<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>PART I: INFLUENTIAL RULINGS</td>
<td>5</td>
</tr>
<tr>
<td>RIGHT TO HEALTH</td>
<td>8</td>
</tr>
<tr>
<td>DISCRIMINATION BASED ON HEALTH STATUS</td>
<td>9</td>
</tr>
<tr>
<td>BODILY AUTONOMY</td>
<td>21</td>
</tr>
<tr>
<td>ACCESS TO MEDICINES &amp; PPE</td>
<td>43</td>
</tr>
<tr>
<td>PUBLIC HEALTH MEASURES</td>
<td>51</td>
</tr>
<tr>
<td>CRIMINAL JUSTICE</td>
<td>68</td>
</tr>
<tr>
<td>CRIMINALISATION OF STATUS</td>
<td>69</td>
</tr>
<tr>
<td>LAW ENFORCEMENT</td>
<td>85</td>
</tr>
<tr>
<td>PLACES OF DETENTION</td>
<td>103</td>
</tr>
<tr>
<td>SENTENCING</td>
<td>125</td>
</tr>
<tr>
<td>CIVIC RIGHTS</td>
<td>142</td>
</tr>
<tr>
<td>FREEDOM OF ASSOCIATION</td>
<td>143</td>
</tr>
<tr>
<td>FREEDOM OF EXPRESSION &amp; PRESS FREEDOM</td>
<td>153</td>
</tr>
<tr>
<td>REFUGEES, IMMIGRATION &amp; CITIZENSHIP</td>
<td>165</td>
</tr>
<tr>
<td>EQUALITY</td>
<td>194</td>
</tr>
<tr>
<td>CHILDREN</td>
<td>195</td>
</tr>
<tr>
<td>DISABILITY</td>
<td>211</td>
</tr>
<tr>
<td>WOMEN</td>
<td>217</td>
</tr>
<tr>
<td>Topic</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>ENVIRONMENT</td>
<td>246</td>
</tr>
<tr>
<td>PART II: KEY EXCERPTS</td>
<td>262</td>
</tr>
<tr>
<td>RIGHT TO LIFE</td>
<td>263</td>
</tr>
<tr>
<td>RIGHT TO EQUAL TREATMENT &amp; PROHIBITION AGAINST DISCRIMINATION</td>
<td>266</td>
</tr>
<tr>
<td>PROHIBITION AGAINST TORTURE &amp; CRUEL, INHUMAN OR DEGRADING TREATMENT</td>
<td>278</td>
</tr>
<tr>
<td>RIGHT TO DIGNITY</td>
<td>283</td>
</tr>
<tr>
<td>RIGHT TO PRIVACY</td>
<td>287</td>
</tr>
<tr>
<td>RIGHT TO LIBERTY &amp; AUTONOMY</td>
<td>291</td>
</tr>
<tr>
<td>RIGHT TO FREEDOM OF EXPRESSION</td>
<td>292</td>
</tr>
<tr>
<td>MARRIAGE</td>
<td>298</td>
</tr>
<tr>
<td>RIGHT TO HEALTH</td>
<td>300</td>
</tr>
<tr>
<td>FREEDOM OF ASSOCIATION</td>
<td>305</td>
</tr>
<tr>
<td>RIGHT TO EDUCATION</td>
<td>306</td>
</tr>
<tr>
<td>ENVIRONMENTAL RIGHTS</td>
<td>308</td>
</tr>
<tr>
<td>SOCIO-ECONOMIC RIGHTS</td>
<td>312</td>
</tr>
<tr>
<td>LAW ENFORCEMENT MEASURES</td>
<td>314</td>
</tr>
<tr>
<td>LIMITATIONS</td>
<td>325</td>
</tr>
<tr>
<td>CONSTITUTIONAL INTERPRETATION</td>
<td>329</td>
</tr>
<tr>
<td>STANDING</td>
<td>331</td>
</tr>
<tr>
<td>INDEX</td>
<td>332</td>
</tr>
</tbody>
</table>
Introduction

Over the last ten years, the judges and legal community attending the African Regional Judges’ Forum (ARJF) have discussed various cases that have advanced human rights and equity across the continent. We thank co-chairs of the Forum, Justice Dingake and Justice Tshiqi, and the many judges who shared valuable insights into their decision-making processes over the past decade.

Initial convenings of the ARJF focused primarily on the right to health, discussing cases relating to access to medicines and discrimination based on health status, with a focus on HIV-related discrimination. Over time, new health issues were incorporated relating to bodily autonomy and, more recently, cases on the legality of various public health measures in response to pandemics.

Recognising the various societal factors that influence the right to health, the Forum also considered punitive and discriminatory laws and practices that created legal barriers to the right to health for people living with HIV, people with TB, key and vulnerable populations, including the criminalisation of persons based on poverty and status and the marginalisation of various groups within society. Accordingly, the criminal justice section includes essential cases relating to the criminalisation of poverty and status, law enforcement practices, sentencing and conditions in detention.
Critical cases relating to the interpretation of prohibited grounds of discrimination, customary law, the rights of persons with disabilities and the child’s best interests are discussed under the equality section.

Discussions often noted that judicial independence should be fiercely protected, especially when civic rights are threatened. Judges shared cases relating to freedom of association, freedom of expression, freedom of the press, and rights relating to refugees, immigration, and citizenship.

In 2024, these discussions will also extend to environmental rights, recognising that Africa faces exponential collateral damage due to climate change, posing systemic risks to its economies, infrastructure investments, water and food systems, public health, agriculture, and livelihoods. Changes to our environment will elevate the likelihood of serious human rights abuses against vulnerable populations, particularly women, girls, indigenous people, and vulnerable communities.

Part I includes summaries of precedential human rights rulings from across the continent, ranging from the right to health to equality, civic rights, criminal justice, and environmental rights.

Cases from 13 African countries are represented, providing a comprehensive view of human rights cases decided in the best interests of all persons and the long-term development of African nations. The case compendium serves as a reference for future decisions, thus summarising the current state of human rights across the continent and facilitating the pan-African exchange of precedential rights-based rulings.
Case summaries are linked through QR codes to online judgements for easy access.

**Part II** provides key excerpts from cases showing the care and diligence judges in the region have applied in their reasoning. The excerpts are indicative of constitutional interpretation that respects the universality of human rights in a context where States are trying to step away from the shackles of colonial laws and policing practices.

**Acknowledgements**

This publication builds on previous publications of both United Nations Development Programme (UNDP) and Southern Africa Litigation Centre (SALC) to document progressive jurisprudence in the region, including the African Regional Judges’ Forum Judicial Training Resource and documentation of case law in various SALC publications available on their website.

This publication was written and edited by: Yanis Belkhelladi, Joelle Besch, Michaela Drucker, Rafael Miranda, Siona Sharma and Michael Weaver at the Southern Africa Litigation Centre (SALC) with additional support from Anneke Meerkotter at SALC, and Beverly Mumbo and Maureen Awuor at Women’s Link Worldwide. Danilo da Silva and Yanis Bekhelladi proofread the Portuguese and French translations of the publication. Photos in the publication were sourced from Shutterstock.

We welcome any corrections to the online version of the publication. Judiciaries, law societies and law schools are also welcome to order additional copies of the compendium.
Part I: Influential Rulings
Part I: Overview

**Right to Health**
Access to Medicines and PPE
Bodily Autonomy
Discrimination Based on Health Status
Public Health Measures

**Criminal Justice**
Criminalisation of Status
Law Enforcement
Places of Detention
Sentencing

**Civic Rights**
Freedom of Association
Freedom of Expression
Refugee, Immigration & Citizenship

**Equality**
Children
Disability
Women

**Environment**
HEALTH
Diau v Botswana Building Society, Industrial Court, Botswana (2003)

Discrimination Based on Health Status

Labour Rights  Bodily Autonomy  Right to Dignity

Discrimination Based on Health Status

Diau v Botswana Building Society 2003 (2) BLR 409 (IC) (19 December 2003).
FACTS
Applicant was employed by Respondent on the condition that the Applicant undergo and pass a full medical examination. As part of this examination, Respondent required the Applicant to submit a certified document of her HIV status. After the Applicant refused to undergo this test, the Respondent chose not to confirm her to permanent and pensionable service, though it did not provide any reason for the termination. The Applicant argued that the termination violated sections 20(1) and 20(2) of the Employment Act Cap 47:01, as well as sections 3, 7(1), 9(1), and 15(2) of the Constitution of Botswana.

RULING
Dingake, J
The Court held that the instruction to undergo an HIV test was irrational and unreasonable to the extent that such a test could not be said to have been related to the inherent requirements of the job. The Applicant was entitled to disobey the order.

The Court also held that, even though the Respondent is a private organisation, the protections of fundamental rights afforded by the Botswana Constitution are not limited to infringement by the State. It has no clause limiting its application to organs of the State, nor does it refer to State organs. The Respondent is bound by the Bill of Rights within the Constitution.

By firing the Applicant for refusing to take an HIV test, the Respondent engaged in inhuman and degrading conduct in violation of the right to dignity of section 7(1) of the Constitution.

By forcing the Applicant to choose between undergoing an HIV test (and thereby cede her right to make that decision) or having her employment terminated, the Respondent violated the Applicant’s right to liberty under section 3(a) of the Constitution.
Kingaipe & Another v Attorney General, High Court, Zambia (2010)

Discrimination Based on Health Status

Discrimination Based on Health Status

Bodily Autonomy

FACTS
The Petitioners were former members of the Zambian Air Force who were subjected to mandatory HIV testing and Anti-Retroviral Treatment (ART) without their knowledge and consent. In 2001, a Medical Board reviewed their records and declared them permanently unfit for service without their knowledge or participation. In 2002, they were both dismissed. Petitioners claimed that this was a violation of their constitutional rights to protection from inhuman and degrading treatment, privacy, adequate medical and health facilities, and equal and adequate educational opportunities, as well as the Government Policy and Guidelines on HIV/AIDS.

RULING
Muyovwe, J
The Court ruled that the Petitioners were subjected to mandatory HIV testing without their consent and put on ART unknowingly, which was a violation of their right to protection from inhuman and degrading treatment and privacy under sections 15 and 17 of the Constitution of Zambia. The Court did not find that the Petitioner's rights to adequate medical and health facilities and equal and adequate educational opportunities were violated. The Court also did not find that the Petitioners were discharged because of their HIV-positive status.
E.L. v Republic, High Court, Malawi (2016)

Discrimination Based on Health Status

Right to Dignity
Right to Privacy
Criminalisation of Status

Discrimination Based on Health Status

FACTS
An HIV-positive woman (E.L.) was holding another woman's baby. E.L. started breastfeeding the baby. She was charged under section 192 of the Penal Code with an offence related to the unlawful spreading of disease and was found guilty. She sought to appeal her conviction and challenge the constitutionality of the law on the basis that it was too broad. E.L., in challenging her conviction, argued that because of her anti-retroviral treatment (ART) regimen, she was under the impression the infection would not spread to children while breastfeeding, which should render the conviction void, as the evidence failed to prove she knowingly acted in a way that would infect a child with HIV.

RULING
Ntaba, J
In its reasoning, the Court illustrated the importance of judicial decisions being grounded in scientific evidence. The Court recognised that the prosecution had not raised any evidence to prove that breastfeeding by a woman on ART is likely to transmit HIV. On the contrary, the Court found that the chances of a mother who is on ART transmitting HIV to an infant through breastfeeding are very low. This was based on expert medical evidence raised by E.L. and in reference to Malawi’s HIV and AIDS Policy and guidelines dealing with HIV services and maternal healthcare, as well as the World Health Organization’s “Guidelines: Updates on HIV and Infant Feeding”.

The Court held that as the prosecutor failed to specify whether E.L. unlawfully, negligently, or recklessly did the accused act, the tests revealed that the Complainant’s child tested negative and that the facts themselves barely showed any wrongdoing on E.L.’s part, the circumstances demanded leniency.
Further, the Court found that the adjudication of E.L.’s case meted out a sentence disproportionate to the offence and featured several irregularities, including blatant bias, such that her conviction and sentence should be dismissed. The Court also noted that the overly broad use of criminal law in cases of HIV exposure, non-disclosure and transmission raises serious human rights concerns.

The Court raised concern that EL’s rights to dignity and privacy under sections 19 and 21 of the Constitution had been violated when information about EL’s health and HIV status and her ART had been obtained by police and admitted into evidence by the Trial Court. It warned that courts must be especially “concerned and careful” with the admission into evidence of private information on health status due to the threat this imposes on peoples’ rights to privacy and dignity. To ensure that all the parties were protected from further non-consensual exposure of their HIV and health status and to protect them from stigmatising public attention, the High Court ordered that the names and personal information of E.L., the Complainant and the children concerned be anonymised.
Government of Namibia v LM & Others, Supreme Court, Namibia (2014)

Bodily Autonomy

FACTS
The Plaintiffs were three HIV-positive women who had been forcibly sterilised without proper consent during emergency caesarean deliveries. They were asked to sign consent forms, which were not adequately explained to them, during the height of labour. Plaintiffs claimed that the forced sterilisations left them unable to bear children, ruined their marriage prospects, constituted discrimination against them based on their HIV status, caused ongoing pain and suffering, violated their constitutional rights to life, liberty, dignity, and founding a family, and that the sterilisations were impermissible discrimination based on HIV-positive status. The Defendants argued that the Plaintiffs’ claims lacked merit because they consented to the procedures.

RULING
Shivute, CJ; Maritz, JA; Mainga, JA
The Court found that the alleged “consent” was deficient because the Defendants failed to prove that they adequately informed the Plaintiffs of the consequences of sterilisation or that the Plaintiffs clearly and knowingly consented to the procedures before they went into labour. However, the Court found no evidence that the complainants were sterilised because of their HIV status and dismissed that claim.

The Court emphasised that the decision to be sterilised is of an extremely personal nature and must be made with informed consent, as opposed to merely written consent.

The Court stated that the choice to undergo a sterilisation procedure must lie solely with the patient, noting that “there can be no place in this day and age for medical paternalism when it comes to the important moment of deciding whether or not to undergo a sterilisation procedure.” (para 109)
The Court also denounced the practice of obtaining ‘consent’ for sterilisation during labour, noting that patients may not fully appreciate the consequences of giving their consent when experiencing the immense pain of labour.
L A W & 2 Others v Marura Maternity & Nursing Home & 3 Others, High Court, Kenya (2022)

Bodily Autonomy

- Bodily Autonomy
- Women
- Right to Dignity

Discrimination Based on Health Status

FACTS
Petitioner L.A.W. was a pregnant woman who learned during an ante-natal visit to the first Respondent’s clinic that she was HIV positive. Respondent advised Petitioner that she should not have more children, as it would pose a risk to herself and her children. The Respondent directed Petitioner to the Respondent’s hospital for a Caesarean section operation using two referral vouchers—one written ‘CS’ and the other ‘TL.’ During the C-section, Respondent’s hospital staff conducted a Bilateral Tubal Ligation (BTL), which resulted in Petitioner becoming permanently unable to conceive. The Petitioner averred that the Respondent had conducted the operation without informing her or receiving her consent. Petitioners argued that this conduct violated the Petitioner L.A.W.’s right to life, freedom from discrimination, right to dignity, freedom from torture, right to privacy, freedom of expression, right to the highest attainable standard of health, right to a family, and right to be given service of a reasonable quality.

RULING
Mrima, J
The High Court found that the Respondents failed to obtain informed consent from the patient in violation of international law and Kenyan statutory law, which require that healthcare providers conduct due diligence to facilitate a patient's understanding of any healthcare services they receive. The Court noted that, under the Kenyan Health Act, the Respondents were obligated to both communicate the implications of the BTL procedure and explain alternative methods of family planning. Further, the Court found that there were no instances in which informed consent could be transferred from the 1st Respondent to the 2nd Respondent. Rather, both Respondents were obligated to conduct their own due diligence to receive informed consent.
The Court held that the 1st Petitioner’s rights and fundamental freedoms were infringed by her consequent permanent inability to conceive. The Court concluded that the positive socioeconomic rights enshrined in Kenya’s Constitution obligated the State to legislate, develop policies, and train qualified health professionals to realise the Petitioner’s right to reproductive health. Finally, the Court also concluded that the procedure undergone by the 1st Petitioner was the result of unfair discrimination based on sex and HIV status, both of which are unjustified in a well-functioning society.
COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others, Court of Appeal, Kenya (2018)

Bodily Autonomy

Bodily Autonomy  Right to Fair Trial  Right to Dignity

Right to Privacy  Law Enforcement

COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others (Civil Appeal No. 56 of 2016) [2018] eKLR (22 March 2018).
FACTS
Applicants filed suit challenging court-ordered medical examinations to which they were subjected. Both Applicants were arrested at a bar on suspicion of engaging in gay activities and distributing pornographic material. When the Applicants refused to undergo medical tests, investigators successfully petitioned the Court to order blood tests (for HIV and Hepatitis B) and an anal examination. The Applicants’ counsellor did not object to the prosecutor’s motion to order the tests. The Applicants alleged that the latter exam amounted to inhuman and degrading treatment because they had not consented to such an invasive procedure, which they were forced to undergo in full view of the police and medical personnel. The Applicants argued that the anal examination had no probative value relating to the charged offences, was unreasonable, and violated their constitutional rights to dignity and privacy. They further argued that the Court’s decision to admit the examination results was contrary to the rule against self-incrimination and the right to a fair hearing enshrined by the Constitution.

RULING
Visram, J; Karanja, JA; Koome, JA
The Court of Appeal held that the use of forced medical examinations to ‘prove’ same-sex sexual conduct is unconstitutional—and, furthermore, in violation of the right to privacy and dignity.

The Court emphasised that the rights to dignity and privacy are granted irrespective of “one’s status or position or mental or physical condition,” because “one is, by virtue of being human, worthy of having his or her dignity or worth respected.” (para 26)
The Court further held that the High Court acted beyond its mandate in granting the order to conduct invasive medical tests, contrary to section 24 of the Constitution. The Court found that the Appellants were not arrested in the act, there was no complainant, and there was no reasonable explanation as to why they were suspected of committing the offence. Nor was there any proper basis laid before the lower court to necessitate the impugned order being made. The Court concluded that whether the Appellants had consented to the test was immaterial because such consent cannot validate an otherwise illegal order. Even so, the Court was not satisfied that the alleged consent could qualify as voluntary.

The Court held that the medical examinations violated the Appellants’ rights under sections 25, 26, 28, and 29 of the Kenyan Constitution, including the right to dignity and the right to be free from torture and discrimination. On the issue of consent, the Court held that the counsellor could not give consent to an illegal order on behalf of the Appellants. The High Court’s admission of the tests’ results subsequently violated the Appellants’ right against self-incrimination, thereby violating the right to a fair trial under section 50 of the Constitution.
Mapingure v Minister of Home Affairs & Others, Supreme Court, Zimbabwe (2014)

Bodily Autonomy

Bodily Autonomy Access to Medicines Women

Gender-Based Violence Law Enforcement Governmental Obligations

FACTS
Mapingure was attacked and raped by robbers at her home. She immediately lodged a report with the police and requested that she be taken to a doctor to access medication to prevent pregnancy and any sexual infections.

Mapingure repeatedly went to the police in the days that followed but was advised that the police officer mandated to deal with her case was unavailable. When she returned to the hospital, the doctor insisted that she could only give her medication if a police report was provided. She was eventually accompanied to the hospital by another police officer but was informed that she could not receive the medication she had requested as the prescribed 72 hours within which the emergency contraception should be administered had elapsed.

Upon discovering she was pregnant, Mapingure sought a lawful termination; as a victim of rape, she was eligible for an abortion under Zimbabwe’s Termination of Pregnancy Act. A prosecutor and magistrate erroneously told her that she could not acquire the magisterial certificate required for termination until the rape trial had been completed. When she eventually obtained a certificate of termination, it was no longer safe to carry out the termination. She subsequently gave birth.

Mapingure approached the High Court, citing the Minister of Home Affairs; the Minister of Health and Child Welfare; and the Minister of Justice, Legal and Parliamentary Affairs as Defendants. She claimed damages in the sum of US$10,000 for physical and mental pain as well as US$41,904 as costs of maintaining the child she had as a result of the rape. The Government failed to respond to Mapingure’s lawsuit.
The High Court nonetheless handed down judgment in favour of the State, arguing that her misfortune was a result of her ignorance as to the correct procedure to follow to acquire a termination of pregnancy and not any wrongdoing on the part of the Defendants. The High Court argued that it was not the mandate of the officials involved to advise Mapingure on the right procedures to follow to ensure that she got the services she needed. She appealed the decision.

**RULING**

*Garwe, J; Patel, J; Gowora, J*

The Supreme Court found that the police had failed in their duty to assist Mapingure so that she could promptly receive the requisite medical attention and that there was a causal link between the negligence of the police, the doctor, and the pregnancy. The Court noted that although the originating cause of Mapingure’s pregnancy was the rape, “its proximate cause was the negligent failure to administer the necessary preventive medication timeously”. The Court pronounced that there was no doubt that Mapingure suffered harm (including mental anguish) as a result of the failure to prevent her pregnancy. The Court found that this harm was foreseeable and accordingly made a claim for damages factually and legally sustainable.

The Court thus found that the Ministry of Home Affairs and the Ministry of Health and Child Welfare were liable to pay for damages for negligence by the police and the doctor.

The Court made important pronouncements as to the importance of international standards that protect a woman’s right to protect and control her biological integrity.
Whilst clarifying that international instruments cannot operate to override or modify domestic law unless and until they are internalised and transformed as rules of domestic law, the Court found that it was proper and instructive to have regard to them as embodying norms of great persuasive value in the interpretation and application of domestic statutes and common law. Within the context of the discussion on the role of international standards, the Court made some admissions that the Zimbabwean Government may be failing in its obligations under international human rights standards, particularly the Convention on the Elimination of all Forms of Discrimination Against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.
Center for Health, Human Rights & Development (CEHURD) & 3 Others v Attorney General, Constitutional Court, Uganda (2020)

Bodily Autonomy

Bodily Autonomy | Women | Right to Health

FACTS
The Petitioners challenged the actions and omissions of the Ugandan Government for failure to provide Minimum Maternal Health Services. Specifically, the Petitioners alleged that the Ugandan Government had failed to provide basic indispensable maternal health facilities, midwives and doctors, sufficient budget allocation, essential drugs, emergency obstetric services, supervision of public health facilities, and oversight of unethical health worker behaviour. The Petitioners argued that these acts and omissions were inconsistent with certain objectives and sections of the Constitution of the Republic of Uganda, violating the right to health, the right to life, and the rights of women. The Petitioners further contended that the Government’s omission to provide adequate emergency obstetric care in public health facilities resulted in obstetric injury and subjected women to inhumane and degrading treatment.

RULING
Cheborion, JCC; Kakuru, JCC; Madrama, JCC; Owiny-Dollo, DCJ; Egonda-Ntende, JCC
The Constitutional Court of Uganda began by addressing the Government’s omission to provide basic maternal healthcare services in public health facilities. Cheborion, JCC, writing for the Court, concluded that the Government had failed to implement policies to improve the availability and quality of maternal healthcare.

The Court held that the Respondent Government had violated the right to health enshrined in the Constitution. It also held that this failure violated the right to life and the rights of women in sections 22 and 33 of the Constitution of Uganda, respectively.
Furthermore, the Court concluded that the Government's omission to provide emergency obstetric care subjected women to injury and inhumane, degrading treatment in violation of the Constitution. The Court held that the failure to provide services leading to the death of two women in two public hospitals amounted to cruel and inhumane treatment, in contravention to their constitutionally guaranteed rights.

To remedy the violations, the Court held that the Government should prioritise and allocate sufficient funding to maternal healthcare in the next financial year. The Court also affirmed that the Minister of Health is responsible for ensuring all staff providing maternal health services are fully trained and working in fully equipped health centres.
Republic v Willy, High Court, Malawi (2022)

Bodily Autonomy

Gender

Gender-Based Violence

Republic v Willy (Criminal Review 6 of 2021) [2022] MWHC 143 (1 December 2022).
FACTS
Defendant Willy (aged 22) was charged with “defilement” of CH (aged 17) contrary to section 138 of the Malawi Penal Code in 2021. CH complained that the Magistrate had subjected her to re-victimization by allowing the defence to have a volunteer woman “play with the accused genitals to jerk him off for more than 30 minutes” to prove that he was not able to get an erection. (para 2.6) She further alleged that the proceedings in the lower court had procedural irregularities, including blatant bias, and that non-judicial factors had influenced the Magistrate’s conduct.

RULING
Ntaba, J
The Court held the decision to allow the Defendant to be sexually touched for 30 minutes in the presence of the putative victim was “very unfortunate and highly illegal.” (para 2.7) The Court drew several inferences from the magistrate’s conduct, including potential collusion between the magistrate and the Defendant to “put forward this lewd act” as evidence and implicit bias on the part of the magistrate to stereotype and not believe the victim’s testimony. (para 2.8)

While the Court maintained the difficulty of proving subjective bias, the Court put forth a deductive test considering appearance, “with the principle borne in mind that justice must not only be done, but it must also be seen to be done.” (para 2.9) The Court ordered the State to assist the victim with resources to attend court and receive counselling services. The issues were also referred to the Judicial Services Commission for gender bias issues, and the Judiciary was instructed to develop training to prevent future issues of gender stereotyping, evidence in sexual offences, safeguarding, and re-victimisation.
Bodily Autonomy

| Bodily Autonomy | Women | Gender-Based Violence | Right to a Fair Trial |

Director of Public Prosecutions, Eastern Cape, Makhanda v Coko, Supreme Court of Appeal, South Africa (2024)

Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (248/2022) [2024] ZASCA 59 (24 April 2024).
FACTS
The Complainant, TS, a 21-year-old student, and Respondent were engaged romantically. On a few occasions, the Complainant informed the Respondent of her virginity and intention to refrain from sexual activity. On 1 July 2018, TS and Respondent agreed to meet at the Respondent’s apartment to spend the evening, and when accepting the invitation, TS reiterated her intentions to refrain from sexual activity—which the Respondent reassured his understanding of. While at the Respondent’s apartment, the two began engaging in non-penetrative sexual activity with the Complainant's initial resistance and later consent, until the Respondent penetrated the Complainant without consent. At this point, the facts are disputed; the Complainant asserts she refused and communicated pain and discomfort, but the Respondent proceeded while apologising. The Respondent claims he understood the prior consent to inform the Complainant's consent for intercourse, and she did not verbally reject his advances.

The lower courts were split on the issues of consent and intent in deciding the crime of rape, and implications of verbal consent, non-verbal cues, force, and coercion. The lower court found for the Complainant, while the High Court found TS to be an active participant who did not resist.

RULING
Petse, DP, Mabindla-Boqwana, JA; Zondi, JJA; Mocumie, JJA; Mbatha, JJA
The Court reaffirmed that the statutory definition of rape requires demonstration of both consent and intent with penetrative intercourse, separate from non-penetrative foreplay.
On the issue of consent, mere submission is insufficient to satisfy consent; rather, the Court held that the Complainant's repeated assertions of not wanting to engage in penetrative intercourse required more than lack of resistance to establish consent. On the issue of intent, the Respondent’s claims that he had the Complainant’s consent and proceeded with the natural course of activities after foreplay indicate he had clear mens rea.

Consequently, the High Court's findings were held to be made in error. Rather, the Court reaffirmed that consent is given for each activity and can be withdrawn. Furthermore, the communication between both parties before and after the evening in question indicate clearly that TS had proven she was raped by the Complainant beyond reasonable doubt. “That TS had the inalienable right to choose whether or not to participate in penetrative sex goes without saying. This goes to the heart of her constitutional right to dignity, bodily integrity and security of person.” (para 74)
Ochieng & 2 Others v Attorney General & Another, High Court, Kenya (2012)

Access to Medicines & PPE

Access to Medicines  Right to Life  Right to Health

Right to Dignity  Discrimination Based on Health Status

FACTS
The Petitioners, HIV-positive Kenyan citizens, challenged the constitutionality of an Act that affected or was likely to affect their access to affordable and essential drugs and medicines, including generic ones for HIV. Petitioners argued that the provisions thereby infringed their fundamental right to life, human dignity and health as protected by the Constitution.

RULING
Ngugi, J
The Court held that sections 2, 32, and 34 of the Anti-Counterfeit Act threaten to violate the Petitioners' rights to life, dignity, and the highest attainable standard of health guaranteed by the Constitution. The Court held that the right to the highest attainable standard of health in the Constitution encompasses access to affordable and essential drugs and medicines, including generic ones.

The Court affirmed that the State's obligation to protect the right to health of its citizens included not only the “positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines.” (para 74) Legislation that restricts affordability and access to essential drugs would thus violate the State’s obligation to uphold the Constitution.
Lesotho Medical Association & Another v Minister of Health & Others, High Court, Lesotho (2020)

Access to Medicines & PPE

Access to PPE  Right to Life  Right to Health

Labour Rights

FACTS
During the COVID-19 pandemic, individual doctors and members of the Lesotho Medical Association filed a petition to Lesotho’s High Court arguing that the Government’s failure to provide personal protective equipment (PPE) and adequate pay violated their constitutional rights to life and freedom from arbitrary seizure of property. The doctors cited that the lack of PPE forced them to treat patients with their bare hands, both exposing themselves and others to communicable diseases and challenging their professional integrity as healthcare workers. The Petitioners argued that the State's failure to provide sufficient PPE during the COVID-19 pandemic violated healthcare workers' right to favourable work conditions and, subsequently, their right to life. The State cited a lack of sufficient funding to provide PPE, for which they claimed the State has no affirmative duty to provide.

