

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

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ACCUSED'S SUBMISSIONS IN REPLY

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These are the Accused's Submissions in Reply to the Submissions of the State filed on 29<sup>th</sup> May, 2013.

The State's position is that the Accused's application is frivolous and vexatious on the basis that none of Articles 18(1) and 20 of the Constitution has been contravened. The argument by the State is that:-

- i. Section 178 (g) of the Penal Code is a limitation to freedom of expression as provided under Article 20 of the Constitution of Zambia.
- ii. Section 178(g) is not constitutionally vague; that this Section is very clear "*as the term Immoral 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*"

- iii. The various cases, international conventions or instruments cited by the Accused are only persuasive in nature and not binding.
- iv. The burden of proof in criminal cases is on the prosecution and it is not the Accused to prove his innocence and therefore the Accused is guaranteed a fair hearing.

On these, we say as follows:-

- 1.1 The Accused's contention is that the State has completely missed the point. If the State is suggesting that Section 178 (g) can be broadly interpreted to limit freedom of expression as in this case, the Accused's position is – and remains the same - that the interpretation and the manner the State is seeking to interpret Section 178(g) infringes upon the Assused's right to freedom of expression
- 1.2 In other words, and by way of emphasis, the Accused is not arguing that a person has the right to solicit for immoral purposes, as per the ordinary definition of the offence. The Accused is arguing that the manner in which the State is seeking to interpret and apply Section 178(g) is so broad that it violates the freedom to express an opinion. This is a fundamental freedom which is recognised in Article 20 of the Constitution.
- 1.3 In the recent case of ***FAUSTINE MWENYA KABWE, AARON CHUNGU VS. MR. JUSTICE ERNEST SAKALA, MR. JUSTICE PETER CHITENGI, (JUDGE OF THE SUPREME COURT) AND THE ATTORNEY GENERAL***, Supreme Court Judgment No. 25 of 2012, (Appeal No. 152/2001) at page 30, the Supreme Court of Zambia pronounced itself on the interpration of findamental rights when it stated as follows:-

*“the provisions conferring the rights and freedoms should not be narrowly construed but stretched in favour of the individual so as to ensure that the rights and freedoms so conferred are not diluted. The individual must enjoy the full measure and benefits of the rights so conferred and in this respect, any derogations to the rights will usually be narrowly or strictly construed.”*

- 1.4 Issues of morality are discussed in Zambian society on a daily basis, including issues relating to homosexuality and prostitution. A quick look at daily newspapers prove this point. **But Section 178(g) has never been intended to "forestall a breakdown in morality" as argued by the State. If that was the case, such a Section would have been included under Chapter XV in the Penal Code relating to Offences Against Morality. In contrast, Section 178(g) is located in Chapter XVII relating to Nuisances and Offences against Health and Convenience.**

For avoidance of doubt, Chapter XV and Chapter XVII are herebelow reproduced in full

*“CHAPTER XV  
OFFENCES AGAINST MORALITY*

<i>Definition of rape</i>	<i>132. Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed "rape".</i>
<i>Punishment of rape</i>	<i>133. Any person who commits the offence of rape is liable to imprisonment for life. (As amended by No. 26 of 1933 and No. 20 of 1964)</i>

- Attempted rape*      134. Any person who attempts to commit rape is guilty of a felony and is liable to imprisonment for life.  
(As amended by No. 26 of 1933)
- Abduction*      135. Any person who with intent to marry or carnally know a woman of any age, or to cause her to be married or carnally known by any other person, takes her away, or detains her, against her will, is guilty of a felony and is liable to imprisonment for seven years.
- Abduction of children*      136. Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanour.
- Indecent assault*      137. (1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment for fourteen years.
- (2) It shall be no defence to a charge for an indecent assault on a girl under the age of twelve years to prove that she consented to the act of indecency:
- Provided that it shall be a sufficient defence to any charge under this subsection if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe, and did in fact believe, that the girl was of or above the age of twelve years.
- Indecently insulting or annoying females*      (3) Any person who is found in any building or dwelling-house or in any verandah or passage attached thereto or in any yard, garden or other land adjacent to or within the curtilage of such building or dwelling-house not being a public place-
- (a) for the purpose of and from motives of indecent curiosity gazing at or observing any woman or girl who may be therein while in a state of undress or semi-undress; or
- (b) with intent to annoy or indecently to insult any woman or girl who may be therein;  
   is guilty of a misdemeanour and is liable to imprisonment for one year.  
   (As amended by No. 26 of 1933)
138. (1) Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of

*imprisonment of not less than fifteen years and may be liable to imprisonment for life.*

