Opportunities Commission contravened the right to a fair trial. The *Lokodo* case is the one case which was lost as the judge found that the criminalisation of consensual same-sex relations justified the limitation of the right to freedom of assembly and association as the particular workshop was aimed at encouraging homosexuality. Two cases were dismissed on preliminary objections, the first one on the grounds that the matter was moot (the *HRAPF* case before the EACJ), and the second on the basis that a US court's jurisdiction could not be established as there was little connection between the injuries in Uganda and the actions done by Scott Lively on US soil (the *Scott Lively* case). The only case pending before the High Court is the *SMUG registration* case. Two appeals are pending decision, one challenging the decision in the *Lokodo* case (the *Lokodo* Appeal) and the other is pending before federal appeal courts in the US following an appeal by the defendant Scott Lively (*Scott Lively* appeal). Two other cases are pending before the UHRC.

These cases have been brought following to a strategy that has been referred to as the incremental approach.<sup>41</sup> This approach involves bringing cases to court to create precedents on the basic rights of LGBTI persons and defeat efforts for further criminalisation, with a view to ensuring the eventual decriminalisation of consensual same-sex sexual conduct and securing positive protections for LGBTI persons. The approach was agreed upon during the Coalition's Symposium on Elaborating a Sexual Rights Advocacy Agenda for Uganda held in Kampala in January 2012, where it was agreed to strategically challenge violations against LGBTI persons which would build precedent for later cases.

The first case was pursued by an individual, Victor Mukasa, but the subsequent cases have

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<sup>36</sup> *Professor J. Oloka Onyango and 9 Others v Attorney General*, Constitutional Petition No. 8 of 2014 (The *Anti-Homosexuality Act* case).

<sup>37</sup> *Human Rights Awareness and Promotion Forum v The Attorney General of Uganda*, Reference No. 6 of 2014 (The *HRAPF* case).

<sup>38</sup> *Frank Mugisha and 3 Others v Uganda Registration Services Bureau (URSB)* Miscellaneous Cause No. 96 of 2016 (The *SMUG Registration* case).

<sup>39</sup> *Shawn Mugisha & 6 Others v DPC Old Kampala* CTR/06/2017.

<sup>40</sup> *Jackson Mukasa & Kim Mukisa v Attorney General*, UHRC No. CTR/24 of 2016.

<sup>41</sup> A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (2013) 381-408.

been coordinated under the auspices of the Coalition, and the petitioners selected basing on the facts of the case. The Coalition was formed in October 2009, shortly after Hon. David Bahati tabled the Anti-Homosexuality Bill.<sup>42</sup> At its strongest point, the Coalition comprised of 51 human rights organisations and its aim was to oppose the anti-human rights, anti-democratic, anti-public health and anti-constitutional agenda that was being promoted by the Anti-Homosexuality Bill. The Coalition had a Steering Committee, which was made up of different organisations representing different interests which approved the cases, and which was chaired by the host organisation, Refugee Law Project. It also had a Legal Committee, which coordinated the cases and organised the litigation and this was composed of lawyers who were part of the various organisations in the Coalition, chaired by Human Rights Awareness and Promotion Forum. The Coalition is currently not as active as it used to be and it only convenes when necessary.

The legal aspects as well as the advocacy components and implications of the cases are discussed before each case in legal strategy meetings. The meetings are not only attended by lawyers, but also by LGBTI community leaders. The implications of bringing the cases to court are discussed and a decision made on whether to proceed with the case or not. For some of the more important cases, legal strategy meetings have been held over a period of two days to fully discuss all the issues. Sometimes, lawyers and activists from other countries are invited to attend the meetings and share experiences.

The cases are handled by a combination of LGBTI friendly lawyers working in private practice and lawyers who are part of organisations working on LGBTI issues. The Coalition oversees the implementation of the legal strategy and assists the advocates who are to appear in court with research for the cases.

## 1.4 Placing Strategic Litigation within the broader struggle for LGBTI rights in Uganda

The struggle for the legal recognition of LGBTI persons in Uganda has been going on for close to two decades with LGBTI individuals initially coming together for social purposes<sup>43</sup> before eventually holding the first public activity: a press conference where everyone was wearing masks.<sup>44</sup>

Ironically, Uganda's LGBTI movement building was precipitated by the increasing expression of anti-gay sentiments in different spheres of Ugandan life, which led to the inclusion of the prohibition on same-sex relations in Uganda's Constitution in 2005.<sup>45</sup> The first strategic case on rights of LGBTI persons - the *Victor Mukasa* case - was filed in December 2006. Thus it can be said that the state's actions of further curtailing LGBTI rights by prohibiting same-sex marriages woke up an hitherto silent movement which started demanding its rights. The state responded by including a provision in the Equal Opportunities Commission Act, 2007 that prevented the Commission from hearing cases concerning behaviour that is considered immoral and unacceptable by the majority. Homosexuality was specifically mentioned as

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<sup>42</sup> The Bill was gazetted on 25 September 2009, as Bills Supplement No. 13 to the Uganda Gazette No. 45 Volume CII. It was tabled by Ndorwa South MP, David Bahati, as a private member's bill.

<sup>43</sup> See Jjuuko n 41 above, 391-393.

<sup>44</sup> AllAfrica.com 'Uganda: Homosexuals demand acceptance in society' 17 August 2007 <http://allafrica.com/stories/200708170273.html>

<sup>45</sup> The Constitutional Amendment Act 2015, Sec 10.

the reason for this provision during the discussions leading to the passing of the bill.<sup>46</sup>

Meanwhile in October 2007, Pastor Scott Lively from the United States of America spoke at a conference at which he and other evangelists from both Uganda and USA emphasised the 'threat' that LGBTI persons pose to the traditional family, at the end of which the evangelists held a meeting with a section of legislators in Uganda, including the then Ndoorwa South MP Hon. David Bahati.

In November 2008, judgment in the *Victor Mukasa* case was delivered in favour of the applicants. On 5<sup>th</sup> January 2009, the case challenging section 15(6)(d) of the Equal Opportunities Commission Act was filed. The reaction of the state was to announce that a tough law on homosexuality was in the offing.<sup>47</sup>

Indeed in October that year, Hon. Bahati tabled the Anti-Homosexuality Bill in Parliament. This Bill was aimed at creating the offences of homosexuality and aggravated homosexuality, imposing the death penalty for the latter offence as well as a clause, which would have created a defence to an offence if the assailant was a 'victim' of homosexuality.

The reaction of the LGBTI groups was swift. The Coalition was immediately formed bringing together LGBTI groups and mainstream organisations led by women's rights organisations. The Coalition's stated aim was to oppose the Bill. The Coalition conducted a visible campaign against the Bill, holding public events, speaking out in the media, bringing cases in courts of law, and mobilising the international community.<sup>48</sup>

The tabling of the Bill led to an upsurge in incidents of violations of LGBTI persons' rights, including the murder of noted gay rights activist David Kato in 2012.<sup>49</sup> This period shone a spotlight on LGBTI persons in Uganda and their realities. In equal measure, this spotlight and attention evoked the ire of anti-gay crusaders, emboldened government's eagerness to position itself on the issue and amassed support for LGBTI persons in Uganda, especially from the international community and human rights groups. The implication of this context was that there were increased attacks not just on LGBTI persons but also on the LGBTI community. The fervent discussions on homosexuality also seeped into the legislature, which went into overdrive and sneaked anti-gay provisions into otherwise progressive laws.<sup>50</sup> There was an urgent need to stop the 'vice' of homosexuality in its tracks and all stakeholders were eager to play their part.

Inversely, this retrogression and the attacks were met by an increasingly solid LGBTI movement and supportive allies. Under the auspices of the Coalition, these attacks were

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<sup>46</sup> Parliamentary Hansards, December 12, 2016 quoted in S Tamale 'Giving with one hand and taking away with the other: The Uganda Equal Opportunities Commission (EOC) Act, 2007' in Human Rights Awareness and Promotion Forum *Still nowhere to run: Exposing the deception of minority rights under the Equal Opportunities Commission Act of Uganda* (2010) 21-23.

<sup>47</sup> J Namutebi 'Anti gay Bill to be tabled soon' *The New Vision* 1<sup>st</sup> July 2009.

<sup>48</sup> See Jjuuko, n 41 above. For the mobilisation of the international community, also see generally A Jjuuko 'International solidarity and its role in the fight against Uganda's Anti-Homosexuality Bill' in K Lalor, E Mills, A Sanchez Garcia & P Haste (eds.) *Gender, Sexuality and Social Justice: What's law got to do with it?* (2016) 126-135.

<sup>49</sup> In October 2010, the Rolling Stone Newspaper published photographs and personal information of about 100 alleged homosexuals in Kampala, as a consequence of which David Kato and three others sued the newspaper. Judgment in the case was delivered in favour of David Kato and his co-applicants on the 30<sup>th</sup> of December 2010. A little over three weeks later on the 26<sup>th</sup> of January 2011, he was brutally murdered in his home in Mukono.