RULING
Mokhesi, J; Monapathi, J; Peete, J
The Lesotho Constitution explicitly protects the right to life, in section 5, and accordingly, the “highest attainable standard of physical and mental health,” in section 27, and “just and favourable conditions of work,” in section 30. The Court held the State's failure to provide PPE was explicitly unconstitutional. The Court ordered the government to provide healthcare professionals with PPE because the State has an obligation to “take preventive operational measures to protect the lives that are potentially being endangered by the work environment, or to at least, minimise the occurrence of loss of life.” (para 41) The Court recognised that, while “medical doctors’ routine job is inherently risky and carries with it a potential for loss of life from infection with deadly diseases,” doctors “cannot, constitutionally, be left at their own devices by the State.” (para 41) The decision relies on domestic constitutional law, in line with international standards of the right to health.
Ng’etich & 2 Others v Attorney General & 3 Others, High Court, Kenya (2016)

Public Health Measures

- Public Health Measures
- Right to Health
- Detention
- Discrimination Based on Health Status
- Limitation of Rights

FACTS
In 2010, Ng’etich and Kirui were arrested by the Nandi Central District Tuberculosis Defaulter Tracing Coordinator, who applied to a Magistrate for their imprisonment, alleging that they had failed to take prescribed TB medication. Pursuant to section 27 of the Public Health Act, the Magistrate ordered that the men be confined for eight months or a satisfactory period for treatment. They remained in prison for 46 days. The two men challenged their confinement as a violation of their constitutional rights under the 1969 and 2010 Kenyan Constitutions.

RULING
Ngugi, J
Drawing on domestic cases, the World Health Organization Guidance on ethics of tuberculosis prevention, care and control 2010 and the Constitution, the Court found that under certain circumstances, confinement of TB patients is a justified limitation of their rights and complies with the Siracusa Principles.

However, their confinement in penal institutions was not in accordance with the Public Health Act or international guidelines and principles regarding the isolation of patients with TB. It violated the Petitioners' and other similarly situated patients' rights to liberty and freedom of movement, association, and assembly.

The Court held that the confinement of the two Petitioners in prison for TB treatment for a period of eight months was not authorised by law. Confinement of patients suffering from infectious diseases in prison facilities for treatment violates their rights under the Constitution.

The Court further found that such confinement could not meet its intended purposes given the conditions in Kenya’s prisons.
The Court ordered that the Minister for Public Health and Sanitation must issue a circular within 30 days from the date of the judgment informing all public and private medical facilities and public health officers that section 27 of the Public Health Act does not authorise confinement of persons in prison facilities for treatment.

The Minister for Public Health and Sanitation was further directed to develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution.
Ajuang & Another v Osodo the Chief of Ukwala Location & Others, High Court, Kenya (2020)

Public Health Measures

- Public Health Measures
- Right to Dignity
- Religion
- Customary Law

Ajuang & Another v Osodo the Chief of Ukwala Location & Others (Petition No. 1 of 2020) [2020] eKLR (15 June 2020).
FACTS
The Petitioners raised several issues for determination. These included whether the decision by the Respondents to inter the remains of the deceased devoid of any traditional and/or Luo burial customs is in complete contravention of the Petitioners’ right to human dignity even in death. They requested an order for the exhumation and re-burial of his body in accordance with World Health Organization guidelines on managing dead bodies during the COVID-19 pandemic.

Respondents replied that in instances where a person has died of highly contagious diseases such as COVID-19, as happened in the instant case, it would be highly prejudicial to the general public living within the immediate location where the deceased has been interred to exhume the body, as it would unnecessarily expose them to the risk of contracting the disease.

RULING
Aburili, J
Relying primarily on international caselaw on the subject, the Court held that the dead have the right to dignity to the extent that a breach of said rights affects the private and family life of others around him and also affects their inherent dignity which does not expire even after his death.

The Court found that the deceased was buried in the dead of the night, in direct neglect of the deceased’s custom or religious beliefs and practices, which are guaranteed under the right to religious freedom of the Constitution, and without any input of the deceased’s surviving relatives and further in direct contravention of the guidelines by both WHO and the local authorities. Thus, both the deceased and Petitioner’s rights were violated.
However, in the interest of public health and public good, the Court declined to grant or issue an order for exhumation and or a biopsy and an autopsy on said body of the deceased, reasoning that exhumation of the body carried significant health risks of further exposure to COVID-19.
Muga & 20 Others v County of Mombasa & 2 Others, High Court, Kenya (2020)

Public Health Measures

- Public Health Measures
- Right to Health
- Access to Information
- Public Participation

FACTS
The Petitioners, adults working and residing in Mombasa, Kenya, sued the Respondents, the Mombasa County Government, Ministry of Health, and Attorney General, for designating Mvita Clinic, a public hospital, as a COVID-19 isolation and treatment centre, despite the availability of other hospital facilities for the same purpose with less severe public impact. The Petitioners allege that the decision to designate the clinic as a COVID-19 centre was made without sufficient public participation and poses a health risk to the adults, elderly people, and children working and attending nearby schools and businesses. The Petitioners claimed an infringement of their right to good health, life, and information; fundamental and national values; and economic and social rights. The Respondents countered that, among other claims, the general good of the public beyond the interest of 22 individuals, the Petitioners, takes precedence.

RULING
Ogola, J
The constitutional and statutory right to information provides that public entities provide a mechanism for the public to request information from the government concerning the protection of their rights, with which the Respondents have complied, and Petitioners have failed to use. Additionally, given the extraordinary circumstances of the pandemic, the Court held the Respondents had insufficient time to engage public participation in decision-making and were only obliged to notify the public, which they did.

Furthermore, public entities have a duty to undertake “all lawful, necessary and, under its special circumstances, reasonably practicable measures” to prevent outbreak of disease and protect public health. Given that the only existing 90-bed facility was fully occupied, the Respondents had the responsibility to open an alternate facility to safeguard access to COVID-19 treatment.
The Petitioners' claim was dismissed because the Respondents fulfilled their obligations and acted responsibly in the face of an emergency.

“As the Cabinet Secretary for Health Mutahi Kagwe frequently says, ‘if we treat COVID-19 normally, it will treat us abnormally.’ We should applaud the efforts being made by the Respondent to respond to, and to control COVID-19 pandemic. This disease did not give the world notice of its arrival. Therefore, the normal constitutional requirements could not be met when programmes were put in place to fight COVID-19 pandemic.” (para 38)

Public Health Measures

Public Health Measures | Limitation of Rights | Law Enforcement

FACTS
The Kenyan Government imposed a night curfew to inhibit the spread of COVID-19 infections. The Petitioner faulted the Curfew Order on three grounds: firstly, that there is no indication of the rationale for the curfew on its face hence failing the test under Article 24 of the Constitution that limitation of rights should be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"; secondly, that it does not demonstrate what legitimate public health or other interest it seeks to achieve and the link between it and the legitimate aim; and thirdly, that it is blanket in scope and indefinite in length and is not the least restrictive measure.

The Petitioner challenged the Curfew Order for failing to provide for written permits, thus penalising vulnerable persons and persons who venture out strictly to perform essential services, obtain essential goods and services or seek emergency, lifesaving or chronic medical attention. It was alleged that the curfew has resulted in the arrest or harassment of persons performing or seeking essential services.

RULING
Korir, J
The Court agreed with the Petitioner that the imposed curfew does negatively impact constitutional rights and freedoms. However, the Court reasoned that the pandemic had itself robbed the people of Kenya of aspects of their rights to freedom of association and assembly, and ability to earn a living. Thus, to the extent that it is reasonable and justifiable, the limitation of rights imposed by the curfew was constitutional.
The Court applied the precautionary principle in its analysis of the proportionality of the curfew measures. Reasoning that the State has the duty to take protective measures to avoid risks without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested, the Court held that the curfew order was constitutional.
Nubian Rights Forum & 2 Others v Attorney General & 6 Others, High Court, Kenya (2020)

Public Health Measures

FACTS
The Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 made amendments to various statutes. It introduced section 9A to the Registration of Persons Act which established the National Integrated Identity Management System (NIIMS) which was intended to be a single source of personal information of all Kenyans as well as foreigners that resided in Kenya. The Petitioners challenged the amendment on grounds that it violated the Constitution and was made in bad faith, that the amendments posed various security risks arising from the collection of personal data and violated rights to privacy, children’s rights and equality and non-discrimination. Petitioners also alleged that the laws were enacted ‘unprocedurally’ without adequate public participation and Senate involvement.

RULING
Nyamweya, J; Ngugi, J; Korir, J
The Court held that the collection of biometric and GPS data constituted the collection of personal and sensitive information which required protection and obliged the State to adopt data protection measures. Additionally, the Court ruled that the collection of DNA and GPS data was ‘intrusive, unnecessary’ and unconstitutional but that the collection of other biometric data was not a violation of section 31 of the Constitution.

The Court stated that the collection of biometric data of children was constitutional. However, the Court held that the Act’s wording and structure was such that NIIMS did not apply to children. The collection of DNA and GPS data without appropriate safeguards and procedures was unjustifiable. Further, the framework set out within the Act was incomplete and so did not create a comprehensive framework for the collection of personal data and was not clear and unambiguous. Accordingly, the Court held that the process was unjustifiable and unconstitutional.
State (on the application of Kathumba & Others) v President of Malawi & Others,
High Court, Malawi (2020)

Public Health Measures

Public Health Measures
Governmental Obligations
Limitation of Rights
Right to Life
Right to Dignity

State (on the application of Kathumba & Others) v President of Malawi & Others (Constitutional Reference 1 of 2020) [2020] MWHC 29 (3 September 2020).
FACTS
Applicants approached the High Court for clarification on whether the Minister of Health had the power to implement legislation related to COVID-19 lock downs prior to review by Malawi legislature.

RULING
Manda, J; Mwale, J; DeGabrielle, J
The Court held that subsidiary regulation without any basis to the parent act is not permissible, accordingly, the COVID-19 rules as implemented by the Minister of Health are without basis in section 31 of the Public Health Act.

Ministers implementing subsidiary legislation must prepare the legislation before Parliament after it has been publicly announced, not doing so is a violation of section 58(1) of Malawi’s Constitution.

The COVID-19 rules substantially affected constitutionally protected rights and their implementation via subsidiary legislation fell outside the legal boundaries addressed in section 58(2) of Malawi’s Constitution. Accordingly, the Minister of Health acted unconstitutionally in implementing the COVID-19 rules.

The COVID-19 rules themselves were limits on fundamental constitutional rights that fell outside the boundaries allowed for limits on rights because there was no state of emergency declared.

Additionally, the Court ruled that there is an implicit right to social security derived from the right to life and dignity.
CRIMINAL JUSTICE
Gwanda v State, High Court, Malawi (2017)

Criminalisation of Status

Criminalisation of Status
Law Enforcement
Detention
Right to Dignity
Right to Fair Treatment
Discrimination

FACTS
Petitioner was arrested en route to his job as a vendor selling plastic bags on allegations of being a rogue and vagabond. He was kept in detention for three days until he was released on bail pending trial. Petitioner appealed to Malawi’s High Court on the grounds that sections of the Penal Code related to vagrancy violated the constitutional right to dignity, freedom from inhuman treatment, freedom & security, non-discrimination, and privacy and freedom of movement.

The Court recommended a review of other provisions with similar negative effects that are arbitrarily applied.

RULING
Kalembera, J; Ntaba, J; Mtambo, J
The Court began by noting the colonial legacy of the law that inherently impacted an individual’s dignity. The Court found the vagrancy law overly broad, resulting in too much discretion for the police.

The Court held that there was no evidence that the Petitioner intended to commit an offence of illegality and that law enforcement officers only arrested him with a view to investigate. Hence, he was presumed guilty until proven innocent. This presumption violated his right to dignity, which in turn resulted in violations of other human rights, including freedom from inhuman and degrading treatment, freedom from discrimination and equal protection of the law. The Petitioner’s arbitrary arrest and detention amounted to inhuman and degrading treatment and a violation of his right to freedom and security of person and the right to freedom from discrimination.
Ateenyi v Attorney General, Constitutional Court, Uganda (2022)

Criminalisation of Status

Criminalisation of Status

Law Enforcement

FACTS
The Government of Uganda maintained a vagrancy law which subjected anyone seen as wandering in public, suspected to be a thief, or seen as without means to support themselves to punishment under section 168(c) and (d) of Uganda’s Penal Code. Petitioner filed suit against the Attorney General in Uganda’s Constitutional Court, arguing that the relevant sections violated Ugandan’s constitutional right to liberty, equality, non-discrimination, and presumption of innocence. Petitioner also states the sections fail constitutional muster based on their imprecision.

RULING
Egonda-Ntende, JCC; Musoke, JCC; Madrama, JCC; Mugenyi, JCC; Gashirabake, JCC
The Court held that the elements for the impugned provisions are ambiguous, vague and too broad to amount to a precise definition of an offence, which is what is required under section 28(12) of the Constitution or what is otherwise referred to as the principle of legality.

The Court further held that section 168(1)(c) of the Penal Code Act imposed a reverse onus of proof on an accused to give ‘a good account’ of himself when presumably he is arrested. These provisions fail constitutional muster by reversing the burden of proof and deeming that an offence has been committed contrary to the presumption of innocence. Any attempt to deprive an individual of his or her personal liberty on account of these impugned offences would contravene the affected person’s right to personal liberty. Offences that do not pass constitutional muster cannot lawfully be the cause of restrictions on one’s fundamental right to move freely throughout Uganda.
Request for Advisory Opinion on Vagrancy Offences by the Pan-African Lawyers Union (PALU), African Court on Human & Peoples’ Rights (2020)

Criminalisation of Status

- Criminalisation of Status
- Law Enforcement
- Right to Dignity
- Children
- Women
FACTS
On 4 December 2020, the African Court on Human and Peoples’ Rights issued an Advisory Opinion on the extent to which vagrancy laws comply with the African Charter on Human and People’s Rights (African Charter). There are a significant number of countries in Africa that make it a crime to be unemployed and without a home or means of income. These offences allow the arrest and detention of persons who did not engage in criminal activity. Not only do these vagrancy offences criminalise the status of being unemployed and homeless, but the crimes enable discriminatory treatment of marginalised persons who access public spaces and persons who seek to enforce their socio-economic rights.

RULING
Oré, P; Kioko, VP; Ben Achour, J; Matusse, J; Mengue, J; Mukamulisa, J; Chizumila, J; Bensaoula, J; Tchikaya, J; Anukam, J; Aboud, J
The Court held that labelling an individual as a ‘vagrant’ is derogatory, and summarily ordering them to be forcefully relocated to another area violates their dignity. Thus, the Court ordered all countries to “take all necessary measures, in the shortest possible time” to review and reform their laws and by-laws to bring them in line with the provisions of the African Charter. (para vi)

The Court observed that arbitrary arrests generally have a disproportionate effect on impoverished and marginalised children, including those who are arrested and those whose caregivers are arrested. Throughout Africa, there are frequent reports of mass arrests of children who live and work on the streets under vagrancy laws. In many such instances, children’s rights are completely ignored, and they are often subjected to abuse and cruelty.
Having found that vagrancy laws violated the rights in the African Charter, including the rights to equality, dignity and freedom from cruel and inhuman treatment, the Court held that some crimes are so vague that it was hard to know what is prohibited, resulting in frequent arrests without warrants and illegal pre-trial detention. This finding places an obligation on all countries to review their policing practices to ensure that they meet the standards set out for arrests in national laws and regional human rights treaties.
Seek v State of Mauritius, Supreme Court, Mauritius (2023)

Criminalisation of Status

Criminalisation of Status  Sexual Orientation  Discrimination
FACTS
The Applicant was a gay man who served as a board member of the interested party, Collectif-Arc-en-Ciel (CAEC)—an NGO based in Mauritius that campaigns against homophobia and discrimination against the LGBTIQ+ community. The Applicant sought constitutional redress concerning section 250 of the Criminal Code, which criminalised anal sex between consenting male adults in private. Specifically, the Applicant argued that the impugned section was unconstitutional inasmuch as it breached sections 3 and 5 (right to liberty), section 7 (proportionality and prohibition against inhuman and degrading treatment), sections 3 and 9 (right to privacy), sections 3 and 12 (freedom of expression), sections 3 and 13 (freedom of assembly and association), and sections 3 and 16 (prohibition against discrimination) of the Constitution of Mauritius. The Applicant also asked the Court to strike down the provision as being null and void.

RULING
Chan Kan Cheong, J; Gunesh-Balaghee, J
The Supreme Court of Mauritius began by consulting caselaw from Australia, Canada, South Africa, Belize, India, and Botswana, as well as the Human Rights Committee’s interpretation of the International Covenant on Civil and Political Rights, all of which had concluded that the prohibition against discrimination based on “sex” necessarily included discrimination based on sexual orientation. After reiterating the importance of adopting a generous and purposive interpretation of the Constitution, the Court held that the prohibition against discrimination on the basis of “sex” under section 16 of the Constitution includes sexual orientation.

The Court concluded that the impugned section violated the constitutional prohibition against discrimination because it had the effect of criminalising the Applicant’s sexual identity.
The Court declared that section 250(1) of the Criminal Code was unconstitutional in so far as it prohibited consensual acts of sodomy between consenting male adults in private. It ordered that the impugned section should accordingly be read to exclude such consensual acts from its ambit. The Court did not find it necessary to make any declaration concerning sections 3, 5, 7, 9, 12, and 13 of the Constitution.
Attorney General v Motshidiemang, Court of Appeal, Botswana (2021)

Criminalisation of Status

Criminalisation of Status  Sexual Orientation  Right to Privacy

Discrimination

FACTS
The Applicant was a gay man who challenged the constitutionality of sections 164(a), 164(c), and 165 of the Botswana Penal Code—provisions which had the effect of criminalising consensual gay intercourse. Applicant argued that the impugned provisions should be struck down as unconstitutionally vague. He further argued that the provisions should be ruled ultra vires the Botswana Constitution for infringing upon his fundamental rights to privacy, liberty, dignity, and freedom from both discrimination and inhuman and degrading treatment. Finally, he argued that section 167 should be severed on the ground that it seeks to regulate private conduct deemed grossly indecent, in violation of his right to privacy and liberty.

The High Court of Botswana ruled in favour of the Applicant. Leburu, J, writing for the Court, concluded that the terms “carnal knowledge” and “against the order of nature” in the impugned provisions were not sufficiently vague to be struck down, for although the statute did not define either term, the courts of Botswana had elucidated clear meanings for both.

The High Court also concluded that sexual orientation was part of the wide definition of “sex” in section 3 of the Constitution. It held that the impugned provisions violated the Applicant’s right to be free from discrimination as per section 15 of the Constitution. Consequently, the High Court struck down the impugned provisions for being ultra vires sections 3, 9, and 15 of the Constitution of Botswana.

Finally, the High Court ruled that the word “private” must be severed and excised from section 167 since any regulation of private conduct between consenting adults represents an unconstitutional violation of the rights to privacy and liberty.
The Attorney General appealed the ruling on three grounds: (1) that the High Court was bound by the decision in Kanane; (2) that the High Court had failed to respect the separations of powers; and (3) that the High Court should have applied section 15(9) which preserved statutory provisions that were in place at the time the Constitution was enacted.

RULING
Kirby JP; Rannowane, CJ; Lesetedi, JA; Gaongalelwe, JA; Garekwe, JA
Kirby JP, writing for the Court of Appeal, began by ruling that the High Court erred in determining that the word “private” should be excised from section 167 to prevent it from being unconstitutional. The Court concluded that the issue presented by section 167 was not properly before the High Court because it was brought by LEGABIBO as amicus curiae.

The Court of Appeal next considered whether the High Court erred by overruling the precedent set by Kanene, concluding that it did not err for two reasons. First, the Court in Kanane expressly provided that the impugned sections might one day be ruled unconstitutional in light of new evidence of changing public opinion concerning homosexuality, both in Botswana and in other countries—a condition that was met in the present case. Second, the Applicant had presented independent evidence that sections 164(a) and (c) of the Penal Code had unjustified negative consequences on the rights to liberty, privacy, dignity, and equal protection of the law on homosexual men.

The Court noted that stare decisis is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional.
The High Court was thus entitled to issue a new ruling ostensibly deviating from the binding decision in Kanane, given that the parties introduced sufficient new evidence and raised new legal issues related to the discriminatory effect of the impugned sections in contravention of sections 15(1) and 3 of the Constitution.

The Court then dismissed the Attorney General's second ground of appeal concerning separation of powers. The Court noted that the framers of the Constitution explicitly empowered the Courts to protect and enforce the fundamental rights enshrined therein, including by striking down or modifying laws that breach those rights.

Next, the Court considered the Attorney General's argument that the provisions were preserved under the savings clause in section 15(9) of the Constitution. Kirby, JP, reaffirmed that the savings clause must be read narrowly, holding that sections 164(a) and (c) are not protected by section 15(9) of the Constitution. First, both laws have been changed from their original substance. Section 164(c) was substantively altered by Parliament in 1998. Meanwhile, section 164(a) originally served as the sole legal protection for men and boys who were victims of rape, but this purpose was nullified by the amendments to the Penal Code in 1998 which extended equal protections to all victims of rape, regardless of gender. Second, section 15(9) does not protect the laws from constitutional scrutiny but rather from being ruled unconstitutional based on the Constitution of 1966, and the Constitution had since been amended to protect people on the basis of sex. Finally, the Court of Appeal reaffirmed the High Court's holding that the right to privacy under sections 3 and 9 of the Constitution extends to protection of the right to make personal choices about one's lifestyle, choice of partner, or intimate relationships. Thus, the Court confirmed that sections 164(a) and (c) were invalid violations of the right to privacy.
Republic v P Banda & Others, High Court, Malawi (2016)

Law Enforcement

Law Enforcement | Women | Right to Fair Trial

Criminalisation of Status

FACTS
The case concerned nineteen women who were arrested and charged with the offence of living on the earnings of prostitution, contrary to section 146 of the Penal Code. The women did not have legal representation and pleaded guilty. They were convicted by a Magistrate and fined MK7000 each.

The women challenged this decision in the High Court on the basis that (1) the police and the magistrate misinterpreted the offence of ‘living on the earnings of prostitution’ under section 146 of the Penal Code; (2) their fair trial rights were violated because the charges and evidence were not adequately explained to them; and (3) their fair trial rights were violated because the Magistrate’s Court incorrectly tried all nineteen women together and recorded a unanimous plea of guilty.

RULING
Ntaba, J
The High Court ruled in the women’s favour on all counts, concluding that there had been a violation of the women’s fair trial rights and an unlawful interference with their right to personal freedom.

The Court acknowledged that although sex work continues to be a sensitive subject in Malawi, the Penal Code does not criminalise the act of buying and selling sex. The Court emphasised that it is not a crime to be a sex worker in Malawi. Rather, certain activities around sex work are criminalised. For example, the Court highlighted that it is an offence to recruit someone to become a sex worker (procurement) or to keep a place that is used for sex work (brothel). It is also a crime to force someone to become a sex worker or to keep someone in a brothel without their consent.
Rather, certain activities around sex work are criminalised. For example, the Court highlighted that it is an offence to recruit someone to become a sex worker (procurement) or to keep a place that is used for sex work (brothel). It is also a crime to force someone to become a sex worker or to keep someone in a brothel without their consent.

The Court further expressed concern that police officials continued to target sex workers by incorrectly applying offences in the Penal Code to arrest and detain sex workers arbitrarily. It concluded that these provisions were open to constitutional review.

The Court concluded that section 146 does not prevent sex workers themselves from living on the earnings of prostitution. Rather, the Court held that section 146 should be read narrowly as criminalising the behaviour of third parties (such as brothel owners or pimps) who control sex workers and have an economic stake in their exploitation. Consequently, the Court ruled that the offence does not prevent sex workers from earning money through sex work or from using the money to support their dependants.

Finally, the Court concluded that the way section 146 had been applied to sex workers, especially during police raids, has resulted in their unlawful and arbitrary arrest and detention. The Court thus held that this application of the law was a violation of their right to liberty and their right to be treated with dignity.
Nathanson v Mteliso & Others, High Court, Zimbabwe (2019)

Law Enforcement

Gender Identity  Law Enforcement

FACTS
A transgender woman was arrested by police officers in Zimbabwe. She was subjected to a strip search and gender verification routine, during which she was forced to strip down in front of multiple strangers. Following the humiliating examination, the officers forced the woman to undergo further gender verification at a hospital where she was again forced to disrobe for a gynaecologist who confirmed her transgender status. Following the ordeal, she was imprisoned for three days during which she was confined to sub-standard living conditions and subjected to cruel humiliation and acts of targeted harassment because of her transgender status by prison guards. The woman filed suit against the officers, seeking damages for unlawful arrest, unlawful detention, emotional distress, and exemplary damages.

RULING
Bere, J
The High Court began by concluding that the Plaintiff was unlawfully arrested and detained since the arresting officers had no warrant and did not show that they had reasonable grounds to suspect her of committing any offence. The Court consequently found that the Plaintiff had suffered from what amounted to inhuman and degrading treatment, in violation of sections 50, 51, and 53 of the Constitution, particularly when the police had forced her to disrobe so that they could inspect her genitalia. The Court affirmed that transgender citizens are citizens of equal standing with other Zimbabwean citizens and held that the Constitution of Zimbabwe does not allow for discrimination against transgender people.
The Court looked to the jurisprudence of the Indian Supreme Court regarding the connection between the right to expression, the right to life, and the prohibition against discrimination to support the assertion that transgender persons are constitutionally protected from discrimination. In light of these findings, the Court ordered the Defendants to pay damages for unlawful arrest, malicious prosecution, and emotional distress.
Khosa & Others v Minister of Defence & Military Defence & Military Veterans & Others, High Court, South Africa (2020)

Law Enforcement

Law Enforcement  Public Health Measures  Right to Dignity

Right to Life

FACTS
Under the context of the countrywide lockdowns brought on by the COVID-19 pandemic, the South African government approved the use of the South African National Defence Force (SANDF) to enforce regulations related to the lockdown. In one instance, members of SANDF subjected Khosa, a civilian living in Johannesburg, to a public beating and humiliation, which resulted in his death from blunt force trauma. His family sought declaratory relief from the Court that included a declaration affirming the fundamental rights of South African citizens, an order asking for State institutions to mandate oversight for policing institutions during the lockdown, an order establishing a process for civilians to report instances of police misconduct related to their enforcement of lockdown regulations, and an order requesting an investigation into the death of Collin Khosa.

RULING
Fabricius, J
The Court affirmed that all people living in South Africa have a right to dignity, life, freedom from torture, and freedom from inhumane punishment despite any notion to the contrary in light of the regulations surrounding the COVID-19 lockdown. The Court ordered all policing bodies to create a code of conduct surrounding the enforcement of the lockdown regulations.

The Court further ordered all leaders of policing bodies to remind all police members of their constitutional obligations surrounding the use of force in interactions with civilians. The Court ordered the immediate creation of an independent reporting process where civilians can report police or military misconduct related to enforcing the lockdown regulations. Finally, the Court ordered an investigation into the death of Khosa and the immediate suspension of the officers involved.
Ex Parte Banda & Others, High Court, Malawi (2022)

Law Enforcement

Criminalisation of Status

Right to Dignity

Right to Fair Trial

Discrimination

State v Officer In-Charge; Ex Parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022).
FACTS
The Petitioners were arrested in a sweeping exercise by police for no stated reason while they were selling fish at a local bar. They were then charged under Malawi’s rogue and vagabond offence. The Petitioners argued that the actions by the police violated their constitutional rights to freedom of movement, dignity, liberty, and economic activity. Furthermore, Petitioners argued that their subsequent conviction violated their constitutional right to a fair trial.

RULING
Ntaba, J
The Court stressed that indiscriminate police sweeps like the one in the Petitioners' case undermine the legitimacy of policing and the criminal justice system overall as it disproportionately affects the poor, marginalised and not legally empowered. It is these who usually serve jail terms for nuisance-related offences.

The Court held that the language of the provision, that “every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself”, is repugnant to the tenet that a person is presumed innocent even at arrest.

Thus, the police's actions in making sweeping arrests, coercing confessions, and the subsequent conviction violated Petitioners' rights to free movement, dignity, liberty, economic activity, and a fair trial.
Lazarus v Government of Namibia, High Court, Namibia (2017)

Law Enforcement

FACTS
Lazarus, a bar owner in Windhoek, Namibia, was arrested by police officers in Windhoek multiple times. On several occasions, he was subjected to assault, robbery, harassment, and intimidation in relation to his report of a robbery at his place of business. Lazarus appealed to the High Court of Namibia, alleging that the officers’ actions amounted to a violation of personal liberty and an abuse of police power.

RULING
Masuku, J
The Court held that the Plaintiff was arrested numerous times by the police without any warrant of arrest or explanation for the arrests and that his fundamental rights, including liberty, dignity and property had been grossly violated by the Defendant’s employees, who acted callously.

The Court further held that the Plaintiff had been shot at by the police when there was no need to do so and that the protection of his right to life had been violated by the police. In all the circumstances, the Court considered violating the Plaintiff’s constitutional rights depraved and a serious abuse of power that should not be countenanced in a democratic State.
Haukongo & Another v Minister of Home Affairs, Immigration, Safety & Security, High Court, Namibia (2023)

FACTS
The first Plaintiff, a minor, travelled home with his relatives, one of whom was wanted by the police for allegedly committing a crime. The wanted suspect was located by the police. However, the police took everyone he was travelling with, including the minor, into their custody. The minor instituted a claim for unlawful arrest and detention. The second Plaintiff, the minor’s father, instituted action against the State for mental distress because he was concerned about the whereabouts of his son. The State maintained that the minor was not arrested and that his detention resulted from his family failing to pick him up from the police station.

