

IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

CR NO.09/04/13

BETWEEN:

THE PEOPLE

AND

PAUL KASONKOMONA

STATE

ACCUSED

PROSECUTIONS SUBMISSION ON A PRELIMINARY ISSUE RAISED BY THE
DEFENCE (ACCUSED) FOR CONSTITUTIONAL REFERENCE

STATUTE REFERED TO

The Constitution of Zambia chapter 1 of the Laws of Zambia.

The Penal Code Chapter 87 of the Laws of Zambia

The criminal Procedure code Chapter 88 of the Laws of Zambia.

CASES REFERED TO

1. The PEOPLE V ANDREW BWEZANI BANDA ANTONELLO LOCCI HPR/11/2012
2. FRED MMEMBE V THE PEOPLE AND FRED MMEMBE MASAUTSO PHIRI,
GOLIATH MUNGONGE V THE PEOPLE (1996) SJ
3. DR FREDRICK JACOB TITUS CHILUBA V THE PEOPLE (2004) ZR 11(SC)

If it may please your honour, the Prosecution has read the submissions by the defence on behalf of the accused and hereby submit as follows:

The defence is asking this Honourable Court to refer the case before this court to the High court of Judicature for Zambia Pursuant to Article 28 (2) of the Constitution chapter 1 of the Laws of Zambia which states;

"If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Article 11 to 26 inclusive, the person presiding in that court may, and shall if any

party to the proceedings so request, refer the question to the High court unless, in his opinion the raising of the question is merely frivolous or vexatious". The defence heads of arguments are that:

1. Section 178 (g) of the Penal code Chapter 87 of the Laws of Zambia is in Unconstitutionally vague, overboard and contravene Article 20 of the Laws of Zambia
2. Further and in the alternative that failure by the prosecutions to avail the defence with Statements of witnesses the prosecutions wish to call the entire video recording of the accused interview to Muvi Television before commencement of trial herein has been, and is being likely to contravene his fundamental rights under Article 18 (1) of the Constitution of Zambia.

THE APPLICATION IS FRIVOULOUS AND VEXATIOUS.

YOUR HONOUR in the case of **THE PEOPLE V ANDREW BWEZANI BANDA AND ANTONELLO LOCCI HPR/11/2012** it was held that a matter can only be referred to the High Court under Article 28 (2) if there is a contravention of Articles 11 to 26 inclusive and if there is no contravention the provision of Article 28 cannot be invoked. The prosecutions humbly submit from the outset that none of Articles 18 (1) and 20 of the constitution has been contravened and therefore the raising of the question of constitution issues by the defence is merely frivolous and vexatious. We submit therefore that for the accused to show that a constitutional issue has arisen in the sense that his right to the freedom of speech and expression has been infringed, he must demonstrate and show that he had a right under Articles 11 to 26 inclusive to advocate and solicit for immoral purposes in this case homosexual rights without any justification whatsoever. The right to solicit for immoral purposes is not one of the rights protected under Articles 11 to 26 of the Constitution. The fundamental rights granted in the said Articles are specified and unambiguous and does not include soliciting for immoral purposes. Section 178 (g) which reads that: "Every person who in any public place solicits for immoral purposes, are deemed idle and disorderly persons". This provision of the law is simply an expression of a limitation to the freedom of expression as provided under Article 20 of the Constitution itself. Article 20 (3) (a) provides:

"Nothing contained 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 interest of defence, public safety, public order, public morality or public health; in other words the meaning of paragraph three is that the freedom of expression is not limitless. It is plain and clear that Section 178 (g) is within the Constitution, just like the limitations provided in Section 69 of the penal code on the defamation of the President as acknowledged by the defence in their submissions at page 18 paragraph one. In the cases of **FRED MMEMBE V THE PEOPLE AND FRED MMEMBE, MASATSO PHIRI, GOLIATH MUNGONGE V THE PEOPLE** (1996) S.J. it was held among other holdings that;

“There was nothing in Article 20 which immunized defamation” a law met the test of being reasonably required if it had as its aim at least one of the interests or purposes listed in Article 20 (3).