<sup>50</sup> As an example, the Equal Opportunities Commission Act 2007.

challenged. The first test came in October 2010, when the Rolling Stone magazine released pictures and details of LGBTI persons and called for their hanging. This resulted in the successful *Rolling Stone* case. In 2012, the then new Minister of Ethics and Integrity, Rev. Fr. Simon Lokodo made his mark by stopping an LGBT skills training workshop in Entebbe. This resulted in the *Lokodo* case, which was lost. The battlelines were clearly drawn.

The Coalition's above efforts, combined with pressure from the international community, managed to delay the passing of the Bill. However, during this delay, new bills were introduced which had provisions that had the same effect as those in the AHA. The first of these was the Public Order Management Act (POMA) which was passed in August 2013. The AHA followed thereafter in December 2013 and the Anti-Pornography Act was passed the next day. Later the HIV/AIDS Prevention and Control Act was passed in May 2014. These laws were arguably passed to restrict the freedom of expression of 'dissident' groups as well as to preserve moral values in the 'public interest'. It was also around this time that new legislation was first considered to control the activities of NGOs in the interests of preserving the 'public interest' and the 'dignity of the people of Uganda'.<sup>51</sup>

The passing of the AHA was immediately followed by a challenge to it in the courts of law which was successful (*AHA* case). Just two months before the case was decided, the High Court issued its negative decision in the *Lokodo* case which upheld the minister's actions in stopping a workshop for LGBTI persons as legal. The battle against the AHA was also taken to the East African Court of Justice, which eventually dismissed the case on the basis of mootness in 2016.

Contrary to expectations, the annulment of the AHA did not abate the violations suffered by LGBTI persons in Uganda. Instead, a marked increase in these violations was documented.<sup>52</sup> The trends of violations also changed, showing an increase in violations perpetrated by non-state actors.<sup>53</sup> This was attributed to anger and disappointment within the populace over the annulment of the Anti-Homosexuality Act, pursuant to which ordinary people chose to 'take the law in their hands'.<sup>54</sup> There was also a change in interpretation and enforcement of laws, with focus being taken away from just section 145 of the Penal Code Act to other laws like the Companies Act, the Registration of Persons Act, 2015 and the Public Order Management Act.<sup>55</sup> These necessitated a change in the strategic litigation approach used. Soon after the positive decision in the *AHA* case, the Coalition's host, Refugee Law Project, had its activities suspended and this accelerated the rapid decline of the Coalition.

The NGO Bill also became law in 2016. HRAPF together with SMUG filed the case challenging the refusal to reserve the company name 'Sexual Minorities Uganda'. After the rights of two LGBTI persons had been violated by the police through anal examinations and long detention, HRAPF filed a case at the UHRC, and this was also done after the arrest of activists and the brutal stopping of the LGBTI Pride event in 2016.

The loss in the *Lokodo* case saw fewer cases being filed thereafter and also saw the increased use of mechanisms other than courts. For example the first LGBTI cases were filed with the UHRC. It also saw increased use of other strategies such as lobbying of the executive and

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<sup>51</sup> See the current NGO Act, 2016, which was introduced as a Bill in Parliament in the early part of 2015.  
<sup>52</sup> The Consortium on Monitoring Violations Based on Sex Determination, Gender identity and Sexual Orientation '2014 Uganda report of violations based on gender identity and sexual orientation' (2015).  
<sup>53</sup> As above.  
<sup>54</sup> As above.  
<sup>55</sup> The police used this Act as the basis for their raid on the 2016 Pride activities.

legislative branches and engagements with the Uganda Police Force through training of police officers<sup>56</sup> and meetings at police stations.<sup>57</sup> Engagements with the Ministry of Health also increased leading to the Ministerial Directive on Non-Discrimination,<sup>58</sup> and continued work with the Most At Risk Populations Initiative (MARPI).<sup>59</sup>

Therefore litigation complements the other strategies aimed towards decriminalisation and eventual equality for LGBTI persons in Uganda. It has been a key component of the struggle for LGBTI equality in Uganda

## 1.5 Conclusion

Strategic litigation is an important strategy employed by the Ugandan LGBTI community to achieve legal and social equality. Its being a public strategy as well one that uses the judiciary, one of the three main organs of the state, makes it very important in the struggle for equality and justice. Ugandan law has a number of provisions under which strategic litigation can be done and activists have also been able to make use of regional options as well as the courts in other countries.

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<sup>56</sup> HRAPF has been training police officers on LGBTI rights countrywide since 2015. So far over 200 senior police officers have been engaged on the rights of LGBTI persons.

<sup>57</sup> This is usually when lawyers go to police stations to get arrested persons released from detention and HRAPF had also started speaking to police officers at the weekly parades.

<sup>58</sup> Republic of Uganda, Ministry of Health (2014) 'Ministerial Directive on Access to Health Services without Discrimination' <https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14> (accessed 8 September 2017).

<sup>59</sup> MARPI is a specialised clinic that provides services to marginalised persons including LGBTI persons.

## SECTION II:

### LITIGATING ON THE RIGHTS OF LGBTI PERSONS IN UGANDA: 2006 TO 2018

This section discusses the strategic cases that have been or are being litigated on the rights of LGBTI persons in Uganda. The cases will be classified in accordance with their objectives, and the individual cases in each cluster will be discussed chronologically. Any pending cases will be discussed at the end of each section.

#### 2.1 Cases challenging restrictive laws

There are four cases brought to the courts so far challenging restrictive laws. These cases are brought under article 137 of the Constitution, and for the case at the East African Court of Justice under articles 23(1) and 27(1) of the East African Treaty, which provisions give the courts powers to nullify laws that are inconsistent with the Constitution or the East African Treaty respectively. The cases are as follows:

##### ***Professor J. Oloka Onyango and 9 Others v Attorney General Constitutional Petition No. 8 of 2014:***

This is the most important case on LGBTI rights in Uganda, which, although not decided on human rights grounds, helped to get rid of a law that would have legalised the mass violation of LGBTI rights.

The petition challenged the procedure through which the Anti-Homosexuality Act, 2014 was passed and some of its provisions as contravening Uganda's Constitution. The background to the petition is that on 13<sup>th</sup> October 2010, Ndorwa West Member of Parliament, David Bahati, tabled the Anti-Homosexuality Bill, 2010 in the Parliament of the Republic of Uganda. The Bill, among other things, had clauses that sought to: create the offence of homosexuality, widely defined to include touching between people of the same sex; propose the death penalty for what was regarded as 'aggravated homosexuality' which included 'repeat offenders'; force professionals and relatives to report persons who were homosexuals; prohibit 'promotion' and 'aiding and abetting of homosexuality'; and nullify international instruments that promoted homosexuality. On 22<sup>nd</sup> December 2014, after a protracted, four year struggle, the Bill was passed into law with a number of the original provisions dropped. The resultant Act, the Anti-Homosexuality Act, 2014, did not include provisions imposing the death penalty; a reporting duty; or the nullification of international instruments, but the remainder of the troubling provisions were retained. On the day that the Bill was passed, the Speaker ignored requests from the Prime Minister and other Members of Parliament to ascertain the quorum in Parliament and simply went ahead with the process.

The petitioners argued that the law was unconstitutional as it was passed without the requisite quorum in Parliament, which contravened the established rules of procedure of Parliament. The petitioners also argued that the Act had provisions that violated constitutionally guaranteed rights to equality, freedom of expression and the right to a fair trial among others. The argument of the Attorney General was simply that the law was necessary and justifiable in the public interest, and that there was a need to provide stronger criminal sanctions for homosexual behaviour since the existing law at the time did not effectively deter such behaviour.

The court (SB Kavuma; AS Nshimye; Eldad Mwangusya; Rubby Aweri Opiyo; Solomy Balungi Bossa JJCC) only heard arguments on the issue of quorum and declared that it would make

a judgment on that basis. It delivered its judgment on 1<sup>st</sup> August 2014. The Court pointed out that according to Rule 23 of the Parliamentary Rules of Procedure, made under article 94 of the Constitution, there was no quorum in Parliament at the time of passing of the Act, and therefore the resultant law was null and void. The Court did not decide the issues on the contents of the law itself.

Even though this case did not ultimately lead to the court making a finding on the rights of LGBTI persons substantively vis-à-vis the criminalisation of consensual same-sex sexual conduct, it did lead to the annulment of the Anti-Homosexuality Act. This Act was without a doubt the single greatest legislative threat to the rights of LGBTI persons and the case is thus commendable as a victory for the LGBTI community in Uganda.

The case was also a show of solidarity in the pursuit of the respect of the rights of LGBTI persons as it was the first case to engage a multiplicity of petitioners from a diverse range of fields. They included: a law professor;<sup>60</sup> two politicians,<sup>61</sup> journalists,<sup>62</sup> a gay medical doctor;<sup>63</sup> LGBTI activists;<sup>64</sup> and Civil Society Organisations.<sup>65</sup> The willingness of all these persons to come together and fight the Act was a message that the Act was disastrous not just for LGBTI persons and their allies, but to all persons working on issues of human rights as well as civic organisations. The galvanising of efforts was an effective way to mainstream rights of LGBTI persons into the general human rights discourse.



