

REFORMING ZAMBIA'S MENTAL HEALTH LAW

THE CASE OF MWEWA AND OTHERS
V THE ATTORNEY GENERAL AND ANOTHER



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There should be no discrimination whatsoever."



Introduction

The first and second Petitioner

*“The following principles shall apply to persons with disabilities:
Respect for inherent dignity of persons with disabilities,
individual autonomy including the freedom to make one’s own choices and
independence of persons.”*

- Section 4(a) of the Persons with Disabilities Act, 2012 -

Persons with psychosocial disabilities in Zambia experience severe and systemic violations of their human rights.

Practices of exclusion, abuse, discrimination, and exploitation are embodied in the 1949 “Mental Disorders” Act¹. The Act provides for people to be detained in prisons and psychiatric facilities on the basis of their disability, to be subjected to forced treatment, isolation, the use of physical and chemical restraints, to be deprived of their property, and denied the inherent right to legal capacity as human beings.

1 The Mental Disorders Act: Chapter 305 of the Laws of Zambia.

Since 1949 when the Act was adopted, Zambia has become a party to the Convention on the Rights of Persons with Disabilities (CRPD),² and has partially domesticated the CRPD into its law through the 2012 Persons with Disabilities Act.³

The CRPD and the Persons with Disabilities Act stand in stark contrast to the 1949 “Mental Disorders” Act.

The CRPD and the Persons with Disabilities Act commit Zambia to dismantling the barriers that sustain discrimination, abuse and exclusion of persons with disabilities from being equal participants in society.

Psychosocial Disability

The term “psychosocial disabilities” is used here to refer to the disabilities of people with either diagnosed or perceived mental health conditions, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

2 *UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <http://www.refworld.org/docid/45f973632.html>.*

3 The Persons with Disabilities Act 6 of 2012.



The Case of Mwewa & Others v The Attorney General and Another⁴

In February 2017, three people brought a Petition to the Zambia High Court, challenging the constitutionality of the outdated "Mental Disorders" Act.

The 1st Petitioner was Mr Gordon Maddox Mwewa, a gospel musician and songwriter. The 2nd Petitioner was Mr Mulima Santa Kasote, a graphic designer and psycho-social counsellor. The 3rd Petitioner was Mr Sylvester Katontoka, the Executive Director and founder of the Mental Health Users Network of Zambia (MHUNZA). Mr Katontoka brought the case on his own behalf and on behalf of all persons with psychosocial disabilities.

All three Petitioners are persons with psychosocial disabilities who have experienced the impact of the "Mental Disorders" Act.

4 *Gordon Maddox Mwewa and Others v the Attorney General and Another* (High Court for Zambia at the Principal Registry Holden at Lusaka) Case 2017/HP 204 (9 October 2017), per Justice M Mapani-Kawimbe.

Evidence in the Court

The Petitioners presented evidence of their experiences under the Act:

- They described being repeatedly arrested and detained in healthcare facilities on the basis of their disabilities. This was done against their will and without court orders.
- They described conditions in detention that were depressing, overcrowded, with poor sanitation and inadequate food.
- They testified to being denied healthcare services and held in isolation after being assaulted in detention.
- They described mental health service users being forcibly secluded in “jail-like” structures, left to lie naked on concrete floors and covered in urine and faeces.
- They testified that these experiences negatively impacted their mental health and caused them to be further isolated from their families and communities.

The Petitioners’ evidence was uncontested and accepted by the Attorney General and the Zambia Agency for Persons with Disabilities who were the Respondents in the case.



Picture showing the conditions in psychiatric facilities.



Pictures showing the conditions in psychiatric facilities.



The Petitioners' case

The Petitioners challenged the "Mental Disorders" Act on the basis that:

1. It allows for an outdated and oppressive system of treatment and care for persons with psychosocial disabilities.
2. It violates their human rights to dignity, equality, non-discrimination, freedom from torture, inhuman and degrading treatment, to personal liberty, to protection from deprivation of property, and to constitutional protection of the law.
3. It is unconstitutional and is therefore invalid.
4. It has been effectively repealed by the 2012 Persons with Disabilities Act.

Judgment

On 9 October 2017, the High Court delivered a judgment declaring a provision of the “Mental Disorders” Act unconstitutional and invalid. The Court criticised the Act on human rights grounds.

A need for “thorough review” of the “Mental Disorders” Act

The Court declined to grant some of the orders sought by the Petitioners mainly for procedural reasons: The Court reasoned that considering the socio-economic implications and questions of separation of powers, it did not have the power to overturn the Mental Disorders Act in entirety – this is the role of other arms of the Government. But the Court stressed the importance of the need of the Zambian government to thoroughly review the “Mental Disorders” Act:

*“[The issues] ignite the need for a **thorough review of the Mental Disorders Act, which the authorities should seriously consider.**”*

Freedom from discrimination

The High Court held that the “Mental Disorders” Act “contains derogatory language which is unconstitutional”.

