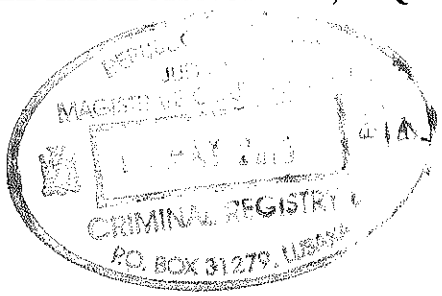
IN THE SUBORDINATE COURT OF THE CLASS CR NO. 9/04/13

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

BEFORE: THE HONOURABLE LAMECK NGAMBI, ESQUIRE



THE PEOPLE

V

PAUL KASONKOMONA **ACCUSED**

ARGUMENTS ON NOTICE TO RAISE PRELIMINARY ISSUES FOR CONSTITUTIONAL REFERENCE

IF IT may please Your Honour,

The Accused person **PAUL KASONKOMONA** requests for constitutional reference to the High Court of Judicature for Zambia to determine the constitutionality of Section 178 (g) of the Penal Code, Chapter 87 of the Laws of Zambia under which the Accused has been arrested, charged and arraigned before this Honourable Court and the constitutionality of the failure by the prosecution to avail the defence with statements of witnesses the prosecution wish to call and the entire video recording of the Accused's interview to Muvi Television before the commencement of trial in the circumstances of this case and the Accused's protected right under Article 18(1) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

THE CHARGE

Statement of offence: Idle and disorderly contrary to Section 178(g) of the Penal Code, Chapter 87 of the Laws of Zambia

Particulars of Offence: Paul Kasonkomona, on 7th April, 2013 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia being a person in the public place namely Muvi Television Studios on a programme called "The Assignment" did solicit for immoral purpose for Homosexual Rights to be respected in Zambia.

The Accused contends that Section 178 (g) of the Penal Code is unconstitutionally vague, unconstitutionally overbroad and contravenes Article 20 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

The Accused further and in the alternative contends that the failure by the prosecution to avail the defence with statements of witnesses the prosecution wish to call and the entire video recording of the Accused's interview to Muvi Television before the commencement of trial herein has been, is being and is likely to contravene his fundamental right under Article 18 (1) of the Constitution of Zambia.

The Accused will not advance arguments herein in relation to contravention of Article 19 of the Constitution.

BASIS OF THE CONSTITUTIONAL REFERENCE

Your Honour, the Accused's constitutional reference is derived from Article 28 (2) (a) of the Constitution of Zambia chapter 1 of the laws of Zambia which provides as follows:-

> ***"28. (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-***
>
> ***(a) hear and determine any such application;***
>
> ***(b) determine any question arising in the case of any person which is referred to it in pursuance of clause(2);***
>
> ***and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.***
>
> ***(2) (a) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person***

presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious.

(b) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court:

Provided that an appeal shall not lie from a determination of the High Court dismissing an application on the ground that it is frivolous and vexatious.

(3) An application shall not be brought under clause (1) on the grounds that the provisions of Articles 11 to 26 (inclusive) are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law.

(4) Parliament may confer upon the Supreme Court or High Court such jurisdiction or powers in addition to those conferred by this Article as may appear to be necessary or desirable for the purpose of enabling that Court more effectively to exercise the jurisdiction conferred upon it by this Article or of enabling any application for redress to be more speedily determined.