**Interesting Fact:** The case was decided in a very short period of time. It was filed on 11<sup>th</sup> March 2014 and decided on 1<sup>st</sup> August, a period of six months. Hearing was done over a period of three days and judgment was delivered on the fourth day, something that is not very common in Uganda where delays in hearing and deciding cases is the order of the day. A clear comparison is the *Adrian Jjuuko* case, which took eight years to complete (2009-2016).

### ***Human Rights Awareness and Promotion Forum (HRAPF) (Applicant) v Attorney General of Uganda (Respondent) and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS) (amicus curiae) Reference No. 6 of 2014:***

This case was filed in the East African Court of Justice at almost the same time as the *AHA* case in the Constitutional Court. It also challenged some of the provisions of the *AHA* as being contrary to the rule of law and good governance principles enshrined in the Treaty for the Establishment of the East African Community (EAC Treaty).

The case originally challenged almost all the provisions of the *AHA* as being contrary to

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<sup>60</sup> Prof. J. Oloka-Onyango.

<sup>61</sup> Hon. Fox Odoi-Owyelowo, a ruling party member of Parliament and Prof. Morris Ogenga-Latigo, a former Leader of Opposition in Parliament.

<sup>62</sup> Renowned journalist Andrew M. Mwenda.

<sup>63</sup> Dr. Paul Semugoma.

<sup>64</sup> Jacqueline Kasha Nabagesera, Julian Pepe Onziema and Frank Mugisha.

<sup>65</sup> Human Rights Awareness and Promotion Forum and the Centre for Health, Human Rights and Development (CEHURD).

articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty which provide for the rule of law, human rights and good governance as the fundamental principles of the East African Community. However, quite unexpectedly, on 1<sup>st</sup> August 2014, the Constitutional Court of Uganda nullified the AHA. This led to an amendment of the case before the EACJ. The amendment limited the case to challenging the enactment of the Act with three particular provisions, which led to violations against LGBTI persons.

The argument of the applicant was that the government of Uganda had violated the treaty by passing a law that would promote stigma, homophobia, and impunity, which undermined principles of social justice, rule of law and universally accepted standards of human rights in contravention of articles 6(d) and 7(2) of the EAC Treaty.

When the case came up for hearing, the respondents raised a preliminary objection that the amendment could not stand as the AHA had been nullified by the Constitutional Court of Uganda - in essence that the case was moot. HRAPF argued that they were not challenging the Act but the passing of the Act with the three provisions that led to the violation of the rights of LGBTI persons during the period when the law was in force and thereafter, and that without prejudice to that argument, this was a matter of public interest that the Court could hear as an exception to the mootness rule. The Court decided to hear the case in its entirety before deciding on the preliminary objections and the merits of the case.

The court (Hon. Justice Monica Mugenyi (Principal Judge) from Uganda; Hon. Justice Faustin Ntezilyayo, (from Burundi) and Hon. Justice Fakihi Jundu (from Tanzania) held that the case was moot since the reference challenged a law that had been nullified by a competent court in the state party. The court relied on their judgment in the *Legal Brains Trust v Attorney General of Uganda*,<sup>66</sup> to find that the court could not adjudicate hypothetical questions, where no real dispute exists. On the public interest exception to the mootness rule, the court held that it did not find the evidence sufficient to establish ‘... the degree of public importance attached to the practice of homosexuality in Uganda.’

This decision is important in regional litigation on the rights of LGBTI persons as it shows the willingness by the regional court to handle cases on rights of LGBTI persons and has opened up possibilities for further litigation in this forum. This was the first case on rights of LGBTI persons to be successfully heard and completed in an African regional court.

The case also brought together different actors from the East African region and beyond working on LGBTI issues. There were affidavits filed from Kenya, Rwanda and Tanzania and amicus curiae applications from Kenya,<sup>67</sup> Rwanda,<sup>68</sup> Tanzania,<sup>69</sup> South Africa<sup>70</sup> and from the UNAIDS.<sup>71</sup>

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<sup>66</sup> EACJ Appeal No.4 of 2012.

<sup>67</sup> UHAI-EASHRI filed an application (*UHAI EASHRI v HRAPF & AG of Uganda*, Application No. 20 of 2015).

<sup>68</sup> Health Development Initiative Rwanda filed an application (*Health Development Initiative v HRAPF & AG of Uganda*, Application No. 21 of 2015).

<sup>69</sup> Dr. Ally Possi, an advocate of the High Court in Tanzania and a lecturer filed an application (*Dr. Ally Possi & the Centre for Human Rights v HRAPF & AG of Uganda*, Application No. 1 of 2015).

<sup>70</sup> The Centre for Human Rights at the University of Pretoria filed an application jointly with Dr. Ally Possi.

<sup>71</sup> The UNAIDS filed an application. Unlike the other applications, this was successful (*Secretariat of the Joint UNAIDS Programme on HIV/AIDS v HRAPF & AG of Uganda*, Application of 2015).



**Interesting Fact:** The ruling of the East African Court of Justice in one of the amicus applications in this case<sup>72</sup> was used as authority on the principles governing amicus curiae during the Ugandan Presidential election petition 2016.<sup>73</sup>

### **Adrian Jjuuko v Attorney General Constitutional Petition No. 1 of 2009:**

This is the latest decision of the courts in Uganda concerning LGBTI rights, and the second case filed on LGBTI rights in Uganda.

The case challenged the constitutionality of section 15(6)(d) of the Equal Opportunities Commission Act, 2007. This provision stopped the Equal Opportunities Commission from investigating any behavior considered immoral or socially harmful or unacceptable by the majority of the cultural and social communities in Uganda. The Equal Opportunities Commission Act was enacted by the Parliament of Uganda in 2007 to operationalise article 32(2) of the 1995 Constitution, which required Parliament to make laws to provide for access to equal opportunities for marginalised communities. The Act is aimed at ensuring that discrimination of any social groups that are marginalised by historical as well as other factors are eliminated. It created a commission to which marginalised groups could report cases of alleged discrimination. Section 15(6)(d) was however added to the Act on the floor of Parliament during the second reading in order to prevent 'homosexuals and the like' from claiming protection as marginalised persons.<sup>74</sup>

The petitioner, a human rights lawyer and the Executive Director of HRAPF, filed the case seeking a court declaration that the section was unconstitutional. In particular, the petitioner argued that section 15(6)(d) of the EOC Act was inconsistent with the Constitution of the Republic of Uganda in as far as it provides that social and cultural minorities may be discriminated against contrary to the following provisions of the Constitution: article 20(1) which guarantees that fundamental human rights and freedoms are inherent and not granted by the state; article 20(2) which enjoins all agents of government to respect, uphold and promote the fundamental human rights and freedoms of the individual; article 21(1) which guarantees equality of all persons before and under the law in all spheres of political, economic, social and cultural life; article 21(2) which prohibits discrimination that negates equal protection of the law; article 28(1) which guarantees the right to a fair hearing before an impartial tribunal; and article 36, which guarantees protection to minorities.

The petitioner argued that this claw-back clause was a negation of the spirit of the Act since marginalisation often stems from a general feeling in society that one is not socially acceptable or deserving of recognition and respect. It meant that the vast majority of marginalised persons would be unable to access the commission that was established to enable them to access justice and equal opportunities. The Act also offended the Equal Opportunities Policy, which provided for the same principles as the Act. The state raised the argument that the petition was misconceived in law as it raised no questions for

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<sup>72</sup> UNAIDS application (n 71 above).

<sup>73</sup> *Foundation for Human Rights Initiative & 7 Others v Amama Mbabazi & 3 Others* Civil Application No. 3 of 2016.

<sup>74</sup> Hon. Syda Bumba's endorsement of the proposed amendment to the Equal Opportunities Commission Bill. See Parliament of Uganda 'Hansard, December 12 2016.' For a discussion of the history of the Act see Tamale, n 46 above.

constitutional interpretation.

The Constitutional Court (Richard Butera; Solomy Balungi Bbossa; Kenneth Kakuru; Barishaki Cheborion; and Catherine Bamugemereire JJSC) in a unanimous judgment noted that the EOC Act was adopted on the basis of a policy which stipulated that certain groups in society are marginalised and discriminated against. The overriding purpose of the Act therefore was to fulfil the constitutional mandate of eliminating discrimination against any individual or group of persons. Ideally, section 15(6) should have been in conformity with the above constitutional and policy objectives. The court noted, however, that a close examination shows that the broad mandate of the Commission excludes investigation into certain groups. The Court held that this section restricts the right to a fair hearing, which right belongs to **everyone**. The court emphasised that:

“  
*a law that precludes a group of people from adjudication on the violation of their rights and does not create an alternative forum to hear them out breaches the right to a fair hearing.*

On stating that there was no justifiable reason to limit the right to a fair hearing in terms of section 15(6)(d), the Court held that:

“  
*...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.*

The Court held that after careful examination of section 15(6)(d) of the EOC Act, it found that the section contravened articles of the Constitution by creating a class of social misfits who are referred to as immoral, harmful and unacceptable; legislating the discrimination of persons said to be immoral, harmful and unacceptable; and denying access to justice to that class/section of people by prohibiting the EOC from investigating persons who it adjudges immoral, socially harmful and unacceptable. The court went ahead and declared the subsection unconstitutional. This opened up access to the Commission to all groups that are marginalised, including LGBTI persons. The decision in this case was momentous because it defeated a clear intention on the part of the legislature to bar unpopular minorities from accessing the EOC. It emphasised the equality of all persons and outlawed the legalisation of discrimination of certain populations adjudged immoral or unacceptable. It also highlighted the paramount obligation to protect rights as opposed to limiting them unjustifiably using the charade of ‘protecting the public from harm’. Although not specifically mentioning LGBTI rights, this was the elephant in the room as this was the category of persons that had been specifically mentioned when the provision was introduced in Parliament, and also the petitioner was a human rights lawyer working on LGBTI rights. The court’s emphasis on the right to a fair trial belonging to everyone was an important pronouncement, and a validation of the equality of every person before and under the law including LGBTI persons.



