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Decriminalising homosexuality: Reshaping the landscape in Botswana and a missed opportunity in Kenya

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Legislation: Laws of Kenya Penal Code 81 of 1948; Botswana Penal Code Law No.2 of 1964

I. Introduction

Less than a month after the High Court of Kenya dismissed a case challenging the provisions of the Penal Code that criminalise private consensual same-sex sexual conduct, The High Court of Botswana, in a ground-breaking decision, has ruled that similar provisions found in the Penal Code of Botswana violate the constitutional rights to equality, dignity, liberty and privacy of LGBT persons. The Botswana ruling comes 16 years after the Court of Appeal upheld the criminalisation of same-sex relations and marks a significant turning point and victory for LGBT rights in Botswana. The aim of this article is to explore the recent legislative developments in Botswana and Kenya relating to the (de)criminalisation of homosexuality and to evaluate the decisions of the Courts.

II. LM v Attorney General of Botswana

In September 2016, the applicant, a gay man, approached the High Court of Botswana in an application challenging the constitutionality of sections 164(a), 164(c), 165 and 167 of the Botswana Penal Code. The provisions in question prohibit ‘carnal knowledge...against the order of nature’ and acts of ‘gross indecency’ and the applicant sought an order from the court declaring the same to be unconstitutional as they criminalise consensual same-sex sexual activity, including acts which take place in private. The applicant argued that the sections were void for vagueness as they did not clarify the exact type of conduct that was criminalised;² the law discriminated against homosexuals;³ violated the fundamental right to liberty;⁴ and the

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² Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae) MAHGB- 000591-16., 6 (High Court. 2019).

³ Bots. Const. § 3.

⁴ Bots. Const. § 5.

right of protection from inhumane and degrading treatment.⁵ Consequently, the impugned provisions degrade the inherent dignity of LGBT people by outlawing their most private and intimate means of self-expression.

On 11th June 2019, in a unanimous decision, the High Court declared that sections 164 and 165 were unconstitutional as they contravened fundamental rights enshrined in the Constitution. Furthermore, sexual acts taking place in private would not amount to indecent practices under section 167.⁶ The court questioned the purpose of the laws, stating:⁷

What regulatory joy and solace is derived by the law, when it proscribes and criminalises such conduct of two consenting adults, expressing and professing love to each other, within their secluded sphere, bedroom, confines and/or precinct? Is this not a question of over-regulation of human conduct and expression, which has the effect of impairing and infringing upon constitutionally ordained, promised and entrenched fundamental human rights.

The Court added that ‘personal autonomy on matters of sexual preference and choice must therefore be respected. Any criminalisation of love or finding fulfilment in love dilutes compassion and tolerance’.⁸ The progressive judgment is particularly notable considering the 2003 decision in the case of *Kanane v The State* in which the Court of Appeal dismissed the case stating ‘the time has not yet arrived to decriminalise homosexual practices between consenting adult males in private. Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution’⁹.

III. Eric Gitari v Attorney General

In 2016 the National Gay and Lesbian Human Rights Commission (‘NGLHRC’) filed Petition 150 to challenge the constitutionality of sections 162(a), 162(c) and 165 of the Penal Code of Kenya which criminalise same sex sexual conduct in terms similar to those found under the Botswana Penal Code. The petitioner also sought a declaration of

⁵ Bots. Const. § 7.

⁶ Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae) MAHGB- 000591-16., 228 (High Court. 2019).

⁷ Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae) MAHGB- 000591-16., 3 (High Court. 2019).

⁸ Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae) MAHGB- 000591-16., 141 (High Court. 2019).

⁹ (2) BLR 67., 80 (Court of Appeal. 2003).

vagueness and submitted that the provisions violate the right to non-discrimination,¹⁰ human dignity¹¹, privacy¹² and health.¹³ The judgment handed down on 24th of May 2019 disposed of two consolidated Petitions, namely, Petition 150 and Petition 234 of 2016. The common thread in both Petitions was that the provisions of the two Penal Codes that were challenged grant legal sanction for discrimination and violence towards individuals who do not conform to society's expectations of gender identity, expression or sexual orientation.

In the arguments opposing the challenge to the constitutionality, it was contended *inter alia* that the petitioners sought to 'use judicial craft to legitimize gay liaisons and such other indecent offences and create a new breed of rights which do not exist in the Constitution'.¹⁴ Furthermore, that 'criminalization of homosexuality is within the confines of the law and that individual liberty is circumscribed where it offends common good and public policy and that the state has a duty to protect the morals and traditional values recognized by the community'.¹⁵

IV. Similar Issues, Different Perspectives

On the question of whether the sections of the Penal Code are unconstitutional on grounds of vagueness and uncertainty, as a matter of general proposition, enactments should define terminology and words, and in the absence of this, the courts may provide a definition to fill the lacuna in the statute. In *Eric Gitari v Attorney General*, Counsel for the petitioners argued that section 162 and 165 do not define the phrases 'unnatural offences', 'against the order of nature' and 'indecent' and as such, this violated the right to a fair hearing under Article 50 of the Constitution.¹⁶ Similarly, in *LM v Attorney General of Botswana* the meaning of 'carnal knowledge' 'against the order of nature' under sections 164 (a) and (c) was considered vague. Under the void for vagueness doctrine, a statute is void and unenforceable if the scope and application of the law is unclear to the average citizen and

¹⁰ Kenya. Const. art 27.

