

LEGAL GROUNDS

Reproductive and Sexual Rights
in African Commonwealth Courts

Volume II

CENTER
FOR
REPRODUCTIVE
RIGHTS



UNIVERSITY OF
TORONTO
FACULTY OF LAW

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Table of Abbreviations and Glossary

ABBREVIATION OR TERM	COMPLETE TERM AND/OR DEFINITION
African Charter	<i>African Charter on Human and Peoples' Rights.</i> A regional human rights treaty that guarantees comprehensive rights including civil, political, socioeconomic, and cultural rights in Africa. It is also commonly referred to as the Banjul Charter, after the city in The Gambia where it was drafted.
African Children's Charter	<i>African Charter on the Rights and Welfare of the Child.</i> A regional human rights treaty that protects the rights of children in Africa.
<i>Amicus curiae</i>	Literally translated as "friend of the court," <i>amicus curiae</i> is a person or party who provides helpful supplementary information to the court, in the form of a legal brief, on a matter that bears on the case.
Cautionary rule	An evidentiary rule of common law origin that required a judicial officer to treat with caution the testimony of a survivor of sexual violence, particularly if uncorroborated.
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women.</i> An international treaty that codifies states' duties to eliminate all forms of discrimination against women. It is also commonly referred to as the "Women's Convention."
CEDAW Committee	<i>Committee on the Elimination of Discrimination against Women.</i> The United Nations body charged with monitoring states' compliance with CEDAW.
Children's Rights Convention	<i>Convention on the Rights of the Child.</i> An international treaty that codifies the human rights of children.
Civil and Political Rights Covenant	<i>International Covenant on Civil and Political Rights.</i> An international treaty that codifies states' duties to protect civil and political rights.
Economic, Social and Cultural Rights Committee	<i>Committee on Economic, Social and Cultural Rights.</i> The United Nations body charged with monitoring states' compliance with the Economic, Social and Cultural Rights Covenant.
Economic, Social and Cultural Rights Covenant	<i>International Covenant on Economic, Social and Cultural Rights.</i> An international treaty that codifies states' duties to guarantee the economic, social, and cultural rights.
ECOWAS	<i>Economic Community of West African States.</i> A group of 15 West African countries formed to bolster regional economic ties. The ECOWAS Court of Justice serves as a regional court for much of West Africa.
Delict/delictual claim	Wrongful act/asserting a civil wrong or negligent act that gives rise to a legal obligation even though there was no contract between the parties.
General Comment/ Recommendation	The official statement of any United Nations treaty monitoring body about a subject related to its work.

Human Rights Committee	The United Nations body charged with monitoring states' implementation of the Civil and Political Rights Covenant.
International Conference on Population and Development	A conference held in 1994 in Cairo, Egypt, where world leaders, high-ranking officials, and representatives of nongovernmental organizations and United Nations agencies gathered to agree on a Programme of Action.
International Convention on the Elimination of All Forms of Racial Discrimination	An international treaty that sets forth states' obligations to prevent and eliminate racial discrimination.
International Guidelines on HIV/AIDS and Human Rights	Guidelines prepared in 2006 by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS to address human rights violations experienced by people living with HIV, and to ensure the use of best practices in designing effective national HIV/AIDS policies and strategies.
Intestate	A person who dies without a legal will.
Maputo Protocol	<i>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.</i> A treaty that guarantees comprehensive rights to women in Africa. Maputo is the common name for the protocol because it was ratified by the African Union at a 2003 session in Maputo, Mozambique.
Non-marital child	A child born to persons who are not married to one another; a child born "out of wedlock."
Non-state/third party/private actors	Persons acting on their own behalf or on behalf of other private persons or entities.
Polygyny	The condition of having more than one wife at a time.
Shari'a law	Traditional law based on Islamic principles of jurisprudence that, in some instances, governs Muslim life. Shari'a law encompasses, among other things, family law and laws about sexuality.
Slavery Convention of 1926	A convention drafted by the League of Nations—precursor to the United Nations—and signed in Geneva, Switzerland, in 1926. The treaty sought to abolish all forms of slavery by suppressing and condemning the slave trade.
State actors	Persons acting on behalf of a government or governmental body.
Universal Declaration	<i>Universal Declaration of Human Rights.</i> United Nations human rights instrument that forms the foundation of modern international human rights law.
Vicarious liability	Indirect or imputed legal responsibility for the acts of another; for example, the liability of an employer for the acts of an employee if committed within the course and scope of employment, or of a principal for torts and contracts of an agent.