**Interesting Fact:** It took a period of eight years from the time the petition was filed until a decision was rendered. At one point, the case has to be reheard since some of the members of the bench that had originally heard the case were retired or deceased before the judgment was delivered. Activists from HRAPF and members of the Coalition at one time stormed the court demanding for the judgement.

## 2.2 Cases challenging state actions

These cases are brought under article 50 of the Constitution and are filed in the High Court or before the UHRC under article 52 of the Constitution. Three cases have so far been filed using these avenues: two in the High Court and one at the UHRC. The cases are as follows:

### **Frank Mugisha and 3 Others v Uganda Registration Services Bureau (URSB) Miscellaneous Cause No. 96 of 2016:**

This case challenged the decision of the Registrar General of the Uganda Registration Services Bureau (URSB) to decline to reserve the name 'Sexual Minorities Uganda' (SMUG). The facts of the case are that the applicants, for the purpose of incorporating SMUG, applied for reservation of the name 'Sexual Minorities Uganda' in November 2012. The URSB wrote back saying that the name 'Sexual Minorities Uganda' was not clear. In December 2012, Counsel for the applicants asked the respondent to clarify what was not clear about 'Sexual Minorities Uganda'. In March 2013, the URSB wrote back simply reiterating its stance that 'Sexual Minorities Uganda' was not clear. On 24<sup>th</sup> May 2013, the applicants submitted SMUG's objectives to the URSB as being, among others, to advocate for the rights and freedoms guaranteed by the Constitution to all persons including LGBTI persons. The URSB did not respond to the application for reservation of a name until 16<sup>th</sup> February 2015, when it rejected the application on the ground that the proposed company was 'to advocate for the rights and well-being of lesbians and gays among others, which persons are engaged in activities labelled criminal acts under S.145 of the Penal Code.' The URSB contended that reserving the company's name, and in effect its registration, would amount to an illegality.

Aggrieved by this decision, the applicants, who are members and promoters of SMUG, filed this case in the High Court seeking enforcement of their rights, which they argue had been violated by the decision of the URSB. The rights sought to be enforced by the applicants include the right to freedom from discrimination; freedom of association; and the right to just and fair treatment in administrative decisions. The most fundamental argument by the applicants is that on the authority of previously decided cases like the *Rolling Stone* case and the *Victor Mukasa* case, the rights enshrined in the Constitution apply to all persons, irrespective of their sexual orientation or gender identity. It is also emphasised that the Penal Code Act simply criminalises sexual acts, and yet SMUG's objectives were human rights advocacy and service provision.

The case is still pending in the High Court.



**Interesting Fact:** It took the URSB four years to make a decision on the reservation of the name 'Sexual Minorities Uganda'.

### **Mukasa Jackson and Mukisa Kim v Attorney General UHRC No. CTR/24 of 2016:**

This case was filed in consequence of the arrest, prolonged detention and trial of the two complainants on charges of having carnal knowledge against the order of nature. The two were violently arrested by the police. They were detained for seven days in police custody without being charged or being taken to court. They were subjected to forced anal examinations and HIV tests. They were also paraded before the media and a story about the alleged HIV positive status of one of them was run in the Red Pepper tabloid, accusing him and his ilk of infecting young boys with HIV/AIDS. The case challenges these police actions that resulted in violations of the right to privacy, the right to dignity and freedom from torture, cruel and degrading treatment, the right to liberty and security of the person as well as the right to a fair trial. It was the first case to be filed with the Uganda Human Rights Commission on the rights of LGBTI persons, and it is hoped that it will create jurisprudence at the Commission on the rights of LGBTI persons.

While the case is still pending at the Commission due to case backlog, it did open doors for the diversification of access to justice mechanisms that are available to LGBTI persons seeking to address violations of their rights.

*Interesting Fact:* This was the first case to be filed at the Uganda Human Rights Commission directly challenging violation of rights based on sexual orientation and gender identity.

### **Victor Juliet Mukasa and Yvonne Oyo v The Attorney General Miscellaneous Cause 24/06:**

This is the first strategic case on the rights of LGBTI persons in Uganda. The case was filed before the High Court under article 50 of the Constitution for enforcement of rights, and it challenged the actions of a Local Government authority and the police. On the evening of 20<sup>th</sup> July 2005, while the second applicant was alone at the home of the first applicant, two men forcibly entered the house, pushed her down to the floor and proceeded to search and ransack the house. When she asked for identification, one of them identified himself as the area LC 1 Chairperson of Kireka. The Chairperson seized some of the property in the house including a CD, documents and booklets, which he handed to the other unidentified man. The second applicant was then ordered to dress up and leave the house. When she inquired where she was being taken and why her friend's (the first applicant) property was being seized, she was told not to question the Chairperson. She was taken to the Chairperson's office and while there, she was denied the use of toilet facilities despite repeated pleas, forcing her to urinate on herself. She was later dragged to the police post where she was forced to undress under the watchful eyes of police officers and members of the public in order to prove her sex. She was also fondled by the officers at the police post before being allowed to dress again. She was released that same night without any charges being preferred against her but ordered to report to the police post the next day with the first applicant.

When the second applicant returned, she was informed by the Chairperson that she was wanted by the police, although when she did go to the police post the next day she was informed that there were no charges against her or the second applicant. Some of her documents were returned to her but others were detained for longer while some were never returned at all. The two applicants decided to file a suit in the High Court against the Attorney General seeking a declaration that their rights to privacy, dignity, freedom from cruel treatment and personal liberty had been violated.

According to the evidence adduced in court, the Chairperson arrested the applicants because he had heard of their 'homosexual tendencies'. No evidence had ever been found that the two applicants had engaged in carnal knowledge against the order of nature, but

they were arrested and mistreated upon suspicion by the locals and the area Chairperson that they were in fact homosexual.

The respondent argued that the actions of the police were intended to protect the applicants from mob violence as they were lesbians.

In deciding the case in favour of the applicants, Justice Stella Arach Amoko held that the arbitrary arrest of the second applicant, denying her access to toilet facilities, undressing and fondling her breasts amounted to a breach of the second applicant's constitutional guarantees and human rights instruments to which Uganda is a state party. She emphasised that the public undressing and fondling of the second applicant was humiliating and degrading and therefore contravened article 24 of the Constitution, which protects against torture, cruel, inhuman, and degrading treatment. She clarified that although the above actions also constituted abuse of office particularly by the Officer in Charge of the station, the case was not about abuse of office and neither was it about homosexuality. She emphasised that the judgment was strictly about abuse of human rights.

She noted that the actions violated the provisions of a number of human rights instruments including equality and dignity in rights under the Universal Declaration of Human Rights; the provision on equal enjoyment and protection of all rights under the Convention for the Elimination of all forms of Discrimination Against Women among other provisions.

The second applicant was awarded Uganda Shillings 10 million in damages for the humiliation suffered and the violation of her right to dignity; while the first applicant was awarded Uganda Shillings 3 million for the violation of her right to privacy. They were also awarded the costs of the application.

As the first case filed in a Ugandan court seeking specific protection for the rights of LGBTI persons, this judgment was groundbreaking in as far as it asserted the equality and equal dignity of LGBTI persons. By asserting that the case was not about homosexuality, this decision affirmed the fact that, regardless of one's sexuality or gender identity, the rights guaranteed under the Constitution apply to all persons. The decision of the Court in this case in essence affirmed that the laws of Uganda do not criminalise sexual orientation or gender identity, and that any acts done to the detriment of an individual on this basis constitute a violation. The case underscored the principle of the universality of rights and laid ground for the protection of the equality, privacy and dignity of all persons regardless of their real or perceived sexual orientation or gender identity. As such, this case was a fundamental building block in the struggle for legal recognition of the humanity and dignity of LGBTI persons in Uganda.



**Interesting Fact:** This was the first case on LGBTI rights as well as the first victory in Uganda. However, it also spurred backlash as soon after it was made, the state promised a tough law on homosexuality and indeed in a few months, the Anti-Homosexuality Bill was tabled in Parliament.