RULING
Munsu, J
The Court held that the confinement of the minor in one of the rooms at the police station for the entire night deprived him of his liberty. It matters not whether the Defendant claimed that the minor was not arrested.

The Court held that the evidence pointed to the conclusion that the minor was deprived of his liberty by the police officials and that he was arrested. The Court found that the State had failed to prove that the arrest and detention of the minor were lawful.

The Court awarded damages for the Plaintiffs.
Khabanyane v Commissioner of Police & Others, High Court, Lesotho (2023)

**FACTS**
Police officers broke into Plaintiff’s home, brutalised him, and then left upon realizing he had a visual impairment that would not assist the officers in identifying a suspect. The Plaintiff filed suit for damages against the officers for pain and suffering, insulting treatment, and medical expenses.

**RULING**
Sakoane, CJ
The Court held that the police had no legal authority to enter Plaintiff’s house without his permission or touch him at all and held the police liable for the assault and all injuries caused.

The Court held that similar instances of police abuse without formal investigation have proven to be “an emerging pattern of failure to protect the rule of law”, which “is bad news for our democracy.” (para 30)
Republic v Children in Detention at Bvumbwe & Kachere Prisons, High Court, Malawi (2018)

Places of Detention

FACTS
The Petitioners were children who asked the High Court to review the propriety of the orders detaining them at Bvumbwe and Kachere Prisons in Malawi. In particular, Petitioners asked the Court to review the propriety of (1) detaining children at these prisons before there has been a finding against them, (2) committing children at these prisons before a finding of liability against them, (3) the assumption of jurisdiction by Second and Third Grade Magistrate Courts over cases involving children, (4) orders remanding children under sections 250 and 265 of the Criminal Procedure & Evidence Code (CP&EC), and (5) using Warrants of Commitment under section 329 of the CP&EC in cases involving children.

RULING
Kalembera, J
The Court ruled that it was improper to detain children at Bvumbwe and Kachere Prisons. Kalembera, J held that, under section 42(2)(g) of the Malawi Constitution and section 95 of the Child Care, Protection and Justice Act, a child may only be detained before a finding of responsibility in exceptional circumstances. Even then, a child may only be incarcerated in a safety home or a reformatory centre. No child may be detained in a prison, even after a finding of responsibility is made against them.

The Court next noted that Second and Third Grade Magistrates cannot preside over a child justice court unless so designated by the Chief Justice through a notice published in the Gazette. Consequently, the Court held that any orders issued by a Second or Third Grade Magistrate purportedly presiding over child justice courts must be set aside, and children affected by this order must be retried before a properly constituted child justice court within 30 days.
Finally, the Court held that it is inappropriate to use sections 250 and 267 of the CP&EC for children because children may not be detained in prison. Likewise, the Court held that it is inappropriate to use Warrants of Commitment under section 329 of the CP&EC because that section uses the words “convicted” and “sentenced,” but children may never be “convicted” of an offence. The Court ordered that all children detained at Bvumbwe and Kachere Prisons be transferred to a safety home or a reformatory centre within 30 days, depending on whether they were subject to a finding of liability.
Attorney General & Others v Tapela & Others, Court of Appeal, Botswana (2015)

Places of Detention

Detention  Citizenship  Right to Life

Attorney General & Others v Tapela & Others 2015 All Bots 196 (CA) (26 August 2015).
FACTS
In 2004, Botswana's Secretary of Health circulated an internal directive to public medical facilities informing them of a Presidential Directive. HIV-positive Zimbabwean prisoners filed lawsuits challenging the lawfulness of the directive that Anti-Retroviral Treatment (ART) should not be provided free of charge to foreign prisoners who are HIV positive, even though such drugs were provided to citizen prisoners. They argued that the refusal to provide ART contravened the National Policy on HIV and AIDS, the Government’s duty to provide basic health care to prisoners, and that it violated the rights to life and non-discrimination and constituted inhuman and degrading treatment. The High Court found that denying the Respondents treatment violated their fundamental rights and consequently set aside the directive and declared it invalid. The Attorney General appealed.

RULING
Kirby, JP; Foxcroft, JA; Lesetedi, JA; Gaongalelwe, JA; Hamilton, JA
The Court held that prisoners are entitled to enjoy the residuum of their constitutional and human rights, subject only to the lawful derogations permitted by the Constitution.

Under the terms of the Prisons Act, imprisonment equalises all inmates, regardless of their status or place of origin. The Court noted that neither citizenship nor place of origin were mentioned anywhere in the Act and concluded that discrimination on those grounds was not permitted by the statute.

The Court then looked to the common law, the Prisons Act, and Government Regulations to support its conclusion that there is no permissible discrimination between prisoners and that prisoners are entitled to basic health care.
Moreover, it found that prisoners are entitled to services, including clothing, bedding, food, and medical treatments, free of charge under Botswana law. The Court thus held that all qualified prisoners in Botswana are entitled to enrol in ART as part of their statutory and common law right to adequate medical treatment.

The Court next held that the Government’s policy of denying ART to foreign prisoners was clearly discriminatory contrary to section 15(2) of the Botswana Constitution. The Court noted that section 15(4)(b), which permits discrimination against foreign nationals in certain circumstances, applies only to laws and does not excuse discrimination in the performance of public functions. The Court concluded that the discrimination in question was not authorised by law but was merely the result of public officers acting in their official duties. Thus, it held that section 15(4)(b) did not apply to the Government policy of denying enrolment in ART to foreign prisoners, and the issue of whether the discrimination was reasonably justifiable in a democratic society did not arise.

The Court held that the government’s refusal to provide ART to non-citizens, as it does for citizens, was a breach of its duty to provide adequate health care services to all prisoners.
Masangano v Attorney General & Others, High Court, Malawi (2009)

Places of Detention

FACTS
In 2007, Masagano was serving a prison term in a Malawi prison. He alleged that the conditions of the institution violated Malawi’s Constitution by subjecting the prisoners to acts of torture, inhumane punishment, and degrading treatment. Masagano alleged that prisoners’ basic rights as humans enshrined in the Constitution were violated because the prison administration did not provide sufficient food, harassed the prisoners regularly, and denied them medical attention and the ability to communicate with people outside the prison freely.

RULING
Mzikamanda, J; Chinangwa, J; Chombo, J
The High Court first noted that the overcrowding in Malawi prisoners facilitated the spread of diseases and led to unbearable sleeping conditions. When considering the cumulative impacts of the poor ventilation and lack of access to fresh air in the prisons, the Court held that this overcrowding amounted to inhuman and degrading treatment in violation of section 19 of the Malawi Constitution.

The Court next analysed rights afforded to inmates by the Prison Act, concluding that the Act provides prisoners with the right to food, clothing, and a cell that falls within the boundaries of that Act. The Court thus ordered the prison administration to initiate a process to reduce overcrowding in prisons and comply with obligations towards prisoners laid out in the Prison Act. It further requested that the Malawí Parliament provide the necessary funding to prison administrations to enable them to comply with the Prison Act.
Mwanza & Another v Attorney General, Supreme Court, Zambia (2019)

Places of Detention

Detention  Access to Medicines  Right to Life

Right to Health

FACTS
Petitioners were two HIV-positive prisoners serving sentences in Lusaka who were undergoing Anti-Retroviral Treatment (ART). Petitioners argued that the State's failure to provide them with sufficiently balanced diets violated their right to life under section 12 of the Constitution of Zambia, Zambian statutory law on prisons, the right to food under article 11 of the International Covenant on Economic, Social and Cultural Rights, and the right to medical and health facilities under section 112(d) of the Constitution. Petitioners further asserted that the prison had violated their right to life by failing to provide them with access to their ART consistently.

Finally, Petitioners argued that the overcrowded conditions in the prison did not provide a sufficiently healthy environment, in violation of the prohibition against torture and inhuman and degrading treatment under section 15 of the Constitution. The High Court found that the intermittent administration of ART had been resolved by establishing a new clinic, and ruled that Petitioners' claims under section 112(d) were not justiciable. Despite finding that the overcrowded conditions and the food provided to prisoners indeed violated Zambian law and the Petitioners' rights, the judge did not grant relief or make a formal pronouncement regarding the violations that had been proved. The Petitioners appealed.

RULING
Malila, JS; Mambilima, CJ; Kajimanga, JS
The Supreme Court of Zambia cited jurisprudence from Indian courts to justify its ruling extending the right to life to include the right to health. It likewise extended the right to include the right to access adequate nutrition, including special dietary needs to prisoners taking anti-retroviral medication.
The Court began by addressing the justiciability of the Petitioners’ claims. Malila, JS, writing for the Court, held that the High Court erred in holding that the Petitioners’ claims concerning access to a balanced diet and the provision of a healthy environment were not justiciable. By extension, the Court also held that the High Court erred by failing to grant relief to the Petitioners for their claims concerning the inhuman and degrading treatment arising from overcrowding and unsanitary conditions since the claims were justiciable.

Next, the Court considered whether the Petitioners were entitled to access to balanced diets. The Court concluded that, by failing to provide the Petitioners with a balanced diet as prescribed in the Prisons Rules, the State failed to observe its own enacted legislation. It also found that the State was obligated to provide preferential consideration to prisoners with special dietary needs in furtherance of their right to life under section 12 of the Zambian Constitution. The Court thus held that the State was in continuing violation of the Petitioners’ constitutional right to life.

The Court also held that the State was in continuing violation of the Petitioners’ right against inhuman and degrading treatment and right to life under section 15 of the Constitution.

“We order the State to increase the allocation of resources to Lusaka Central Prison for purposes of improving the dietary needs of prisoners, special attention being paid to HIV positive prisoners on ART, and ensure that the dietary needs of the inmates comply with the prescriptions in the Prison Rules. A report ... shall be submitted to the session judge at the opening of every session at Lusaka.” (para 16.8)
“We direct and order the State to immediately take measures to decongest the Lusaka Central Correctional facility and to render a report to the session judge at all subsequent opening days of the Lusaka Session of the High Court on the measures taken to decongest the facility so as to make it humane.” (para 16.7)
September v Subramoney N.O. & Others, Equality Court, South Africa (2019)

Places of Detention

Detention  Freedom of Expression  Gender Identity

Right to Dignity

FACTS
An incarcerated transgender woman sought relief in the Equality Court alleging violations of the Equality Act for discrimination and harassment. Upon her conviction for various crimes, she was initially allowed to express her gender identity freely through wearing feminine clothing and having a feminine hairstyle. However, upon her transfer to a separate prison, the prison administration did not allow her to express her gender identity in various ways and further discriminated against her.

RULING
Fortuin, J
The Equality Court stated that the infringement of the right to freedom of expression is particularly severe when it is connected to another constitutional right such as the right to freedom of culture or religion. In this case, it was linked to the rights to dignity and equality. The Applicant’s choice of clothing was not merely an expression of taste or fashion, but the expression of her basic gender identity.

Further, wearing certain clothes, applying make-up, and fashioning one’s hair in particular ways - as the Applicant sought to do - are all sorts of expressions. To deny someone the opportunity or ability to express themselves as such limits their rights. The Respondents’ conduct limited her right to freedom of expression.

The Respondents were directed to take reasonable steps to give effect to the Applicant’s constitutional rights by, among others, respecting the Applicant’s pronouns, allowing the Applicant to use make-up and jewellery, allowing the Applicant to wear long hair, and introducing transgender sensitivity training.
Minister of Safety & Security & Others v Kennedy & Another, Supreme Court, Namibia (2020)

Places of Detention

Detention  Law Enforcement  Right to Fair Trial

FACTS
The Namibian Government (Appellant) sought to reverse a High Court’s orders favouring inmates at a correctional facility. An Appellant inmate cross-appealed, challenging various practices, including handcuffing, solitary confinement, and denial of contact visits.

The government’s appeal lapsed due to procedural errors, prompting a condonation application two years later, blaming their legal representative for the breach of court rules.

RULING
Damaseb, DCJ; Hoff, JA; Frank, AJA
Regarding the appeal, the Court dismissed the Government’s condonation application due to lack of promptitude but allowed them to argue against the cross-appeal.

Regarding the cross-appeal, the Court found the definition of “offender” in the Correctional Service Act violated the presumption of innocence by attributing to a person who is only suspected of an offence and yet to stand trial, a connotation that he or she had already been judged guilty. The Court thus held that the definition of “offender,” in so far as it includes persons awaiting trial, was inconsistent with sections 8, 10, and 12(d) of the Namibian Constitution, and struck it down.

The Court next addressed the question of whether authorities were permitted to handcuff inmates while transporting them in police vans. The government asserted that the practice was designed to prevent physical harm to an inmate while in vehicles that lacked safety features. The Court found that the practice of handcuffing inmates in a van without safety features while the vehicle was moving was inconsistent with article 8(2)(b) of the Namibian Constitution.
The Court then addressed the challenged policy of denying contact visits to inmates awaiting trial. The Court accepted that there may be perfectly rational reasons, linked to a legitimate governmental objective, for why contact visits may not be allowed to an inmate. It noted that the desirability of visits must be weighed against the real danger of possible interference with witnesses and tampering with evidence. Nevertheless, the Court emphasised that public interest cannot be subordinated to the equally important presumption of innocence. On the contrary, the Court concluded that the public interest in the integrity of criminal investigations is just as important as the interest in ensuring that a person who has not yet been convicted is treated in a manner befitting that status. Thus, the Court held that the blanket, non-discretionary adoption by the Correctional Service of the Police’s policy of not allowing contact visits to inmates awaiting trial inmates was inconsistent with sections 8 and 12 of the Namibian Constitution. The Court further held that the policy was inconsistent with the discretion granted to corrections officers by statutory law.

Finally, the Court addressed the lawfulness of the challenged scheme for solitary confinement. Specifically, the Appellant inmate challenged the prison’s procedure because it did not afford an inmate the opportunity to make representations to end their solitary confinement, nor did it provide for any independent review mechanism. The Court accepted that there might be some instances where solitary confinement of inmates awaiting trial might be justified, such as to protect one or more inmates after a prison gang fight. Nevertheless, the Court concluded that there was no conceivable reason why an inmate should be afforded the opportunity to make representations to terminate their solitary confinement. The Court held that the challenged scheme unduly perpetuated the deprivation of an inmate’s meaningful human contact with others. It ruled that the procedure was inconsistent with sections 7 and 11 of the Namibian Constitution.
Sonke Gender Justice NPC v President of the Republic of South Africa & Others, Constitutional Court, South Africa (2020)

Places of Detention

Detention

Governmental Obligations

FACTS
Sonke Gender Justice NPC (Sonke) sought to invalidate sections of the Correctional Services Act 111 of 1998 (CSA) on the grounds that it failed to properly provide independence to the government body designed to ensure that the correctional system meets its constitutional obligations to detained persons. Sonke stated that sections 88A(1)(b) and 91 of the CSA put the budget of the Judicial Inspectorate under supervision by the Department of Corrections. Sonke argued that the placement of the budget of the oversight body into the hands of the Department of Corrections—i.e. the department the oversight board is tasked with overseeing—constitutes a lack of financial independence.

RULING
Theron, J
The Court held that the State has a constitutional obligation to create an oversight department for purposes of monitoring the country’s corrections system.

The Judicial Inspectorate could not fulfil its constitutional obligations because it is not sufficiently independent from the Department of Correctional Services due to sections 88(A)(1)(b) and 91 of the Corrections Act. Sections 88A(1)(b) and 91 of the Correctional Services Act structure the Judicial Inspectorate such that its budget is subject to the discretion of the Department and that the CEO of the Judicial Inspectorate is answerable to the National Commissioner of the South African Police Service (Commissioner).

Section 88A(4), which refers matters of misconduct by the CEO of the Judicial Inspectorate to the Commissioner, is constitutional because the mechanism for referral is itself independent since referrals begin with the Inspecting Judge.
State v Makwanyane & Another, Constitutional Court, South Africa (1995)

FACTS
In 1995, two Defendants convicted and sentenced to death in South Africa before the passage of the 1993 interim South African Constitution sought clarity as to whether the death penalty sentence was constitutional under the 1993 Constitution.

RULING
Chaskalson, P; Ackermann, J; Didcott, J; Kentridge, AJ; Kriegler, J; Langa, J; Madala, J; Mahomed, J; Makgoro, J; O'Regan, J; Sachs, J
The Court ruled that the intent of the framers when creating the constitutional right to life included the prohibition on the death penalty, reasoning that retribution cannot be accorded the same weight under the new South African Constitution as the rights to life and dignity, which are the most important of all the rights. It had not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment.

Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the Court held that the clear and convincing case, which is required to justify the death sentence as a penalty for murder, had not been made out.
Kadumbagula & Magunga v Tanzania, African Court on Human & Peoples’ Rights (2024)

Sentencing

Sentencing  Children  Detention

FACTS
Kadumbagula and Magunga are Tanzanian nationals who were convicted of gang rape and sentenced to life imprisonment which they were serving at Uyui Central Prison at the time of filing the Application. In the Application before the Court, the Applicants alleged that the Respondent State violated their rights under articles 7(1)(c) of the African Charter on Human and Peoples' Rights (the African Charter). The Second Applicant alleged that the Respondent State additionally violated his right under article 7(2) of the African Charter. The First Applicant's case was dismissed on procedural grounds.

The Second Applicant alleged that the Respondent State violated his right to a fair trial by (i) failing to provide him with legal representation and (ii) imposing a sentence of life imprisonment against him when a more lenient sentence for his offence had been prescribed under an amended domestic Penal Code.

RULING
Sacko, VP; Kioko, J; Ben Achour, J; Mengue; Chizumila, J; Bensaoula, J; Tichikaya, J; Anukam, J; Ntsebeza, J; Adjei, J

The Court found that the Second Applicant was a minor at the time the offence was committed and that he was never informed of his right to legal assistance in domestic proceedings despite being charged with a grave offence that carried a heavy sentence.

The Court found that the Respondent State violated article 7(1)(c) of the African Charter, read together with article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), by failing to inform the Second Applicant of his right to legal representation and providing same free of charge for his serious criminal proceedings.
The Court then considered the Second Applicant’s allegation that minors who commit gang rape are sentenced to corporal punishment under the Respondent State’s revised Penal Code, but he was sentenced to life imprisonment given the Respondent State’s Interpretation of Laws Act, which prohibited retrospective application of the revised Penal Code. In making its determination, the Court considered that while the retrospective application of lenient penalties was not expressly stated in article 7(2) of the African Charter, it was provided under article 15(1) of the ICCPR to which the Respondent State was a party. As such, the Court held that retrospective application of more lenient sentences was part of an emerging consensus in international law and found that the Respondent State violated the Second Applicant’s right to benefit from a more lenient sentence in terms of article 15(1) of the ICCPR. The Court further found that the inclusion of corporal punishment for minors violated article 5 of the Charter as it constituted inherently inhuman and degrading punishment.

The Court also held that the Second Applicant, as a minor, was entitled to treatment which was aimed at his reformation and reintegration into society in terms of article 17(3) of the African Charter on the Rights and Welfare of the Child and article 40(1) of the United Nations Convention on the Rights of the Child both of which have been ratified by the Respondent State. The Court consequently held that the imposition of a life sentence on the Second Applicant constituted a violation of the aforementioned provisions.
State v Madhinha, High Court, South Africa (2018)

State v Madhinha (Review No. 18617) [2018] ZAWCHC 172 (7 December 2018).
FACTS
In 2010, a physical dispute between two informal traders resulted in Respondent’s subsequent arrest and assault charge. After the Respondent was placed in custody, the police issued a notice permitting the Respondent to pay a 500 Rand fee, appear in Court, and admit his guilt in exchange for his release, a mechanism often provided for trivial offences. The issue is whether the Respondent had a criminal record after paying his ‘admission of guilt’ fine. In 2018, when the Respondent later required a police clearance certificate for a job application, the police refused to issue a certificate because of his 2010 admission of guilt. The Respondent brought the matter to court, applying to have his 2010 conviction and sentencing set aside.

RULING
Thulare, AJ, Dolamo, J
The Court held that the 2010 conviction and sentence were not valid. Firstly, the Court noted that the Respondent had not been informed of his rights while in custody, and he believed the only way to be released from custody was to pay the fine. Furthermore, the type of admission of guilt that the Respondent made was not a verdict or pronouncement by the Court. It was only entered into the admission of guilt register, which is temporary and destroyed after one year, rather than the criminal record book used for criminal matters heard in court.

Given that the fee payment was sufficient to settle the matter before a trial proceeded, the Court determined that the conviction was invalid.
Damian v Tanzania, African Court on Human & Peoples’ Rights (2024)

Sentencing

FACTS
At the time of filing the Application, the Applicant was awaiting the execution of a death sentence at Butimba Central Prison, having been convicted of the offence of murder. In the Application before the Court, he alleged that the Respondent State violated his rights under articles 4, 5, 7(1)(c) and 7(1)(d) of the African Charter on Human and Peoples’ Rights (the African Charter) as a result of the criminal proceedings before domestic courts.

RULING
Tchikaya, J; Ntsebeza, J
The African Court on Human and Peoples’ Rights began by considering the issue of the Applicant's right to a fair trial. Tchikaya, J, writing for the Court, found that the Applicant's trial had been conducted in reasonable manner. The Court thus dismissed the allegation that the Respondent State violated the Applicant's right to a fair trial.

Next, the Court considered the Applicant's right to life. The Court relied on its now established caselaw that the right to life is breached under article 4 of the African Charter in instances where the judicial officer is deprived of the discretion to decide on any other penalty than the death sentence once the offence of murder is established. The Court noted that Tanzanian authorities had imposed a mandatory death sentence under section 197 of Tanzania’s Penal Code. Consequently, the Court held that the Applicant's right to life under article 4 of the Charter had been violated, as a mandatory death sentence automatically constitutes an arbitrary deprivation of the right to life.
The Court then emphasised that hanging as a method of implementing the death penalty constitutes a violation of the right to dignity under article 5 of the African Charter, as it constitutes a form of torture and cruel, inhuman and degrading treatment.

The Court thus ordered that the Respondent State remove the mandatory death penalty from its statute book within six months of the notification of the judgment.
Zabron v Tanzania, African Court on Human & Peoples’ Rights (2024)

Sentencing

Sentencing  Detention  Right to Fair Trial

FACTS
The Applicant is a national of the Republic of Burundi who was residing in Tanzania (the Respondent State). At the time of filing the Application, he was awaiting execution of the death sentence at Butimba Central Prison in Mwanza, having been convicted of the offence of murder. However, at the time of the ruling, the Applicant had had his sentence commuted to life imprisonment. In his Application, the Applicant alleged that the Respondent State violated (i) his right to a fair trial, (ii) his right to life, and (iii) his right to respect for his dignity.

RULING
Tchikaya, J; Ntsebeza, J
The African Court on Human and Peoples’ Rights began by addressing the issue of whether the Applicant was prejudiced by the lapse of time between arrest and trial. Tchikaya, J, writing for the Court, found that the Applicant’s case was not complex and had relied on witness testimony. Consequently, the lapse of time of seven years, ten months and twenty-nine days constituted an unduly prolonged period that violated the Applicant’s right to be tried within a reasonable time under article 7(1)(d) of the African Charter on Human and People’s Rights (African Charter).

The Court then considered the issue of the Applicant’s right to life. The Court reiterated its now-established caselaw that the right to life is breached under article 4 of the African Charter in instances where the judicial officer is deprived of the discretion to decide on any other penalty than the death sentence once the offence of murder is established. The Court noted that, in the present case, Tanzanian officials had imposed a mandatory death sentence under section 197 of Tanzania’s Penal Code, which constitutes an arbitrary deprivation of the right to life. The Court held that the Respondent State had violated the Applicant’s right to life under article 4 of the Charter.
In relation to the third alleged violation of the right to dignity under article 5 of the African Charter, the Court noted that the Applicant was sentenced to death by hanging and reiterated its previous jurisprudence establishing that hanging as a method of execution constitutes a form of torture and cruel, inhuman and degrading treatment. The Court also restated that holding the Applicant prisoner on death row for more than three years constituted cruel, inhuman or degrading treatment. Consequently, the Court held that the prolonged waiting period and the proposed method of execution both violated article 5 of the African Charter.
Attorney General v Rammoge & Others, Court of Appeal, Botswana (2016)

Freedom of Association

Freedom of Association  Discrimination  Right to Dignity

Attorney General v Rammoge & Others 2016 All Bots 165 (CA) (16 March 2016).
FACTS
The civil society group, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) sought to register as a society under the Societies Act. The Act requires all societies apply for registration within 28 days of their formation.

In March 2012, the Director of the Department of Civil and National Registration refused LEGABIBO’s application on the basis of section 7(2)(e) of the Societies Act, which permits the director to refuse to register a society “where it appears to him that any of the objects of the society is, or is likely to be used for any unlawful purpose or any purpose prejudicial or incompatible with peace, welfare, or good order in Botswana.” The objectives of LEGABIBO are to promote the health and welfare of lesbian, gay and bisexual individuals in Botswana and to lobby for the decriminalisation of same-sex relationships in the country. Same-sex sexual conduct is criminalised in Botswana.

Twenty Respondents petitioned Botswana’s High Court to challenge the decision of Botswana’s Government to refuse to register LEGABIBO as a legitimate organisation on the basis that it violated the following rights guaranteed under Botswana’s Constitution: equal protection under section 3, freedom of expression under section 12, freedom of association and assembly under section 13. Additionally, Respondents stated that the decision unconstitutionally discriminates based on sexual orientation in violation of section 15 of Botswana’s Constitution.

The High Court held for the Petitioners, and the Attorney General of Botswana appealed to the Court of Appeal.
RULING
Kirby, JP; Howie, JA; Lesetedi, JA; Gaongalelwe, JA; Lord Hamilton, JA

There was no reference to public morality in the Societies Act, even though both parties had referred to public morality in their arguments. The Court reasoned that any reliance on issues of “public morality” by the Minister would not be a valid exercise of discretion.

The Court held that the objectives of LEGABIBO were not to pursue unlawful activity, instead characterising its objectives as advancing the interests of gay, lesbian and trans-sexual persons in Botswana and generally to educate the public on human rights aspects of sexual orientation.

The Court stated that advocating for legal change is the democratic right of every citizen, and concluded that the Minister’s decision interferes in the most fundamental way with the Respondents’ right to form an association to protect and promote their interests.

Accordingly, the Court held that the Minister’s decision was unconstitutional and ordered the Registrar of Societies to register LEGABIBO.
Non-Governmental Organisations Co-ordination Board v Gitari & 4 Others, Supreme Court, Kenya (2023)

Freedom of Association

Freedom of Association  Discrimination  Right to Dignity

FACTS
The Petitioner attempted to register a non-governmental organisation (NGO) seeking to advance human rights in Kenya, with a focus on addressing the violence, discrimination, and other human rights violations regularly perpetrated against the LGBTIQ+ community. The Petitioner approached the NGO Co-ordination Board—the government entity tasked with coordinating and regulating NGO activity in Kenya—seeking to reserve the names Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy, and Gay and Lesbian Human Rights Organisation. The Board rejected the application because the proposed names included references to gay and lesbian people. After multiple unsuccessful attempts to revise the name, Gitari filed suit against the Board for declaratory relief, arguing that the failure to recognise the NGO was a violation of the constitutionally guaranteed right to assemble and the prohibition against discrimination. The Petitioners also requested an order of mandamus to force the Board to register the NGO.

The High Court ruled in favour of the Petitioner, declaring that section 36 of the Constitution applies to all persons in Kenya regardless of their sexual orientation and holding that NGO Co-ordination Board had violated the Petitioners’ right to form an association by “failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.”¹ The Board appealed, but the High Court’s holdings were affirmed by the Court of Appeal.

The Board thus appealed to the Supreme Court. The Appellant cited sections of Kenya's Penal Code criminalising homosexual liaisons and argued that the Court of Appeal did not apply appropriate limits to the Constitution by misconstruing the right of freedom of association as an absolute right to associate under any label and pursue any activity, objective, or policy.

**RULING**

*Mwilu, DCJ; Wanjala, J; Ndungu, J; Ibrahim, J; Ouko, J*

The Supreme Court began by considering whether the petition was properly within the Court’s jurisdiction, noting that the initial petition concerned whether and how the Constitution applied to LGBTIQ+ organisations. Given that the inquiry related to the interpretation of the Kenyan Constitution, the Court held that the petition was properly within the jurisdiction of the Kenyan judiciary.

Next, the Court noted that NGOs are defined as persons within the Kenyan Constitution and concluded that the NGO in this case was entitled to enjoy constitutionally guaranteed fundamental rights. Accordingly, the Court held that the Respondent’s NGO was guaranteed the right to freedom of association. The Court further concluded that, regardless of the reasoning behind the rejection, rejecting the name in this context was equivalent to rejecting the NGO as a whole, which was on its face a violation of the freedom of association. By extension, the Court held that the Appellant NGO Coordination Board denied the Respondent’s constitutional right to freedom of association by refusing to register any of the proposed names. The only remaining question was whether the Board’s decision was a lawful limitation.

The Court then considered the Appellant’s claim that the limitation was justified by other laws prohibiting certain homosexual liaisons.
Under section 24 of the Kenyan Constitution, freedoms guaranteed, such as the freedom of association, can only be limited if it is reasonable and justifiable in a “democratic society based on human dignity, equality and freedom.” It concluded that, while there are laws prohibiting homosexual activity in Kenya, those laws do not affect the fundamental right to association. Rather, the Court stressed that the right to freely associate cannot be applied in such a way as to prejudice any group, regardless of how anyone views their opinions. Only if the NGO had been acting illegally could the Board have restricted its right to form an association. The Court held that the Board’s limitation of the Petitioner’s freedom of association was not proportional to the aim sought and was both unreasonable and unjustified. It thus affirmed the High Court’s rulings that the Board had violated the Petitioner’s constitutional right to freedom of association.