*(2) Any person who attempts to have unlawful carnal knowledge of any child commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fourteen years and not exceeding twenty years.*

*(3) Any person who prescribes the defilement of a child as cure for an ailment commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and may be liable to imprisonment for life.*

*Defilement of Child*

*(4) A child above the age of twelve years who commits an offence under subsection (1) or (2) is liable, to such community service or counseling as the court may determine, in the best interests of both children.*

*(As amended by Act No. 15 of 2005)*

*Defilement of imbeciles  
or person with mental  
illness*

*139. Any person who, knowing a child or other person to be an imbecile or person with mental illness, has or attempts to have unlawful carnal knowledge of that child or other person in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the child or other person was an idiot or imbecile commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fourteen years and may be liable to imprisonment for life.  
(As amended by No. 26 of 1933, repealed and replaced by Act No. 15 of 2005)*

*Procuration*

*140. Any person who-*

*(a) procures or attempts to procure any child or other person to have unlawful carnal knowledge either in Zambia or elsewhere, with an person or other persons for pornography, bestiality or any other purpose;*

*(b) procures or attempts to procure any child or other person to become, either in Zambia or elsewhere, a common prostitute;*

*(c) procures or attempts to procure any child or person to leave Zambia, with the intent that the child or person may become an inmate of or frequent a brothel elsewhere; or*

*(d) procures or attempts to procure any child or person to leave that child's or other person's usual place of abode in Zambia with intent that the child or other person may, for the purposes of*

*prostitution, become an inmate of or frequent a brothel either in Zambia or elsewhere;*

*commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life:*

*Procuring child or other person for prostitution, etc*

*.Provided that no person shall be convicted of an offence under this Section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.*

*(As amended by No. 26 of 1933, No. 9 of 1954 and repealed and replaced by Act No. 15 of 2005)*

*Procuring defilement by threat or fraud or administering drugs*

*141. Any person who-*

*(a) by threat or intimidation procures or attempts to procure any child or other person to have any unlawful carnal knowledge, either in Zambia or elsewhere;*

*(b) by false pretence or false representation procures any child or other person to have any unlawful carnal knowledge, either in Zambia or elsewhere; or*

*(c) applies, administers to, or causes to be taken by any child or other person any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any third person to have unlawful carnal knowledge with such child or other person;*

*commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life:*

*Provided that no person shall be convicted of an offence under this Section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.*

*(As amended by No. 9 of 1954, repealed and replaced by Act No. 15 of 2005)*

*Householder, etc., permitting defilement of child on premises*

*142. Any person who, being the owner or occupier of premises or having or acting or assisting in the management or control thereof, induces or knowingly permits any child to resort to or be upon such premises for the purpose of being unlawfully and carnally*

*known by any other person, whether such carnal knowledge is intended to be with any particular person or generally, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life.*

*(As repealed and replaced by Act No. 15 of 2005)*

*Householder, etc.,  
permitting defilement  
of girl under sixteen  
on premises*

*143. Any person who sells or traffics in a child or other person for any purpose or in any form commits an offence is liable, upon conviction, to imprisonment for a term of not less than twenty years:*

*Selling or trafficking  
in children, etc.*

*Provided that where it is proved during the trial of the accused person that the sale or trafficking in a child or other person was for the purpose of causing that child or person to be unlawfully and carnally known by any other person, whether such carnal knowledge was intended to be with any particular person or generally, the person is liable, upon conviction, to imprisonment for life.*

*(As repealed and replaced by Act No. 15 of 2005)*

*Detention with intent  
in premises or brothel*

*144. (1) Any person who detains any child or other person against that child or other person's will-*

*(a) in or upon any premises with intent that the child or other person may be unlawfully and carnally known by any third person, whether particularly or generally or for rituals or any other purpose; or*

*(b) in any brothel;*

*commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life.*

*(2) When a child or person is in or upon any premises for the purposes of having any lawful carnal knowledge or in any brothel, another person shall be deemed to detain such a child or person in or upon such premises or in such brothel, if, with intent to compel or induce the child or person to remain in or upon such premises or in such brothel, such other person withholds from the child or person any wearing apparel or other property belonging to the child or person, or where wearing apparel has been lent or otherwise supplied to such child or person or by directions of such*

*person, such other person threatens such person with legal proceedings for taking away the wearing apparel so lent or supplied.*

*(3) No legal proceedings, whether civil or criminal, shall be taken against any child or person for taking away or being found in possession of any such wearing apparel as was necessary to enable the child or person to leave such premises or brothel.  
(As repealed and replaced by Act No. 15 of 2005)*