### 2.3 Cases challenging violations by individuals

These form the highest number of cases litigated on the rights of LGBTI persons in Uganda. Article 50 of the Constitution applies not only to violations of human rights occasioned by the state, but also violations occasioned by individuals. Although the Constitution does not specify the competent court to handle such cases, the practice is to approach the High Court, which has unlimited original jurisdiction. Recourse has also been had to the Uganda Human

Rights Commission, by virtue of its mandate under articles 51 and 52 of the Constitution. However, other forums have also been used depending on the nature of the case. So far, five cases have been filed against individuals: two in the High Court of Uganda, one at the Uganda Human Rights Commission, one in the Uganda Court of Appeal and one case in federal court in the United States of America. Some of the individuals whose actions are challenged hereunder are state agents, but they were sued in their own individual capacity.

The cases are as follows:

***Kasha Jacqueline, David Kato Kisule, Onziema Patience v Rolling Stone Newspaper and Giles Muhame, Miscellaneous Cause No. 163 of 2010:***

This case challenged the actions of the Rolling Stone newspaper in publishing names, addresses and photographs of suspected LGBTI persons and calling for them to be hanged.

On the 2<sup>nd</sup> of October 2010, the Rolling Stone Newspaper published a story titled ‘Hang Them; They are after our Kids!!!! Pictures of Uganda’s 100 Homos Leak.’ The story was accompanied by photos of some of the persons suspected to be homosexual, three of whom were the applicants in the case. The story named the first applicant as the one at whose home homosexual orgies were held and the third applicant as one of the leaders of the drive to recruit school children into homosexuality. The article gave the location of the home of the first applicant, also pointing out a popular bar in town at which she was known to spend some time. The story continued that gays intended to recruit one million children into homosexuality by 2012.

The applicants filed the suit seeking, among others, an injunction permanently barring the respondents from publishing injurious information, on the grounds that among others, their rights to privacy and dignity had been violated. The respondents argued that as known gay rights activists, the applicants had already exposed themselves as homosexuals to the public and that therefore their privacy was not infringed and that in any event, they were homosexuals, and therefore engaged in behavior criminalised under the laws of Uganda, so they did not come to court with clean hands. The respondents also argued that the suit was abstract since there was no proof that any of the rights complained of had actually been infringed and that the applicants were merely speculating.

In his judgment, Justice Musoke Kibuuka noted that the application was not about homosexuality, but rather about whether the publication infringed the rights of the applicants. He then went on to hold that the publication threatened the applicants’ right to dignity as by calling for their hanging, the respondents extracted the applicants from the other members of the community who are regarded as worthy of human dignity and who ought to be treated with respect. He noted that if a person is only worthy of death, then that person’s human dignity is placed at the lowest ebb, and it is threatened to be infringed or abused. The judge further held that publishing the applicants’ faces and addresses for the purpose of fighting gayism threatened their right to privacy, a right they are entitled to.

Most noteworthy, the judge disagreed with the contention that section 145 of the Penal Code Act renders every person who is gay a criminal. He guided that

“*the scope of section 145 is narrower than gayism generally. One has to commit an act prohibited under section 145 to be regarded a criminal.*”

Based on this ruling, the court issued the injunction barring the newspaper from further publication of the identities and homes of LGBTI persons. The Court also awarded damages of Uganda Shillings 1.5 million to each applicant and costs of the suit.

This case, besides clarifying the argument that sexual and gender diversity are not criminalised in Uganda, also recognised the inherent and equal dignity of all persons, and held public incitement to do violence upon suspected LGBTI persons to be a violation of this inherent dignity. This re-emphasised the equality of all persons and the fact that LGBTI persons are not criminalised and are entitled to equal enjoyment of all the rights guaranteed under the Constitution.



**Interesting Fact:** Before the injunction was issued, the Rolling stone magazine went ahead and published the next edition of the newspaper naming more LGBTI persons. It was later stopped from publication by the Media Council after it was established that it had no licence and that was the end of the publication.

***Kasha Nabagesera, Frank Mugisha, Julian Onziema, Geoffrey Ogwaro v Attorney General and Rev. Fr Simon Lokodo Miscellaneous Cause No. 33 of 2012:***

This case challenged the stopping of an LGBTI skills training workshop by the Minister of Ethics and Integrity.

Between the 9<sup>th</sup> and 16<sup>th</sup> of February 2012, the applicants were holding and attending a workshop on planning, advocacy and leadership organised by Freedom And Roam Uganda (FARUG). The workshop was intended to train and equip participants with project planning, advocacy, human rights, leadership and business skills. On the 14<sup>th</sup> of February 2012, the second respondent in his official capacity as the Minister of Ethics and Integrity appeared at the venue and ordered the workshop to be closed immediately on an allegation that it was an illegal gathering of homosexuals. No other workshops taking place at the same hotel were dispersed on that day.

The applicants filed suit arguing that the second respondent's actions amounted to an unjustifiable restriction of their fundamental rights and freedoms to expression, association and assembly. They argued that the actions by the Minister were discriminatory against the applicants as they were restricted to them and none of the other events taking place at the same venue were disrupted in any way. They contended that this discrimination and violation of the right to freedom of expression, association and assembly was neither necessary nor demonstrably justifiable in a free and democratic society.

The respondent's submission on the other hand was that it had been established that the participants at the workshop were homosexuals who were engaged in a workshop meant to enhance their personal and organisational skills in order to enable them further their objective of promoting same-sex sexual practices, and that this could not be allowed or tolerated in a free and democratic society such as Uganda where such acts were criminalised.

The judge, in dismissing the application, stated that it is a well-established principle of criminal law that where an act is prohibited, so are all acts that directly or indirectly encourage or assist the commission of that offence, whether or not the offence actually does occur. The judge cited sections 21, 390 and 391 of the Penal Code Act on incitement and conspiracies, saying that promotion of an illegality is also illegal and ought to be

penalised. The Court distinguished the case of *Kasha Nabagesera and 3 Others v The Rolling Stone Publications and Another*,<sup>75</sup> stating that it did not call upon court to consider penal provisions on homosexuality but merely to look at the actions of the newspaper and determine whether, in the absence of any evidence that the perceived homosexuals were actually homosexuals, the newspaper had the right to treat them the way it did. He noted however that in the *Lokodo* case, there was ample proof to show that the applicants were members of the LGBTI community in Uganda, which encourages same-sex practices among homosexuals. He further noted that the evidence adduced in court showed that the closed workshop was aimed at encouraging persons to engage in and or promote same-sex practices in future. He concluded that in light of the evidence, the workshop was engaging in direct and indirect promotion of same-sex practices, which is prohibited by section 145 of the Penal Code Act and section 21 of the Penal Code Act, which prohibits incitement of another person to commit an offence, whether that offence is actually committed or not. The judge held that the actions of the Minister were justifiable as he acted in the public interest to protect public moral standards, a duty that falls within his ministerial docket.

On whether the applicants' rights were infringed, the Court noted that indeed all rights in the Constitution are guaranteed to all persons. However, the particular rights invoked by the applicants in this case were not non-derogable and their enjoyment could therefore be limited under article 43 of the Constitution in the public interest. The judge held that while it is true that the applicants were exercising their rights of freedom to expression, association, assembly etc., in so doing they were promoting prohibited acts, which was prejudicial to the public interest. He concluded that restriction of the applicants' rights was justified under the Constitution, since protection of morals is widely recognised as a legitimate aspect of public interest. The court referred to article 27 of the African Charter on Human and Peoples' Rights (The African Charter) which provides that the exercise of human rights may be limited for purposes of due regard to the rights of others, collective security, morality and the common interest; and article 17(3) which emphasises that the promotion and protection of morals and traditional values recognised by the community shall be the duty of the state. The Court also considered article 29(7) of the African Charter which provides that every individual has a duty to preserve and strengthen positive African cultural values and to contribute to the moral wellbeing of society. It ultimately held that no violation had been suffered by the applicants that could not be justified in the public interest.

The import of this judgment is that the many things that are done in pursuance of the realisation of the rights and dignity of LGBTI persons can easily be regarded as being criminalised. This would extend to provision of health services, provision of legal aid services, engaging in human rights advocacy and influencing of law reform among others, as they could be interpreted as inciting people to engage in criminalised same-sex sexual acts. It is noteworthy, however, that even with such a contested conclusion, the judge in the case acknowledged the universality of human rights and their application to all persons including LGBTI persons. This emphasises the fact that the existing constitutional protections are guaranteed to all regardless of sexual orientation and gender identity, but their enjoyment by LGBTI persons can be limited because of the existing criminal provisions. The decision is the subject of an appeal.



**Interesting Fact:** The judge relied on international and comparative law to reach his conclusions choosing to rely on the limitation clauses and to distinguish precedents basing on Ugandan laws.

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<sup>75</sup> n 32 above.

## **Sexual Minorities Uganda v Scott Lively C.A. No. 12-cv-30051-MAP in the District Court of Massachusetts:**

This is the case filed in the USA challenging the actions of a US evangelical in promoting hate against LGBTI persons in Uganda.