Finally, the Court considered whether the Board had violated the prohibition against discrimination. It found that the Board had relied on moral and religious grounds in deciding not to register the NGO. In the Court’s view, that decision was tantamount to the exact discrimination that is banned under section 27 of the Constitution.

The Court reaffirmed that the Constitution does not cease to apply just because a particular group may be seen as undesirable or unpopular. Rather, section 27 guarantees that all individuals are equal before the law. Consequently, the Court held that the Board had violated the constitutional principles of non-discrimination by making a discriminatory decision based on sexual orientation when denying the Respondent’s attempts to register an NGO with an explicit focus on LGBTIQ+ advocacy.
Simelane N.O. & Others v Minister of Commerce Industry & Trade & Others, Supreme Court, Eswatini (2023)

Freedom of Association

Simelane N.O. & Others v Minister of Commerce Industry & Trade & Others (Civil Case 34 of 2022) [2023] SZSC 23 (16 June 2023).
FACTS
The Registrar of Companies refused to register Eswatini Sexual & Gender Minorities (ESGM) as a company. Simelane, as director of ESGM, sought relief in Eswatini’s High Court. ESGM stated that the government’s refusal to register their company amounted to constitutional violations of their right to freedom of association, assembly, and expression, and their rights to dignity and privacy as guaranteed in Eswatini’s Constitution. The High Court ruled in the Petitioners’ favour, holding that the decision to not register ESGM was ultra vires the Companies Act because it was reached in a grossly irregular manner that lacked legal merit or basis.

RULING
S.P. Dlamini, JA; M.J. Dlamini, JA; Maphalala, JA; Cloete, AJA; Simelane, AJA
The Supreme Court declared that the Registrar's refusal to register ESGM was null and void because the procedure to reach the decision involved the Registrar seeking guidance from parties outside the legally mandated scope of his job, which violated the right to fair treatment under section 33 of the Eswatini Constitution.

The Court referred ESGM’s application to the Minister of Commerce, to be reviewed as if it was a new application. The Court declined to address the constitutional issues related to freedom of association, assembly, expression, dignity or privacy.
Peta v Minister of Law, Constitutional Affairs and Human Rights, Constitutional Court, Lesotho (2018)

Freedom of Expression & Press Freedom

Press Freedom  Freedom of Expression

FACTS
The owner of the Lesotho Times was charged with criminal defamation following the publication of a satirical article detailing the influence of Lesotho Defence Force commander Tlali Kamoli. The article showcased how Kamoli made absurd requests to Lesotho’s ministers. Upon being charged with criminal defamation, the publisher appealed to the Constitutional Court of Lesotho, petitioning the Court to find the criminal defamation charges inconsistent with the right to freedom of expression protected in the Constitution.

RULING
Mokhesi, AJ; Mahase, J; Moiloa, J
The Court ruled that the charges of criminal defamation are inconsistent with the Constitution and should be struck down on the grounds of vagueness, over breadth, and disproportionality.

The act criminalising defamation leaves an exception for published matters intended for the public benefit, but the act does not define “public benefit” such that any published matters could be characterised as not for the public benefit.

In criminalising satire, extending unlimited defamatory protection to dead persons, and allowing for defamation prosecution regardless of whether the publication reached anyone except the targeted person, the criminal defamation offences were overly broad.

Choosing criminal sanctions for defamation over civil remedies has the potential to cause self-censoring, which results in a chilling effect on free expression and press.
Media Council of Tanzania & Others v Tanzania, East African Court of Justice (2019)

Freedom of Expression & Press Freedom

Freedom of Expression  Access to Information  Press Freedom

Media Council of Tanzania & Others v Tanzania (Reference No. 2 of 2017) East African Court of Justice (28 March 2019).
FACTS
In 2016, the Republic of Tanzania passed the Media Services Act, which required government-approved accreditations for journalists via an approved board, criminalised the publication of false news, and gave the Government absolute power to sanction or prohibit media content. Applicants representing NGOs in Tanzania filed suit against the Republic of Tanzania in the East African Court of Justice under the rules outlined in the Treaty for the Establishment of the East African Community (Treaty). Applicants alleged that the Media Services Act violated articles of the Treaty related to the freedom of expression and access to information.

RULING
Mugenyi, PJ; Ntezilyayo, DPJ; Jundu, J; Ngiye, J; Nyachae, J
The Court used a three-part test to determine whether the Media Services Act violated Tanzania’s rights under the Treaty. The test involved determining whether the Act (1) meets a threshold for statutory clarity and specificity, (2) involves an important social objective, and (3) is enforced proportionately. The Court held that the language of the Act was overly broad and imprecise, and failed the three-part test.

Sections 19, 20, and 21 relating to the journalist accreditation system violated the Treaty, as the definition of the term ‘journalist’ in section 19 is too broad, and it was also not clear what legitimate aim the accreditation requirement pursued.

Sections 35-40, 50, and 54 of the Act dealing with criminal offences for defamation and media services also violated the Treaty as they were broad in scope and without a clear aim and imposed disproportionate penalties.
Mwenda & Another v Attorney General, Constitutional Court, Uganda (2010)

Freedom of Expression & Press Freedom

Press Freedom

Freedom of Expression

FACTS
Mwenda, a political journalist in Uganda, was charged with sedition and promotion of sectarianism due to statements made during his live talk show which criticised President Museveni and alleged that government mismanagement led to the death of Lt. General John Garanga. Mwenda and an NGO, petitioned Uganda’s Constitutional Court to render the offences null and void on the grounds that they are inconsistent with the constitutional right to freedom of the press and expression. Uganda argued that the offences are well within the constitutionally allowed limits on rights.

RULING
Mukasa-Kikonyogo, DCJ; Byamugisha, JA; Kavuma, JA; Nshimye, JA; Engwau, JA
The Court held that the sedition offence is unconstitutional because it violates the right to freedom of speech and press on the grounds that the offence defines sedition in such a vague manner such that any speech could be deemed seditious.
Qwelane v South African Human Rights Commission & Another, Constitutional Court, South Africa (2021)

Freedom of Expression & Press Freedom

Freedom of Expression  Discrimination  Limitation of Rights

FACTS
Qwelane published a homophobic article in one of South Africa’s larger newspapers. Consequently, the South African Human Rights Commission (SAHRC) filed proceedings against Qwelane on the grounds that the article constituted hate speech and violated provisions of South Africa’s Equality Act. Qwelane argued that section 10(1) of the Equality Act, which dealt with the publication of harmful material, unconstitutionally vague and overbroad.

RULING
Majiedt, J; Khampepe, J; Madlanga, J; Mathopo, AJ; Mhlantla, J; Theron, J; Tshiqi, J; Victor, AJ
The Court held that section 10(1) of the Equality Act is unconstitutionally vague for its inclusion of the word hurtful since anything deemed hurtful could be seen as hate speech, resulting in a chilling effect on freedom of expression.

The Court then moved to the issue of whether Qwelane’s comments constituted hate speech in light of the unconstitutionality of section 10 of the Equality Act. In the context of hate speech, what must objectively be determined is whether Qwelane’s article could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

The Court held that the likelihood of the infliction of harm and the propagation of hatred is beyond doubt. Reasoning that it was difficult to conceive of a more egregious assault on the dignity of LGBTIQ+ persons, their dignity as human beings deserving of equal treatment was catastrophically denigrated by a respected journalist in a widely read article.

The Court ruled that there can be no question that Qwelane’s statements constituted hate speech. However, as Qwelane was deceased, this was limited to a declaratory judgement.
Katiba Institute & 8 Others v Director of Public Prosecutions & 2 Others, High Court, Kenya (2024)

Freedom of Expression & Press Freedom

Freedom of Expression
Limitation of Rights
Law Enforcement

FACTS
Petitioners challenged the constitutionality of the “subversion” offence, alleging that the vagueness of the offence unlawfully limits the right to freedom of expression. The challenge follows a case in which a party was arrested and charged with subversion over a social media post which stated that the Kenyan army would take control of the Government for 90 days, after which elections would follow.

RULING
Mohochi, J
The High Court held that the offence of ‘subversion’ is unconstitutional because it unlawfully violates the right to freedom of expression by criminalising subversive speech without clearly defining the necessary intention.

The Court accepted that the right to freedom of expression was not unlimited. Nonetheless, the Court stated that the section of the Penal Code criminalising speech or actions deemed subversive was an unreasonable limit to the right to freedom of expression.
Association des Blogueurs de Guinee v Guinea, Court of Justice of the Economic Community of West African States (2023)

Freedom of Expression & Press Freedom

Access to Information

Freedom of Expression

Association des Blogueurs de Guinee v Guinea, Case No. ECW/CCJ/JUD/38/23, Community Court of Justice, ECOWAS (21 October 2023).
FACTS
Applicants were NGOs registered under Guinean laws. They petitioned the ECOWAS Community Court of Justice, alleging that the Guinean government had violated people's right to information and freedom of expression when it suspended internet services and Facebook throughout the country during and after the 2020 presidential elections. Applicants claimed the restriction violated article 19(3) of the International Covenant on Civil and Political Rights and article 27 of the African Charter on Human and People’s Rights.

RULING
Ouattara, J
The Court held that Guinea violated the Applicants’ right to information by interrupting access to the internet and social media as the State did not demonstrate that the disruption to telecommunications services was justified.

The challenged restrictions on access to the internet were not prescribed by law, nor did the State specify the objective it wished to achieve. Even if Guinea had been pursuing a legitimate objective, restricting access to the internet would remain a disproportionate means because it made communication almost impossible. Thus, the restriction violated the Applicants’ right to freedom of expression.
Baby ‘A’ & Another v Attorney General & 6 Others, High Court, Kenya (2014)

Refugees, Immigration & Citizenship

Citizenship  Intersex  Children

 discrimination

Baby ‘A’ (Suing through the Mother E A) & Another v Attorney General & 6 Others (Petition No. 266 of 2013) [2014] eKLR (5 December 2014).
FACTS
Baby A was born intersex, with both male and female genitalia. The hospital marked Baby A’s sex as “?” on the legal paperwork. Under Kenyan Law, the Registrar of Births and Deaths required a determinate sex to issue a birth certificate and the birth certificate form only includes two options for sex—male or female. As a result, Baby A had not been issued a birth certificate. The Petitioners—Baby A, through the mother, and The CRADLE—brought this case to the High Court at Nairobi, claiming that the entry of a question mark in the medical notes denied an intersex child such as Baby A the right to legal recognition and the right to be registered immediately after birth and have a name under article 7 of the CRC. Petitioners requested the Court to order that a third category be added to the birth certificate form for intersex children.

RULING
Lenoala, J
The Court held that Baby A and other intersex children were entitled to all rights enshrined within the Kenyan Constitution, including the right to legal recognition, the right to access health services, and the right to be free from discrimination on the grounds of being intersex. However, Lenoala, J, found that the Petitioners had not introduced any evidence that Baby A or other intersex persons had been subject to any violations of their constitutionally protected rights.

The Court thus implicitly rejected the Petitioners’ assertion that the lack of any category for intersex individuals constitutes per se discrimination. Nevertheless, the Court ordered that Baby A must be registered by the Registrar of Births and Deaths.
The Court further concluded that the Court was not empowered to add a third sex to the birth certificate form via judicial ruling but found that the matter ought to be addressed by legislation. To that end, the Court held that it was the duty of the Government to develop a legal framework to govern issues surrounding the rights of intersex children, such as their registration under the Births and Death Registration Act. The Court strongly urged Parliament to consider enacting relevant legislation and to develop guidelines and regulations for corrective surgeries for intersex persons. It ordered the Government to submit a report within 90 days on the status of such a statute, as well as on guidelines and regulations. Finally, the Court ordered the Government to submit a report containing information about which organ, agency or institution was responsible for collecting and keeping data relating to intersex children, in order to facilitate better data collection.
Ex Parte Audrey Mbugua Ithibu, High Court, Kenya (2015)

Refugees, Immigration & Citizenship

Republic v Kenya National Examinations Council (KNEC) & Another; Ex parte Audrey Mbugua Ithibu (JR Case No. 147 of 2013) [2014] eKLR (7 October 2014).
FACTS
Audrey Mbugua was diagnosed and treated for gender identity disorder (GID) and depression sometime in 2008. She then changed her name from Andrew to Audrey. Thereafter, she embarked on the process of changing her particulars on her national identity card, passport and academic papers to reflect her change of gender from male to female. In 2010 and 2011, she enquired from KNEC about the possibility of changing the name and gender of persons diagnosed with GID. KNEC responded that it did not allow gender changes on the certificates once candidates have sat for an examination to deter the forgery of certificates. However, they can consider gender changes for individuals who have undergone or who are undergoing a sex change if the individuals can prove the same.

Subsequently, in 2012, Audrey sought to change her gender and name on the certificates. However, the same was denied by KNEC, claiming that it is the responsibility of the candidates to ensure that entries including names are correct before signing the registration documents. Aggrieved, Audrey filed a Judicial Review for orders to compel KNEC to carry out its statutory mandate and change the particulars on Audrey's Kenya Certificate of Secondary Education.

RULING
Korir, J
The Court dismissed the Council’s concern over its inability to authenticate academic records and that implementing a name change policy would lead to the commission of fraud. The Court was of the opinion that the existing governing rules allow the Council to “verify the information,” even after a candidate's name has been changed. Additionally, the Court found the Council’s limited financial resources argument without merits as Audrey had already expressed her willingness to pay a reasonable fee for the issuance of an amended certificate.
Furthermore, the Court held that Audrey was correct in pointing out that the current governing rules of the Council do not expressly require the gender of candidates to appear on academic certificates or awards.

The Court stressed the importance of respecting and promoting human dignity and issued an order of mandamus, compelling the Kenya National Examinations Council to issue an amended certificate that would replace Audrey’s former name and remove the male designation.
ND v Attorney General & Another, High Court, Botswana (2017)

Refugees, Immigration & Citizenship

- Citizenship
- Gender Identity
- Freedom of Expression
- Discrimination

ND v Attorney General & Another 2018 (2) BLR 223 (HC) (29 September 2017).
FACTS
The Applicant was a transgender man who filed suit against the Registrar of National Registration, challenging its refusal to change the gender on his identity document (Omang) from female to male. The Omang is an essential document required to access any service (e.g., shopping with a credit card, banking) in Botswana. The Applicant argued that the discrepancy between his physical appearance and the gender listed on his Omang put him at a disadvantage and caused him ongoing distress and discomfort. He further argued that the Registrar’s refusal violated his fundamental rights under sections 3, 7, 9, 12, and 15 of the Botswana Constitution. Finally, the Applicant also argued that section 16 of the National Registration Act—which empowers the Registrar to change the particulars of a registered person when these particulars materially affect that person’s registration—should be read generously and purposively to give effect to his constitutional rights.

RULING
Nthomiwa Nthomiwa, J
The High Court began by examining section 17 of the National Registration Act, which empowers the Registrar to change the Omang to reflect changes to a person’s physical appearance. The Court noted that the purpose of this provision is to prevent the likelihood of others questioning someone’s identity as certified by the identity card.

The Registrar had the necessary power to alter the Applicant’s Omang, and the question was whether the refusal to do so fell within the ambit of the Registrar’s reasonable discretion.

The Court next looked to jurisprudence from Malaysia and South Korea concerning the role of medical evidence in cases involving transgendered persons.
The Court held that where doctors have concluded that an Applicant's gender is different from the gender assigned at birth based on a comprehensive consideration of the biological, psychological, and social factors, it is incumbent upon courts to grant appropriate relief.

The Court proceeded to analyse the Applicant's claims concerning the violations of his constitutional rights. Nthomiwa Nthomiwa, J, first noted that the Applicant is protected by the fundamental rights enshrined in the Botswana Constitution. Consequently, the Court held that the refusal to change the Applicant’s gender marker violated his constitutional rights to privacy by forcing the Applicant to disclose his gender identity every time he needs to confirm the information on his Omang or explain why that information does not match with his appearance.

The Court next considered the issue of freedom of expression and gender identity. It held that freedom of expression includes the right to express and define one's own personal identity, including gender identity. By extension, the refusal to change the Applicant’s gender marker violated his right to freedom of expression under section 12 of the Botswana Constitution.

The Court also noted that the above violations were a result of discriminatory treatment related to the Applicant’s gender identity. It thus held that the refusal to change the Applicant’s gender marker violated his right to equal protection of the law under section 3 of the Constitution. By extension, the Court held that the refusal to change the Applicant's gender marker violates his right to freedom from discrimination under sections 3 and 15(2) because his gender identity was “immutable or changeable at unacceptable cost” to his psychological and emotional well-being, and having a female gender marker places him at risk of discriminatory and hostile treatment.
The Court likewise held that the refusal to change the Applicant’s gender marker violates his right to freedom from inhumane and degrading treatment under section 7 of the Constitution because it exposes him to harassment and embarrassment.

Finally, the Court conducted a limitations analysis to determine whether the above violations were permissible limitations to the Applicant’s rights. After considering the Respondent’s argument that gender identity does not suffice to justify altering the sex on the Applicant’s Omang, the Court concluded that the Respondent’s refusal was predicated upon a restrictive interpretation of the Act and that it unreasonably limited the Applicant’s rights.

Nthomiwa Nthomiwa, J, further noted that the Respondents had not provided any evidence to support their allegation that the change of gender markers would compromise the national identification register and national security. Consequently, the Court concluded that the registrar’s refusal to change the Applicant’s gender marker was not a justifiable limitation of his constitutional rights.
Digashu & Another v GRN & Others; Seiler-Lilles & Another v GRN & Others, Supreme Court, Namibia (2023)

Refugees, Immigration & Citizenship

- Immigration
- Citizenship
- Discrimination
- Right to Dignity
- Sexual Orientation

FACTS
In the Digashu matter, the Government denied an application for a work permit following Digashu's disclosure of his marriage to a Namibian citizen, Potgieter. In the Seiler-Lilles matter, Seiler-Lilles was denied a permanent resident permit after moving to Namibia with her wife. In both cases, the couples allege they were denied work and residency permits on the basis of their same-sex marriages. The Ministry of Home Affairs and Immigration argued that the practice was a lawful interpretation of section 2(1)(c) of the Immigration Control Act.

The cases were jointly heard by the Full Bench of the High Court. The Court determined that the Ministry of Home Affairs and Immigration's practice of denying visa applications to applicants engaged in a lawful same-sex marriage concluded outside of Namibia violated the parties' constitutional rights. Nevertheless, it found that it was bound by the doctrine of precedent, which precluded it from granting relief to the Petitioners on constitutional grounds in accordance with the Namibian Supreme Court's ruling in Immigration Selection Board v Frank (Frank). The Petitioners appealed the decision.

RULING
Shivute, CJ & Smuts, JA; Damaseb, DCJ & Hoff, JA (concurring); Mainga, JA (dissenting)
The Supreme Court began by considering the issue of the doctrine of precedent. It held that, under that doctrine, the Constitution required and bound both lower courts and the Supreme Court to adhere to the basis of decision (ratio decidendi) in prior Supreme Court judgments, though they were not bound by obiter dicta ('considered to be said along the wayside'). The Court emphasised that all courts may depart from their own previous decisions only when they are satisfied that those decisions were clearly wrong.
It then held that the portions of the Frank decision cited by the High Court were obiter dicta because they were not necessary to the ultimate ruling in that case. Consequently, the Court held that the lower court erred when it considered those portions of the Frank case binding. The Court also concluded that the facts of the present cases were sufficiently distinct from the facts of the Frank case, as that case had not involved a same-sex marriage but rather a committed long-term relationship. The Court thus held that the High Court was entitled to distinguish the present case from Frank for the purposes of granting relief.

The Court next considered the legality of the Petitioners' marriages. It first acknowledged the well-established common law principle in Namibia recognising valid marriages concluded in a foreign jurisdiction in accordance with the statutory requirements of that State. The Court then applied the principle to recognise the Petitioners' same-sex marriages, which were performed in other countries and legally recognised in the jurisdictions in which they took place.

The Court then examined the constitutionality of the practice of denying visa applications to foreigners in same-sex marriages. Writing for the Court, Shivute, CJ, and Smuts, JA, narrowed the analysis to examine the practice through the lens of the rights to dignity and equality as enshrined in the Namibian Constitution.

The Court first held that, when determining the ambit of the right to dignity, courts should consider constitutional values and the aspiration, norms, expectations, and sensitivities of the Namibian people as expressed in the Constitution. However, the Court was careful to distinguish between constitutional values and the public opinion expressed by elected officials within the Namibian Parliament.
After examining these values, the Court held that the Ministry's practice of excluding persons in same-sex marriages had the effect of infringing both spouses' right to dignity protected under article 8 of the Constitution.

The Court then shifted to examining the issue of the right to equality. It began by affirming that the unfairness of discrimination must be determined with reference to the impact upon the victim(s) discriminated against, the purported purpose of the discrimination, and the extent to which rights have been impaired. The Court expressly disapproved of the approach adopted by the majority in Frank, which had held that equality before the law does not extend to equal recognition of a person's sexual relationships.

The Court found that this approach went against the Supreme Court's jurisprudence that the right to equality must be interpreted in a purposive right-giving way, as well as the principle that human worth and dignity are at the core of the equality clause. The Court consequently held that the Ministry had violated the Appellants' interrelated rights to dignity and equality. The Court thus ruled that section 2(1)(c) of the Act must be interpreted to include same-sex couples lawfully married in another country.
Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others, Constitutional Court, South Africa (2023)

Refugees, Immigration & Citizenship

Refugees  |  Right to Dignity  |  Children

Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others (CCT 51/23) [2023] ZACC 45 (12 December 2023).
FACTS
The Petitioners challenged the constitutionality of subsections 22(12) and 22(13) of the Refugees Act. Those subsections stated that asylum seekers who fail to personally renew their asylum seeker visas under section 22 of the Act within one month of the visa's expiry date must be regarded as having ‘abandoned’ their asylum applications. Such persons would then not be permitted to re-apply for asylum and were dealt with as illegal foreigners. The High Court sided with the Petitioners, ruling that the impugned provisions were invalid for violating the Constitution and the principle of non-refoulement. The Government appealed.

RULING
Schippers, AJ; Zondo, CJ; Maya, DCJ; Kollapen, J; Mathopo, J; Mhlantla, J; Rogers, J; Theron, J; Tshiqi, J; Van Zyl, AJ
The Constitutional Court began by considering whether subsections 22(12) and 22(13) of the Refugees Act violated the principle of non-refoulement. The Court noted that that principle, which is well-established in both international law and within the Act itself, prohibits South Africa from ejecting asylum seekers before making a determination on the merits of their application. The Court held that the impugned subsections violated the principle of non-refoulement, as they had the effect of ejecting asylum seekers without considering the merits of their claim.

The Court next considered the constitutionality of the impugned subsections. Schippers, AJ, writing for the Court, noted that asylum visas are essential to a life of dignity for asylum seekers pending a determination of their application, as they are the only means of accessing most public services (e.g., healthcare, banking) or finding gainful employment. The Court also emphasised that asylum seekers who were deemed to have abandoned their applications lived in constant fear of arrest, detention, and expulsion from the country.
The Court thus held that subsections 22(12) and 22(13) infringed on the right to dignity. The Court further concluded that the impugned subsections also threatened other fundamental rights, including the rights to personal liberty and life, for asylum seekers who failed to renew their visas.

Schippers, AJ, placed particular importance on the impact of subsections 22(12) and 22(13) on the rights of children. The Court noted that children's asylum applications are tied to their parents, meaning that if their parents fail to renew their visas, the children's applications are abandoned as well. Consequently, the Court held that the impugned subsections violated children's rights.

Finally, the Court considered the rationality of the challenged subsections. It noted that the rationality inquiry hinges upon showing that the challenged measure is properly related to the public good it seeks to realise.

The Court concluded that the impugned subsections served no legitimate government purpose since neither subsection was shown to be sufficiently related to any of the Government's purported goals to justify the automatic abandonment of asylum applications. The Court held that the impugned subsections were irrational and arbitrary, meaning it was not required to conduct any further limitations analysis. The Court thus struck down subsections 22(12) and 22(13).
State (on application of Lin Xiaoxiao & Others) v Director General – Immigration & Citizenship Services & Another, High Court, Malawi (2020)

Refugees, Immigration & Citizenship

FACTS
The case arose after some individuals of various nationalities, including 24 Chinese nationals, were denied entry upon arriving in Malawi. The Claimants believed that they were discriminated against on the basis of race, nationality, or status. Immigration officials argued that their refusal was justified because they had denied visas to visitors from countries where COVID-19 was prevalent. The Claimants filed for a judicial review of the decision and requested an interlocutory injunction preventing the Respondents from expelling them from the country pending the ultimate determination of the merits. The High Court granted the requested injunction and ordered the Respondent to admit the Claimants. This ruling concerned the Claimants’ request for a continuation of the interlocutory injunction.

RULING
Nyirenda, J
The High Court began by examining the relevant provisions of the Disaster Preparedness and Relief Act, which confers upon the President the exclusive authority to declare a state of disaster but not the power to impose or introduce measures to deal with the state of disaster. Rather, the Act confers the power to impose such measures upon specific Ministers. The Court expressed concern that the Act was drafted and enacted before the entrenchment of the Bill of Rights in the 1994 Constitution.

It also noted the important distinction between a state of disaster under the Act and a state of emergency under section 45 of the Constitution, the latter of which governed the lawfulness of derogations from fundamental rights. The Court opined that the judiciary must be vigilant to ensure that the executive did not conflate the two states by attempting to derogate from fundamental rights on the grounds of a state of disaster.
Next, the High Court considered the application of the Immigration Act, which permits authorities to deny entry to anyone found to be “infected, afflicted with or suffering from a prescribed disease”. (para 9.2.2) The Court described the Act as archaic but nevertheless accepted that the Act established the test governing a central question in this case. The Court held that the test was whether the immigration officer knew as a matter of fact that a person was infected, afflicted with, or suffering from COVID-19, as distinguished from a reasonable suspicion standard.

The Court also examined the relevant provisions in other statutes relating to public health and immigration, which govern how executive agencies can promulgate rules designed to protect public health, including during states of disaster. In addition, the Court looked to the International Covenant on Civil and Political Rights for guidance concerning the evaluation of the challenged decision.

The Court concluded that the laws governing Malawi’s response to the disaster were archaic, obsolete, and “in total shambles”. (para 12.3) The Court held that neither a state of emergency nor a state of disaster gives the executive carte blanche to exercise power indiscriminately. It subsequently advised the Government to enact legislative measures to combat the dangers posed by COVID-19, emphasising that the failure to do so would expose the State to the risk of paying “colossal sums of money in compensation for violating human rights”. (para 12.8)

Finally, the Court considered whether to grant the Claimants’ request for a continuation of the injunction. The Court rejected the Respondent’s claim that the injunction was not merited because the case did not raise serious issues. On the contrary, the Court listed numerous serious issues that it believed must be determined for an ultimate ruling in this case.
For example, the Court found no evidence that the Claimants were infected, afflicted with, or suffering from a prescribed disease. Moreover, the Court noted that, at the time of the refusal of entry, no official publication had listed COVID-19 as a proscribed disease for immigration purposes. The Court concluded that it was questionable whether the Immigration Act was even relevant to the case.

The Court granted the request to extend the injunction blocking Malawi officials from deporting the Claimants.
P L v Minister of Home Affairs and Immigration, High Court, Namibia (2021)

Refugees, Immigration & Citizenship

Citizenship

Children

Discrimination

FACTS
The Applicant petitioned the Court to determine the eligibility of a child born through surrogacy in South Africa to receive Namibian citizenship by descent. The Applicant is a Namibian male in a same-sex marriage with a South African male who had a child via surrogacy with a South African woman. After birth, the child was issued a South African birth certificate with the Applicant and his partner as the child’s parents. The Applicant brought the child to Namibia and applied for Namibian citizenship by descent. The Respondent requested proof that the Applicant is the child’s biological father, premised on the possibility that the biological father of the child is not Namibian but South African. The Applicant believes the position taken by the Respondent is discriminatory and not in the child’s best interests. The Respondent lodged a counter application to require the Applicant and his child to undergo a DNA test to determine the paternity.

RULING
Masuku, J
The Court held that because the Applicant is the father to the child and a Namibian citizen, and the child was born outside Namibia, the child meets the requirement of Article 4(2) of the Constitution.

The citizenship provision makes no reference to biology or genetics, so assuming the Respondent’s position could have widespread negative consequences for children conceived and born outside Namibia, for example, to a single Namibian parent or a heterosexual couple via vitro fertilisation employing a double donation. The Court stated that the Constitution must be given a purposive interpretation that is “elastic, flexible and adaptive to changing norms, beliefs and practices in society.” (para 35)
As to the counterapplication, the Court stated that the issue of whose gamete could have caused the conception is not an issue to the Applicant and his partner but to the Respondent. The Court held that the Respondent’s inquisition of paternity is improper. The Court found that given the relationship of the parents and that no dispute exists between them regarding the issue of paternity, it is in the child’s best interests to live with his parents and assume Namibian citizenship. Ultimately, the Court rejects Respondent’s request for a DNA analysis of the child.