*Power of search*

*145. (1) If it appears to any magistrate, on information made before the magistrate, on oath, by any parent, relative or guardian of any child or other person who, in the opinion of the magistrate, is acting bona fide in the interests of any child or person, that there is reasonable cause to suspect that such child or other person is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such magistrate, such magistrate may issue a warrant authorizing the person named therein to search for, and when found to take to and detain in a place of safety such child or person until the child or person can be brought before a magistrate.*

*(2) The magistrate before whom the child or person is brought in accordance with subsection (1) may cause the child or person to be delivered up to the child's parents or guardians, or be otherwise dealt with as circumstances may permit and require.*

*(3) A magistrate issuing a warrant under this Section may, by the same or any other warrant, cause any person accused of so unlawfully detaining such child or person to be apprehended and brought before a magistrate and proceedings to be taken for punishing such person according to law.*

*(4) A child or person shall be deemed to be unlawfully detained for the purpose of being unlawfully and carnally known by any other person, whether any particular third person or generally; and*

*(a) in the case of the child whether the child consented to the detention or not; or*

*(b) if the person is of, or above the age of, sixteen years and is so detained against the person's will or against the will of the person's father or mother or of any person having the lawful care or charge of that person.*

*(5) Any person authorised by warrant under this Section to search for any child so detained as aforesaid may enter if need be by*

*force, any house, building or other place mentioned in the warrant, and may remove such child or person from there.*

*(As amended by S.I. No. 63 of 1964, repealed and replaced by Act No. 15 of 2005)*

*Person living on earnings  
of prostitution or persistently  
soliciting*

*146. (1) A person who-*

*(a) knowingly lives wholly or in part on the earnings of prostitution; or*

*(b) in any public place, persistently solicits or importunes for immoral purposes;*

*commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fifteen years;*

*Provided that a child who commits an offence under subsection is liable to such community service or counseling as the court may determine in the best interests of the child.*

*(2) Where a person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such manner as to show that the person is aiding, abetting or compelling the prostitution with any other person, or generally, that person shall, unless the person shall satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.*

*(As repealed and replaced by Act No. 15 of 2005)*

*Person living on aiding,  
etc., prostitution of  
another for gain*

*147. (1) Every person who knowingly lives wholly or in part on the earnings of the prostitution of another or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such manner as to show that such person is aiding, abetting or compelling that person's prostitution with any other person, or generally, commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fifteen years.*

*(2) Where a person compels a child to become a prostitute that person commits an offence and is liable, upon conviction, to imprisonment for life.*

*(As repealed and replaced by Act No. 15 of 2005)*

*Power of search*

148. If it is made to appear to a magistrate, by information on oath, that there is reason to suspect that any house or any part of a house is used by a woman or girl for purposes of prostitution, and that any person residing in or frequenting the house is knowingly living wholly or in part on the earnings of the prostitute, or is exercising control, direction or influence over the movements of the prostitute, the magistrate may issue a warrant authorising any police officer to enter and search the house and to arrest such person.

*Brothels*

149. Any person who keeps a house, room, set of rooms, or place of any kind whatsoever for purposes of prostitution commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and not exceeding twenty five years.

*(As repealed and replaced by Act No. 15 of 2005)*

*Conspiracy to defile*

150. Any person who conspires with another person to induce any person or child, by means of any false pretence or other fraudulent means, to permit any other person to have unlawful carnal knowledge of such person or child, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and may be liable to imprisonment for life.

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Attempts to procure  
Abortion*

151. Any person who, with intent to procure the miscarriage of a woman or female child, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatsoever, commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding seven years.  
*(As repealed and replaced by Act No. 15 of 2005)*

*Abortion by pregnant  
woman or female child*

152. (1) Every woman being pregnant who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used, commits a felony and is liable, upon conviction, to imprisonment for a term of fourteen years.