Foreword

The post-Second World War era has witnessed a steady proliferation of international law instruments dedicated to the protection of human rights. The 1948 Universal Declaration of Human Rights laid the edifice for the universal recognition of the inherent dignity of the equal and inalienable rights of all human beings as the foundation of freedom and justice. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966, significantly advanced the cause of human rights protection by moving beyond a mere declaration of rights to establish clear treaty obligations for states parties.

These covenants have been followed by other United Nations (UN) treaties dedicated to protecting the rights of specific disadvantaged and marginalized groups. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 as a universal instrument for protecting women's rights, is one such example. Regional human rights systems have followed suit. To a great extent, the African human rights system emulated CEDAW when, in 2003, it adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) to establish a regional instrument for the protection of women's rights. In terms of ensuring accountability for human rights abuses, the African regional human rights system, which was first established with only the African Commission on Human and Peoples' rights, aspired to a new height in 1998 when it adopted a protocol to establish the African Court on Human and Peoples' Rights. The protocol came into effect in 2004; the court issued its first decision in late 2009.

But what has been the sum total of these important developments at the UN and regional levels? How tangible is the promise of human rights in the daily lives of women, men, and children, including those in Africa?

The ultimate objective of human rights treaties is to recognize individuals as repositories of rights that are the subject of enforceable international law. It is all too apparent that the world is no longer short of declarations and treaties that recognize human rights. What the world, and not least the African region, is woefully short of, though, is the realization of human rights. The challenge now is to secure not just the respect and protection, but the fulfillment of human right guarantees. Unless rights are fulfilled, they remain rhetoric at best. Writing about international human rights law in Africa, Frans Viljoen has said that "[t]he ultimate test of international human rights law is the extent to which it takes root at the national level, and its ability to flourish in the soil of states and to bear fruit in the lives of people."

National courts have a crucial role to play in cultivating this process. With the privilege of dispensing decisions that are unquestionably authoritative in the eyes of national authorities, such courts can play an august role in contributing towards the fulfillment of human rights if they are able and willing to indigenize human rights. Ultimately, national courts must be able and willing to discharge their constitutional judicial functions as not just impartial arbiters in disputes, but, equally, intrepid custodians of the constitutional guarantees of rights enshrined in national constitutions, many of which emulate human rights guarantees in UN and regional instruments.

However, in a democracy, the task of ensuring human rights protection cannot be left to the courts alone. Civil society has a crucial role to play in raising awareness about rights and in giving vitality to the demand for, as well as enforcement of, human rights. The Treatment Action Campaign's successful litigation against intransigent state denial of the rights of persons living with HIV to health care in South Africa, for example, is a testament to civil society's capacity to make human rights come alive. Civil society also represents a necessary component of democracy, for through advocacy and litigation, it can hold governments accountable for their failure to respect, protect, or fulfill human rights.

An important prerequisite for civil society's ability to advocate for and litigate human rights is the accessibility of jurisprudence. Obtaining decisions of national courts and tribunals in many parts of Africa is a challenge, because decisions are not always reported on a regular basis, or they are reported in a manner that is not easily accessible to the public. *Legal Grounds II* fills a gap in the availability and accessibility of jurisprudence pertaining to reproductive and sexual health and rights. A question can be asked: Why the focus on reproductive and sexual health-related jurisprudence, and why now?

Perhaps the most compelling reason is that reproductive and sexual health remains one of the weakest areas of human rights on the African continent. Africa's unmet contraceptive needs, high levels of unsafe abortion, high incidence of early or coerced marriages, deteriorating access to health-care services (including reproductive health services), prevalence of sexual violence and sexual exploitation, pandemic levels of HIV, and laws and customs that discriminate on the grounds of sex and sexual orientation all testify to a failure to effectively realize reproductive and sexual health on the continent.