The case was filed by the Centre for Constitutional Rights (CCR) in the USA on behalf of Sexual Minorities Uganda (SMUG) under the Alien Torts Statute. The statute allows for an individual to be sued in the United States by non-citizens for crimes against humanity. The case challenged the actions of US evangelical pastor Scott Lively in propagating hatred for LGBTI people, asking law-makers and the general public to castigate and fight homosexuals and blaming all the greatest atrocities in history on homosexuality. His visit to Uganda in 2009 also inspired the tabling of the Anti-Homosexuality Bill later that year. The applicants argued that these actions amounted to crimes against humanity under international law, and as such the jurisdiction under the Alien Torts Statute could be rightly invoked. The defendant asked the Court to dismiss the case on the grounds that the Court had no jurisdiction to decide the suit, as there was no connection between Scott Lively's action and what transpired in Uganda.

On June 5<sup>th</sup> 2017, Judge Ponsor granted the defendant's application and dismissed the case. However, in dismissing the case, the judge declared that the case had been dismissed only for lack of jurisdiction but that the actions of Pastor Lively were abhorrent and that the acts complained of were indeed a violation of international human rights standards. The judge emphasised that

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*the question before the court is not whether the defendant's actions in aiding and abetting efforts to demonise, intimidate, and injure LGBTI people in Uganda constitute violations of international law. They do.*

He however noted that the actions that Lively had committed on American soil were too narrow and insufficient to grant the court jurisdiction to hear the case on its merits under the Statute.

Although this case was lost on jurisdictional grounds, it is to be hoped that it had a positive impact on Lively and other anti-gay activists in that it would deter them from further actions such as those engaged in by Pastor Lively. Indeed it is on record that since the case was filed, Lively, even though he has continued to be vehemently vocal against the LGBTI movement, has not been back to Uganda, nor has he organised or been involved in any specific campaign against LGBTI persons in Uganda. Again since the case was filed, very few US evangelicals have come to Uganda to hold mass crusades against homosexuality. Also since a subpoena was issued in this case against Pastor Sempa, he has been much less vocal against homosexuality. Therefore the case is already having direct and indirect impact even if it is still ongoing.

The value of this judgment to the LGBTI movement lies in the obiter dictum, the statements made by Judge Ponsor in condemning the actions of Scott Lively. This was a clear indicator that the courts would be willing to defend the rights of LGBTI persons even when fettered by existing laws, and the fact that SMUG made the decision to take on Scott Lively himself communicated the willingness of the movement to hold liable the individuals responsible for the violations of the rights of LGBTI persons that they perpetrate or abet. It is to be hoped that this judgment will discourage others with the same idea as Scott Lively from

propagating their hate and homophobia in Uganda.



**Interesting Fact:** Despite being successful, Scott Lively decided to appeal the case on the basis that the judge's statements condemning his actions were not proper. The appeal is still pending before the federal appeal courts in the US.

### ***Shawn Mugisha and 6 Others v Attorney General and the District Police Commander (DPC), Kabalagala Police Station CTR/06/2017:***

This case was also filed at the UHRC challenging the actions of the District Police Commander (DPC) Kabalagala Police Station in stopping the Pride pageant on the 4<sup>th</sup> of August 2016, harrasing participants and arresting 16 persons including human rights defenders.

The pageant was held as part of the 2016 weeklong Pride celebrations. The Police, under the DPC's command, raided the venue, forcibly arrested 16 of the organisers and activists, including the applicants. The police went ahead and locked the more than 200 attendees inside the venue for over an hour and confiscated some people's phones and forced others to sit on the floor. Some of the participants were groped by Police officers, had their hair pulled, and the Police took photographs without the consent of the victims and threatened to release identifying information to the public. A participant jumped from a 4-storey window to avoid police abuse and he suffered a fractured spine. Many participants were beaten. They were later released from the venue. Those arrested were dumped on police trucks and taken to Kabalagala Police Station. While at the station, two transmen and one transwoman were subjected to humiliating and degrading treatment when they were groped and strip searched by policemen. They were also beaten by the Police and other inmates. The 16 were later released without charge after being cautioned.

The case is still pending before the UHRC.



**Interesting Fact:** The DPC eventually met face to face with some of the persons that he had arrested during a HRAPF police training and after disagreeing on what exactly happened and whether it was justifiable, the parties agreed that what was done was not warranted.

### ***Jacqueline Kasha Nabagesera and 3 Others v Attorney General Civil Appeal 195 of 2014:***

This is an appeal from the decision of the High Court in the case of *Kasha Nabagesera, Frank Mugisha, Julian Onziema, Geoffrey Ogwaro v Attorney General and Rev. Fr Simon Lokodo* Miscellaneous Cause No. 33 of 2012 wherein the Court found that the Minister of Ethics and Integrity was justified to stop an advocacy workshop at which participants were discussing advocacy for rights of LGBTI persons on the grounds that such discussions amounted to aiding the illegality of unnatural offences. The main ground of appeal is that the learned judge erred in law and fact in attempting to resolve on the basis of affidavit evidence the highly contentious question of whether the appellants committed a criminal offence when they organised the impugned workshop. The learned Trial Judge erred in law and fact when he relied on conjecture and speculation and reached the 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. The Judge furthermore erred in

concluding that the restrictions of the Applicants' rights was justified on the basis that they were promoting an illegality in the exercise of their rights.

The case is still pending in the Court of Appeal.



**Interesting Fact:** The appeal has not been fixed for hearing since it was filed in 2014.

## 2.4 Conclusion

Uganda's LGBTI community has managed to bring 11 cases before courts of law in 11 years. These cases have not just been brought before courts and tribunals in Uganda, but also regionally and in the USA. This strategic litigation has been largely done in a reactive way following violations of LGBTI rights. Many of the cases have been won, a few have been lost and some are still pending decision. LGBTI strategic litigation in Uganda is therefore still alive and well, and it remains an important strategy in the struggle for LGBTI equality.

## SECTION III:

### OUTCOMES OF UGANDA'S LITIGATION ON THE RIGHTS OF LGBTI PERSONS

Uganda's LGBTI community and its allies have undoubtedly benefited from the above strategic litigation efforts. While some of the successes explained below were a result of combined strategies, they can all be largely attributed to the strategic litigation efforts engaged in by the LGBTI movement. These outcomes are legal, political and social. Some of them are direct results of the court processes, while others are not. They include the following:

#### 3.1 Legal outcomes

These are outcomes with an effect on Uganda's legal and policy framework as regards the rights of LGBTI persons. They are as follows:

**Annulment of restrictive laws:** The most tangible and identifiable success from Uganda's strategic litigation efforts is the annulment of restrictive laws. These include Uganda's Anti-Homosexuality Act, 2014 and section 15(6)(d) of the Equal Opportunities Commission Act. The AHA remains Uganda's most prominent attempt to further criminalise homosexuality in Uganda and the Act was rife with potential for the gross violation of the rights of actual and suspected LGBTI persons and their allies or sympathisers. The Act although nullified on the basis of the procedure by which it was passed, is no longer law in Uganda, something that would not have otherwise been achieved in the current political and social dispensation. Section 15(6)(d) of the EOC Act on the other hand barred LGBTI persons and other minorities marginalised by majority prejudices from accessing a commission that is established to deal with marginalisation. This implied that these persons were denied access to the one forum that is established specifically to deal with discrimination and marginalisation in Uganda. Its annulment opens up access to the Commission and adds to the many available forums in which LGBTI persons can demand for the respect of their rights.

**Recognition that constitutional protections have universal application:** In five of the cases, courts of law have affirmed that constitutional or legal protections apply to everyone, regardless of their sexual orientation or gender identity. This was expressly stated in the cases of *Victor Mukasa*, the *Rolling Stone* and *Adrian Jjuuko*. In these cases, court upheld the rights of LGBTI persons and expressly noted that they enjoyed the same protections as everyone else. In the *AHA* case, the Constitutional Court also showed that constitutional procedures as to passing of legislation cannot be flouted merely because the law being passed is popular and criminalises unpopular groups of people. The federal court in Massachusetts, in the *Scott Lively* case also emphasised the fact that LGBTI persons are entitled to human rights protection, like everyone else.

**Moving towards decriminalisation:** The approach adopted for litigation on rights of LGBTI persons in Uganda has been the incremental approach.<sup>76</sup> The idea is to build jurisprudence that will essentially water down the effects and implications of section 145 of Uganda's Penal Code to a point when decriminalisation is feasible. The current jurisprudence that has been built moves the movement closer towards this goal. The above-discussed court decisions variously clip the effect and wide interpretation of the section by limiting its criminalising

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<sup>76</sup> Jjuuko (n 41 above).

effect to sexual acts;<sup>77</sup> emphasising that the section does not negate the enjoyment of rights by LGBTI persons;<sup>78</sup> and the fact that the section cannot be used as a basis to violate the rights of LGBTI persons.<sup>79</sup> All these judicial pronouncements pave way for an easier challenge of the necessity of criminalisation of same-sex sexual conduct/practices in future.