*(2) Any female child being pregnant who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing or uses any force of any kind commits an offence and is liable to such community service or counseling as the court may determine, in the best interests of the child:*

*Abortion by pregnant  
Woman or female child*

*Provided that where a female child is raped or defiled and becomes pregnant, the pregnancy may be terminated in accordance with the Termination of Pregnancy Act.  
(As repealed and replaced by Act No. 15 of 2005)*

*Supplying drugs or  
instruments to procure  
abortion*

*153. Any person who unlawfully supplies to or procures for any person any thing whatsoever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman or female child, whether she is or is not with child, commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fourteen years.  
(As repealed and replaced by Act No. 15 of 2005)*

*Knowledge of age of  
female immaterial*

*154. Except as otherwise expressly stated, it is immaterial in the case of any of the offences committed with respect to a woman or girl under a specified age, that the accused person did not know that the woman or girl was under that age, or believed that she was not under that age.*

*Unnatural offences*

*155. Any person who-*  
*(a) has carnal knowledge of any person against the order of nature; or*  
*(b) has carnal knowledge of an animal; or*  
*(c) permits a male person to have carnal knowledge of him or her against the order of nature;*  
*commits a felony and liable, upon conviction, to imprisonment for a term not less than fifteen years and may be liable to imprisonment for life:*

*Provided that where a person-*

*(i) has carnal knowledge of a child against the order of nature;*

*(ii) causes a child to have carnal knowledge of an animal; or*

*(iii) permits a male person to have carnal knowledge of a male or female child against the order of nature;*

*that person commits an offence and is liable, upon conviction, to imprisonment for not less than twenty-five years and may be liable to imprisonment for life.*

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Attempt to commit  
Unnatural offences*

*156. Any person who attempts to commit any of the offences specified in Section one hundred and fifty-five commits a felony and is liable, upon conviction of not less than seven years but not exceeding fourteen years.*

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Indecent assault  
of boys under  
fourteen*

*157. (1) Any person who conducts or causes to be conducted a harmful cultural practice on a child commits a felony and is liable, upon conviction, to imprisonment for a term not less than fifteen years and may be liable to imprisonment for life.*

*(2) In this Section “harmful cultural practice” includes sexual cleansing, female genital mutilation or in initiation ceremony that results in injury, the transmission of an infectious or life threatening disease or loss of life to a child but does not include circumcision on a male child.*

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Indecent practices  
between males*

*158. (1) Any male who, whether in public or private, commits any act of gross indecency with a male child or person, or procures a male child or person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.*

*(2) Any female who, whether in public or private, commits any act of gross indecency with a female child or person, or procures a female child or person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any*

*female person with himself or with another female child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.*

*(3) A child who, whether in public or private, commits any act of gross indecency with another child of the same sex or attempts to procure the commission of any such act by any person with the child's self or with another child or person of the same sex, whether in public or private, commits an offence and is liable, to such community service or counseling as the court may determine in the best interests of the child.*

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Incest by males*

*159. (1) Any male person who has carnal knowledge of a female person who is to that person's knowledge his grandmother, mother, sister, daughter, grand-daughter, aunt or niece commits a felony and is liable, upon conviction, for a term of not less than twenty years and may be liable to imprisonment for life.*

*Consent immaterial*

*(2) Any female person who has carnal knowledge of a male person who is to that person's knowledge her grand-father, father, brother, son, grand-son, uncle or nephew commits a felony and is liable, upon conviction, for a term of not less than twenty years and may be liable to imprisonment for life.*

*Attempt*

*(3) For the purposes of this Section, it is immaterial that carnal knowledge was had with consent of the other person.*

*(4) Any person who attempts to commit incest commits a felony and is liable to imprisonment for a term of not less than ten years and not exceeding twenty-five years.*

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Order for guardianship*

*160. On the conviction before any court of any person of an offence under Section one hundred and fifty-nine, or of an attempt to commit the same, against any child it shall be in the power of the court to divest the offender of all authority over such child, and, if the offender is the guardian of such child, to remove the offender from such guardianship, and in any case to appoint any person or persons to be the guardian or guardians of such child during the child's minority or any less period:*

*Provided that the High Court may at any time vary or rescind the order by the appointment of any other person as such guardian or in any other respect.*

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Incest by females*

*161. (1) Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, uncle, nephew, son or grandson to have carnal knowledge of her knowing him to be her grandfather, father, brother, uncle, nephew, son or grandson, as the case may be, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life:*

*Provided that a female child commits an offence under this subsection is liable to such community service or counseling as the court may determine in the best interests of the child.*

*(2) Any male person of or above the age of sixteen years who with consent permits his grandmother, mother, sister, auntie, niece, daughter or grand-daughter to have carnal knowledge of him knowing her to be her grandmother, mother, sister, aunt, niece, daughter or grand-daughter, as the case may be, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life:*

*Provided that a male child commits an offence under this subsection is liable to such community service or counseling as the court may determine in the best interests of the child.*

*(As amended by No. 26 of 1933 and repealed and replaced by Act No. 15 of 2005)*

*Test of relationship*

*162. In Section one hundred and fifty-nine and one hundred and sixty-one, "brother" and "sister", respectively, include half-brother and half-sister, and the provisions of the said Section shall apply whether the relationship between the person charged with an offence and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock.*