IN MUFAYA MUMBUNA V. THE PEOPLE [1984] ZR 66 Per GARDNER, JS (as he then was, the Supreme Court of Zambia had this to say on the provisions of Article 28 (2) (a) of the Constitution;

> ***"Both the learned Director and counsel for the appellant agree that the failure to hear counsel was an error by the judge and it would be proper either to remit the reference for hearing by the High Court or for this court to deal with the matter on its merits. In the event, in order to avoid any further delay in this matter, it was decided that this court would hear arguments and deal with the reference itself.***
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> ***The circumstances giving rise to a reference under Article 29 (3) are set out in that article as follows:***
>
> ***"29 (3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Article 13 to 27 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."***

Mr. Mwisiya has sought to bring this reference within the terms of Article 29 (3) by arguing that there is a contravention of Article 20 (4). In this connection he has said that under the definition section of the Penal Code, Ministers were not liable to prosecution for corruption and the new definition in the Corrupt Practices Act cannot be used against the appellant. We have considered the definition in section of the Penal Code and the reference to public office and are of the opinion that that definition probably includes Ministers. However, that opinion is immaterial because section 103A of the Penal Code which was enacted by Act 29 of 1976 provides as follows:

"103A 'public service' means service of the Party, the Government or a local authority, or of a statutory board or body including an institution of higher learning, corporation or company in which the Government has majority . . . interest or control."

There is no doubt that this section must be construed as including a Minister as a person in the service of the Government. It follows that prior to the enactment of the Corrupt Practices Act, a Minister was included within the

class of persons who could be prosecuted for official corruption under section 94 of the Penal Code, and section 26 (1) of the Corrupt Practices Act, which relates to the corrupt use of official powers, does not create a new offence as envisaged by Article 20 (4).

Our attention has been drawn to the fact that so far as penalties are concerned the penalty laid down under the new Act provides for imprisonment for a minimum term of five years and a maximum term of twelve years, whereas under the Penal Code the penalty was fifteen years imprisonment. The maximum term is therefore less under the new legislation, but, for the first time in connection with this type of offence, a minimum sentence has been imposed. The question of whether or not a minimum sentence can be imposed having regard to Article 20 (4) may be arguable but it does not of course arise at this stage, and does not affect the question of whether there can be a conviction for the new offence.

Mr. Mwisiya was desirous of putting forward the merits of his argument that the Constitution definition of public office excludes any contradictory definitions in other Acts, but such a point cannot be referred under the

provisions of Article 29 (3) because that question of construction cannot be said to be a question which arises as to the contravention of any of the provisions of Article 13 to 27 of the Constitution.

The finding of this court is, therefore, that the prosecution of the appellant does not contravene Article 20 (4) of the Constitution. This case is sent back to the senior resident magistrate Lusaka for plea and continued trial."

In the later case of ***OLIVER JOHN IRWIN V. THE PEOPLE [1993-1994] ZR 7 Per GARDNER JS*** (as he then was), the Supreme Court of Zambia re-affirmed the provisions of Articles 28 (2) (a) of the Constitution of Zambia for such reference by a Subordinate Court to the High Court by stating as follows:

"Mr. Godwin drew our attention to the case of Mumbuna v The People [3] in which this Court held that no case would be stated by a subordinate court for consideration by the High Court until a full hearing before a subordinate court had been determined. He argued that as there could be no case stated there could be no appeal. We agree with Mr. Godwin that a case stated did not lie in this case; but, as we indicated in the Mumbuna case,

there is provision in art.28 (2) of the Constitution for reference by a subordinate courts to the High Court of any question as to the contravention of arts.11 to 26, and thereafter for appeal to the Supreme Court. The learned judge dealt with the first application before him as being by way of case stated. He criticised the form in which it was presented to him by the learned magistrate as not being in accordance with s.350 of the Criminal Procedure Code relating to cases stated, and sent it back to the learned trial judge in his ruling, but, in view of the fact that the learned judge proceeded to hear argument and to deliver a ruling, we presume that he decided to deal with the matter as reference under the provisions of art.28(2) as this Court did in the Mumbuna case where proceedings had been started by similar irregular procedure.

In the event we are satisfied that, although the appropriate procedure was not followed in this case, the questions referred under the improper case stated were questions which could properly have been referred under art.28(2) and an appeal consequently lies to this Court. Mr. Godwin's argument as to the proper form of reference to the High Court therefore falls away."