### 3.2 Political Outcomes

Besides the legal outcomes, a number of political gains have also been made. These are:

**Setting precedents at a national and regional level:** Uganda's litigation on the rights of LGBTI persons has been precedent-setting in the area of strategic litigation in general, and in the area of litigating on the rights of LGBTI persons in particular. This has not been just on the national level, but also at the regional level. In Uganda, the LGBTI community remains the first criminalised community to file a strategic litigation case for recognition and enforcement of rights, while Uganda also remains the first country to successfully have a case on LGBTI rights heard in a regional court within the African human rights system, which was the case challenging the AHA at the East African Court of Justice. Such pioneering activism has opened doors for other marginalised populations to engage in litigation as part of the fight for their rights.<sup>80</sup> The case at the East African Court of Justice also opened the door for litigation on rights of LGBTI persons at that level, which increases the space for engagement on the issues. The case also set important precedents on the issue of amicus curiae, which precedents have since been used in litigating other cases.<sup>81</sup>

**Contribution to the development of a strong movement:** Strategic litigation is one of the solidifying blocks of the LGBTI movement, not just in Uganda but in East Africa as a whole. The Coalition was formed to defeat the AHB, and the AHA thereafter, and this was effectively done through strategic litigation. After the annulment of the Act, the Coalition remained unified and active due to the strategic litigation cases that are filed under its auspices. The strategic cases also go beyond the Coalition to other key players in the movement such as ordinary LGBTI persons, organisation leaders, lawyers and academics and through consultative meetings that are done on the cases. These processes and meetings keep the movement together and contribute to a consolidated understanding of the movement's vision and focus. Strategic litigation also serves as a vehicle to regional concerted efforts on rights of LGBTI persons. In the pre-litigation stages of the *EACJ* case, a regional meeting was held that brought together LGBTI persons, activists and lawyers to discuss the case and the best approach to take. Participants were from Uganda, Kenya, Tanzania, Rwanda and Burundi. The case also attracted amicus curiae applications from Kenya, Rwanda, Tanzania and South Africa. This was a solid show of solidarity of the movements at a continental level, and the central force behind this cooperation was the Court case. Strategic litigation has therefore greatly contributed to movement-building and strengthening.

**Practical protections by the State:** The various positive judicial pronouncements on the rights of LGBTI persons and attempts at defining the ambit of section 145 of the Penal Code Act have influenced the state to change its stance towards LGBTI persons and offer more

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<sup>77</sup> The *Rolling Stone* case (page 17-18 above).

<sup>78</sup> As above; the *Victor Mukasa* case (page 15-17 above).

<sup>79</sup> The *Rolling Stone* case (page 17-18 above).

<sup>80</sup> For example the case of *Centre for Domestic Violence Prevention & Others v Attorney General* Constitutional Petition No. 13 of 2014 was championed and filed by the sex workers' movement.

<sup>81</sup> *Prof Oloka Onyango & Others v Amama Mbabazi & Others* Miscellaneous Application No. 2 of 2016.

protection to them. This has been seen in the passing of different directives and policies particularly in the area of health<sup>82</sup> and willingness by state agencies to engage on the rights of LGBTI persons. The Uganda Police have allowed trainings for their officers on rights of LGBTI persons,<sup>83</sup> while the Uganda Human Rights Commission has extensively trained legal actors like the judiciary and prosecutors on rights of LGBTI persons.<sup>84</sup> This has not only opened discourse on the issues to state agencies, but has also changed many mindsets and improved the way such agencies deal with LGBTI persons. Some police officers have taken deliberate steps<sup>85</sup> to protect LGBTI persons in their custody and LGBTI persons have gained more access to health services particularly in the area of HIV/AIDS.

### 3.3 Social outcomes

The social outcomes are as follows:

**Development of jurisprudence that legitimises activism:** Various strategic litigation cases have led to the development of jurisprudence that legitimises the continued activism for the respect of the rights of LGBTI persons in Uganda. In a country rampant with expressed homophobia and laws criminalising same-sex conduct, it is easy to assume that even doing work for the protection of the rights of LGBTI persons is criminal. This has indeed been the interpretation of the law in one of the discussed cases.<sup>86</sup> However, with existing jurisprudence that speaks to the fact that the rights of LGBTI persons are protected as rights accruing to all other persons, there is cogent backing for the advocacy done on the protection of LGBTI persons.

**Stimulation of conversation around LGBTI issues:** Uganda is largely a homophobic country and for a very long time, issues surrounding homosexuality were taboo and could not be discussed in public. This remains true for a large part of the population. However, headway has been made in introducing these issues into the public discourse and, to a certain extent, this progress can be attributed to extensive strategic litigation.<sup>87</sup> Courts of law are respected spaces and when cases are filed there and even won, it legitimises conversations about the issues and steadily extends them into the mainstream realm. Reduction in the stigma around engagement on issues of LGBTI persons increases discussion, information flow and understanding. Many of the myths and misunderstandings are removed as a result.

**Affirming the humanity and agency of LGBTI persons:** Besides the legal outcomes and political implications, strategic litigation recognises the agency of LGBTI persons who are traditionally marginalised. It is a way of affirming that LGBTI persons can take their destiny in their hands and challenge and change laws. This means a lot to a marginalised minority group.

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<sup>82</sup> Uganda AIDS Commission and Republic of Uganda Ministry of Health *National MARPs Priority Action Plan 2015-2017* (2014).

<sup>83</sup> Human Rights Awareness and Promotion Forum *Annual Report 2016* (2017) 26.

<sup>84</sup> As above at 25.

<sup>85</sup> See generally, Human Rights Awareness and Promotion Forum (HRAPF) et al 'Uganda Report of Violations Based on Sexual Orientation and Gender Identity 2017' (2017) 26-27.

<sup>86</sup> The *Lokodo* case (n 33 above).

<sup>87</sup> In a recent study published by Afrobarometer, it was found that 5% of Ugandans would 'strongly like', 'like' or 'not care' if their neighbours were homosexuals. Afrobarometer 'Good neighbours? Africans express good levels of tolerance for many, but not for all' (2016) 12.

### **3.4 Conclusion**

There are a number of benefits that have accrued from strategic litigation that would certainly have been more difficult to come by if strategic litigation was not pursued. It has opened many doors and many frontiers for LGBTI persons, and recognised their humanity, citizenship and agency.

## SECTION IV: SETBACKS AND LESSONS LEARNT

Strategic litigation on LGBTI rights in Uganda has suffered a number of setbacks which have resulted into lessons that have been learnt by the LGBTI community in Uganda, and which can be learnt by others doing strategic litigation on LGBTI rights. This section discusses the setbacks and the lessons learnt.

### 4.1 Setbacks

There are a number of setbacks afflicting strategic litigation, and the main ones are:

**Lack of experienced and interested litigation lawyers:** Homosexuality is one of the most controversial issues in Uganda, a country that is rife with homophobia. It is no surprise therefore that most people do not want to be associated with work on homosexuality. This includes lawyers. There are currently few lawyers in Uganda that are able and willing to represent LGBTI persons in courts of law. This makes options very limited and creates a monopoly of lawyers that litigate such cases.<sup>88</sup> This implies that for almost all cases filed on the rights of LGBTI persons, the same lawyers appear. While ordinarily this should not be a challenge, it is problematic in a country like Uganda where there is a belief that promoters of rights of LGBTI persons are implementing a specific abhorrent agenda. This is because it proves the lack of buy-in from other members of society including professionals, which reinforces the notion that homosexuality is an issue pursued by a certain clique of people who are being funded to do so. This undermines the litigation efforts and influences the attitudes with which even positive judgments are received.

**Negative judgments:** In three cases, courts have delivered negative judgments, which have set back some of the gains made through strategic litigation. The most outstanding judgment in this regard was the judgment in the *Lokodo* case,<sup>89</sup> which was to the effect that the enjoyment of rights by LGBTI persons can be limited using section 145 of the Penal Code Act as a basis. The judgment widened the scope of the section to include almost everything done in support of LGBTI persons. This set the movement back as this decision is now being used to interfere with service provision to and advocacy for LGBTI persons.<sup>90</sup> The two decisions in the *HRAPF* case<sup>91</sup> and the *Scott Lively* case<sup>92</sup> were also negative in as far as the petitioners did not receive the remedies sought. Although they were decided on technical grounds, the two decisions represented lost opportunities for precedents to be set at their respective levels of litigation. The impact sought by the petitioners in both cases was therefore not achieved.

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<sup>88</sup> For example, Counsel Ladislaus Rwakafuuzi has handled seven of the above discussed cases that were filed in court, including the case at the East African Court of Justice.

<sup>89</sup> n 33 above.

<sup>90</sup> In a space of less than 2 years for example, the Minister of Ethics and Integrity, who was the respondent in the case has interfered with 5 events organised for and by the LGBTI community. These include two Pride events in 2016; the 2017 Pride celebrations; a Pride gala in 2017; and the 2017 edition of the Queer Kampala International Film Festival. He uses the decision in the case as justification for these actions.

<sup>91</sup> *The HRAPF* case (n 37 above)

<sup>92</sup> *Scott Lively* case (n 35 above)

**Slow judicial processes:** One of the biggest challenges faced by litigants in Uganda are the slow judicial processes of the courts of law and other quasi-judicial bodies like the Uganda Human Rights Commission. The *Adrian Jjuuko* case<sup>93</sup> for example was decided eight years after its filing. The *Lokodo* Appeal,<sup>94</sup> which was filed in 2014 has never been allocated a date for hearing; while the complaints filed with the Uganda Human Rights Commission are currently still being investigated. These delays affect the momentum of litigation as the movement avoids having many pending cases at a time. The delays also affect the process of victims of human rights violations getting justice and redress for wrongs suffered. In addition, delays in handling cases like the *Lokodo* Appeal<sup>95</sup> foster frameworks that continue to perpetuate and legitimise the violations of the human rights of LGBTI persons.