The Court found that the attitude of the Respondent and its counterapplication is one of discrimination in violation of the right to equality.
EQUALITY
Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs N.O. & Others, Constitutional Court, Zimbabwe (2016)

Children

FACTS
The Petitioners were two young women, aged 19 and 18, who alleged that the fundamental rights of the girl child were infringed by the Marriage Act and the Customary Marriages Act. They argued that section 22(1) of the Marriage Act was unconstitutional because it prohibited girls under the age of 16 and boys under the age of 18 to marry without explicit permission from the Minister. The Customary Marriages Act, meanwhile, did not establish a minimum age of 18 for entering into a marriage contract. Petitioners asserted that these provisions violated sections 78(1) and 81(1) of the Constitution as amended in 2013, which they argued established 18 as the minimum age for marriage in Zimbabwe.

RULING
Malaba, DCJ; Garwe, JCC; Patel, JCC; Hlatshwayo, JCC; Chidyausiku, CJ; Gowora, DCJ; Ziyambi, JCC; Gwaunza, JCC; Guvava. JCC
The Zimbabwe Constitutional Court declared that section 78(1) of the Constitution sets 18 as the minimum age of marriage. Consequently, the Court held that sections 78(1) and 81(1) of the Constitution rendered section 22(1) of the National Marriage Act invalid insofar as it permits child marriage. It also held that the prohibition against child marriages enshrined in the Constitution renders the Customary Marriages Act unconstitutional to the extent that it authorises child marriage.

The Court began the analysis by looking to Zimbabwe's various international legal obligations. Under section 46(1)(c) of the Constitution, Zimbabwean courts must consider international law and all treaties and conventions to which Zimbabwe is a party when interpreting any fundamental constitutional rights.
The Court thus interpreted sections 78(1) and 81(1) of the Constitution in light of, inter alia, the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Convention on the Elimination of Discrimination against Women (CEDAW). The Court noted that under the CRC and CEDAW, any marriage of a child (i.e., anyone under the age of 18) shall lack legal effect, while the ACRWC explicitly prohibits child marriages and enjoins State Parties to adopt effective measures, including legislation, that set the minimum age of marriage at 18 years.

The Court held that courts should apply a broad, generous and purposive interpretation that would give full effect to the rights enshrined in the Constitution, the Court concluded that sections 78(1) and 81(1) of the Constitution of Zimbabwe establish 18 as the minimum age of marriage.
Attorney General v Gyumi, Court of Appeal, Tanzania (2019)

Attorney General v Gyumi (Civil Appeal 204 of 2017) [2019] TZCA 348 (23 October 2019).
FACTS
Rebeca Gyumi filed a complaint in Tanzania’s High Court arguing that sections 13 and 17 of the Law of Marriage Act (LMA) violated the prohibition against discrimination under the Tanzanian Constitution because the law allowed women to be married at a lower age than men. The LMA stated that women could be married at 15 years, whereas the legal minimum age for men was 18 years. Gyumi asserted that the discrepancy violated girls’ rights to equality and freedom from non-discrimination. The High Court held that the specific sections of the LMA were unconstitutional. The Attorney General appealed.

RULING
Levira, JA; Korosso, JA; Mwarija, JA
The Court of Appeal of Tanzania affirmed the High Court’s ruling, holding that sections 13 and 17 of the LMA are unconstitutional on the basis that they gave preferential treatment to boys over girls by making the legal minimum age for marriage higher for boys than for girls. Levira, JA, writing for the Court, first examined the LMA’s historical context and various international legal instruments. The Court subsequently held that sections 13 and 17 of the LMA are unconstitutional because the impugned sections violate Tanzania’s international legal obligations and the “salutary principles of contract law”.

The Court held that there was “no scientific proof which substantiates the narrative that, due to biological reasons, girls should be subjected to early marriages”. Nor was the Court convinced that the impugned provisions were valid based on their origin in customary and Islamic laws. It stated that upon codification of the law, the plain meaning of the law applied, and the Court was not compelled to interpret it any further.
The Court rejected the Attorney General’s argument that the LMA existed in parallel to customary laws concerning marriage, as the law itself did not reference custom and the plain intent was for the law to govern all marriages in Tanzania.
Ex Parte Mbewe, High Court, Malawi (2023)

Children

State & Attorney General, Minister of Education (Education Division Manager Southern Region), Headmaster Blantyre Girls Primary School; Ex Parte Mbewe & Registered Trustees of the Centre of Human Rights Education, Advice & Assistance (CHREAA) (Judicial Review Case 55 of 2019) [2023] MWHC 32 (8 May 2023).
FACTS
The Petitioners were two minor Rastafari children who sought judicial review of the decision not to allow them to register and enrol in public schools because they had dreadlocked hair. Petitioners were joined by a human rights organisation representing 73 other Rastafari children. They also challenged the Malawian Ministry of Education’s policy requiring all learners to have trimmed hair, including Rastafari children, as being a violation of the Education Act 2012 and an unconstitutional violation of their right to religion. They requested an order directing Respondents to abolish the challenged policy on the grounds that it was unlawful, unconstitutional, unreasonable, and unjustified. The first two Petitioners had already received temporary injunctions allowing them to register and enrol in their respective schools. They requested that the Court issue permanent orders to the same effect.

RULING
Ntaba, J
The High Court of Malawi held that the Ministry of Education’s policy of requiring all learners to have trimmed hair, as applied, constituted an unjustifiable limitation on the rights contained in sections 44 and 20 of the Constitution of the Republic of Malawi. Ntaba, J, found that the policy that all learners in public schools should have trimmed hair was unlawful and unconstitutional on the grounds that it violated Rastafari students’ rights to religion, education, and equality, as well as the prohibition against discrimination. The Court further held that the decision not to allow the two Petitioners to register and enrol because they had dreadlocked hair was illegal and unconstitutional. The Court quashed the decision to not allow the Petitioners to attend public schools for their dreadlocked hair. It directed the Respondents to abolish the policy on the grounds that it is unlawful, unconstitutional, unreasonable, and unjustified.

Children & Gender

Legal & Human Rights Centre & Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania, (Communication No.0012/Com/001/2019, Decision No 002/2022) [2022] ACERWC 1 (15 September 2022).
FACTS
The Legal and Human Rights Centre and Centre for Reproductive Rights in Tanzania (Complainants) alleged that Tanzania had engaged in systematic discrimination against pregnant girls due to policies requiring mandatory pregnancy testing and the removal of pregnant girls from public schools without any option of re-entry following childbirth. Complainants argued that Tanzania’s policies towards pregnant girls in school violated their obligations under the African Charter on the Rights and Welfare of the Child to guarantee the right to education, equality, protection from stereotypes, access to health, privacy and dignity, freedom from cruel and inhuman treatment (including child abuse), and the right to general measures of implementation. They further alleged that Tanzania violated the Charter principle of acting in the best interests of the child.

RULING
Ndayisenga, C
The Committee of Experts on the Rights and Welfare of the Child held that Tanzania violated their obligations under the Charter by violating Tanzanian girls’ rights to freedom from cruel, inhuman and degrading treatment and protection from child abuse, education, non-discrimination, protection against stereotypes, health access, and privacy. The Committee further noted that Tanzania violated its obligation to act in the best interests of the child and its duty to create legislation which prevents the violation of the rights enshrined in the Charter.

The Committee recommended that Tanzania abolish mandatory pregnancy testing, create processes to facilitate the abolition of child marriage and other social practices harmful to school-age girls and nullify regulations and policies surrounding the expulsion, detention, and discrimination of pregnant girls.
The Committee concluded that Tanzania should investigate cases of detention of pregnant girls and immediately release detained pregnant girls who were being interrogated about who impregnated them. It further recommended that Tanzania should immediately stop the arbitrary and illegal arrests of pregnant schoolgirls and immediately re-admit schoolgirls who have been expelled due to pregnancy and wedlock. The Committee also recommended that Tanzania should provide special support programmes to compensate for lost years and ensure better learning outcomes for the returned girls. Finally, the Committee concluded that Tanzania must provide adolescent sexuality education and friendly sexual and reproductive health services.
Nkhoma & 13 Others v Child Protection Team, High Court, Malawi (2019)

Children

- Children
- Bodily Autonomy
- Detention
- Education

Nkhoma & 13 Others v Child Protection Team, High Court, Malawi (2019)
FACTS
In April 2016, learners in Nkata Bay in Malawi were hauled before a First Grade Magistrates’ Court on allegations of breaching a community by-law by falling pregnant. The Magistrate ordered the learners, the boys who had allegedly made them pregnant, and some parents, to pay hefty fines. Those who were unable to pay the fines were placed in police custody and only released upon payment. The learners and their parents filed an application for review in the High Court.

RULING
DeGabriele, J
The Court held that the Magistrate had acted without jurisdiction and abused his powers in using the State system to enforce informal laws as the community by-laws were not formal laws and could not be enforced through formal legal channels. The Court held that community by-laws can be beneficial to the community, but they had to be in conformity with the law and the Constitution and should not breach rights. The enforcement of the by-law in this case was harsh and punished even those who did not commit the “offence”.

The Court noted that in any event, there is no law penalising falling pregnant, even in terms of the by-law concerned, and thus, the Magistrate’s actions in meting out such punishment were unlawful.

The Court declared that the Magistrate, in imposing fines on and ordering the detention of the Applicants, had acted irrationally and unlawfully, in breach of the right to liberty.

The Court also declared that there was a breach of the right to education, as the learners were prevented from writing their examinations. They were subsequently awarded damages.
Brotherton N.O. v Electoral Commission of Zambia, High Court, Zambia (2011)

FACTS
The dispute arises from the Respondent’s alleged failure to initiate legislative reform to ensure equitable participation by persons with disabilities in the electoral process of Zambia. It is also alleged that the services offered by the Respondent at the registration and polling stations (the stations) in selected constituencies in Zambia were not accessible to persons with disabilities. Neither did the services cater adequately for their needs.

The tables used by the registration officers were high, so they were not accessible by persons with disabilities; registration tables were placed in positions which were inaccessible as they were either on stages, platforms or the first floor of the buildings used; some stations were located in classrooms, churches, and rooms which had very narrow doorways which are not accessible by wheelchair users; and the toilets in the buildings were not appropriate because of the size of the entrance. In certain instances, there were stairs leading to the toilets, while in others, toilet pans were not accessible, and in other instances, the toilets were pit latrines; the registration officers were not able to use sign language so there was no direct communication with persons with hearing disabilities; some offices were located far from the entrance to the centre, which entailed long walks to get to the office, in paths that had either ditches or potholes and could not be easily accessed by people with disabilities. There were no facilities for the blind to conduct a secret ballot by use of a tactile ballot guide.

RULING
Mutuna, J
The evidence revealed that the services offered at the stations by the Respondent were flawed to the extent that the organisation’s members could not easily access them, yet they were easily accessible to persons without disabilities.
To this extent, the organisation’s members were treated less favourably than those without disabilities, contrary to section 19 of the Persons with Disabilities Act. The Court held that the Respondent discriminated against persons with disabilities when they failed to make adequate provision for persons with disabilities at the voting stations.
Moshoeshoe & Others v Director of Public Prosecutions & Others, High Court, Lesotho (2019)

Disability

Disability  Discrimination  Right to Fair Trial

Moshoeshoe & Others v Director of Public Prosecutions & Others, High Court, Lesotho (2019)
FACTS
The Petitioner submitted a claim of sexual abuse by a woman residing in a village in Maqhaka. While the Petitioner was visiting the village, a woman invited the Petitioner into her home and thereafter engaged in nonconsensual sexual activity with the Petitioner. Upon submission of the claim, the Petitioner alleged that the First Respondent declined to hear the case because he was deemed incompetent to give evidence and testify against the woman. The issues at stake are the rights to equality before the law and equal protection of the law.

RULING
Mahase, ACJ; Peete, J; Chaka-Makhooane, J
The Court held that the right to a fair trial within a reasonable time before an impartial court of law equally applies to not just the accused but also those who are victims of crimes. The Court held that the Trial Court exercised the power to determine the competency of a witness, a responsibility that is, in practice, limited to a medical professional. The Criminal Procedure and Evidence Act was deemed inconsistent with the Constitution, which grants the magistrate the power to determine the competency or compellability of witnesses.

On the issue of disability, the Court discouraged the use of any language like “afflicted,” “lunacy,” and “imbecility” as inappropriate for any reasonable court. The Court held itself to be the “upper guardian” of all children and people with disabilities, maintaining that the latter deserve more protection of the law given their liability to abuse and exile.
Attorney General v Dow, Court of Appeal, Botswana (1992)

FACTS
Unity Dow was a citizen of Botswana who married a citizen of the United States. The couple had three children—one born in 1979 (before the marriage) and two born after marriage in 1984. Dow’s first child was legally a citizen of Botswana under the law in force in 1979. However, Dow’s second and third children were not citizens under sections 4 and 5 of the Citizenship Act of 1984. Dow challenged these sections as contravening the fundamental rights protected by section 3 and the freedom of movement guaranteed by section 14 of the Constitution of Botswana. The High Court found that sections 4 and 5 of the Citizenship Act violated Botswana women’s constitutionally protected fundamental rights and freedom of movement. The Attorney General appealed the decision.

RULING
Amissah, P; Aguda, JA; Bizos, JA; Schreiner, JA; Puckrin, JA
The Court of Appeal began by reviewing methods of constitutional interpretation. Amissah, P, writing for the majority, reasoned that constitutional rights should be interpreted broadly, while derogations from such rights should be narrowly construed, and all provisions conferring relevant fundamental rights should be interpreted together. With these principles in mind, the Court proceeded to address the issue of whether the Constitution prohibited discrimination on the basis of sex. It noted that section 15 of the Constitution does not explicitly protect citizens from discrimination on the basis of sex.

Nevertheless, it found that section 15 necessarily protects against sex discrimination because the guiding provisions in section 3 explicitly provide equal protection regardless of sex. Amissah, P, fortified this conclusion by pointing to another conspicuous omission within section 15—disability.
Because it would be unjust and inhuman to allow discrimination on the basis of disability, the Court concluded that section 15 must necessarily protect against discrimination that is not explicitly enumerated within its provisions. The Court thus held that section 15 of the Botswana Constitution protects against discrimination on the basis of sex.

The Court next considered the issue of standing. The Court noted that Dow had challenged the statute on constitutional grounds concerning effects that she experienced, including impediments to her ability to enter and exit the country with her children and negative impacts on her peace of mind (e.g., from waiting for renewed residence permits for her children).

The Court thus held that Dow had standing to bring her claim regarding section 4 of the Citizenship Act under section 18 of the Constitution. However, the Court found that Dow lacked standing to challenge section 5 of that Act, as that section applied only to children born outside of Botswana and all three of Dow’s children were born in Botswana.

Having confirmed the interpretative methods of the lower court and the standing of the Petitioner, the Court of Appeal confirmed the High Court’s holdings that section 4 of the Citizenship Act of 1984 infringed upon the fundamental rights to freedom of movement and freedom from discrimination enshrined in sections 3, 14, and 15 of the Constitution of Botswana.
Ramantele v Mmusi & Others, Court of Appeal, Botswana (2013)

Women

Women Customary Law Discrimination

Ramantele v Mmusi & Others [2013] 2 BLR 658 (CA) (3 September 2013).
FACTS
Respondent Edith Mmusi and others challenged Botswana's succession laws after applicable customary laws favoured their nephew, Appellant, as the rightful owner of the home they were residing in. The Respondents were four women, each of whom is the Appellant’s paternal aunt. Upon his claim of rightful succession, the Appellant attempted to evict the Respondents, who contested the claim and cited their responsibility for maintaining and expanding the home.

The Appellant and Respondents were members of the Ngwaketse tribe. Ngwaketse customary law maintains that the last-born male of the decedent inherits the family home. The High Court ruled that the customary law violated the right to equality and recognised the right of women to inherit property in Botswana. The issue on appeal to the Court of Appeal was whether customary law violated the Respondents’ constitutional right to equality solely on the basis of sex by denying them the right to inheritance.

RULING
Lesetedi, JA, Kirby, JP, Twum, JA, Foxcroft, JA, Legwaila, JA
The Court of Appeal issued a unanimous decision in favour of the Respondents, upholding the High Court’s ruling that the Appellant failed to demonstrate his ownership. The Appellant could not prove that his deceased parents had transferred ownership to their son, and the customary law the Appellant cited did not stand if the son had long left the home.

Further, the Court struck down the legality of the customary rule of inheritance, maintaining that customary law could only be valid if it is not inconsistent with the values of natural justice and current norms. Here, customary law would grant the property to a child who provided no assistance, while the Respondents had developed the home to take care of the family.
The Court concluded that such an outcome would go “against any notion of fairness, equity, and good conscience.” (para 50) The Court thus held that the customary law, if applied, would discriminate against a woman unfairly solely on the basis of her gender and was thus an unconstitutional violation that was not in accordance with humanity, morality or natural justice.
Sacolo & Another v Sacolo & Others, High Court, Eswatini (2019)

Women

FACTS
The Application arose between a husband and wife who wished to determine the legal regime of their marriage—i.e., whether they were married under the terms of civil rights or Eswatini Customary Law. Upon their separation, the wife, Petitioner, was unable to sell the livestock the couple owned, including some which she had bought independently, under the common law and Eswatini statutory law. The common law doctrine also prevented married women from concluding contracts, administering property, representing themselves in civil suits, and accessing loans and credit.

RULING
Hlophe, J; Mabuza, PJ; Mlangeni, J
The High Court of Eswatini strengthened gender equality by broadly declaring the highly controversial issue of the common law marital power of a husband to be both discriminatory and unconstitutional.

The Court invalidated the common law doctrine of marital power as being discriminatory against married women and in contravention of the right to equality and dignity enshrined in the Constitution. The Court further concluded that the word “African” in the Marriage Act was both vague and potentially discriminatory, as it effectively imposed customary Swazi law on African spouses while granting the benefits of the common law to non-Africans. The Court thus struck down sections 24 and 25 of the Marriage Act. However, the Court preserved the provision in section 24 stating that “[t]he consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law.” (para 30.3) Lastly, the Court held that spouses married under the terms of the Marriage Act have equal capacity and authority to administer marital property.
Mlotshwa v District Administrator, Hwange N.O., High Court, Zimbabwe (2020)

Women

Customary Law

Right to Fair Treatment

Discrimination

FACTS
The late Chief Mlotshwa - the substantive chief of Mvuthu area in Hwange District - is survived by three daughters, of whom the Applicant is the eldest. The line of succession to the Mvuthu chieftainship is lineal, and as the late Chief’s eldest child, the Applicant is next in this line of succession. Because of her gender, the District Administrator charged with the responsibility of selecting a successor, discriminated against her and moved the chieftainship sideways to her uncle. The uncle does not hail from the chief’s area of jurisdiction but has lived in South Africa. The Applicant brought a mandamus application to compel the District Administrator to act lawfully.

RULING
Takuva, J
The Court found that the District Administrator, being fully aware of the constitutional provisions of equality and non-discrimination, proceeded to carry out his duties in terms of section 3 of the Traditional Leaders Act in a discriminatory manner.

“It is common cause that the Applicant is the eldest daughter of the late Chief Nyangayezizwe Mvuthu Mlotshwa. In view of this, she is the next in line of succession to the Mvuthu Chieftainship which is lineal. On the evidence, it cannot be doubted that the succession principle of the clan clearly points to the Applicant as the heiress to the throne. Herein lies the basis of her clear right that she seeks to protect.” (8)

The Court declared the initial nomination by the District Administrator void and ordered that the District Administrator reconvenes a meeting within 60 days to select a chief.
The Court further compelled the District Administrator to act lawfully during the selection process, within the constitutional dictates of human dignity and equality before the law. The Court compelled the District Administrator to make lawful recommendations to the President regarding the appointee to the Mvuthu Chieftainship per the constitutional imperatives of human dignity, non-discrimination and equality.
Mokhele & Others v Commander, Lesotho Defence Force & Others, High Court, Lesotho (2018)

FACTS
The Petitioners were three female soldiers discharged from the army by the Commander of the Lesotho Defence Force on the grounds of pregnancy pursuant to Standing Order No. 2 of 2014. Two of the Petitioners were married and using contraceptives at the time they became pregnant. The Commander claimed that the Standing Order was a lawful use of the powers vested by section 31(b) of the Lesotho Defence Force Act, 1996, which allows the Commander to administratively discharge soldiers when it is not in the best interests of the Defence Force for the soldier to remain in the force. The Petitioners demanded that (a) the Commander’s decision to discharge be reviewed, corrected, and set aside as being irregular and unlawful; (b) the Court declare Standing Order No. 2 to be unlawful and contrary to public policy and the common law principles of reasonableness, legality, and rationality; and (c) the Petitioners be fully reinstated or paid five hundred thousand maloti in compensation for their unlawful discharge.

RULING
Mokhesi, J
The High Court held that the Commander was not entitled to use section 31(b) powers to undermine the State’s protective scheme for the benefit of pregnant soldiers. Mokhsei, J, noted that the Lesotho Defence Force Act and governing regulations were silent about whether pregnant soldiers may be banned from the military. Consequently, the Court concluded that the Commander’s Standing Order extended beyond the scope of governing law and was ultra vires the Act and Regulations. The Court thus held that the Standing Order was an “unlawful and condemnable” trigger for exercising the power to discharge under section 31(b). (para 30.1) By extension, it held that the Commander wrongly invoked the Standing Order to justify discharging the Petitioners.
The Court set aside the decision to discharge the Petitioners and declared that it was illegal and invalid.

The Court then addressed the legality of the Standing Order itself. Based on its prior conclusions, the Court held that Standing Order No. 2 failed the tests of legality, rationality, and reasonableness. The Court thus declared that the Standing Order was illegal and invalid.

In light of its other rulings, the Court declared that the Petitioners must be reinstated to their positions and ranks in the Lesotho Defence Force without any loss of benefits.
PAK & Another v Attorney General & 3 Others, High Court, Kenya (2022)

Women

FACTS
Under Kenya’s Constitution, abortion is generally impermissible unless a medical professional determines the abortion is medically necessary. Petitioner PAK experienced pregnancy complications and sought emergency care at the nearby Chamalo Medical Clinic. Mohammed, a clinical officer qualified to perform abortions, treated PAK after determining she had lost her pregnancy. Both PAK and Mohammed were arrested and detained by the police—she was accused of attempting an abortion; he was charged with providing her with a medication abortion.

PAK was subsequently charged with the offence of procuring an abortion contrary to section 159 of the Penal Code. On the same date, Mohammed was charged with attempting to provide an abortion. Authorities alleged that Mohammed, together with others, gave PAK drugs that led to her miscarriage and supplied drugs to procure an abortion, contrary to sections 158 and 160 of the Penal Code. The Magistrates Court refused to drop the charges against both PAK and Mohammed. The Petitioners subsequently filed suit against government officials in Malindi, alleging that the Kenyan laws criminalising abortion violated the right to privacy, the right to physical health, freedom from inhumane and degrading treatment, and freedom from self-incrimination.

RULING
Nyakundi, J
The High Court held that the right to abortion is fundamental yet not absolute under section 26(4) of the Constitution. Critically, the Court stressed that protecting access to abortion impacts vital constitutional values, including dignity, autonomy, equality, and bodily integrity.
Despite the relevant provisions criminalising the practice in some circumstances, the Court held that the abortion performed by a licensed medical professional, Petitioner Mohammed, with Petitioner PAK’s consent, was not punishable if the abortion was necessary to prevent danger to the pregnant mother.

Second, the Court held that the arbitrary arrest and prosecution of patients and health care providers seeking or offering abortion services is illegal. The Court concluded that the police did not have the medical qualifications to determine whether PAK was in a condition to leave the clinic and emphasised that she should not have been interrogated without legal representation. Consequently, it held that PAK’s arrest was inhuman and degrading. Private communication between patients and healthcare providers is guaranteed and protected under the Constitution and other enabling laws. Therefore, the Kenyan parliament must enact reforms, including abortion laws and a public policy framework that aligns with the Constitution.
FIDA Kenya & 3 Others v Attorney General & 2 Others, High Court, Kenya (2019)

Women

Bodily Autonomy

Access to Medicines

Gender-Based Violence

FACTS
In 2014, JMM, a minor, was defiled. About two months after being sexually abused, she realised she was pregnant. Fearing condemnation and rejection from her family, she chose not to divulge her pregnancy to them. Instead, she confided in an older female who recommended terminating the pregnancy. Following this advice, JMM sought an abortion from an unqualified medical practitioner, who unsuccessfully performed an abortion. Consequently, JMM developed medical complications and was taken to a local dispensary, which lacked proper medical equipment and skilled staff to treat her. She was referred to two other hospitals. JMM died at 18 years of age.

Her mother, PKM, sued the Respondents, contending that the withdrawal of both the 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya (2012 Standards and Guidelines) and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies (National Training Curriculum) undermined the right to safe, legal abortion services, leading to women and girls in JMM’s position to pursue unsafe abortions. The Petitioner also alleged the violation of her right to health under the Constitution of Kenya.

RULING
Muchelule, J; Ngugi, J; Odunga, J; Achode, J; Mativo, J
The Court held that the withdrawals of both the 2012 Standards and Guidelines and the National Training Curriculum violated or threatened to violate the Petitioners’ right to the highest attainable standard of health, as well as her right to non-discrimination, right to information, consumer rights, and right to benefit from scientific progress.
The withdrawals further violated or threatened to violate healthcare professionals’ right to information, freedom of expression and association, consumer rights, and right to benefit from scientific progress.

Finally, while abortions are illegal under the Kenyan Constitution, the Court held that pregnancy resulting from rape or defilement may fall under exceptions that permit abortion when a trained health professional determines that pregnancy poses a danger to the life or the physical health, mental health, and social well-being of the mother.
Centre for Domestic Violence Prevention & Others v Attorney General of Uganda, Constitutional Court, Uganda (2021)

Women

Women

Right to Privacy

Discrimination

Freedom of Expression

FACTS
Petition to Uganda's Constitutional Court on behalf of several Petitioners seeking a declaration that provisions of Uganda’s Anti-Pornography Act (APA) are unconstitutional. Petitioners argued that the APA was broadly defined, thus violating constitutional requirements for defining criminal offences. Petitioners also argued that provisions of the APA violated their constitutional rights to (1) a fair hearing, (2) non-discrimination, (3) liberty, privacy, and property and (4) freedom of expression. Additionally, the Petitioners argued that the imposition of the APA was a violation of the government’s domestic duty to protect its citizens and its international duties as a party to international human rights treaties.

RULING
Cheborion, JCC; Kibeedi Mutangula, JCC; Musoke, JCC; Mulyagonja, JCC; Egonda-Ntende, JCC
The Court ruled that section 2 of the APA’s definition of pornography is overly broad thus violating the right to a fair hearing on the grounds that the law is not sufficiently clear in what is prohibited and a violation of the requirement of defining the criminal offence. The Court reasoned that section 2 in defining and criminalising pornography and section 13 in criminalising any creation, sharing, or sale of material defined as pornography under section 2 violated the right of freedom of speech and expression enshrined in the Constitution.

Furthermore, the Court stated that section 11 which gives discretionary powers to the Pornography Control Committee that allows for the inspection, search, and seizure of any materials connected to the violation of the APA is unconstitutional because it violates the rights to liberty, privacy and property. Finally, the Court also ruled that section 15 which authorises courts to adjudicate offences related to violations of the APA is unconstitutional because it violates the rights to liberty, privacy and property.
ENVIRONMENT
Ministry of Environment, Energy and Climate Change & Others v Woodlands Holdings Limited & Another, Court of Appeal, Seychelles (2023)

FACTS
In 2018, Petitioners, a private company and its directors, alerted Seychelles’ Ministry of the Environment to unlawful disposal by a livestock operation, leading to water contamination. Despite notice, no action was taken for over three years. The Petitioners sued the Government for failing to protect citizens’ right to a healthy environment under section 38 of the Constitution.

RULING
De Silva, JA; Fernando, PCA; Gunesh-Balaghee, JA
The Court held that the right to a clean environment entrenched in section 38 of the Constitution extends to the State taking executive, legislative and administrative measures to ensure that private citizens do not pollute the environment.

Additionally, the Court held that the State is obligated to take steps to clean up pollution of public places such as rivers and beaches, and the State may, in certain instances, be liable to its citizens for damages where it fails to do so.
Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another, National Environmental Tribunal, Kenya (2019)
FACTS
Petitioners filed suit before the National Environmental Tribunal challenging NEMA’s decision to grant an Environmental Impact Assessment (EIA) Licence to the Amu Power Company (the second Respondent) for the purposes of building a coal-fired power plant in Lamu. Petitioners argued that the EIA Licence had not complied with the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya. They also argued that the Environmental & Social Impact Assessment (ESIA) Study prepared by Respondent Amu did not involve proper and effective public participation and that it did not include adequate mitigation measures. Finally, Petitioners argued that Respondents had not conducted a proper analysis of alternatives to the projects or their economic viability. Consequently, the Petitioners asserted that Respondent NEMA had not discharged its mandate in accordance with the law by issuing an EIA Licence.

RULING
Balala, C; Kipsang, VC; Mwamuye, M; Ngaruiya, M; Muigua, M
The Court held that the steps taken after the publication of the EIA Study report, including the notices issued, time for receipt of comments and the time and venue of meetings, were all done in a manner contrary to the regulations and did not meet the threshold of the regulations for public participation.

The Court also held that there was a lack of proper and effective public participation as required by law. The issuance of the licence was unreasonable in ignoring the prescribed procedure and its own directive, and arbitrary in disregarding the views given without providing reasons for refusing to consider them.

Environment

Environment  Religion  Customary Law

FACTS
The Kenyan Government attempted to evict a forest-dwelling indigenous community, the Ogiek, from the Mau Forest. The African Commission on Human and Peoples' Rights filed a case in the African Court on Human and Peoples' Rights against the Kenyan Government, arguing that the Government's attempts to evict the Ogiek violated the rights enshrined in articles 1, 2, 4, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples’ Rights.