The Court declared section 5 of the Act unconstitutional, null and void.

Section 5 is the provision of the Act that creates categories for persons regarded as mentally “disordered”, “mentally infirm”, an “idiot”, “imbecile”, “feeble-minded” and a “moral imbecile” for purposes of the Act.

*“In their natural and ordinary meaning, I find that the definitions and classifications used in section 5 of the Mental Disorders Act are **highly offensive, derogatory and discriminatory**. They have no place in a modern society and it is obvious that in 1949, that the authorities did not have anything in mind as far as **the protection of human rights and fundamental freedoms is concerned.**”*

Because this provision has been declared invalid, section 5 is, in effect, no longer a part of the “Mental Disorders” Act.

Section 5 explicitly creates its definitions and categories “for the purposes of all proceedings” under the Act. These proceedings include the granting of adjudication, control and detention orders that provide the legal basis to detain people in psychiatric institutions against their will.

Because sections 5’s categories are now invalid, it is unclear whether there is any lawful basis for adjudication, control and detention orders to be made anymore. This means that the legality of these orders is uncertain.

Freedom from torture and inhuman and degrading treatment

“The allegations [of the Petitioners] attest to the degeneration of human rights protection at [Chainama Hills Hospital] ranging from claims of torture, poor health provision and administration, poor diet and inhumane treatment. ... From the Petitioners’ Affidavits, it is quite clear that Chainama Hills Hospital is not conducive for mental health treatment.”

The Court was concerned about the conditions that the Petitioners described in psychiatric units and hospitals. The Court described these conditions as torture and inhumane treatment.

The Court said that persons with psychosocial disabilities have a right to freedom from torture, inhumane and degrading treatment, and that any treatment not meeting these standards is unconstitutional.

“[A]ll persons with mental disabilities should be treated humanely at all health institutions. Any cruel or inhumane treatment inflicted at mental health facilities contravenes Article 15 of the Constitution.”

The prohibition against torture and inhumane and degrading treatment under international law is absolute – there can be no justification for violating the rights.

States also have direct duties to prevent torture and inhumane and degrading treatment, and to investigate and provide adequate remedies when this occurs. The Court's findings are therefore of pressing concern and heighten the urgency for legal reform.

Informed consent

The reasoning in the Court's judgment means that healthcare workers cannot use the Act to deny all persons with psychosocial disabilities the right to informed consent to be admitted to healthcare facilities.

Non-discriminatory healthcare and the right to access mental health services at primary healthcare level

"I find it incontrovertible that every person is supposed to be provided with health care services without discrimination. That is to say, persons with disabilities must enjoy the same health range, quality and standard of services and treatment as provided to others. There should be no discrimination whatsoever."

The Court stated its concern that the Act perpetuated a two-tier healthcare system, centralising mental health services in psychiatric units and hospitals, and making it difficult for people with mental health needs to access services. In addition, the evidence before the Court illustrated difficulties in accessing healthcare services even within psychiatric hospitals.

The Court therefore affirmed that persons with psychosocial disabilities have a right to access healthcare without discrimination and that access to mental health services should be made available at primary healthcare level:

"mental health patients should be able to access treatment at primary health care level wherever possible. In doing so, the authorities must pay attention to the principles of equality, equal access and non-discrimination."



Conclusion

The Court judgment has the following implications:

1. The government of Zambia and Parliament:

- Should thoroughly review the “Mental Disorders” Act to ensure that the rights of persons with psychosocial disabilities are respected, protected and promoted.
- Should investigate all allegations of torture and inhuman and degrading treatment of persons with psychosocial disabilities, provide remedies for violations of these rights, and prevent future violations.

2. The Ministry of Health and all healthcare workers:

- Must treat all persons with psychosocial disabilities humanely. They must not expose people accessing mental health services to any conditions or treatment that amounts to torture and inhuman and degrading treatment
- Must not use the “Mental Disorders” Act as a basis to deny all persons with psychosocial disabilities the right to informed consent.

- Must not discriminate in the quality, nature or range of healthcare provided to persons with psychosocial disabilities.
- Must, as far as possible, make mental healthcare services available at primary healthcare level.

In the light of the judgment, persons with psychosocial disabilities and civil society supporting the rights of persons with disabilities in Zambia call for the following, urgent action to be taken:

1. To repeal of the "Mental Disorders" Act of 1949.
2. To review all other legislation in Zambia that similarly uses unconstitutional and derogatory language against persons with psychosocial disabilities and violates their human rights.
3. To enact a new Mental Health Bill that embodies and promotes the principles of the CRPD.
4. The Zambia Human Rights Commission and the Zambian Agency for Persons with Disabilities to monitor conditions and treatment in psychiatric facilities and places of detention for compliance with human rights standards.
5. Zambian citizens to demand full compliance with the CRPD and the respect for the rights of persons with psychosocial disabilities on an equal basis with all others.



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