**Absence of enough activists willing to stand up and challenge violations:** Only a few of the LGBTI persons and activists in Uganda are involved in strategic litigation.<sup>96</sup> This is largely because they fear the risk of public exposure associated with such a public strategy, and like the effect with few lawyers, having few LGBTI faces featuring in strategic litigation cases reinforces the notion that only a handful of people are pursuing a deliberate agenda on homosexuality in the country.

**Lack of adequate funding:** Strategic litigation is very expensive to pursue and yet the organisations that take the lead on it all rely on donor funding. Litigation does not appear to be a big priority for many of the donors and yet legal fees and the hosting of stakeholders' meetings are expensive. The lack of adequate funds therefore affects the quality of legal counsel provided and the consultations made on the cases. It also affects the kind of follow-up or advocacy that is done on the cases. These in turn affect the quality of the cases, the chances of success and the impact of the cases on the targeted communities. It also discourages people and organisations from taking up litigation as a strategy.

## 4.2 Lessons learnt

Uganda's strategic litigation journey has presented many lessons for the LGBTI community and its allies. These lessons have extensively contributed to the improvement of the strategic litigation efforts in the country generally and advocacy efforts on the rights of LGBTI persons specifically. Some of the lessons learnt include the following:

**The need to complement strategic litigation efforts with other advocacy strategies:**

Strategic litigation alone cannot be enough to improve the observance of the rights of LGBTI persons, especially due to some of the challenges discussed above. There is therefore always need to complement it with other advocacy strategies like engaging duty bearers, conducting research and documentation, and provision of services. Even when there is a positive pronouncement in a case, if deliberate efforts are not taken to ensure that the decision is implemented, then it becomes irrelevant. Strategic litigation should therefore not always be looked at as an end in itself, but rather as part of a collection of strategies that should complement each other.

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<sup>93</sup> The *Adrian Jjuuko* case (n 31 above).

<sup>94</sup> The *Lokodo* Appeal (n 34 above).

<sup>95</sup> As above.

<sup>96</sup> As an example, Frank Mugisha has been a direct petitioner in four of the cases that have been litigated in court; while other activists like Kasha Nabagesera and Pepe Julian Onziema have been direct petitioners in two of the cases that were filed in court.

**All stakeholders must be involved in the cases as much as possible:** Strategic litigation is intended to benefit a wide group of people, in this case, LGBTI persons in Uganda. When planning strategic litigation, it is imperative that as many people as possible are included in the process to get their buy-in, and also to make ownership of the resultant decision possible. This is especially important where cases are challenging systemic practices or laws/policies that affect a wide range of people, as opposed to challenging individual violations. Decisions from strategic litigation affect the lives and rights of many people, and it is only fair that these people are part of the process, or are, at the very least, represented. Other stakeholders like lawyers, other activists and state agencies should also be included to improve the cases, devise other strategies to complement the cases and ease implementation of court decisions respectively. This makes the cases and the resultant decisions relevant to all those concerned.

**Creation and adoption of a plan for strategic litigation:** Strategic litigation is a long-term strategy and for it to be effective, there is need for a collective plan and approach that should be designed and adopted by all relevant stakeholders. In Uganda for example, the agreed approach is the incremental approach. The existence of such a plan ensures that all relevant stakeholders are on the same page and that all strategic litigation efforts are aimed at achieving the same goals, instead of undermining each other. This creates unity. It also assists in the selection of cases to file in courts of law. This is because there is already a target in mind and all cases that are filed should be able to build towards that target. Targeted strategic litigation is likely to be more impactful than litigation that is undertaken haphazardly.

**Going beyond victories or losses in court:** The relevance of strategic litigation could easily be lost in the subtleties of winning or losing a case. However, there should be more to litigation than a win or a loss in court. It is therefore important for litigants and activists to be able to see a strategic litigation victory at every step of a case, and capitalise on it. If these victories are not identified and capitalised on, many times the cases are not as impactful as they should be. In Uganda for example, although the *HRAPF* case<sup>97</sup> was lost, it is important that a court at that level was willing to entertain a case on the rights of LGBTI persons. Similarly in the *Lokodo* case it was important that the judge acknowledged that LGBTI persons are entitled to the same rights as everybody else, but that their enjoyment was limited for them because of the existence of section 145 of the Penal Code Act. Such victories need to be capitalised on and need to count for the targeted communities.

### 4.3 Conclusion

The over ten years journey on LGBTI strategic litigation has led to a lot of setbacks. However, these setbacks have not greatly altered the momentum of using strategic litigation, but they have impacted on its relevance and impact on the rights of LGBTI persons. Many lessons have also been picked along the way and these are being used to inform further strategic litigation in Uganda. Although much has been done to ensure protection of the rights of LGBTI persons through strategic litigation, the struggle continues and all LGBTI persons, CSOs, partners, friends and human rights defenders have a duty to accept and take up this challenge to ensure that increased protection for the rights of LGBTI persons is achieved in Uganda. The strategic litigation successes so far have put into place building blocks on which the fight for legal recognition of LGBTI persons in Uganda can ultimately be won, consensual same-sex relations in Uganda can be decriminalised and a society can be created in which people are treated equally regardless of their sexual orientation.

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<sup>97</sup> The *HRAPF* case (n 37 above).

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## ABOUT HRAPF

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### Background:

Human Rights Awareness and Promotion Forum (HRAPF) is an independent, non-partisan, Non-Governmental human rights organisation that is duly registered under the laws of Uganda. HRAPF was founded in 2008. HRAPF prides itself in promoting access to justice, raising awareness on human rights among the most marginalised groups in Uganda and advocating for an enabling legal and policy framework for the promotion of rights of marginalised groups.

### HRAPF's Vision:

A society where the human rights of all persons including marginalised groups are valued and respected.

### HRAPF's Mission:

To promote respect and observance of human rights of marginalised groups through legal and legislative advocacy, research and documentation, legal and human rights awareness, capacity building and partnerships.

### HRAPF's Slogan:

'Taking Human Rights to all'

### HRAPF's Objectives:

1. To sensitise Ugandans on the international and national human rights regime in order to promote a culture of respect for human rights of marginalised groups.
2. To undertake research and document human rights abuses suffered by marginalised groups for appropriate remedial action.
3. To influence legal and policy developments in Uganda to ensure compliance with human rights principles.
4. To offer legal assistance to marginalised groups in order to enhance access to justice.
5. To share information and best practices on the rights of marginalised groups in order to strengthen the human rights movement in Uganda.
6. To network and collaborate with key strategic partners, government, communities and individuals at a national, regional and international level.
7. To build a strong and vibrant human rights organisation.

## **HRAPF's Values:**

- Non-discrimination
- Equal opportunity
- Justice
- Practical approach
- Team work

## **HRAPF'S PROGRAMMES**

Under the strategic plan 2013-2017, HRAPF has three broad programmes:

### **• ACCESS TO JUSTICE PROGRAMME**

This programme aims at promoting sustainable access to justice for marginalised groups in Uganda. The programme mainly focuses on criminal justice, family justice and sexual and gender-based violence. It targets sexual minorities, women and children living with HIV/AIDS, indigent men and women and the elderly with land problems.

### **• LEGISLATIVE ADVOCACY AND NETWORKING PROGRAMME**

The objective of this programme is to work with like-minded organisations and institutions to advocate and influence the adoption of policies and legislation that promotes equality and non-discrimination in order to prevent discrimination of marginalised groups.

### **• ORGANISATIONAL DEVELOPMENT AND CAPACITY BUILDING PROGRAMME**

The objective of this programme is to create the appropriate institutional structures and an organisational framework for the efficient and effective implementation of the Programme activities and realisation of the Programme Goal.

## **HRAPF'S GOVERNANCE AND LEADERSHIP STRUCTURE**

HRAPF's governance and leadership structure is composed of four organs: The General Assembly, the Trustees, the Board of Directors and the Secretariat.

### **• The General Assembly**

This is the supreme policy-making body of the organisation. It is made up of all members. Currently HRAPF has 53 members. Membership is open to all persons interested in promotion, protection and creation of awareness of human rights to the most marginalised Ugandans.

- **The Trustees**

The Trustees are the custodians of the organisation's Memorandum of Association and Articles of Incorporation. Currently there are five trustees.

- **The Board of Directors (BOD)**

The BOD is responsible for guiding the Secretariat to perform the day-to-day running of the organisation. The BOD is composed of seven members: the Chairperson, the Vice Chairperson, the Secretary General, the Treasurer, two other members, and the Executive Director as ex-officio. The BOD meets once every quarter.

- **The Secretariat**

This is the implementing body of the organisation. It is headed by the Executive Director and is currently made up of 23 staff members. HRAPF regularly hosts interns and volunteers.

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