Your Honour, Article 18 (1) and 20 of the Constitution of Zambia in which the Accused's reference is anchored are reproduced in the order referred to herein are as follows:-

> "18. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence-
>
> (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
>
> (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
>
> (c) shall be given adequate time and facilities for the preparation of his defence;
>
> (d) shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the court in person, or at his own expense, by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge;

and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after

judgement a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(4) A person shall not be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and a penalty shall not be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time it was committed.

(5) A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(6) A person shall not be tried for a criminal offence if he shows that he has been pardoned for that offence.

(7) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

(8) A person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law:

Provided that nothing in this clause shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefore is not so prescribed.

(9) Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(10) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

(11) Nothing in clause (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority-

(a) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings; or

(b) may be empowered by law to do in the interest of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings.

(12) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of-

(a) paragraph (a) of clause (2) to the extent that it is shown that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

(b) paragraph (d) of clause (2) to the extent that it is shown that the law in question prohibits legal representation before a subordinate court in

proceedings for an offence under Zambian customary law, being proceedings against any person who, under that law, is subject to that law;

(c) paragraph (e) of clause (2) to the extent that it is shown that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds;

(d) clause (2) to the extent that it is shown that the law provides that-

(i) where the trial of any person for any offence prescribed by or under the law has been adjourned and the accused, having pleaded to the charge, fails to appear at the time fixed by the court for the resumption of his trial after the adjournment, the proceedings may continue notwithstanding the absence of the accused if the court, being satisfied that, having regard to all the circumstances of the case, it is just and reasonable so to do, so orders; and

(ii) the court shall set aside any conviction or sentence pronounced in the absence of the accused in respect of that offence if the

accused satisfies the court without undue delay that the cause of his absence was reasonable and that he had a valid defence to the charge;

(e) clause (2) to the extent that it is shown that the law provides that the trial of a body corporate may take place in the absence of any representative of the body corporate upon a charge in respect of which a plea of not guilty has been entered by the court;

(f) clause (5) to the extent that it is shown that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

(13) In the case of any person who is held in lawful detention, clause (1), paragraphs (d) and (e) of clause (3) shall not apply in relation to his trial for a criminal offence

under the law regulating the discipline of persons held in such detention.

(14) In its application to a body corporate clause (2) shall have effect as if words "in person or" were omitted from paragraphs (d) and (e).

(15) In this Article "criminal offence" means a criminal offence under the law in force in Zambia.

20. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

(2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society."

UNCONSTITUTIONALLY VAGUE AND FREEDOM OF SPEECH

Your Honour now is humbly invited to kindly note the question and the answer to the question:

"when is a law constitutionally vague?

In the United States case of ***CONNALLY V. GENERAL CONSTRUCTION 269 U.S 385,391 (1926),*** the Court stated that the law is unconstitutionally vague when people

"of common intelligence must necessarily guess at its meaning"

In short, a law is unconstitutionally vague if a reasonable person cannot tell what is not allowed and what is allowed.

In the United States case of ***PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 US 1556 (1977,)*** the Court held that a vagrancy law was void for vagueness;-

"both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated

conduct is forbidden by the statute'...and because it encourages arbitrary and erratic arrests and convictions" (at paragraph 162)

Similarly, in the United States case of ***KOLENDER v. LAWSON, 461 U.S461 U.S 352,357 (1983)*** which is apt as an example for the Accused's argument in this case, the Court declared unconstitutional the loitering law of California and held, inter alia, that

"the void-for-vagueness doctrine requires that a penal statute define the criminal offence with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"

In the case of ***CITY OF CHICAGO V. MORALES, 527 U.S. 41 (1999)*** the United States Supreme Court held that where a law contained no guidelines for the exercise of police discretion, it contained uneven police enforcement.

In the sphere of freedom of speech, Courts are troubled about vague laws restricting speech out of concern that such vague laws they will chill constitutionally protected speech. As the Court observed in the United States case of ***NAACP V. BUTTON, 371 U.S 415, 433 (1963),*** freedom of speech is

"***delicate and vulnerable, as well as precious in our society ... (and) the threat of sanctions may deter their***

exercise almost potently as the actual applications of sanctions."