¹¹ Kenya. Const. art 28.

¹² Kenya. Const. art 31.

¹³ Kenya. Const. art 43.

¹⁴ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, 71 (High Court.2019).

¹⁵ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, 76 (High Court.2019).

¹⁶ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, 261 (High Court.2019).

if it is unclear what conduct is prohibited.¹⁷ In both cases it was accepted that the meaning of the offending words have been clearly defined in law dictionaries and judicial pronouncements such as *Gaolete v. State*¹⁸ which defined ‘carnal knowledge’ as sexual intercourse and ‘the order of nature’ as anal sexual penetration. Therefore, the lack of definitions in the statute *per se* does not render the impugned provisions vague, ambiguous or uncertain. Essentially, the law does not require absolute certainty or perfect lucidity.¹⁹

Though the courts of Botswana and Kenya reached different conclusions on the question of violation of fundamental rights, in both cases it was accepted that the fundamental rights and freedoms enshrined in the Constitution are not absolute and may be limited so as not to prejudice the rights and freedoms of others.²⁰ In Kenya, on the enforceability, practicability, reasonability and justification of the provisions, Counsel submitted that the sections are reasonable to protect against sexual immorality and therefore, the right to privacy is justifiably limited under Article 24 of the Constitution. Counsel further submitted that the LGBT community is not a marginalised group as defined by Article 260 of the Constitution given that sexual orientation is by choice.²¹ In essence, the impugned provisions are necessary to preserve procreation and should be interpreted in a manner that upholds the social values and morals of Kenya, for the court has a responsibility to ‘preserve and strengthen positive African Cultural values and to contribute to the moral wellbeing of society’.²² When the new Constitution was drafted in 2010, the issue of same-sex relationships was raised but there was no appetite to legalise them and as such, Article 45(2) only recognises heterosexual marriage. Therefore, the Court concluded that to permit consensual, private same-sex relations would lead to same sex couples living together and this would contradict the spirit of the Constitution.²³ In other words, had there been a desire by the people of Kenya to protect and recognise same sex relations, this would have been reflected in the drafting of the new

¹⁷ See, *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, 274 - 276 (High Court.2019). See also, *Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae) MAHGB- 000591-16.*, 84 - 88 (High Court. 2019).

¹⁸ [1991] BLR 325 (HC)

¹⁹ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006(3) SA 247(CC)

²⁰ See, e.g., Bots. Const. § 3 and Kenya. Const. art 24.

²¹ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, 184 (High Court.2019).

²² *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, 183 (High Court.2019).

²³ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, 396 (High Court.2019).

Constitution in 2010. In terms of the alleged discriminatory nature of the provisions, the Court determined that the touchstone is the intention of the legislature and the safest guide to follow is the plain meaning of the language in the statute.²⁴ Therefore, as section 162 refers to ‘any person’ committing the offence, on a literal reading of the statute, the provisions do not target any particular group of people. Similarly, while section 165 refers to ‘any male person’, the court concluded that the plain reading of the provision refers to males in general and not those with a particular sexual orientation.

While the two cases consider many of the same regional and international authorities, where these two judgments differ is in the interpretation of the Penal Code in juxtaposition with the Constitution. The Court in Botswana discouraged the literal approach in favour of a generous construction, and highlighted that judges have a duty to make the Constitution grow in a developing society. The law ought to protect both the majority and minority rights and interests. Indeed, the Constitution of Botswana does not contain a provision the equivalent of Article 45 (2), which perhaps limited the Kenyan Courts ability to adopt a more generous approach. A notable difference between the two cases can be seen in the willingness of the Court in *LM v Attorney General of Botswana* to rely on foreign jurisprudence and literature supporting decriminalisation, whereas in *Eric Gitari v Attorney General* the Kenyan Court exercised caution in using foreign decisions in its interpretation.

V. Conclusion

The case of *Eric Gitari v Attorney General* presented the court with an opportunity to consider a weighty issue pertaining to the rights of the LGBT community, a question that had not been determined by any other court in Kenya. It presented an opportunity for the court to recognise the rights of a marginalised community, but instead, the ruling has dealt a major setback for the rights of sexual minorities in Kenya. In contrast, the court in Botswana recognised that criminalisation perpetuates stigma and hostility and that the provisions of the Penal Code are discriminatory in effect. Furthermore, the court acknowledged that the provisions do not serve any useful public purpose and that their removal does not erode public morality. It is now open to NGLHRC to appeal the decision

²⁴ EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), 254 (High Court.2019).

with the Court of Appeal. Only time will tell if Kenya will follow in the footsteps of other jurisdictions to adopt an approach that promotes diversity and inclusivity in the law.