RULING
Akuffo, P; Ouguergouz, VP; Ngoepe, J; Niyungeko, J; Ramadhani, J; Tambala, J; Thompson, J; Oré, J; Guisse, J; Aba, J
The African Court on Human and Peoples' Rights concluded that the Ogieks constitute an indigenous community. It held, based on Article 14 of the Charter, that they have the right to occupy their ancestral lands, as well as use and enjoy those lands.

The Court also held that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.

Finally, the Court concluded that given the link between indigenous populations and their land for purposes of practicing their religion, the evictions of the Ogieks from the Mau Forest rendered it impossible for the community to continue its religious practices. The Court thus held that the Government's action was an unjustifiable interference with the Ogieks’ freedom of religion.
Minister of Mineral Resources & Energy & Others v Sustaining the Wild Coast NPC & Others, Supreme Court of Appeal, South Africa (2024)

Environment

Minister of Mineral Resources & Energy & Others v Sustaining the Wild Coast NPC & Others (Case Nos. 58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (3 June 2024).
FACTS
Applicant, an energy company, received exploration rights to conduct seismic survey operations off the Eastern Cape coast in search of oil and gas reserves. Respondents, including individuals and companies fighting on behalf of environmental rights, sued to overturn the decision on the basis that they were not properly informed of the surveys. They further argued that the right to survey the coast would have a substantive impact on the environment such that their input should’ve been considered prior to the granting of the exploration rights. The High Court found that the energy company did not sufficiently consult with relevant parties and ordered the interdiction of all survey operations granted by the decision. The energy company appealed to the Supreme Court of Appeal.

RULING
Ponnan, JA; Mocumie, JA; Matojane, JA; Smith, Smith, AJA; Seegobin, AJA
The Court reasoned that the right to procedurally fair administrative treatment, found in section 33 of the Bill of Rights, is triggered when an administrative action materially and adversely affects the rights of any person. The requirements for procedural fairness include that persons whose rights are impacted, must be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.

The Court clarified that interested and affected persons must be informed in sufficient detail of the proposed mining activities and provided with a meaningful consultation process, so that they can properly assess its impact. The provision of the necessary information will allow such persons to make an informed decision.
The people of the Respondent community mostly get their news through radio and are, for the majority, isiXhosa or isiMpondo speakers, very few read English, and virtually none read Afrikaans. The notices of the proposed oil surveys were published in four newspapers, three in English, and one in Afrikaans. In addition, there is no newspaper circulating in the area. Newspapers are not delivered to these communities. Newspaper advertisements would simply not reach them, even if in a language of their choice.

The Court held that the notification process employed by the Applicants was more illusory than real, and manifestly inadequate. The Court dismissed the Appeal.
Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation, Supreme Court, Nigeria (2018)

Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (SC. 319/2013) [2018] (20 July 2018).
FACTS
On 13 May 2005, the Applicant commenced legal action against the Respondent alleging that their negligent action had caused an oil spillage. Respondent was a corporation in the business of prospecting, mining, producing, exploring and storing crude oil. The oil spillage was allegedly caused by the Respondent’s pipeline, which had corroded due to lack of maintenance and had ruptured, fractured and spewed its entire contents of oil into the surrounding streams and river of Ineh/Aku, resulting in contaminating two community streams that were the major sources of water supply to the community. The Applicant alleged that although the Respondent contained the spillage on the surface, it failed to clean up or reinstate the Ineh/Aku river. Furthermore, the Applicant averred that the Respondent was negligent in both the causation and containment of the oil spillage; that the spillage had harmful effect on living resources, marine life, human health and other usage of the streams.

The Respondent challenged the Applicant’s standing to sue and sought an order striking the suit. On 9 February 2006, the Trial Court struck out the suit for lack of locus having not suffered any injury at all, let alone any injury above every other member of the Acha community resulting from the alleged oil spillage. On 28 January 2013, the Court of Appeal dismissed the appeal by reaffirming the Trial Court’s ruling. The Applicant appealed to the Supreme Court.

RULING
Nweze, JSC; Onnoghen, CJN; Muhammad, JSC; Aka’ahs, JSC; Kekere-ekun, JSC; Okoro, JSC; Eko, JSC
The Court unanimously granted the appeal in favour of the Applicant. The Court held that the Applicant had standing to sue the Respondent, thereby liberalizing or broadening the rule of standing.
The Court specifically highlighted that public spirited individuals and organisations can bring an action in courts against relevant public authorities and private entities to demand their compliance with relevant laws and to ensure the remediation, restoration and protection of the environment.

The Court also acknowledged that recognising public interest litigation will help address some other barriers to access to justice. Poor communities, which disproportionately bear the brunt of environmental and climate change problems, will have the benefit of public-spirited persons and organisations fighting their cause.

The Court explicitly recognised for the first time, that the right to life guaranteed in the Constitution, implicitly includes and constitutes a fundamental right to a clean and healthy environment for all.
Part II: Key Excerpts
Part II: Overview

- RIGHT TO LIFE
- RIGHT TO EQUAL TREATMENT & PROHIBITION AGAINST DISCRIMINATION
- PROHIBITION AGAINST TORTURE & CRUEL, INHUMAN OR DEGRADING TREATMENT
- RIGHT TO DIGNITY
- RIGHT TO PRIVACY
- RIGHT TO LIBERTY & AUTONOMY
- RIGHT TO FREEDOM OF EXPRESSION
- MARRIAGE
- RIGHT TO HEALTH
- FREEDOM OF ASSOCIATION
- RIGHT TO EDUCATION
- ENVIRONMENTAL RIGHTS
- SOCIO-ECONOMIC RIGHTS
- LAW ENFORCEMENT MEASURES
- LIMITATIONS
- CONSTITUTIONAL INTERPRETATION
- STANDING
Abortion: Nyakundi, J: “The right to life exception in... the Constitution should be understood to encompass emotional, mental, psychological and physical health grounds and pregnancies arising from sexual violence related acts. The police were obligated to respect, protect and promote implicit rights to the protection the women’s rights as painted in...the Constitution.”


Abortion: Nyakundi, J: “In many circumstances, those who have no choice but to resort to unsafe abortions also risk prosecution and punishment, including imprisonment, and can face cruel, inhuman and degrading treatment and discrimination in, and exclusion from, vital post-abortion health care. This, in my view, endangers the life of the mother/maiden due to the inherent fear of prosecution by health professionals who assist the mother in carrying out safe abortion. This puts the life of the mother in danger and ipso facto violates the right to life.”


Death Penalty: Chaskalson, P: “By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death.”

Death Penalty: Chaskalson, P: “There is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether.”

Realisation of Socio-economic Rights: Mrima, J: “Socio-economic rights, also known as rights of equality (egalite), therefore, derived their identity from the fact that their realisation called upon the State to take positive steps in order for its citizens to realise their rights.”

Right to Food: Malila, JS: “The right to life entails that the two prisoners should have the right to decent food - adequate nutritious food. Prison food or conditions of detention should not be used as an additional punitive measure. In other words, they should not be leveraged as further punishment of criminals by the State. Being incarcerated is punishment enough; being served bad inadequate or unsafe food or being kept in inhumane conditions is unfairly punitive.”

Right to Food and Health: Malila, JS: “...the right to life must be interpreted liberally. It inevitably dovetails and is interlinked with other rights such as the right to food and the right to health.”
Right to Health: Malila, JS: “Overcrowding, lengthy confinement with poor ventilation and sanitation, are all conditions which frequently contribute to the spread of diseases and ill health. These factors, when combined with poor hygiene, inadequate nutrition and limited access to adequate health care are a serious threat to the right to life.”

Constitutional Values: Leburu, J: “Our constitutional ethos of liberty, equality and dignity are paramount. Our Constitution is a dynamic, enduring and a living charter of progressive rights; which reflect the values of pluralism, tolerance and inclusivity. Minorities, who are perceived by the majority as deviants or outcasts are not to be excluded and ostracised. Discrimination has no place in this world. All human beings are born equal.”


Customary Law: Lesetedi, JA: “It is axiomatic to state that customary law is not static. It develops and modernises with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society’s changing ethos being retained and probably being continuously modified…to keep pace with the times… The increased levelling of the power structures with more and more women heading households and participating with men as equals in the public sphere and increasingly in the private sphere, demonstrate that there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems.”

Ramantele v Mmusi & Others 2013 (2) BLR 658 (CA) (3 September 2013), para 77-80.

Disability: Mahase, ACJ: “…The Court is the ‘Upper Guardian’ of all children and the disabled and it is its sacred and fundamental duty to guarantee that all persons appearing before courts of law as suspect, accused, victims or witnesses all have a fair hearing—otherwise justice imperilled and jeopardized.”

**Right to Equal Treatment & Prohibition against Discrimination**

**Equal Treatment:** Waki, JA: “I do not understand the Bill of Rights as meant to protect only the individuals that we like and leave unprotected those we find morally objectionable or reprehensible.”

Non-Governmental Organisations Coordination Board v Gitari & 5 Others (Civil Appeal No. 145 of 2015) [2019] eKLR (22 March 2019)

**Equal Treatment:** Rannowane, J: “Fundamental freedoms are to be enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others.”


**Governmental Obligation:** Nthomiwa Nthomiwa, J: "The government is in terms of the Constitution responsible for removing obstacles to the effective realisation of the Applicant’s right to equal protection of the law.”

Health Status: Makara, J: “In seeking to apply the concept of human dignity within the context of the inquiry at hand, it emerges that the discrimination of people who are living with HIV for the sole purpose of subjecting them to the relatively harsher sentencing scheme designed specifically for them, would be spiritually torturous upon the affected persons. It indirectly implies that they are being punished for their health status. This is so because the others who committed the same offence are not equally treated. So, any continued operationalization of the scheme, would sustain the torturing of the same people and subject them under a degrading punishment.”


Health Status: Ntaba, J: “Criminal law should not be applied to cases where there is no significant risk of transmission or where the person did not know that he/she was HIV [positive], did not understand how HIV is transmitted, did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences. Legal systems should ensure their ... application of general criminal laws to HIV transmission is consistent with their international human rights obligations.”

Labour Rights and Pregnancy: Mokhesi, J: “If the proposition is accepted that pregnancy ipso facto constitutes unfitness to serve in the army, it would mean that the Lesotho Defence Force is an institution beyond bounds for pregnant soldiers. The absurdity of the proposition is accentuated by the arbitrary imposition of the five years pregnancy moratorium. This goes to show that it cannot be true or right to contend, as the Commander does, that pregnant soldiers undermine the army’s discipline and combat readiness.”


LGBTIQ+: Chan Kan Cheong, J & Gunesh-Balaghee, J: “We, therefore, find considerable force in the Plaintiff's above submission that since Mauritius has acceded to the ICCPR, it has accepted to adhere to international norms and standards regarding the fundamental rights and freedoms the ICCPR provides for and that interpreting 'sex' as including 'sexual orientation' in section 16 of our Constitution would be in conformity with the standard canon of constitutional interpretation which requires, where possible, that our constitutional provisions be interpreted in line with our international obligations.”

Seek v State of Mauritius (Rec. No. 119259) [2023] Supreme Court of Mauritius (4 October 2023), 17.
LGBTIQ+: Chan Kan Cheong, J & Gunesh-Balaghee, J: “In the light of all the above, including the need to adopt a generous and purposive interpretation, especially as we are being called upon to interpret a section of the Constitution which enshrines fundamental rights, we hold that the word 'sex' in section 16 of the Constitution should be interpreted as including 'sexual orientation'.”

Seek v State of Mauritius (Rec. No. 119259) [2023] Supreme Court of Mauritius (4 October 2023), 19.

LGBTIQ+: Chan Kan Cheong, J & Gunesh-Balaghee, J: “It other words, the effect of section 250(1) is to afford a different treatment to the Plaintiff and other homosexual men attributable to their sexual orientation by subjecting them to restrictions with regard to the expression of their sexuality in a way natural to them whereas heterosexual men are not subjected to such restrictions. Section 250(1) is therefore discriminatory under section 16 of the Constitution against the Plaintiff and other homosexual men on the basis of their sexual orientation. It proscribes in effect the only mode of sexual expression available to the Plaintiff. It has the effect of criminalising the Plaintiff sexual orientation which is an innate attribute of his identity and over which he has no choice. We, however, are of the view that the Plaintiff’s choice of a sexual partner cannot be the basis of discrimination and it is not for the State to make such a choice for him.”

Seek v State of Mauritius (Rec. No. 119259) [2023] Supreme Court of Mauritius (4 October 2023), 23.
LGBTIQ+: Bere, J: “Transgender citizens are part of the Zimbabwean society. Their rights ought to be recognised like those of other citizens. Our Constitution does not provide for their discrimination. It is nothing but delusional thinking to wish away the rights of transgender [persons].”


LGBTIQ+: Nthomiwa Nthomiwa, J: “section 3 of the Constitution of Botswana protects the rights of ‘every person’ and an individual human being, regardless of his or her gender identity is ‘a person’ for the purposes of the Constitution of Botswana.”

ND v Attorney General & Another [2017] 2018(2) BLR 223 (HC), para 77.

LGBTIQ+: Nthomiwa Nthomiwa, J: “It is for the aforegoing [conclusion that section 3 applies to all persons] that in my judgment the State has a duty to uphold the fundamental human rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy. This includes taking all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity documents which indicate a person’s gender/sex reflect the person’s self-defined gender identity.”

ND v Attorney General & Another [2017] 2018(2) BLR 223 (HC), para 80.
LGBTIQ+: Kirby, P: “Here convincing expert evidence, which was accepted by the Court below, and which was not controverted, was led that sections 164(a) and 164(c) of the Penal Code have unjustified negative consequences, particularly on homosexual men, and that those negative consequences undermine and negate their right to liberty, privacy, dignity and equal protection of the law, as guaranteed by section 3 of the Constitution. Those are properly to be construed as applying to ‘every person’, regardless not only of his or her sex, but of his or her sexual orientation as well. Those sections lead to the stigmatisation of gay men, make them more vulnerable to HIV/AIDS and STDs through a resultant reluctance to access public health facilities for testing and treatment purposes, and can lead to stress-related mental health issues, and also to suicidal tendencies. They lead also to a reluctance to report assaults and blackmail attempts arising from their orientation or fear of being branded by the police as criminals themselves.”
Attorney General v Motshidiemang (Civil Appeal No CACGB-157-19) [2021] BWCA (9 November 2021), para 67

LGBTIQ+: Kirby, P: “It is proper that, applying the generous construction required in the interpretation of fundamental rights, the definition of ‘sex’ in both section 3 and section 15(3) falls to be expanded by the inclusion of the wider meanings of the word, which must embrace not only sexual orientation but gender identity as well. Both those characteristics are embodied in the full generic meaning of the word ‘sex’.”
Attorney General v Motshidiemang (Civil Appeal No CACGB-157-19) [2021] BWCA (9 November 2021), para 65.
LGBTIQ+: Shivute, CJ: “Homosexual relationships are without doubt, globally recognised, and increasingly more countries have changed their laws to recognise one’s right not to be discriminated against on the basis of one’s sexual orientation. We believe it is time, too, for the Namibian Constitution to reflect that homosexuality is part and parcel of the fabric of our society and that persons - human beings - in homosexual relationships are worthy of being afforded the same rights as other citizens.”

Digashu & Another v GRN & Others; Seiler-Lilles & Another v GRN & Others (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paras 125-26

LGBTIQ+: Shivute, CJ: “To interpret that the prohibited form of discrimination on the basis of sex does not include sexual orientation is also untenable. Article 10(2) goes further to prohibit discrimination on the basis of social status, and to then state that all these exclude sexual orientation, constitutes a narrow interpretation of a constitutional provision. This restrictive approach, couched in tabulated legalism cannot be sustained in a society founded on democratic values, social justice and fundamental human rights enshrined in the Constitution.”

LGBTIQ+: Shivute, CJ: “We cannot in a functioning democracy, founded on a history such as our own, come from a system of unreasonable and irrational discrimination, to obtain freedom and independence, and then continue to irrationally and unjustifiably take away human rights of another segment of Namibian citizenry, simply because of their orientation. It amounts to cherry-picking of human rights, and deciding whose rights are more 'human', and to be protected, more than others. This is not what our democracy was founded upon. We suggest a proper reconsideration of a most imperative recognition of inviolable human rights under Article 8.”


LGBTIQ+: Dlamini, JA: “Having alluded to the fundamental rights, it is clear that our Constitution guarantees the rights irrespective of gender or sex. So that it is safe to say that LGBTs have the rights conferred by section 14 of the Constitution. They have a right to life, liberty, privacy or dignity. They have a right not to be discriminated against or be subjected to inhumane and degrading treatment. They have a right to associate. They have a right to form a company. They have a right to freedom of expression. These rights are inherent in them not by reason of their sexual preferences as LGBTs but as human beings.”

Simelane N.O. & Others v Minister of Commerce Industry & Trade & Others (Civil Case 34 of 2022) [2023] SZSC 23 (16 June 2023), para 82.
**Right to Equal Treatment & Prohibition Against Discrimination**

**Judiciary Obligation:** Kirby, JP: “It is most unlikely that the popular majority as represented by its elected members of Parliament, will have any inclination to legislate for the interests of vulnerable individuals or minorities, so the framers, in their wisdom, allocated that task and duty to the Judiciary – a task which every judge must execute in accordance with his or her judicial oath. It is sometimes said by cynics that political promises last only until sundown. That is not the case with the judicial oath to uphold the Constitution. This is binding upon and must be faithfully upheld by every judge for the entire term of her or her tenure, and, hopefully thereafter as well.”

Attorney General v Motshidiemang (Civil Appeal No CACGB-157-19) [2021] BWCA (9 November 2021), para 88.

**Refugees:** Schippers, AJ: “Refugees are, by definition, persons in flight from persecution or threats to their life, physical safety or freedom and other serious human rights abuses, and should not be forced to return to the country inflicting these harms. They are an ‘especially vulnerable group’ in our society, and their plight calls for compassion.”

Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others (CCT 51/23) [2023] ZACC 45; 2024 (4) BCLR 592 (CC); 2024 (3) SA 330 (CC) (12 December 2023).
Religion: Ntaba, J: "Discrimination against Rastafarians, though not always apparent, is embedded in the appearance and grooming regulations of most employers and schools which prohibit dreadlocks. Numerous surveys of religious movements, freedom and discrimination indicate that Rastafari adherents face the dual hardships as well as not being recognized officially as a religious minority. Further they are facing varying degrees of prejudice and hostility from both state actors and the mainstream faiths due to entrenched stereotypes and biases of uncleanliness, criminality to mention a few. ...A person's religious convictions need not make sense to us in order for us to accord them the necessary respect and space for them to flourish. An issue that may appear trifling to one may be of monumental value to another in the realm of religious beliefs. Their validity and the right of their holders to hold religious beliefs are not dependent on general acceptance or a majority vote. They are personal to the individual in accordance with their own inner light and must be respected because they are clear, not to the observer but to the believer.”

State & Attorney General, Minister of Education (Education Division Manager Southern Region), Headmaster Blantyre Girls Primary School; Ex Parte Mbewe & Registered Trustees of the Centre of Human Rights Education, Advice & Assistance (CHREAA) (Judicial Review Case 55 of 2019) [2023] MWHC 32 (8 May 2023), para 4.22.
Scope of the Protection from Discrimination: Oré, P: “The scope of the right to non-discrimination [in the African Charter] extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression ‘any other status’ in Article 2 of the Charter encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter.”

Prohibition Against Torture & Cruel, Inhuman or Degrading Treatment

**Children and Bodily Autonomy:** Ndayisenga, C: “In this instance, the girls being detained are not suspected of having committed any crime under Tanzanian law, but rather as survivors of the crime of impregnating a schoolgirl . . . . The detention of persons who have not committed nor are suspected of having committed a crime violates the principle of illegal detention . . . . This detention constitutes an unjustifiable infringement on the girls’ dignity and physical integrity because it violates their dignity as well as their physical and mental integrity as children.”


**Children and Detention:** Chirwa, J: “Turning to the present application, there is no evidence before this Court to show that before the orders for the detention of the Applicants in police custody at the Limbe Police Station the lower court had considered the welfare of the Applicants and been satisfied that such a place had the best interests of the Applicants as children, such as adequate nutrition, beddings, education and recreation.”

**Prohibition Against Torture & Cruel, Inhuman or Degrading Treatment**

**Children and Detention:** Chirwa, J: In the premises, this Court would be inclined to concur with the contention of both the parties hereto that the detention of the Applicants in police custody at the Limbe Police Station was clearly in breach of Section 23(1) of the Constitution, Section 88 of the Act and Article 3 of the Convention and thus unlawful . . . . And since there appears to be no safety homes designated by the Minister as mandated by Section 157(1) of the Act, it is the further order of this Court that the Minister responsible for the welfare of children should within the next 30 days from the date hereof proceed to designate or establish places or institutions as public safety homes in terms of the said provision. The Minister as a duty-bearer ought to have discharged this statutory duty soon after the Act became operational. The Minister’s failure to do so by this date is thus a clear abdication of a statutory duty."


**Children and Gender-Based Violence:** Ndayisenga, C: “[R]ape is the worst form of sexual abuse and is severely physically and psychologically damaging to children. In the context of survivors of sexual violence, it is necessary to note that sexual violence is itself- a form of cruel, inhuman, and degrading treatment and a violation of article 16 of the [African] Charter [on the Rights and Welfare of the Child]. Subjecting girls who are survivors of sexual violence to illegal detention is thus a continuation of the cruel, inhuman, and degrading treatment they have already suffered."

Legal & Human Rights Centre & Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania, (Communication No.0012/Com/001/2019, Decision No 002/2022) [2022] ACERWC 1 (15 September 2022), para 36.
Criminal Justice: Mzikamanda, J: “[O]vercrowding has been noted as one factors creating the spread of diseases in prison such as tuberculosis which has been said to be a major cause of sickness and death in prison, along with HIV... Apart from poor ventilation and therefore lack of adequate fresh air in our prisons, inmates become packed like sardines, obviously making sleeping conditions unbearable for the inmates. Such kind of conditions in relation to overcrowding and poor ventilation are not consistent with treatment of inmates with human dignity. Put simply, the overcrowding and poor ventilation in our prisons amounts to inhuman and degrading treatment of the inmates.”


Gender-Based Violence: Mathopo, AJ: “...For far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa.”

Prohibition Against Torture & Cruel, Inhuman or Degrading Treatment

**Gender-Based Violence:** Khampepe, J: “Rape is often mischaracterised as being an act of sexual intercourse, absent of consent, committed by inhumane monsters. This is a dangerous mischaracterisation of rape. Words matter. Words give construction of a certain viewpoint of the world, and this viewpoint tends to be gendered. Although rape is defined as an unlawful and intentional act of sexual penetration of one person by another, without consent, it must be buttressed that the victim does not experience rape as being sexual at all. The requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse. For many victims and survivors of rape, they ‘do not experience rape as a sexual encounter’ but as a frightening, life-threatening attack’ and ‘as a moment of immense powerlessness and degradation.”


**Gender-Based Violence:** Tsanga, J: “Ultimately, this is a criminal case of murder in which a woman said not to a man's advances and was killed for doing so. The accused’s assault of the deceased in the initial instance when he slapped her for ignoring him, was his exercise of power over her and has to be understood for what it was – an ultimate display of power over her rejection. . . This is therefore not a case of murder in a gender-neutral context. The genesis of the attack that led to the killing of the deceased must be understood for what it was – a form of gender-based violence.”

Informed Consent: Mrima, J: “A healthcare provider was the custodian of the information that facilitated a patient’s informed consent...The 1st Petitioner’s low level of literacy and understanding of family planning options and health generally imposed upon healthcare providers a high legal duty to facilitate her consent.”


Minimum Standards of Living: Malila, JS: “The right to humane treatment imposes a positive obligation on States intended to ensure the observance of minimum standards with regard to persons deprived of their liberty.”


Sentencing: Masuku, J: “It must not be forgotten that suspects who have been correctly arrested are not less human by virtue of being suspected of having been on the wrong end of the law. Their dignity and self-worth have to continue being respected because they are not less human by being accused of crime. The situation is more pronounced in a situation such as the present where the police, it would appear, knew that the Plaintiff had committed no offence. It was their mission to tar him with a brush of criminality with no reasonable basis to do so and literally sent him to hell and back in the process.”

**Right to Dignity**

**General:** Kalemera, J: “There is no doubt in my mind that [the application of the Penal Code] led to the violation of the Appellant’s constitutional right to dignity. His dignity was violated. He was presumed guilty until proven otherwise. All because he possible appeared to be of no means. He was not treated as a human being. And where a person’s dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual's human rights end up being violated.”


**Abortion:** Nyakundi, J: “Where formal legal channels to abortion are lacking or inaccessible the victims (women) terminate their pregnancies by unscrupulous devices and substances. In the view of this Court, in abortion cases the pregnant women tend to avoid such medical examination on the ground that it violates her right to privacy or for that matter, the right to human dignity.”


**Citizenship:** Nthomiwa Nthomiwa, J: “The recognition of our citizenship and personal identity by the State which includes the ability to have access to proper identification is at the core of our humanity and dignity. Identity documents not only enable us to have access to routine services, healthcare, social security and employment but affords us an opportunity to live in dignity.”

ND v Attorney General & Another 2018 (2) BLR 223 (HC), para 83.
**Criminalisation of Status:** Oré, P: “The Court also holds that labelling an individual as a ‘vagrant’, ‘vagabond’, ‘rogue’ or in any other derogatory manner and summarily ordering them to be forcefully relocated to another area denigrates the dignity of a human being. If the implementation of such order is accompanied by force, it may also amount to physical abuse.”


**Informed Consent:** Mrima, J: “A healthcare provider was the custodian of the information that facilitated a patient’s informed consent...The 1st Petitioner’s low level of literacy and understanding of family planning options and health generally imposed upon healthcare providers a high legal duty to facilitate her consent.”

*ND v Attorney General & Another 2018 (2) BLR 223 (HC) (29 September 2017)*, para 85.

**Gender:** Nthomiwa Nthomiwa, J: “It follows therefore from the foregoing that the recognition of the Applicant’s gender identity lies at the heart of his fundamental right to dignity. Gender identity constitutes the core of one’s sense of being and is an integral part of a person’s identity. Legal recognition of the Applicant’s gender identity is therefore part of the right to dignity and freedom to express himself in a manner that he feels psychologically comfortable with.”

*ND v Attorney General & Another 2018 (2) BLR 223 (HC) (29 September 2017)*, para 85.
LGBTIQ+: Leburu, J: “The impugned sections, in my view deny the Applicant the right to sexual expression in the only way available to him. Such a denial and criminalisation, goes to the core of his worth as a human being. Put differently, it violates his inherent dignity and self-worth. All human beings are born free and equal in dignity. Dignity acts as a core of a diverse but interrelated body of inalienable rights. Human dignity refers to the minimum dignity and belongs to every human being qua human. It does not admit of any degrees. It is equal for all humans.”


LGBTIQ+: Rannowane, J: “Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive State, to the constitutional protection of their dignity.”


National Values: Korir, J: “[I]n Article 10 of our Constitution, human dignity is one of the national values and principles of governance which must be applied in interpreting the Constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions.”

Republic v Kenya National Examinations Council (KNEC) & Another; Ex parte Audrey Mbugua Ithibu (JR Case No. 147 of 2013) [2014] eKLR (7 October 2014), 10-11.
National Values: Fortuin, J: “The right to dignity implies protection from conditions or treatment which offends a person's sense of worth in society. Dignity entails recognising everyone's incalculable worth. It generates an entitlement to be treated with respect and concern. These ideas are at the centre of the rights culture which we as a country are aiming at. If the state undermines a person's self-worth through condemnation of conduct that forms part of a person's experience of being human, the state violates that person's right to dignity.”


Presumption of Innocence: Kalembera, J: “What evidence was there that the Applicant intended to commit an offence? ... there was no investigation, there was no evidence that the Applicant intended to commit an offence or an illegality... His dignity was violated. He was presumed guilty until proven otherwise. All because he possibly appeared to be of no means. He was not treated as a human being. And where a person's dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual's human rights end up being violated.”

Abortion: Nyakundi, J: “Security of the person had to include the right of access to medical treatment for a condition representing a danger to life or health without fear of criminal charges. Reproductive rights were understood to be performed in privacy. Sexual activity occurred in the innermost of the privacy walls. Yet the right to privacy was not absolute but could be protected only against unjust interference.”


Absolutism: Leburu, J: “The right to privacy, it is common cause, is not absolute. Through reverse syllogism, any entitlement to privacy is what remains after the law has siphoned out from the wholesome basket of privacy, through acceptable limitations.”

Motshidiemang v Attorney General 2019 All Bots 46 (HC) (11 June 2019), para 118.

Bodily Autonomy: Leburu, J: “In casu, we have determined that it is not the business of the law to regulate private consensual sexual encounters between adults. The same applies to issues of private decency and/or indecency between consenting adults. Any regulation of conduct deemed indecent, done in private between consenting adults, is a violation of the constitutional right to privacy and liberty[.]”

**Bodily Autonomy:** Visram, J: “The right to privacy particularly, not to have one’s privacy invaded by an unlawful search of the person, is closely linked to the right to dignity. Those rights, in our view, extend to a person not being compelled to undergo a medical examination.”

COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others (Civil Appeal No. 56 of 2016) [2018] eKLR (22 March 2018), para 27.