There are other authorities which illuminate the same arguments

In ***SMITH V. GOGUEN, 415 U.S. 566, 561 (1974),*** the United States Court held as invalid a law that prohibited treating a flag " contemptuously" as the law

"fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not"

In ***HUSTON V. HILL 482, U.S 459,*** the Court declared unconstitutional a City's ordinance that made it unlawful to interrupt police officers in the performance of their duties. The Court found that the law was not narrowly tailored to prohibit only 'disorderly conduct' or 'fighting words' but rather that law.

"effectively grants police the discretion to make arrests selectively on basis of the content of the speech(465)'

In the ***Namibian case of FANTASY ENTERPRISES CC T/A HUSTLER THE SHOP V. MINISTER OF HOME AFFAIRS AND ANOTHER, CASE NO. A159/96*** the Namibian High Court held that:

"the words employed in a penal provision which limits the exercise of a fundamental freedom must at least provide an intelligible standard from which to

gain an understanding of the act enjoined or prohibited so that those to whom the law apply know whether they act lawfully or not."

Your Honour, the terminology used to describe the offence in Section 178(g) of the Penal Code, Chapter 87 of the Laws of Zambia does not provide a clear indication of the conduct which is prohibited.

In any case, Section 178(g) assumes that there is a uniform understanding of "immoral purposes" and that the public's understanding of the ambit of the section is uniform and clear despite the long passage of time since the enactment of the law. This cannot possibly be the case. If this was the case, then the public would, for example, find a man who flirts for sexual purposes with a married woman "immoral" even though society has long since excluded adultery from the ambit of criminal law. The Court may take judicial notice of the fact that over time, the definitions of sexual offences have become more precise and new sexual offences have been created.

It is argued by the Accused that Section 178 (g) has never before been used in the manner in which the State is attempting to use it now. It would not be tenable that at the time of appearing on television the Accused was aware that his actions could fall foul of section 178(g) because the section's wording does not suggest that expressing one's views on television would contravene the section in any respect.

SECTION 178(G) (OR THE STATE'S USE THEREOF) IN ITSELF VIOLATES THE RIGHT TO FREEDOM OF EXPRESSION

Section 28 of the Zambia Constitution provides that, where a person alleges that any of the rights in articles 11 to 26 has been violated, he can apply to the High Court which shall hear and determine any such application or determine any question arising from the proceedings of a subordinate court.

Section 11 of the Zambian Constitution provides that every person shall have the right to:

a) life, liberty, security of the person, and the protection of the law;
b) freedom of conscience, expression, assembly, movement and association;
c) protection of young persons from exploitation;
d) protection for the privacy of his home and other property and from deprivation of property without compensation.

Section 11 requires that any limitation of the rights in the Constitution must be in the public interest.

Section 20(1) of the Zambian Constitution which we repeat by way of emphasis provides that,

> ***"except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impact and communicate ideas and***

information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence."

Section 20(3) limits the right to freedom of expression and provides that

"nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provisions:

a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating education institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television or

c) that imposes restrictions upon public officers;

and except so far as that provision, or the thing done under the authority thereof as the case may be, is shown to be reasonably justifiable in a democratic society."

Thus, the right to communicate ideas can only be limited by a law which is reasonably aimed at protecting public morals and which is reasonably justifiable in a democratic society.

Your Honour, to interpret this, it is useful to look at the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR) which Zambia has ratified, and the General Comment and Concluding Observations of the United Nations Human Rights Committee.

Zambia accepted its obligations under various international and regional treaties by acceding to or ratifying them but has yet to domesticate such treaties. In the 1993 in the Zambian High Court case of ***SARAH LONGWE V INTER CONTINENTAL HOTELS*, 1992/HP/765,** Justice C. Musumali stated as follows:-

"ratification of such instruments by a national state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute."