*Conviction of incest  
lawful on charge  
of rape*

*163. (1) If, on the trial of any information for or charge of rape, the court is satisfied that the defendant is guilty of an offence under*

*Section one hundred and fifty-nine, but is not satisfied that the defendant is guilty of rape, the court may acquit the defendant of rape and find him guilty of an offence under Section one hundred and fifty-nine, and he shall be liable to be punished accordingly.*

*Conviction of unlawful  
Carnal knowledge on  
charge of incest*

*(2) If, on the trial of any information for or charge of an offence under Section one hundred and fifty-nine, the court is satisfied that the defendant is guilty of an offence under Section one hundred and thirty-eight or one hundred and thirty-nine, but is not satisfied that the defendant is guilty of an offence under Section one hundred and fifty-nine, the court may acquit the defendant of an offence under Section one hundred and fifty-nine and find him guilty of an offence under Section one hundred and thirty-eight or one hundred and thirty-nine, and he shall be liable to be punished accordingly.*

*Sanctions of Director of  
Public Prosecution*

*164. (1) A person shall not without the consent, in writing, given by or on behalf of a child or person publish or disclose to any person otherwise than in the course of duty, the contents of any documents, communication or information which relates to and which has come to that person's knowledge in the course of duty performed in relation to offences under this Part, including the handling, medical treatment or counseling of victims.*

*(2) A person who contravenes subsection (1) commits an offence and is liable, upon conviction, to a fine of not less than fifty thousand penalty units or to imprisonment for six months, or to both.*

*(As repealed and replaced by Act No. 15 of 2005)"*

Next is

## ***"CHAPTER XVII NUISANCES AND OFFENCES AGAINST HEALTH AND CONVENIENCE***

*Common nuisance*

*172. (1) Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a "common nuisance" and is liable to imprisonment for one year.*

*(2) It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a*

*part of the public may show that it is not a nuisance to any of the public.*

*Watching and  
besetting*

*173. (1) Every person who, with a view to compelling any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority-*

*(a) uses violence to or intimidates such other person or members of his household, or injures his property; or*

*(b) persistently follows such other person about from place to place; or*

*(c) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or*

*(d) follows such other person in a disorderly manner; is guilty of an offence.*

*(2) Every person who, wrongfully and without legal authority, watches or besets-*

*(a) any premises or the approaches to such premises with a view to preventing any other person from doing any act which such other person has a legal right to do thereat; or*

*(b) the house or other place where any other person resides or works or carries on business, or happens to be, or the approaches to such house or place with a view to preventing such other person from doing or compelling him to do any act which such other person has a legal right to do or abstain from doing; is guilty of an offence.*

*(3) Every person who is guilty of an offence under the provisions of this Section is liable to a fine not exceeding three thousand penalty units or to imprisonment for a period not exceeding six months, or to both.*

*(No. 60 of 1957 and Act No. 13 of 1994)*

*Gaming houses*

*174. (1) Any person being the owner or occupier, or having the use of, any house, room or place, who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house,*

room or place, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room or place opened, kept or used for the purpose aforesaid, is said to keep a common gaming house.

(2) In this Section, "unlawful gaming" means any game the chances of which are not alike favourable to all the players, including the banker or other person or persons by whom the game is managed or against whom the other players stake, play or bet.

(3) Any person who keeps a common gaming house is guilty of a misdemeanour.

(4) Any person, other than the persons mentioned in subsection (1), who is found in a common gaming house shall be deemed, unless the contrary is proved, to be there for the purpose of unlawful gaming, and is guilty of a misdemeanour and is liable to a fine of one hundred and fifty penalty units for the first offence, and for each subsequent offence to a fine of six hundred penalty units or imprisonment for three months, or to both.

(As amended by Act No. 13 of 1994)

*Betting houses*

175. (1) Any house, room or place which is used for any of the purposes following, that is to say:

(a) for the purpose of bets being made therein between persons resorting to the place and-

(i) the owner, occupier, or keeper of the place, or any person using the place; or

(ii) any person procured or employed by or acting for or on behalf of any such owner, occupier or keeper, or person using the place; or

(iii) any person having the care or management, or in any manner conducting the business, of the place; or

(b) for the purpose of any money or other property being paid or received therein by or on behalf of any such owner, occupier, or keeper, or person using the place, as, or for the consideration-

(i) for an assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or other property on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise; or

(ii) for securing the paying or giving by some other person of any money or other property on any such event or contingency;