**Health Status Discrimination:** Muyovwe, J: “I find that the petitioners were subjected to mandatory testing without their consent and that they were put on ARVs unknowingly. This was a grave error on the part of the doctor. Having regard to authorities cited herein, I find that the petitioners’ right to protection to protection from inhuman and degrading treatment under Article 15, the right to privacy under Article 17 were violated. I must hasten to note that after the petitioners were put on ARVs they responded positively to treatment and this is going by their own evidence – but this does not take away the fact that their fundamental right to privacy and protection from inhuman treatment were infringed.”

**Right to Privacy**

**LGBTIQ+:** Leburu, J: “In my view, the attacked provisions, impair the Applicants right to express his sexuality in private, with his preferred adult partner. The Applicant has a right to a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that it is consensual. There is no complainant/victim in that regard.”


**Reasonableness:** Ndayisenga, C: “While the requirement that no interference [of the right to privacy] may be unlawful envisages that such interference should be prescribed by law, the requirement that no such interference may be arbitrary foresees that this interference cannot compromise any other rights in the Charter. Rather, for interferences not to be arbitrary, they must be deemed to be reasonable. Reasonableness requires that the measures taken are responsive to context, are not discriminatory, and do not infringe any rights. There must also be a balance between the goal sought and the means employed for this goal to be achieved.”

Legal & Human Rights Centre & Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania, (Decision No 002/2022) [2022] ACERWC 1 (15 September 2022), para 92.
**Rights of the Deceased:** Aburili, J: “In my humble view, whereas the dead have no individual guaranteed rights, human dignity does not end with death. In all cultures across the world, the burial of the dead is a solemn event accompanied by elaborate rituals. In other cultures, only those who commit suicide or those who drown are buried at night. The dead are respected and that is why we have graves, tombs, crypts, mausoleums and pyramids. Veneration of the dead is based on love, respect and dignity for the deceased.”


**Rights of the Deceased:** Aburili, J: “Human rights come in two parts: the rights of the individual, and the corresponding duty of the state to protect them. Our rights may die with us, but the duties of the state linger on. It follows that when an individual is no longer around to exercise their rights, the State still has a duty to investigate violations leading to their demise. Similarly, while deceased victims are no longer around to experience the assault of human rights violations, the impacts of actions taken against them can affect the human rights of their loved ones, for, our personhood remains entangled amongst the rights of those we shared our lives with. The rights that we hold are fixed in our legacy, alongside the echoes of our dignity. Though they may pass with us, human rights are much bigger than our individual rights.”

Ajuang & Another v Osodo the Chief of Ukwala Location & Others (Petition No. 1 of 2020) [2020] eKLR (15 June 2020), para 212.
Justiciability: Maha, J: “It is the law that any person who alleges that any of the Fundamental Rights provided for in the 1999 Constitution (as amended) or African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act or any other legal instrument, has been, is being or is likely to be infringed, may apply to the Court in the State for redress.”

Sam v Minister, FCT & 10 Others (Suit FHC/ABJ/CS/970/2019) Federal High Court of Nigeria, Abuja (5 August 2021).

LGBTIQ+: Leburu, J: “Sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important attribute of one’s personality and identity; hence all and sundry are entitled to complete autonomy over the most intimate decisions relating to personal life, including choice of a partner. The right to liberty therefore encompasses the right to sexual autonomy.”


Limitations: Leburu, J: “Whenever the State seeks to rely on one of the constitutional limitations to the fundamental rights, the State is then saddled with the onus to prove that such limitation, squarely satisfies the constitutional limitation, under the circumstances. The onus to justify a limitation to a fundamental right is not an easy one to discharge, considering that clauses which derogate from constitutional rights are to be narrowly construed, whereas clauses conferring and giving such rights receive a generous construction.”

Motshidiemang v Attorney General 2019 All Bots 46 (HC) (11 June 2019), para 175-76.
Right to Freedom of Expression

**Access to Information:** Ouattara, J: “[A]ny unjustified measure which aims to suspend or restrict free access to information constitutes a violation of the right to information.”

Association des Blogueurs de Guinee v Guinea, Case No. ECW/CCJ/JUD/38/23, Community Court of Justice, ECOWAS (21 October 2023), para 47.

**Access to Information:** Mokhesi, A.J: “Fear of potential criminal sanction for reputational incursion may result in media practitioners doing what is known as self-censoring. The corollary of this self-censoring is to stop the flow of information, leaving the public less informed about the goings-on in Government.”


**Controversial Opinions:** Mulongoti, J: “from the evidence on the record the accused was not engaging anyone to practice homosexuality. What I heard was that he was advocating for the rights of those already practicing it to be protected. ... It is through debate that people share information and ideas whether good or bad”

People v Kasonkomona (HPA/53/2014) ZMHC (15 May 2015)
Criminal Sedition: Mukasa-Kikonyogo, DCJ: “But that does not solve the fundamental criticism that the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one's right under 29(I)(a) ... It is so wide and it catches everybody to the extent that it incriminates a person in the enjoyment of one’s right of expression of thought. Our people express their thoughts differently depending on the environment of their birth, upbringing and education... All these different categories of people in our society enjoy equal rights under the Constitution and the law. And they have equal political power of one vote each... We find that, the way impugned sections were worded have an endless catchment area, to the extent that it infringes one’s right enshrined in Article 29(1) (a). We answer issue one in affirmative and in favour of the petitioners.”


Freedom of Expression: Mokhesi, A.J: “Satirical expression, notwithstanding the fact that it distorts and exaggerates reality, assists individuals in attaining self-fulfilment and fostering political participation.”

**Hate Speech:** Majiedt, J: “The right to freedom of expression in international law contains two parts – the first imposes on states the obligation to protect the right to free speech, the second makes it equally mandatory for States to prohibit hate speech. The judgment of the Supreme Court of Appeal, while making cryptic reference to international law, did not address at all the provisions of the ICERD, despite its central role. That central role emanates from Article 4(a), which obliges South Africa to proscribe (as “an offence punishable by law”) not only “incitement to racial discrimination [or violence]” but “all dissemination of ideas based on racial superiority or hatred”. Various factors have been identified in international law that justify the curtailment of freedom of expression. These include: (i) the prevailing social and political context; (ii) the status of the speaker in relation to the audience; (iii) the existence of a clear intent to incite; (iv) the content and form of the speech; (v) the extent and reach of the speech; and (vi) the real likelihood and imminence of harm.”


**LGBTIQ+:** Kirby, P: “The real question is whether there is anything unlawful or offensive about advocating for a change in these laws so as to decriminalise the forbidden aspects of same-sex relationships. I think it is clear, as Rannowane J found, that there is nothing unlawful about advocating for a change or changes in the law.”

Attorney General v Rammoge 2016 All Bots 165 (CA) (16 March 2016), paras 63-64.
LGBTIQ+: Nthomiwa Nthomiwa, J: “The Applicant as a transgender man has expressed his desire to be identified and live as a man, which is part of his constitutional right to define his own personal identity. In my opinion therefore as an expression of free choice, the decision to live his life in accordance with his gender identity must be respect. His male gender identity is innate from which he cannot dissociate.”
ND v Attorney General & Another 2018 (2) BLR 223 (HC) (29 September 2017), para 122.

Necessity: Monochi, J: “This Court thus finds that, the provisions of the section 77 of the Penal Code [defining the offence of 'subversion'] are over broad and vague, and that they limit the right to freedom of expression and there is lack of clarity as to the purpose and intent. the limitation in section 77 is not ‘provided by law’. The section is vague and over-broad firstly by not explicitly limiting the freedom of expression but adding the limitation on to other acts or conduct, there exists confusing definition of 'subversion' . . . None of the terms used in the offence are defined or capable of precise or objective legal definition or understanding. The . . . Respondents have not justified the necessity of the provisions in section 77 . . . I accordingly find that the said provision serves no legitimate aim and is not strictly necessary in an open and democratic state.”
Katiba Institute & 8 Others v Director of Public Prosecutions & 2 Others [2024] (Petition No. E016 of 2023) eKLR, para 138.
Right to Freedom of Expression

**Political Advocacy:** Kirby, JP: “There is nothing unlawful about advocating for a change or changes in the law. That is the democratic right of every citizen.”

Attorney General v Rammoge 2016 All Bots 165 (CA) (16 March 2016), para 64.

**Sedition:** Mugenyi, PJ: “The definitions of sedition in the said section are hinged on the possible and potential subjective reactions of audiences to whom the publication is made. This makes it all but impossible, for a journalist or other individual, to predict and thus, plan their actions.”


**Self-Censorship:** Nwoke, J: “Narrowly drawing offences has been treated as particularly important in the case of free speech because of what is known as “chilling effect” which occurs when a wide or vague speech-restricting provision forces self-censorship on speakers even with, because they do not wish to risk being caught on the wrong side of it.”

Women: Cheborion, JCC: “[Addressing an Anti-Pornography Act that defined pornography to include ‘indecent show’] ...Even if one were to accept that the legislative objective of the impugned provisions and the Act were to protect women and children, it has not been demonstrated that the criminalisation of pornography is rationally connected to that legislative objective. Neither am I able to determine if this measure is no more than necessary to achieve the legislative objective.”

Children: Malaba, DCJ: “The effect of s 78(1) as read with s 81(1) of the Constitution is very clear. A child cannot found a family. There are no provisions in the Constitution for exceptional circumstances. It is an absolute prohibition in line with the provisions of Article 21(2) of the ACRWC. The prohibition affects any kind of marriage whether based on civil, customary or religious law. The purpose of s 78(1) as read with s 81(1) of the Constitution is to ensure that social practices such as early marriages that subject children to exploitation and abuse are arrested. As a result, a child has acquired a right to be protected from any form of marriage.”

Equal Protection: Prinsloo, J: “The unfairness of discrimination is thus to be determined with reference to the impact upon the victim(s) discriminated against, the purpose sought to be achieved by the discrimination, the position of the victim(s) in society, the extent to which their rights and interests have been affected and their dignity impaired.72 [123] The impact of the differentiation upon Mr Digashu and Ms Seiler-Lilles (as spouses in a same-sex marriage) is far reaching and potentially devastating when compared to spouses in a heterosexual marriage. Instead of being entitled to cohabit in Namibia with their Namibian citizen spouse under s 2(1)(c), they are required by the Ministry to apply for one of the range of permits posited by Part V to provide them with permission to reside or be employed in Namibia. In the instance of Mr Digashu, the permit identified by the Ministry would be temporary and of a precarious nature which was in any event refused, as was the permanent residence application by Ms SeilerLilles. ...The result of the differentiation has led to a profound impairment of their fundamental human dignity at a ‘deeply intimate level of their human existence’.”

Digashu v Namibia 2022 All Nam 17 (HC) (20 January 2022), para 122-24.
Access to Medicine: Ngugi, J: “It would be in violation of the state’s obligations to the Petitioners with respect to their right to life and health to have included in legislation ambiguous provisions subject to the interpretation of intellectual property holders and customs officials when such provisions relate to access to medicines essential for the Petitioners’ survival. There can be no room for ambiguity where the right to health and life of the Petitioners and the many other Kenyans who are affected by HIV/AIDS are at stake.”

Ochieng & 2 Others v the Attorney General & Another (Petition No. 409 of 2009) [2012] eKLR (20 April 2012), para 84.

Access to Medicine: “The right to life, dignity and health of people like the Petitioners who are infected with the HIV virus cannot be secured by a vague proviso in a situation where those charged with the responsibility of enforcement of the law may not have a clear understanding of the difference between generic and counterfeit medicine. The primary concern of the Respondent should be the interests of the Petitioners and others infected with HIV/AIDS to whom it owes the duty to ensure access to appropriate health care and essential medicines.”

Ochieng & 2 Others v the Attorney General & Another (Petition No. 409 of 2009) [2012] eKLR (20 April 2012), para 84.
**Governmental Obligations:** Cheborion, JCC: “The right to health is to be understood as the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health and without wholly exonerating Uganda, it should be appreciated that the full realisation of the right to health is difficult to attain because of structural and other obstacles resulting from factors beyond the control of State and Uganda is no exception.”


**Governmental Obligations:** Kirby, JP: “It is the responsibility of Government to budget for the fulfilment of its legal obligations. If the law requires a service to be provided, then funds must be found to provide that service, or Parliament must be engaged to amend that law. Lack of funds will not in the normal course justify disobedience of the law.”

Attorney General v Tapela 2015 All Bots 196 (CA), para 70.

**Maternal Health:** Mokhesi, J: “Medical science tells us that pregnancy is not a medical condition but a temporary physical disability. It is for this reason that labour laws and international human rights treaties enjoin employers – be they private or public – to gender-sensitise the workplace environment by prohibiting dismissals on the grounds of pregnancy, marital status and denial of maternity and paternity leave.”

Public Health Measures: Nyirenda, J: “The Court will be the first in joining the State in the fight against the corona virus epidemic. The Court will help in ensuring that all necessary measures put in place, be it by the legislature or the executive branches, are enforced. However, it has to be made clear that the Court will not be part of a fight against the epidemic that is being waged outside the dictates of the law. Equally true, the Court will not endorse measures that are unconstitutional and ultra vires. This country is founded on the rule of law: see sections 9, 12, 45(6) and 103 of the Constitution.”


Public Health Measures: Manda, J: “It would therefore be unconstitutional if the lockdown in the context of the matter before us was implemented without paying particular regard to the right to life, and the right to a livelihood, which are seriously affected.”

State (on the application of Kathumba & Others) v President of Malawi & Others (Constitutional Reference 1 of 2020) [2020] MWHC 29 (3 September 2020).

Public Health Measures: Fabricius, J: “The virus may well be contained – but not defeated until a vaccine is found – but what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and overall, the maintenance of the rule of law.”

Right to Health: Cheborion, JCC: “Indeed, progressive realisation takes into account a state parties' available resources and requires the state to move as expeditious and effectively as possible and take deliberate steps to realise them. Unimplemented policies and strategies in Uganda as pointed by Prof Waiswa cannot be said to be expeditious and effective steps towards realisation of the right to health.”


Right to Food and Water: Malila, JS: “The two prisoners’ claim that their right to life - a clearly justiciable right of the first-generation type - was violated through the non-observance of another right, i.e. the right to food (adequate food) - which as a second-generation right is generally taken to be of doubtful justiciability. The point is conceded that the right to food in Zambia is not in the justiciable category of rights in the domestic Bill of Rights. The right to food is, however, a distinct, valid and fundamental human right which has been recognised as such for many years.”

Right to Food and Water: Malila, JS: “[W]e must state that the right to life ought to be given a broader interpretation as a right to a dignified life, that is to say a life according to human dignity, encompassing a wider range of aspects of the right to food nutritious to sustain a dignified human life. For those with special requirements owing to their health conditions, the right to life should be construed even more broadly to mean food which will take care of their peculiar health needs. Any consideration of the right to life which is short of these stipulations, is in our view, is meaningful - it is merely rhetorical or metaphorical.”

Freedom of Association

General: Kirby, JP: “It is clear that the Minister’s decision [to refuse to register LEGABIBO (Lesbians Gays and Bisexuals of Botswana)] interferes in the most fundamental way with the Respondents’ right to form an association to protect and promote their interests.”

Attorney General v Rammoge 2016 All Bots 165 (CA), 69.

Human Right of Association: Mwilu, DCJ: “Given that the right to freedom of association is a human right, vital to the functioning of any democratic society as well as an essential prerequisite enjoyment of other fundamental rights and freedoms, we hold that this right is inherent in everyone irrespective of whether the views they are seeking to promote are popular or not.”

Non-Governmental Organisations Co-ordination Board v Gitari & 4 Others (Petition No. 16 of 2019) [2023] eKLR (24 February 2023), para 70.

Equal Protection: Kirby, JP: “All persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests.”

Attorney General v Rammoge 2016 All Bots 165 (CA) (16 March 2016), 69.
Anti-Discrimination: Ntaba, J: “The legitimacy of a code of conduct should reflect the culture and experiences of the entire school community which includes Rastafari children. Therefore, it is this Court’s considered view that school codes of conduct but more so national policies on education should celebrate diversity and be conscious of their potential to exclude, particularly in relation to hair, but also be more comprehensively inclusive.”

State & Attorney General, Minister of Education (Education Division Manager Southern Region), Headmaster Blantyre Girls Primary School; Ex Parte Mbewe & Registered Trustees of the Centre of Human Rights Education, Advice & Assistance (CHREAA) (Judicial Review Case 55 of 2019) [2023] MWHC 32 (8 May 2023), para 4.15.

Anti-Discrimination: Ntaba, J: “It must also be acknowledged as noted by the circumstances of this case but also the cases from other jurisdictions that leaving the issue to be regulated purely by policy statements is not advisable. Fundamentally, it should not take courts to intervene in order to stop discriminatory practices which were outlawed in the first place. It is incumbent upon all duty bearers to ensure that they avoid discriminatory application of policies. Legislative provisions which provide for protection of the religious and cultural rights of Rastafari students must always be upheld by all those charged with the duty to educate or otherwise.”

State & Attorney General, Minister of Education (Education Division Manager Southern Region), Headmaster Blantyre Girls Primary School; Ex Parte Mbewe & Registered Trustees of the Centre of Human Rights Education, Advice & Assistance (CHREAA) (Judicial Review Case 55 of 2019) [2023] MWHC 32 (8 May 2023), para 4.22.
Education of Girls: Ndayisenga, C: “[T]he exclusion of pregnant and married girls from schools with no opportunity for re-entry creates a vicious cycle of gender-based discrimination as these girls will be excluded from the benefits of education. This is because education is not only a substantive right, but the enjoyment of the right to education also facilitates the realisation of other rights of children and the elimination of discrimination against girls.”

Legal & Human Rights Centre & Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania, (Decision No 002/2022) [2022] ACERWC 1 (15 September 2022), para 55.
Environmental Rights

**Fundamental Rights:** De Silva, JA: “Although the right to live and enjoy a clean and healthy environment is referred to in academic discourses as a “third generation right”, it is in my view one of the fundamental, if not the most fundamental right of a human being. None of the myriad of other fundamental rights, including civil and political rights, can be meaningfully exercised by a human being in the absence of a clean and healthy environment which can sustain life. Man must live to exercise any of the fundamental or human rights bestowed upon him. A clean and healthy environment is a sine qua non for the meaningful expression of any other fundamental right or human right.”


**Governmental Obligation:** De Silva, JA: “The preamble to the EPA states inter alia that it is to provide for the protection, improvement and preservation of the environment. These are the very words used in Article 38(a) of the Constitution. Nevertheless, the constitutional undertaking of the State does not end there. The power to implement laws are vested with the executive branch of government. Thus, there is a further undertaking of the State to implement the EPA through executive and administrative action with a view of ensuring the effective realization of the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment.”

Public Participation: Balala, C: “In our view, public participation in an EIA Study process is the oxygen by which the EIA study and the report are given life. In the absence of public participation, the EIA study process is a still born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the EIA study report is. In this case, the report was extremely bulky and purported to capture a lot of information. By all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value.”

**Meaningful Consultation:** Ponnan, JA: “Meaningful consultations consist not in the mere ticking of a checklist, but in engaging in a genuine, bona fide substantive two-way process aimed at achieving, as far as possible, consensus, especially in relation to what the process entails and the import thereof. For all we know, contrary to the provisions of regulation 3, the consultants did not “make known” by way of a notice that there was an exploration application underway; no notice accessible to the public was placed on a notice board at a place determined to be accessible to the public; the consultants purportedly “[made] known” to the public by way of provincial and national newspapers (not a local newspaper). [...] In these circumstances, the object of regulation 3, in so far as it provides that the notice must let the affected and interested parties know and that the notice must be accessible to all affected communities, was thwarted. This is a clear case where little regard (or no regard at all) was paid to the significance of language as a tool of communication.”

Minister of Mineral Resources & Energy & Others v Sustaining the Wild Coast NPC & Others (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (3 June 2024).
Meaningful Consultation: Poonan, JA: “The consultation process was woefully lacking in yet another respect; after the initial project information had been compiled and availed “online,” a website was provided for interested and affected persons to have access to more information. Much as in this age and era computers and other similar devices are more ubiquitous than flies on a summer day, this court does not hesitate in taking judicial notice of the fact that a great number of the population, especially in rural communities, still lacks access to these devices. The Applicant communities are part of those who are still disadvantaged. The majority of members of aMadiba community are on record as not having access to email or internet facilities. In these circumstances, the distribution of the relevant information document by email and on the website would be neither accessible nor effective as a consultation tool within aMadiba community.”

Minister of Mineral Resources & Energy & Others v Sustaining the Wild Coast NPC & Others (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (3 June 2024).
Cultural Rights: Akuffo, P: “The protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity. In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality.”


Social & Cultural Rights: Malila, JS: “Economic, social and cultural rights are now increasingly being widely recognized as enforceable in the courts either directly or indirectly through civil and political rights.”

**Criminalisation of Status:** Oré, P: “Vagrancy laws, effectively, punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. Notably, however, individuals under such difficult circumstances are already challenged in enjoying their other rights including more specifically their socio-economic rights.”

Advisory Opinion of the African Court on Human and Peoples’ Rights, No. 1/2018, 4 December 2020, para 70.

**Right to Social Security:** Manda, J: “The right to social security is implicitly guaranteed under sections 19 (human dignity) and 16 (right to life) of the Constitution, as read with section 13 of the Constitution on principles of national policy, and that section 13 is paramount in elucidating the rights and fundamental freedoms guaranteed under the Constitution.”

State (on the application of Kathumba & Others) v President of Malawi & Others (Constitutional Reference 1 of 2020) [2020] MWHC 29 (3 September 2020).
Abuse: Korir, J: “It appears that in confronting the coronavirus, which is by all means a faceless enemy, the police brought the law and order mentality to the fore. Diseases are not contained by visiting violence on members of the public. One cannot suppress or contain a virus by beating up people. The National Police Service must be held responsible and accountable for violating the rights to life and dignity among other things.”


Abuse: Bere, J: “I have already explained in greater detail the emotional distress and loss of dignity suffered by the Plaintiff due to the conduct of the police. The forced invasive examinations stole from the Plaintiff her very core of humanity.”


Abuse: Bere, J: “One cannot avoid concluding that the conduct of the police in arresting and detaining the Plaintiff, was quite outrageous because clearly, they abused their discretion in arresting her. The conduct complained of against the Plaintiff is one of those where police would have easily conducted their investigations while the Plaintiff continued to enjoy her freedom”

**Law Enforcement Measures**

**Abuse:** Bere, J: “...the inescapable conclusion is that the Plaintiff did not commit any cognisable offence warranting her arrest and subsequent deprivation of liberty... There can be no debate that the Plaintiff's arrest was both high-handed and unlawful.”


**Abuse:** Bere, J: “If the Plaintiff was arrested outside the provisions of section 25 [of the Criminal Procedure and Evidence Act], her arrest could not possibly have been lawful...The involvement of the six riot police officers elevated the malicious arrest to an even higher and unacceptable level.”


**Abuse:** Bere, J: “…the accepted legal passion is that police do not arrest in order to investigate.”


**Abuse:** Chiotcha, J: "... They were being dragged by the police officers to the police station. They were exposed to a lot of humiliation and ridicule as people were taking their pictures as police were dragging them. People shouted insults at them. At police they were remanded barefooted and in very unventilated and unkempt police cells. Some of the stood in open human defecate and urine right in the cell. For avoidance of any doubt, the claimants are awarded MK 51 000 000 in total for damages for false imprisonment.”

Crime Prevention Measures: Ntaba, J: “Crime prevention can arguably be achieved by more precise and constitutionally valid provisions; including other provisions in the Penal Code; developing alternatives to arrest; ensuring arrests that are more targeted and intelligence-based; reducing vulnerability; addressing structural issues; preventing and reducing exploitation; and adopting strategies to expand educational, economic and social opportunities... arrest itself is not automatically the most appropriate response and police can, for example, caution and warn a person as a first response, whereafter an arrest for a substantive offence could be appropriate where there is a sufficient basis for such arrest.”


Criminalisation of Status: Oré, P: “In relation to the application of vagrancy laws, no reasonable justification exists in the distinction that the law imposes between those classified as vagrants and the rest of the population, except their economic status. The individual classified as a vagrant will, often times, have no connection to the commission of any criminal offence hence making any consequential arrest and detention unnecessary.”

Criminalisation of Status: Oré, P: “The Court holds that vagrancy laws, both in their formulation as well as their application, by, among other things, criminalising the status of an individual, enabling the discriminatory treatment of the underprivileged and marginalised, and also by depriving individuals of their equality before the law are not compatible with Articles 2 and 3 of the Charter.”


Criminalisation of Status: Oré, P: “The Court notes that vagrancy laws commonly use the terms ‘rogue’, ‘vagabond’, ‘idle’ and ‘disorderly’ to label persons deemed to be vagrants. These terms, the Court holds, are a reflection of an outdated and largely colonial perception of individuals without any rights and their use dehumanises and degrades individuals with a perceived lower status.”

Advisory Opinion of the African Court on Human and Peoples’ Rights No. 1/2018, 4 December 2020, para 79.
Criminalisation of Status: Oré, P: “The Court notes that a major challenge with the enforcement of vagrancy laws is that, in practice, the enforcement of these laws often results in pretextual arrests, arrests without warrants and illegal pre-trial detention... vagrancy laws do not, ex ante, sufficiently and clearly lay down the reasons and conditions on which one can be arrested and detained to enable the public to know what is within the scope of prohibition.”


Criminalisation of Status: Oré, P: “Since vagrancy laws are incompatible with several human rights enshrined in the Charter as well as other international human rights instruments, they cannot be the basis for lawful law enforcement activity.”


Criminalisation of Status: Oré, P: “The Court observes that arbitrary arrests, generally, have a disproportionate effect on impoverished and marginalised children.”

Law Enforcement Measures

**Criminalisation of Vagrancy:** Oré, P: “...many poor and marginalised women across Africa earn a living by engaging in activities that put them at constant risk of arrest under vagrancy laws. By sanctioning the arrest of poor and marginalised women on the ground that they have ‘no means of subsistence and cannot give a satisfactory account’ of themselves, vagrancy laws undermine Article 24 of the Women’s Protocol.”


**Duty of Law Enforcement Officers:** Ntaba, J: “Malawi’s current human rights dispensation emphasizes that there should be legality in the criminal justice system, thus abhorring absurdity in penal provisions like in section 184 (1)(b), particularity and certainty in charges as well as legality in pleas of guilty. It is, therefore, important that Malawi in the implementation of all the decisions which Malawian courts have decided in vagrancy or nuisance related to adopt the Principles on the Decriminalisation of Petty Offences in Africa as adopted by the African Commission. Every person needs to trust the criminal justice system but more so the law enforcement agencies. In terms of the police, they are first responders, protectors of the law, promoters of public security and safety but most of all they should the first to guard against illegality. Lastly, all criminal justice players are duty bound to promote justice and protect human rights.”

State v Officer In-Charge; Ex parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022), para 2.34.
**Over-Broad Criminal Statutes:** Oré, P: “Common terminology used in framing vagrancy offences include expressions such as ‘loitering’, ‘having no visible means of support’ and ‘failing to give a good account of oneself’. Such language does not provide sufficient indication to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws.”


**Over-Criminalisation:** Ntaba, J: “It is imperative at this point; this Court raises a significant socio-legal impact that these arrests and subsequent convictions have. Malawi for the time being has yet to establish a proper database in terms of arrests and convictions but when it does, these arrests as noted above will start to have a negative impact on the people whose arrest were wrong in law from the beginning and further whose convictions for most times not appealed against and sometimes even at confirmation will usually be confirmed. It should be noted that the negative impact will not evenly be felt by all Malawian society but certain categories and classes of people, that is, sex workers, poor people, homeless, people who work in bars or former convicts. The law and its application should not and must not be inherently discriminatory and it is therefore critical that all three arms of Government remind themselves of the important role they place especially as dictated by section 4 of the Constitution which stipulates that this Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution...”

State v Officer In-Charge; Ex parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022), para 3.3.
Police Sweeps: Ntaba, J: “Turning to ‘sweeps’, ‘raids’ or ‘sweeping’ or ‘swooping’ exercises which refer to coordinated police actions in which they seek out and arrest large numbers of offenders. Sweeps are also referred to crackdowns and characterized by aggressive behaviour by police meant to clean up usually in an urban setting of “undesirables” like sex workers, street children, beggars etc or those believed to be criminals or target certain groups like illegal immigrants to mention a few. The concept of police sweeps is historical, or colonial as noted by their aim. These are also characterized by massive arrests aimed at boosting police presence as well crime prevention. The legitimacy of police sweeps, or raids is not in question, but it is when they are meant to target certain groups in society without reasonable grounds or suspicion for arrest as set up in the law. They also lack legitimacy since they are usually one category of offences, that is, vagrancy or nuisance related offences like idle and disorderly, rogue and vagabond, public nuisance or loitering to mention a few. In African and more especially Malawi they lack legitimacy because are typically flout with arbitrary arrests at most times conducted by police over weekends especially a Friday and at night so that offenders are unable to apply for bail or consult legal counsel.”

State v Officer In-Charge; Ex parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022), para 2.9.
Police Sweeps: Ntaba, J: “These massive arrests with exceptions of sweeps that have been properly planned (arrested persons are promptly charged with appropriate offences not vagrancy ones), crime targeted (removal of concealed weapons during festive season), and evidence-based (unroadworthy cars after road officials have provided information of the same) sweeps result in human rights violations as people are harassed, forced to plead without proper legal counsel, fined or imprisoned for offences that should not have carried custodial sentences as per section 339 and 340 of the Criminal Procedure and Evidence Code. Considering our prison or detention centres, such are fraught with problems from a lack of food, lack of proper health care and are overcrowding. It would seem that Malawi’s policing systems in terms of criminal justice seems to be going against various constitutional standards as well as standards that Malawi agreed has to be bound by.”