The African Commission on Human and Peoples' Rights (African Commission), which is responsible for monitoring compliance with regional human rights treaties, in ***LEGAL RESOURCES FOUNDATION V ZAMBIA,*** Comm. 211/98 noted that

> ***"international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties."***

Moreover, the African Commission noted in ***ZIMBABWE HUMAN RIGHTS NGO FORUM V ZIMBABWE*** that:

> ***"Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation."***

Article 9(2) of the African Charter on human and Peoples' Rights (ACHPR) provides that "every individual shall have the right to express and disseminate his opinions within the law".

The African Commission, in the case of ***CONSTITUTIONAL RIGHTS PROJECT AND OTHERS V NIGERIA,*** **(2000)** ***AHRLR 227 (ACHPR 1999),*** held that

> ***"freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of the public affairs of his country. Under the African Charter, this right comprises the right to receive information and express opinions"*** (paragraph 26).

Similarly, in the case of ***LAW OFFICE OF GHAZI SULEIMAN V SUDAN (II) (2003) AHRLR 144 (ACHPR 2003),*** the African Commission emphasised the right to freedom of expression as a cornerstone of democracy. Citing the Inter-American Court of Human Rights, the African Commission noted that

> ***"when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas"*** (paragraph 50).

The African Commission on Human and Peoples' Rights' *Declaration of Principles on Freedom of Expression in Africa* (2002) states the following:

- ***"Freedom of expression and information, including the right to seek, receive and impact information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human rights and an indispensable component of democracy.***
- ***Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.***
- ***No one shall be subject to arbitrary interference with his or her freedom of expression.***
- ***Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.***
- ***Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity."***

Article 19 of the ICCPR deals with the right to freedom of opinion and expression:

> "19(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals."

The Human Rights Committee (HRC) in General Comment 34 elaborates on the content of this right. (CCPR/C/GC/34, 12 September, 2011). The HRC notes that freedom of opinion and expression are indispensable conditions for the full development of the person and are essential for any society:

- ***"They constitute the foundation stone for every free and democratic society" (paragraph 2);***
- ***"Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights" (paragraph 3);***
- ***Freedom of expression includes "discussion of human rights" (paragraph 11); and***
- ***Freedom of expression extends to expression that may be regarded as "deeply offensive"*** (paragraph 11).

The HRC held in General Comment 24 that the "harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19(1)" (paragraph 9).

Article 19 allows for limitations similar to that in section 20 of the Zambian Constitution. Section 20 allows for restrictions provided by law and which is reasonably justifiable in a

democratic society. Article 19 of the ICCPR similarly provides that restrictions must be "provided by law" and must conform to the strict tests of necessity and proportionality.

General Comment 34 provides that restrictions on the exercise of freedom of expression "may not put in jeopardy the right itself" (paragraph 21). The law "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly" and "may not confer unfettered discretion for the restrictions of freedom of expression on those charged with its execution" and laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not" (paragraph 25).

Regarding restriction of freedom of expression on the ground of public health or morals, the HRC notes that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition" and "any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination" (paragraph 32).

Restrictions must be "necessary for a legitimate purpose" (paragraph 33), must not be overbroad (paragraph 34), must conform to the principle of proportionality, must be appropriate to achieve their protective function, must be the least intrusive instrument amongst those which might achieve their protective function and must be proportionate to the interest to be protected (paragraph 34).

"The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law" (paragraph 34).

"When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat" (paragraph 35).