*is called a common betting house.*

*(2) Any person who, being the owner or occupier of any house, room or place, knowingly and wilfully permits it to be opened, kept, or used as a common betting house by another person, or who has the use or management, or assists in conducting the business, of a common betting house, is guilty of a misdemeanour and is liable to imprisonment for one year:*

*Provided that-*

*(i) nothing herein contained shall make illegal the use of a totalisator by a race club, gymkhana club or sports club recognised by the Government, with the approval in each case of the Commissioner of Police. In this proviso, "totalisator" means and includes the instrument, machine or contrivance, commonly known as the totalisator and any other instrument, machine or contrivance of a like nature, or any scheme for enabling any number of persons to make bets with one another on the like principles;*

*(ii) nothing in this Section shall be deemed to prohibit any lottery lawfully promoted and conducted under the provisions of the Lotteries Act.*

*(As amended by No. 15 of 1946 and Nos. 8 and 27 of 1957) Cap. 163*

*Keeper of premises  
Defined*

*176. Any person who appears, acts, or behaves as master or mistress, or as the person having the care or management of any such house, room, set of rooms, or place as is mentioned in Section one hundred and seventy-four and one hundred and seventy-five is to be taken to be the keeper thereof, whether he is or is not the real keeper.*

*Obscene matters or  
things*

*177. (1) Any person who-*

*(a) makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other object tending to corrupt morals; or*

*(b) imports, conveys or exports, or causes to be imported conveyed or exported, any such matters or things, or in any manner whatsoever puts any of them in circulation; or*

*(c) carries on or takes part in any business, whether public or private, concerned with any such matters or things, or deals in any such matters or things in any manner whatsoever, or distributes any of them, or exhibits any of them publicly, or makes a business of lending any of them; or*

*(d) advertises or makes known by any means whatsoever with a view to assisting the circulation of, or traffic in, any such matters or things, that a person is engaged in any of the acts referred to in this Section, or advertises or makes known how, or from whom, any such matters or things can be procured either directly or indirectly; or*

*(e) publicly exhibits any indecent show or performance or any show or performance tending to corrupt morals;*  
*is guilty of a misdemeanour and is liable to imprisonment for five years or to a fine of not less than fifteen thousand penalty units nor more than seventy-five thousand penalty units.*

*(2) If, in respect of any of the offences specified in paragraph (a), (b), (c) or (d) of subsection (1), any constituent element thereof is committed in Zambia, such commission shall be sufficient to render the person accused of such offence triable therefor in Zambia.*

*(3) A court, on convicting any person of an offence against this Section, may order to be confiscated or destroyed any matter or thing made, possessed or used for the purpose of such offence.*

*(4) Any court may, on the application of a public prosecutor, order the destruction of any obscene matter or thing to which this Section relates, whether any person may or may not have been convicted under the provisions of this Section in respect of such obscene matter or thing.*

*(5) No prosecution for an offence under this Section shall be instituted without the written consent of the Director of Public Prosecutions.*

*(No. 61 of 1970 and Act No. 13 of 1994)*

*177A. (1) Any person who engages a child or other person-*

*(a) in a pornographic performance;*

*(b) in the production of a pornographic film or other material; or*

*(c) in a pornographic activity of any nature;*

*commits an offence and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.*

*(2) Any person who-*

*(a) sells to a child pornographic material;*

*(b) compels a child to watch a pornographic film or view pornography on the internet or elsewhere or in any form intended to corrupt a child's morals;*

*commits an offence and is liable, upon conviction, to a term of imprisonment of not less than fifteen years.*

*(3) A child who commits an offence under subsection (2) is liable, to such community service or counseling as the court may determine in the best interests of the child. Child pornography*

*(As amended by Act No. 15 of 2005)*

***Idle and disorderly  
persons***

***178. The following persons:***

***(a) every common prostitute behaving in a disorderly or indecent manner in any public place;***

***(b) every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do;***

***(c) every person playing at any game of chance, not being an authorised lottery, for money or money's worth in any public place;***

***(d) every person wandering abroad and endeavouring by the exposure of wounds or deformity to obtain or gather alms;***

***(e) every person who, without lawful excuse, publicly does any indecent act;***

***(f) every person who publicly conducts himself in a manner likely to cause a breach of the peace; and***

***(g) every person who in any public place solicits for immoral purposes;***

***are deemed idle and disorderly persons, and are liable to imprisonment for one month or to a fine not exceeding sixty penalty units or to both.***

***(As amended by No. 15 of 1938, No. 26 of 1940, No. 29 of 1948 and Act No. 13 of 1994)***

*Use of insulting language*

179. Every person who uses insulting language or otherwise conducts himself in a manner likely to give such provocation to any person as to cause such person to break the public peace or to commit any offence against the person, is liable to imprisonment for three months or to a fine not exceeding four hundred and fifty penalty units or to both.