State v Officer In-Charge; Ex parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022), para 2.12.
**Law Enforcement Measures**

**Police Sweeps:** Ntaba, J: “This Court underscores that indiscriminate police sweeps like the one in the Applicants’ case actually undermine the legitimacy of policing and overall the criminal justice system as it disproportionately affects the poor, marginalized and not legally empowered and it is these who are usually serving jail terms for petty or vagrancy offences who are causing congestion in the prisons, increasing human rights violations in criminal justice system but also creating a bad reputation for the criminal justice players especially police and courts.”

State v Officer In-Charge; Ex parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022), para 2.13.

**Presumption of Innocence:** Ntaba, J: “The arrest of persons classified as vagrants, clearly, was therefore largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets. It also recalled that any arrest without a warrant required reasonable suspicion or grounds that an offence has been committed or is about to be committed. Notably, where vagrancy-related offences are concerned, most arrests were made on the basis of an individual’s underprivileged status and the inability to give an account of oneself. In that context, therefore, arrests were substantially connected to the status of the individual who was being arrested and would not be undertaken but for the status of the individual.”

State v Officer In-Charge; Ex parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022), para 2.26.
Presumption of Innocence: Ntaba, J “This Court further finds that the said section and its consequent application constitutes an unjustifiable limitation on the rights contained in the above sections of the Constitution of the Republic of Malawi. Furthermore, the language therein of the provision, that is, every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself (my emphasis) is repugnant to the tenet of criminal justice that a person is presumed innocent even at arrest. The provision fails to take into account the principles of fair trial as provided for in section 42 of the Constitution. Further the language of the section is discriminatory in nature as it violates the right to equality as enshrined in section 20 of the Constitution as the provision convicts the person before trial due to their reputation as well as category of person they belong to in society. Furthermore, if the same should be considered a limitation, then it is not reasonable, it is not recognized by international human rights standards, and cannot be said to be necessary in an open and democratic society. The Court cannot in good conscience as the current provision stands consider that section 184(1)(b) of the Penal Code is in line with section 44 of the Constitution, that it is, legally justifiable, reasonable, necessary and acceptable in an open and democratic society; as well as meeting internationally acceptable human rights standards.”

State v Officer In-Charge; Ex parte Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022), para 3.2.
Agency Powers: Maha, J: “... the power of the 6th Respondent [Abuja Environmental Protection Board] cannot by any stretch of the imagination be interpreted to include organising sweeping raids, arresting and detaining people in clubs at night or policing social behaviour of women at clubs in Abuja. The 6th Respondent has failed to show this Honourable Court that they were acting within the powers as granted to them by law. As rightly submitted by the Applicant, they acted ultra vires their powers under the law establishing them.”

Sam v Minister, FCT and 10 Ors, Suit FHC/ABJ/CS/970/2019, Federal High Court of Nigeria, Abuja (5 August 2021).

Democratic Society: Musoke, JCC: “It is worth pointing out that any measures taken in relation to limiting a right must be such as are ‘acceptable and demonstrably justifiable in a free and democratic society’. A measure is acceptable and demonstrably justifiable in a free and democratic society if it is proportionate, that is, it must be the least intrusive and oppressive means available for achieving the intended purpose.”

**Freedom of Expression:** Majiedt, J: “[H]urtful speech does not necessarily seek to spread hatred against a person because of their membership of a particular group, and it is that which is being targeted by section 10 of the Equality Act. Therefore, the relationship between the limitation and its purpose is not proportionate.”

Qwelane v South African Human Rights Commission & Another (CCT 13/20) [2021] ZACC 22, para 139.

**General:** Nthomiwa Nthomiwa, J: “[T]he State must provide evidence to justify the limitation of the right of any person and that there is no alternative or lesser means that the limitation of the right.”

ND v Attorney General & Another [2017] 2018(2) BLR 223 (HC), para 158.

**Government Powers:** Maha, J: “...That the Respondents are restrained jointly or severally whether by themselves or through their servants, agents and privies from carrying out any further raised in Abuja, arrest and detention...”

Sam v Minister, FCT and 10 Ors, Suit FHC/ABJ/CS/970/2019, Federal High Court of Nigeria, Abuja (5 August 2021).
**Constitutional Interpretation**

**Broad Construction:** Nthomiwa Nthomiwa, J: “It is well established that in interpreting the provision of the Constitution more particularly with regard to the fundamental rights the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed. . . . It is also well established that constitutional derogations from fundamental rights, like penal statutes are ordinarily to be given a strict and narrow rather than broad and generous construction.”

ND v Attorney General & Another [2017] 2018(2) BLR 223 (HC), para 54-55.

---

**Broad Construction:** Kirby, P: “Reading the Constitution as a whole, a saving clause cannot validly be construed in such a way as to make fundamental rights unenforceable.”


---

**Contextual:** Shivute, CJ: “The Constitution must, because it is a moving, living, evolving document, stand evolution and the test of time, be broadly interpreted so as to avoid the austerities of tabulated legalism.”

Digashu & Another v GRN and Others; Seiler-Lilles & Another v GRN & Others [2023] NASC 14 (16 May 2023), para 125.
LGBTIQ+: Kirby, P: “Since the Penal Code (Amendment) Act of 1998, there can be no discernible public interest purpose in the continued existence of sections 164(a) and 164(c) of the Penal Code. In my judgement they have been rendered unconstitutional by the march of time and the change of circumstances. At present, they serve only to stigmatise gay men unnecessarily, which has a harmful effect on them, and as far as I am aware there has never been any prosecution of a women, or even any thought of doing so, for the offence of sodomy. Those sections have outlived their usefulness and serve only to incentivise law enforcement agents and others to become key-hole peepers and intruders into the private space of citizens. That, in my view, is neither in the public interest, nor in the nature of Botswana.”


Separation of Powers: Prinsloo, J: “Whilst public opinion expressed by the elected representatives in Parliament through legislation can be relevant in manifesting the views and aspirations of the Namibian people, the doctrine of the separation of powers upon which our Constitution is based means that it is ultimately for the court to determine the content and impact of constitutional values in fulfilling its constitutional mandate to protect fundamental rights entrenched in the Constitution. That is the very essence of constitutional adjudication which is at the core of our Constitution.”

Digashu v Namibia 2022 All Nam 17 (HC) (20 January 2022), para 103.
Standing

Chima Centus Nweze, JSC: “A party prosecuting an action would have locus standi where the reliefs claimed would confer some benefit on such a party.”


Nweze, J: “Every person, including NGOs, who bonafide seek the due performance of statutory functions or enforcement of statutory provisions or public laws, especially laws designed to protect human lives, public health and the environment, should be regarded as proper persons clothed with standing in law to request adjudication on such issues of public nuisance”

Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (SC. 319/2013) [2018] (20 July 2018).

Aka'ahs, JSC: “There is no gain saying in the fact that there is increasing concern about climate change, depletion of the ozone layer, waste management, flooding and global warming etc... Both nationally and internationally, countries and organizations are adopting stronger measures to protect and safeguard the environment for the benefits of the present and future ... it is on account of this, inter alia, that I am of the firm view that this court, being a court of policy should expand the locus standi of the Plaintiff/Appellant to sue.”

Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (SC. 319/2013) [2018] (20 July 2018).
Index

Access to Information
- Muga & 20 Others v County of Mombasa & 2 Others, High Court, Kenya (2020), 55
- Media Council of Tanzania & Others v Tanzania, East African Court of Justice (2019), 155
- Association des Blogueurs de Guinee v Guinea, Court of Justice of the Economic Community of West African States (2023), 163
- Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another, National Environmental Tribunal, Kenya (2019), 249
- Minister of Mineral Resources & Energy & Others v Sustaining the Wild Coast NPC & Others, Supreme Court of Appeal, South Africa (2024), 253

Access to Medicines
- Mapingure v Minister of Home Affairs & Others, Supreme Court, Zimbabwe (2014), 29
- Ochieng & 2 Others v Attorney General & Another, High Court, Kenya (2012), 43
- Mwanza & Another v Attorney General, Supreme Court, Zambia (2019), 113
- FIDA Kenya & 3 Others v Attorney General & 2 Others, High Court, Kenya (2019), 239

Access to PPE
- Lesotho Medical Association & Another v Minister of Health & Others, High Court, Lesotho (2020), 49
Bodily Autonomy

- Diau v Botswana Building Society, Industrial Court, Botswana (2003), 9
- Kingaipie & Another v Attorney General, High Court, Zambia (2010), 11
- Government of Namibia v LM & Others, Supreme Court, Namibia (2014), 17
- L A W & 2 Others v Marura Maternity & Nursing Home & 3 Others, High Court, Kenya (2022), 21
- COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others, Court of Appeal, Kenya (2018), 25
- Mapingure v Minister of Home Affairs & Others, Supreme Court, Zimbabwe (2014), 29
- Center for Health, Human Rights & Development (CEHURD) & 3 Others v Attorney General, Constitutional Court, Uganda (2020), 33
- Republic v Willy, High Court, Malawi (2022), 37
- Director of Public Prosecutions, Eastern Cape, Makhanda v Coko, Supreme Court of Appeal, South Africa (2024), 39
- Nkhoma & 13 Others v Child Protection Team, High Court, Malawi (2019), 209
- Mokhele & Others v Commander, Lesotho Defence Force & Others, High Court, Lesotho (2018), 231
- PAK & Another v Attorney General & 3 Others, High Court, Kenya (2022), 235
- FIDA Kenya & 3 Others v Attorney General & 2 Others, High Court, Kenya (2019), 239

Citizenship

- Attorney General & Others v Tapela & Others, Court of Appeal, Botswana (2015), 107
- Baby ‘A’ & Another v Attorney General & 6 Others, High Court, Kenya (2014), 165
• Ex Parte Audrey Mbugua Ithibu, High Court, Kenya (2015), 169
• ND v Attorney General & Another, High Court, Botswana (2017), 173
• Digashu & Another v GRN & Others; Seiler-Lilles & Another v GRN & Others, Supreme Court, Namibia (2023), 177
• P L v Minister of Home Affairs and Immigration, High Court, Namibia (2021), 189
• Attorney General v Dow, Court of Appeal, Botswana (1992), 217

**Children**

• Request for Advisory Opinion on Vagrancy Offences by the Pan-African Lawyers Union (PALU), African Court on Human & Peoples’ Rights (2020), 73
• Haukongo & Another v Minister of Home Affairs, Immigration, Safety & Security, High Court, Namibia (2023), 99
• Republic v Children in Detention at Bvumbwe & Kachere Prisons, High Court, Malawi (2018), 103
• Kadumbagula & Magunga v Tanzania, African Court on Human & Peoples’ Rights (2024), 127
• Baby ‘A’ & Another v Attorney General & 6 Others, High Court, Kenya (2014), 165
• Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others, Constitutional Court, South Africa (2023), 181
• P L v Minister of Home Affairs and Immigration, High Court, Namibia (2021), 189
• Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs N.O. & Others, Constitutional Court, Zimbabwe (2016), 195
• Attorney General v Gyumi, Court of Appeal, Tanzania (2019), 199
• Ex parte Mbewe, High Court, Malawi (2023), 203
• Legal & Human Rights Centre & Centre for Reproductive Rights v Tanzania, African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (2022), 205
• Nkhoma & 13 Others v Child Protection Team, High Court, Malawi (2019), 209

Criminalisation of Status
• E.L. v Republic, High Court, Malawi (2016), 13
• Ateenyi v Attorney General, Constitutional Court, Uganda (2022), 71
• Request for Advisory Opinion on Vagrancy Offences by the Pan-African Lawyers Union (PALU), African Court on Human & Peoples’ Rights (2020), 73
• Seek v State of Mauritius, Supreme Court, Mauritius (2023), 77
• Attorney General v Motshidiemang, Court of Appeal, Botswana (2021), 81
• Republic v P Banda & Others, High Court, Malawi (2016), 85
• Ex Parte Banda & Others, High Court, Malawi (2022), 95

Customary Law
• Ajuang & Another v Osodo the Chief of Ukwala Location & Others, High Court, Kenya (2020), 51
• Ramantele v Mmusi & Others, Court of Appeal, Botswana (2013), 221
• Mlotshwa v District Administrator, Hwange N.O., High Court, Zimbabwe (2020), 227
• African Commission on Human & Peoples' Rights v Kenya, African Court on Human & Peoples' Rights (2017), 251

Detention
• Ng’etich & 2 Others v Attorney General & 3 Others, High Court, Kenya (2016), 47
• Haukongo & Another v Minister of Home Affairs, Immigration, Safety & Security, High Court, Namibia (2023), 99
• Republic v Children in Detention at Bvumbwe & Kachere Prisons, High Court, Malawi (2018), 103
• Attorney General & Others v Tapela & Others, Court of Appeal, Botswana (2015), 107
• Masangano v Attorney General & Others, High Court, Malawi (2009), 111
• Mwanza & Another v Attorney General, Supreme Court, Zambia (2019), 113
• September v Subramoney N.O. & Others, Equality Court, South Africa (2019), 117
• Minister of Safety & Security & Others v Kennedy & Another, Supreme Court, Namibia (2020), 119
• Sonke Gender Justice NPC v President of the Republic of South Africa & Others, Constitutional Court, South Africa (2020), 123
• State v Makwanyane & Another, Constitutional Court, South Africa (1995), 125
• Kadumbatagula & Magunga v Tanzania, African Court on Human & Peoples’ Rights (2024), 127
• State v Madhinha, High Court, South Africa (2018), 131
• Zabron v Tanzania, African Court on Human & Peoples’ Rights (2024), 137
• Nkhoma & 13 Others v Child Protection Team, High Court, Malawi (2019), 209

**Discrimination**

• Gwanda v State, High Court, Malawi (2017), 69
• Firaas Ah Seek v Mauritius, Supreme Court, Mauritius (2023), 77
• Attorney General v Motshidimang, Court of Appeal, Botswana (2021), 81
Discrimination Based on Health Status

- Diau v Botswana Building Society, Industrial Court, Botswana (2003), 9
- Kingaipe & Another v Attorney General, High Court, Zambia (2010), 11
- E.L. v Republic, High Court, Malawi (2016), 13
- Government of Namibia v LM & Others, Supreme Court, Namibia (2014), 17
- L A W & 2 Others v Marura Maternity & Nursing Home & 3 Others, High Court, Kenya (2022), 21
- Ochieng & 2 Others v Attorney General & Another, High Court, Kenya (2012), 43
- Ng’etich & 2 Others v Attorney General & 3 Others, High Court, Kenya (2016), 47

Disability
- Brotherton N.O. v Electoral Commission of Zambia, High Court, Zambia (2011), 211
- Moshoeshoe & Others v Director of Public Prosecutions & Others, High Court, Lesotho (2019), 215

Education
- Ex parte Mbewe, High Court, Malawi (2023), 203
- Nkhoma & 13 Others v Child Protection Team, High Court, Malawi (2019), 209

Environment
- Ministry of Environment, Energy and Climate Change & Others v Woodlands Holdings Limited & Another, Court of Appeal, Seychelles, 247
- Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another, National Environmental Tribunal, Kenya (2019), 249
Minister of Mineral Resources & Energy & Others v Sustaining the Wild Coast NPC & Others, Supreme Court of Appeal, South Africa (2024), 253
Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation, Supreme Court, Nigeria (2018), 257

Freedom of Association
- Attorney General v Rammoge & Others, Court of Appeal, Botswana (2016), 143
- Non-Governmental Organisations Co-ordination Board v Gitari & 4 Others, Supreme Court, Kenya (2023), 147
- Simelane N.O. & Others v Minister of Commerce Industry & Trade & Others, Supreme Court, Eswatini (2023), 151

Freedom of Expression
- September v Subramoney N.O. & Others, Equality Court, South Africa (2019), 117
- Peta v Minister of Law, Constitutional Court, Lesotho (2018), 153
- Media Council of Tanzania & Others v Tanzania, East African Court of Justice (2019), 155
- Mwenda & Another v Attorney General, Constitutional Court, Uganda (2010), 157
- Qwelane v South African Human Rights Commission & Another, Constitutional Court, South Africa (2021), 159
- Katiba Institute & 8 Others v Director of Public Prosecutions & 2 Others, High Court, Kenya (2024), 161
- Association des Blogueurs de Guinee v Guinea, Court of Justice of the Economic Community of West African States (2023), 163
- ND v Attorney General & Another, High Court, Botswana (2017), 173
- Centre for Domestic Violence Prevention & Others v Attorney General of Uganda, Constitutional Court, Uganda (2021), 243
Gender
- Republic v Willy, High Court, Malawi (2022), 37
- Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs N.O. & Others, Constitutional Court, Zimbabwe (2016), 195
- Attorney General v Gyumi, Court of Appeal, Tanzania (2019), 199

Gender-Based Violence
- Mapingure v Minister of Home Affairs & Others, Supreme Court, Zimbabwe (2014), 29
- Republic v Willy, High Court, Malawi (2022), 37
- Director of Public Prosecutions, Eastern Cape, Makhanda v Coko, Supreme Court of Appeal, South Africa (2024), 39
- FIDA Kenya & 3 Others v Attorney General & 2 Others, High Court, Kenya (2019), 239

Gender Identity
- Nathanson v Mteliso & Others, High Court, Zimbabwe (2019), 89
- September v Subramoney N.O. & Others, Equality Court, South Africa (2019), 117
- Ex Parte Audrey Mbugua Ithibu, High Court, Kenya (2015), 169
- ND v Attorney General & Another, High Court, Botswana (2017), 173
Governmental Obligations
- Mapingure v Minister of Home Affairs & Others, Supreme Court, Zimbabwe (2014), 29
- State (on the application of Kathumba & Others) v President of Malawi & Others, High Court, Malawi (2020), 65
- Sonke Gender Justice NPC v President of the Republic of South Africa & Others, Constitutional Court, South Africa (2020), 123
- Brotherton N.O. v Electoral Commission of Zambia, High Court, Zambia (2011), 211
- Ministry of Environment, Energy and Climate Change & Others v Woodlands Holdings Limited & Another, Court of Appeal, Seychelles, 247
- Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another, National Environmental Tribunal, Kenya (2019), 249

Immigration
- Digashu & Another v GRN & Others; Seiler-Lilles & Another v GRN & Others, Supreme Court, Namibia (2023), 177
- State (on application of Lin Xiaoxiao & Others) v Director General – Immigration & Citizenship Services & Another, High Court, Malawi (2020), 185

Intersex
- Baby ‘A’ & Another v Attorney General & 6 Others, High Court, Kenya (2014), 165
Labour Rights

- Diau v Botswana Building Society, Industrial Court, Botswana (2003), 9
- Lesotho Medical Association & Another v Minister of Health & Others, High Court, Lesotho (2020), 49
- Mokhele & Others v Commander, Lesotho Defence Force & Others, High Court, Lesotho (2018), 231

Law Enforcement

- COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others, Court of Appeal, Kenya (2018), 25
- Mapingure v Minister of Home Affairs & Others, Supreme Court, Zimbabwe (2014), 29
- Gwanda v State, High Court, Malawi (2017), 69
- Ateenyi v Attorney General, Constitutional Court, Uganda (2022), 71
- Request for Advisory Opinion on Vagrancy Offences by the Pan-African Lawyers Union (PALU), African Court on Human & Peoples’ Rights (2020), 73
- Republic v P Banda & Others, High Court, Malawi (2016), 85
- Nathanson v Mteliso & Others, High Court, Zimbabwe (2019), 89
- Khosa & Others v Minister of Defence & Military Defence a& Military Veterans & Others, High Court, South Africa (2020), 93
- Ex Parte Banda & Others, High Court, Malawi (2022), 95
- Lazarus v Government of Namibia, High Court, Namibia (2017), 97
- Haukongo & Another v Minister of Home Affairs, Immigration, Safety & Security, High Court, Namibia (2023), 99
- Khabanyane v Commissioner of Police & Others, High Court, Lesotho (2023), 101
• Minister of Safety & Security & Others v Kennedy & Another, Supreme Court, Namibia (2020), 119
• State v Madhinha, High Court, South Africa (2018), 131
• Katiba Institute & 8 Others v Director of Public Prosecutions & 2 Others, High Court, Kenya (2024), 161
• PAK & Another v Attorney General & 3 Others, High Court, Kenya (2022), 235

Limitation of Rights
• Ng’etich & 2 Others v Attorney General & 3 Others, High Court, Kenya (2016), 47
• State (on the application of Kathumba & Others) v President of Malawi & Others, High Court, Malawi (2020), 65
• Qwelane v South African Human Rights Commission & Another, Constitutional Court, South Africa (2021), 159
• Katiba Institute & 8 Others v Director of Public Prosecutions & 2 Others, High Court, Kenya (2024), 161

Marriage
• Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs N.O. & Others, Constitutional Court, Zimbabwe (2016), 195
• Attorney General v Gyumi, Court of Appeal, Tanzania (2019), 199
• Sacolo & Another v Sacolo & Others, High Court, Eswatini (2019), 225

Press Freedom
• Peta v Minister of Law, Constitutional Court, Lesotho (2018), 153
• Media Council of Tanzania & Others v Tanzania, East African Court of Justice (2019), 155
• Mwenda & Another v Attorney General, Constitutional Court, Uganda (2010), 157

Public Health Measures
• Ng’etich & 2 Others v Attorney General & 3 Others, High Court, Kenya (2016), 47
• Ajuang & Another v Osodo the Chief of Ukwala Location & Others, High Court, Kenya (2020), 51
• Muga & 20 Others v County of Mombasa & 2 Others, High Court, Kenya (2020), 55
• Nubian Rights Forum & 2 Others v Attorney General & 6 Others, High Court, Kenya (2020), 63
• State (on the application of Kathumba & Others) v President of Malawi & Others, High Court, Malawi (2020), 65
• Khosa & Others v Minister of Defence & Military Defence & Military Veterans & Others, High Court, South Africa (2020), 93
• State (on application of Lin Xiaoxiao & Others) v Director General – Immigration & Citizenship Services & Another, High Court, Malawi (2020), 185

Public Participation
• Muga & 20 Others v County of Mombasa & 2 Others, High Court, Kenya (2020), 55
• Brotherton N.O. v Electoral Commission of Zambia, High Court, Zambia (2011), 211
• Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another, National Environmental Tribunal, Kenya (2019), 249
• Minister of Mineral Resources & Energy & Others v Sustaining the Wild Coast NPC & Others, Supreme Court of Appeal, South Africa (2024), 253
Refugees
- Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others, Constitutional Court, South Africa (2023), 181

Religion
- Ajuang & Another v Osodo the Chief of Ukwala Location & Others, High Court, Kenya (2020), 51
- Ex parte Mbewe, High Court, Malawi (2023), 203

Right to Dignity
- Diau v Botswana Building Society, Industrial Court, Botswana (2003), 9
- E.L. v Republic, High Court, Malawi (2016), 13
- Government of Namibia v LM & Others, Supreme Court, Namibia (2014), 17
- L A W & 2 Others v Marura Maternity & Nursing Home & 3 Others, High Court, Kenya (2022), 21
- COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others, Court of Appeal, Kenya (2018), 25
- Ochieng & 2 Others v Attorney General & Another, High Court, Kenya (2012), 43
- Ajuang & Another v Osodo the Chief of Ukwala Location & Others, High Court, Kenya (2020), 51
- State (on the application of Kathumba & Others) v President of Malawi & Others, High Court, Malawi (2020), 65
- Gwanda v State, High Court, Malawi (2017), 69
- Request for Advisory Opinion on Vagrancy Offences by the Pan-African Lawyers Union (PALU), African Court on Human & Peoples’ Rights (2020), 73
• Khosa & Others v Minister of Defence & Military Defence & Military Veterans & Others, High Court, South Africa (2020), 93
• Ex Parte Banda & Others, High Court, Malawi (2022), 95
• State v Makwanyane & Another, Constitutional Court, South Africa (1995), 125
• Attorney General v Rammoge & Others, Court of Appeal, Botswana (2016), 143
• Non-Governmental Organisations Co-ordination Board v Gitari & 4 Others, Supreme Court, Kenya (2023), 147
• Simelane N.O. & Others v Minister of Commerce Industry & Trade & Others, Supreme Court, Eswatini (2023), 151
• Digashu & Another v GRN & Others; Seiler-Lilles & Another v GRN & Others, Supreme Court, Namibia (2023), 177
• Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others, Constitutional Court, South Africa (2023), 181
• September v Subramoney N.O. & Others, Equality Court, South Africa (2019), 117

Right to Fair Treatment
• Gwanda v State, High Court, Malawi (2017), 69
• Brotherton N.O. v Electoral Commission of Zambia, High Court, Zambia (2011), 211
• Mlotshwa v District Administrator, Hwange N.O., High Court, Zimbabwe (2020), 227

Right to Fair Trial
• COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others, Court of Appeal, Kenya (2018), 25
• Director of Public Prosecutions, Eastern Cape, Makhandu v Coko, Supreme Court of Appeal, South Africa (2024), 39
• Republic v P Banda & Others, High Court, Malawi (2016), 85
• Ex Parte Banda & Others, High Court, Malawi (2022), 95
• Minister of Safety & Security & Others v Kennedy & Another, Supreme Court, Namibia (2020), 119
Zabron v Tanzania, African Court on Human & Peoples’ Rights (2024), 137
Moshoeshoe & Others v Director of Public Prosecutions & Others, High Court, Lesotho (2019), 215

**Right to Health**
- Center for Health, Human Rights & Development (CEHURD) & 3 Others v Attorney General, Constitutional Court, Uganda (2020), 33
- Ochieng & 2 Others v Attorney General & Another, High Court, Kenya (2012), 43
- Lesotho Medical Association & Another v Minister of Health & Others, High Court, Lesotho (2020), 49
- Ng’etich & 2 Others v Attorney General & 3 Others, High Court, Kenya (2016), 47
- Muga & 20 Others v County of Mombasa & 2 Others, High Court, Kenya (2020), 55
- Mwanza & Another v Attorney General, Supreme Court, Zambia (2019), 113

**Right to Life**
- Ochieng & 2 Others v Attorney General & Another, High Court, Kenya (2012), 43
- Lesotho Medical Association & Another v Minister of Health & Others, High Court, Lesotho (2020), 49
- State (on the application of Kathumba & Others) v President of Malawi & Others, High Court, Malawi (2020), 65
- Khosa & Others v Minister of Defence & Military Defence & Military Veterans & Others, High Court, South Africa (2020), 93
- Lazarus v Government of Namibia, High Court, Namibia (2017), 97
- Attorney General & Others v Tapela & Others, Court of Appeal, Botswana (2015), 107
• Mwanza & Another v Attorney General, Supreme Court, Zambia (2019), 113
• Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation, Supreme Court, Nigeria (2018), 257

Right to Privacy
• E.L. v Republic, High Court, Malawi (2016), 13
• COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others, Court of Appeal, Kenya (2018), 25
• Nubian Rights Forum & 2 Others v Attorney General & 6 Others, High Court, Kenya (2020), 63
• Attorney General v Motshidiemang, Court of Appeal, Botswana (2021), 81
• Centre for Domestic Violence Prevention & Others v Attorney General of Uganda, Constitutional Court, Uganda (2021), 243

Sentencing
• State v Makwanyane & Another, Constitutional Court, South Africa (1995), 125
• Kadumbagula & Magunga v Tanzania, African Court on Human & Peoples’ Rights (2024), 127
• State v Madhinha, High Court, South Africa (2018), 131
• Damian v Tanzania, African Court on Human & Peoples’ Rights (2024), 133
• Zabron v Tanzania, African Court on Human & Peoples’ Rights (2024), 137

Sexual Orientation
• Seek v State of Mauritius, Supreme Court, Mauritius (2023), 77
• Attorney General v Motshidiemang, Court of Appeal, Botswana (2021), 81
• Digashu & Another v GRN & Others; Seiler-Lilles & Another v GRN & Others, Supreme Court, Namibia (2023), 177
Standing
• Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation, Supreme Court, Nigeria (2018), 257

Women
• Government of Namibia v LM & Others, Supreme Court, Namibia (2014), 17
• L A W & 2 Others v Marura Maternity & Nursing Home & 3 Others, High Court, Kenya (2022), 21
• Mapingure v Minister of Home Affairs & Others, Supreme Court, Zimbabwe (2014), 29
• Center for Health, Human Rights & Development (CEHURD) & 3 Others v Attorney General, Constitutional Court, Uganda (2020), 33
• Director of Public Prosecutions, Eastern Cape, Makhanda v Coko, Supreme Court of Appeal, South Africa (2024), 39
• Request for Advisory Opinion on Vagrancy Offences by the Pan-African Lawyers Union (PALU), African Court on Human & Peoples’ Rights (2020), 73
• Republic v P Banda & Others, High Court, Malawi (2016), 85
• Ramantele v Mmusi & Others, Court of Appeal, Botswana (2013), 221
• Sacolo & Another v Sacolo & Others, High Court, Eswatini (2019), 225
• Mlotshwa v District Administrator, Hwange N.O., High Court, Zimbabwe (2020), 227
• Mokhele & Others v Commander, Lesotho Defence Force & Others, High Court, Lesotho (2018), 231
• PAK & Another v Attorney General & 3 Others, High Court, Kenya (2022), 235
• FIDA Kenya & 3 Others v Attorney General & 2 Others, High Court, Kenya (2019), 239
• Centre for Domestic Violence Prevention & Others v Attorney General of Uganda, Constitutional Court, Uganda (2021), 243
• Attorney General v Dow, Court of Appeal, Botswana (1992), 217