General Comment 34 was referred to by the HRC in the case of ***IRINA FEDOTOVA V RUSSIAN FEDERATION, COMMUNICATION 1932/2010, adpoted 31 October, 2012***
In that case, a lesbian activist was fined under an administrative law which specifically prohibits "public actions aimed at propaganda of homosexuality". Fedotova displayed posters that declared "homosexuality is normal" and "I am proud of my homosexuality" near a secondary school building. She stated that her aim was to promote tolerance towards homosexuality. Both parties admitted that the conviction had amounted to a restriction of Fedotova's right to freedom of expression. The HRC had to consider whether this limitation was justified because it was provided by law and necessary. The HRC held that the concept of public morals cannot be homogenous and must be understood in the light of the universality of human rights and the principle of non-discrimination. The HRC held that the State had not shown that the restriction of propaganda on homosexuality, as opposed to heterosexuality, was based on reasonable and objective criteria. In addition, there was no evidence which pointed to the existence

of factors which justified such a distinction. It was held that the actions did not urge minors to engage in particular sexual activity nor did it advocate for a particular sexual orientation. Instead, her actions sought to give expression to her sexual identity and sought understanding for it. The HRC held that the State failed to demonstrate why it was necessary for one of the legitimate purposes of article 19(3) to restrict Fedotova's right to freedom of expression.

The European Court of Human Rights has also considered a case where the Russian authorities banned a gay pride march. In the case of ***ALEKSEYEV V RUSSIA* 4916/07, *JUDGEMENT 21 October 2010 confirmed 11 April 2011,*** the court noted that the intention of the march was to promote human rights and freedoms and to call for tolerance towards sexual minorities. There was no suggestion that participants would exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views. The court held that

> ***"there is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or 'vulnerable adults'. On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of***

homosexuality, or opt into or out of it voluntarily. This was exactly the kind of debate that the applicant in the present case attempted to launch, and it could not be replaced by the officials spontaneously expressing uniformed views which they considered popular. In the circumstances of the present case the Court cannot but conclude that the authorities' decision to ban the events in question was not based on an acceptable assessment of the relevant facts."

The Court found the ban amounted to in interference with the right to freedom of assembly.

The Court referred to its previous case law on the meaning of a democratic society:

"Referring to the hallmarks of a 'democratic society', the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair treatment of minorities and avoids any abuse of a dominant position"

It is the Accused's argument that his arrest and charge amounted to an arbitrary interference with his right to freedom of expression. The arrest and charge is or seeks to punish him for the views he expressed on television and to deter him and others of similar views from doing so in the future.

UNCONSTITUTIONALLY OVERBROAD

Further and in the alternative, Your Honour, it is trite law that a Law is constitutionally overbroad if it regulates free speech more than the Constitution allows to be regulated. The same arguments advanced in relation to Section 178(g) being unconstitutionally vague also apply to Section 178(g) as being unconstitutionally overbroad.

But in addition, Section 178(g) is unconstitutionally overbroad in that other persons to whom Section 178(g) is unconstitutional may refrain from any expression or speech or opinion including debate than challenge the existence of Section 178(g) of the Penal Code. Intellectual debate would so be equally prohibited if member of the public found it to be immoral or immoral purposes.

RIGHT TO A FAIR TRIAL

Your Honour, the prosecution has despite request todate failed to furnish the defence with statements of witnesses the prosecution wish to call as well as the entire video recording of the interview by the Accused to Muvi Television for proper preparation of the defence before the commencement of trial in contravention of Article 18(1) of the Accused's right to a fair hearing or trial.

The lack of the requested for material for the defence to work with before the commencement of trial deprives the Accused to go through the statements with his Advocates, clarify issues with the Advocates, check for any areas of weaknesses and points of disputes among others things and use this as a basis for cross- examination.

Coupled with the vagueness of Section 178(g) including the lack of homogeneous concept or definition of what constitutes ***"for immoral purposes"***, the Accused has a perfectly arguable case in terms of his fundamental right under Article 18 (1) of the Constitution of Zambia

We humbly submit that this request for Constitutional reference to the High Court of Judicature for Zambia is neither frivolous nor vexatious. We humbly pray that this is a fit and proper case for reference to the High Court of Judicature for Zambia to determine the constitutionality of the issues raised.

We are obliged

Dated at Lusaka this day of 2013

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