(No. 15 of 1938 and Act No. 13 of 1994)

*Nuisances by drunken persons, etc.*

180. (1) Every person found drunk and incapable in any highway or other public place, or on any premises licensed under the Liquor Licensing Act, may be arrested without warrant and is liable to a penalty not exceeding one hundred and fifty penalty units, and on a second conviction within a period of twelve months is liable to a penalty not exceeding three hundred penalty units, and on a third or subsequent conviction within the said period of twelve months is liable to a penalty not exceeding six hundred penalty units.

(2) Every person who, in any highway or other public place or on any premises licensed under the Liquor Licensing Act, is guilty while drunk of riotous or disorderly behaviour or who is drunk while in charge on any highway or railway or other public place of any horse, cattle, steam engine, locomotive, wagon, van, carriage or any other vehicle, other than a motor vehicle, or who is drunk when in possession of any loaded firearms, may be arrested without warrant and is liable to a penalty not exceeding seven hundred and fifty penalty units, or to imprisonment with or without hard labour for a period not exceeding three months.

(No. 21 of 1958 and Act No. 13 of 1994) Cap. 167

*Rogues and vagabonds*

181. The following persons:

(a) every person convicted of an offence under Section one hundred and seventy-eight after having been previously convicted as an idle and disorderly person:

(b) every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;

(c) every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself; and

(d) every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose; shall be deemed to be a rogue and vagabond, and are guilty of a misdemeanour and are liable for the first offence to imprisonment for three months, and for every subsequent offence to imprisonment for one year.

*Offences relating to  
official uniform*

182. (1) In this Section, unless the context otherwise requires-

"official uniform" means any uniform prescribed for or used by the Defence Force, the Zambia Police Force or any other force or service in Zambia, or such department of the Government as the President may, by statutory instrument, prescribe;

"uniform" includes any distinctive part of such uniform.

(2) Any person who unlawfully wears any official uniform, or any dress bearing any of the distinctive marks of any such official uniform- Wearing of official uniform with intent to commit offence

(a) with intent to commit a felony is guilty of an offence and is liable upon conviction to imprisonment for a term not exceeding seven years; or

(b) with intent to commit any offence other than a felony is guilty of an offence and is liable upon conviction to a fine not exceeding seven thousand five hundred penalty units or to imprisonment for a term not exceeding three years, or to both.

*Unauthorised wearing of  
official uniform*

(3) Any person who, without authority, wears an official uniform, or any dress having the appearance or distinctive marks of such official uniform, is guilty of an offence and is liable upon conviction to a fine not exceeding seven hundred and fifty penalty units or to imprisonment for a term not exceeding two months, or to both.

*Provided that nothing in this Section shall prevent any person from wearing any official uniform or dress in the course of a stage play performed in any place in which stage plays may lawfully and publicly be performed, or in the course of a music-hall or circus performance, or in the course of any bona fide military representation.*

*Unauthorised importation,  
manufacture or sale of official  
uniform, etc.*

*(4) Any person who, not being in the service of the Republic or having previously received the written permission of the President or other appropriate authority so to do, imports, manufactures or sells or has in his possession for sale any official uniform is guilty of an offence and is liable upon conviction to a fine not exceeding seven thousand five hundred penalty units or to imprisonment for a term not exceeding three years, or to both.*

*Unauthorised wearing  
of badges, etc*

*(5) Any person who wears or uses without authority any badge or insignia of office, decoration, medal or ribbon supplied to or authorised for use by any member of the Defence Force, the Zambia Police Force or any other force or service in Zambia, or of such department of the Government as is prescribed under subsection (1), is guilty of an offence and is liable upon conviction to a fine not exceeding seven hundred and fifty penalty units, or to imprisonment for a term not exceeding two months, or to both.*

*Bringing contempt  
on official uniform*

*(6) Any person who unlawfully wears any official uniform, or any dress having the appearance of or bearing any of the distinctive marks of any such official uniform, in such manner or in such circumstances as to be likely to bring contempt on that uniform or dress is guilty of an offence and is liable upon conviction to a fine not exceeding seven hundred and fifty penalty units or to imprisonment for a term not exceeding two months, or to both such fine and imprisonment.*

*Forfeiture of official  
uniform, etc.*

*(7) Any uniform, dress, button, badge or other thing which is the subject of an offence under this Section is liable to forfeiture, unless the President otherwise directs.*

*(As amended by Federal Act No. 23 of 1955, G.N. No. 303 of 1964, S.I. No. 63 of 1964, Act No. 2 of 1987 and No. 13 of 1994)*

*Negligent act likely to spread infection*

183. Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanour.