“It may therefore be implied that Section 178(g) is furthermore reasonably required to forestall a breakdown of public morality and is accordingly a proximate relationship between the two as required by the Constitution. The case of **FELIYA KACHASU v THE ATTORNEY GENERAL** (1964) ZR sets a bench mark where the court demonstrates that the rights under Articles 11 to 23 have limits. The intention of our parliamentarians in Section 178(g) which is supported by the Constitution was to prevent appearance and practicing of such behaviour in the Zambian society.

Furthermore, section 178 (g) of the penal code does not in any way offend the provision of Articles 18 (1) of the Constitution. The accused person who is entitled to a fair trial shall be accorded a fair trial, before this Honourable Court contrary to the fears expressed by the defence. In the case of **Dr FREDRICK JACOB TITUS CHILUBA V THE PEOPLE** (2004) ZR11 (SC) it was held that Article 18 (1) of the Constitution guarantees a right to a fair hearing in all the courts of Judicature to any person charged with any criminal offence” and that includes this Honourable court. It is trite law that the burden of proof in criminal cases rests on the prosecution and the accused has no burden to prove his innocence as it was held in the case of **MUWOWO V THE PEOPLE** (1965) ZR 91 (CA) one of the many cases in which this well settled principles of law has been repeated. Even in this case before this court the burden is on the prosecution to prove its case and not that of the accused.

While the defence contends and insists that Article 18 (1) has been infringed and accused will not be therefore receive a fair trial in the absence of witness statements from the prosecution and video recording being availed to the defence. The said Article does not include what the defence is claiming would render the hearing unfair or disadvantage the accused from preparing his defence. In the same vein neither the Constitution nor the Criminal Procedure Code Chapter 88 of the Laws of Zambia has provision where the Prosecutions is obligated to give witness statements or exhibits to the defence before trial commences.

UNCONSTITUTIONALLY VAGUE AND FREEDOM OF SPEECH

Your Honour, the other question which the defence seeks to be answered is the vagueness of the law to render it unconstitutional. Several international conventions or instruments and cases outside our jurisdiction have been cited to help demonstrate the vagueness of the Section under which the accused has been charged. Quoting the comment made by the court in the case of **FRED MMEMBE V THE PEOPLE AND FRED MMEMBE MATSAUTSO PHIRI and GOLIATH MUNGONGE** as it was commented in the **SATA v POST NEWSPAPER** case (unreported) on the recourse to International norms and decisions of courts in various jurisdictions. The court said;

“What is certain is that it does not follow that because there are these similar provisions in international instruments or domestic laws, the courts in the various jurisdictions can have or have had uniform approach. For one thing, as the example I have quoted show the right to free expression and free speech is qualified by exceptions, in some cases more heavily than others. For another, we are at different stages of development and democratization and courts in each country must surely have regard to social values applicable in their milieu”

Therefore these are only persuasive in nature and not binding on this court including international instruments. In any case while the defence suggests that the subject Section of the law is vague. It is clear that while the Constitution itself has an interpretation provision in Article 139 of Part XIV, there is nowhere in this Article where the limitations under Article 20 (3) have been defined in particular the one on public morality. Does the lack of the definition of what public morality in the Constitution entail that the Constitution is vague. The answer to this question will be no. Furthermore the defence contended that Section 178(g) is unconstitutionally vague and cited the case of **CONALLY V GENERAL**

CONSTRUCTION 269 U.S where it was stated that the law is unconstitutionally vague when people of common intelligence must necessarily guess as its meaning "our humble and simple reply is that Section 178(g) is very clear. The term immoral simply means any behaviour that is unacceptable in society and according to Christianity it includes such as prostitution and homosexuality which is the case at hand.

YOUR HONOUR with the forgoing reasons we submit that the raising of the question of constitutional reference of the matter to the High Court for Zambia is frivolous and vexatious as there are no constitutional issues raised.

We are most obliged.

Dated.....*2013* this.....*27th*.....day of.....*MAY*.....2013

PER: THE DIVISIONAL PROSECUTIONS OFFICER
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TO: THE ACCUSED AND HIS ADVOCATES