*Adulteration of food or drink intended for sale*

184. Any person who adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, is guilty of a misdemeanour.

*Sale of noxious food or drink*

185. Any person who sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, is guilty of a misdemeanour.

*Adulteration of drugs*

186. Any person who adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, is guilty of a misdemeanour.

*Sale of adulterated drugs*

187. Any person who, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, is guilty of a misdemeanour.

*Fouling water*

188. Any person who voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour.

*Fouling air*

189. Any person who voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of

*persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, is guilty of a misdemeanour.*

*Offensive trades*

*190. Any person who, for the purposes of trade or otherwise, makes loud noises or offensive or unwholesome smells in such places and circumstances as to annoy any considerable number of persons in the exercise of their common rights, commits and is liable to be punished as for a common nuisance."*

- 1.5 It is the Accused's compelling argument that had it been the intention of the State to make public speech on issues of morality an offence, it would have done so when it amended all the other offences in the Penal Code's Chapter dealing with Morality. In contrast, Section 178(g) is simply an archaic anomaly in our law which dates back to the English Vagrancy Act of 1824 (as amended in 1898) and has not been changed since. In fact, we observe with surprise the Submission by the State at page 3 that 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. This is surprising because contrary to the State's Submission, Section 178(g) has never been discussed by the Zambian legislature.
- 1.6 Further, the defence is not arguing in its application that it is only the reference to "immoral purpose" that is vague. If the State is suddenly applying a nuisance offence which was intended to curtail disorder on the streets, to acts involving speech on television, the other elements of the offence are clearly vague as well - "soliciting", "public place"
- 1.7 The Accused has already disputed that there is a uniform understanding of "immoral purpose." The State, however, argues that "*the term Immoral 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.”*

YES, it may be so if we were in this case dealing with an act of homosexuality or prostitution. But in this case, we are dealing with an expression of opinion. Is the State contending that in Zambia, only Christians are allowed to express opinions and all other minority groups who have different opinions must remain silent?

- 2.1 In relation to a fair hearing, the State argues that the burden of proof in criminal cases is on the prosecution and it is not the Accused to prove his innocence and therefore the Accused is guaranteed a fair hearing.

We respectfully contend that this cannot be so in the circumstances of this case. The disadvantage to be suffered by not providing the defence with the requested for documents prior to the trial is vast.

- 2.2 We invite the Court to take note of the following:-

- i. there is a general duty placed on every Court to ensure a fair trial.
- ii. there is no controversy that the right to a fair trial is an entrenched right in the Constitution of Zambia.
- iii. there is no controversy that the main evidence the State wish to rely on in proving the case against the Accused is the video recording of the Accused to Muvi Television which the State has undoubtedly previewed before commencement of trial
- iv. there is no legal bar in the Criminal Procedure, Cap 88 of the laws of Zambia against the State providing the defence with documents as requested to ensure a fair trial.
- v. depriving the defence of the requested for material or documents to work with before the

commencement of trial does not meet the standards of a fair hearing in the circumstances of this case as the Accused is denied of the opportunity 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 of cross- examination.

vi. constitutional protection for a fair hearing is not only triggered at the point when an Accused is put on his defence as the State seems to allege but also applies before and during commencement of the whole trial.

3. Lastly, the State quotes a passage in the case of **FRED MMEMBE V. THE PEOPLE AND FRED MMEMBE MATSAUTO 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 relevant passage which was also quoted in the case of **KINGAIPE AND ANOTHER V. ATTORNEY GENERAL 2009/HL/86 (2010)** which was a Livingstone High Court case on mandatory testing of Zambia Defence Force Employees was as follows:-

*“I make reference to the international instruments because I am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic litigation but also because the opinions of other senior courts in the various jurisdictions dealing with a similar problem tend to*

*have a persuasive value. At the very least, consideration of such decisions may help us to formulate our own preferred direction which, given the context of our own situation and the state of our own laws, may be different to a lesser or greater extent."*

This case is no exception to the guidance in the above passage.

### **CONCLUSION**

In view of what has been stated in the main Submissions of the Accused and Submission in Reply to the State's Submissions, we humbly request for constitutional reference as sought by the Accused.

So we submit.

Dated at Lusaka this                      day of                      2013

Per: Messrs. SBN Legal Practitioners  
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**LUSAKA**

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