Legal Grounds II is a tool for organizations, individuals, and institutions of learning. Though the study of reproductive and sexual health as a human rights discipline on the African continent is still at a relatively young stage, a number of countries, including Nigeria and South Africa, are developing the discipline in their tertiary institutions. This publication is a compelling resource for students in this field. In addition, it is a contribution towards a knowledge base for jurisprudence that bears directly or indirectly on reproductive and sexual health as human rights, and is conducive towards building and entrenching a human rights culture on the African continent.

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1. Introduction

Gender-based discrimination constitutes one of the greatest threats to women's health and lives worldwide. Equality, along with reproductive and sexual rights, is guaranteed in international and regional human rights treaties, and in many domestic laws. Such guarantees, though, are empty promises if not recognized and reinforced by national courts. However, just as in 2005, when the first volume of *Legal Grounds* was published, relatively few publications examine the interpretation and application of human rights norms by national courts. Even fewer consider whether and how national courts interpret and apply regional and international human rights laws. In sub-Saharan Africa, there is a scarcity of accessible information on national courts' jurisprudence, particularly regarding how they analyze and adjudicate legal issues that deal with women's rights.

The first volume of *Legal Grounds* was a preliminary step toward enhancing access to and knowledge about some of these decisions in African Commonwealth countries, with an emphasis on cases that directly and indirectly affect women's reproductive and sexual health and rights. This second volume furthers that goal and also offers a crucial starting point for women's rights advocates who seek to develop and strengthen litigation strategies at the national level, and to researchers who intend to analyze existing gaps in interpretation and adjudication and to propose solutions.

This volume includes judicial interpretations of both statutory and customary laws and addresses a range of issues, including sexual violence, marriage-related gender discrimination, validity of customary and religious marriages, property inheritance and distribution, age of consent to sexual activity, abortion and claims of fetal interests, and HIV discrimination. Cases focusing on child maintenance and custody demonstrate that infringements on women's rights also have grave implications for the rights of children. Further, while some of the cases are not expressly gender-related and the rationale for the court decisions reached do not explicitly touch on women's rights, they illustrate the types of violations faced by women in the region and their potential impact on women's well-being and rights. Finally, a number of cases underscore how African advocates, particularly women's groups, are holding governments accountable under their regional and international human rights obligations.

This volume also includes an important decision concerning Niger that was recently delivered by the Economic Community of West African States (ECOWAS) Court of Justice. The case serves as an indication of other legal venues open to women's rights advocates when national courts delay or are unable to deliver justice. Another venue is the communications procedure at the African Commission on Human and Peoples' Rights (African Commission), which has not yet delivered a decision on sexual and reproductive rights under the Maputo Protocol. The African Court on Human and Peoples' Rights provides yet another important forum for bringing such cases.

Indeed, while national courts are increasingly applying regional and international laws, particularly in cases where national laws are uncertain or incomplete, there is also recognition that national jurisprudence can inform and influence regional and international laws and jurisprudence¹ and further the recognition and promotion of human rights, including sexual and reproductive health and rights.

Advocates can use the information in this report in the following ways:

To develop litigation strategies:

- Jurisprudence from African Commonwealth courts showing a trend or consistent line of reasoning is persuasive, since it demonstrates growing regional acceptance of and support for human rights norms, particularly as they relate to women.

- o Jurisprudence implementing international standards can inform and instruct courts struggling to interpret and apply international women's rights norms.
- o Jurisprudence from African Commonwealth courts provides human rights practitioners with legal arguments that can be used to support the judicial recognition and protection of women's rights.

To develop grassroots and other advocacy strategies:

- o Legal cases can offer compelling, concrete examples of the need for national-level law reform.
- o Jurisprudence from African Commonwealth courts may spur policy reform by exposing the poor implementation of international and national legal standards that protect women's rights.
- o Advocates can use jurisprudence to educate women about the content and scope of their rights at the national and global levels.
- o Advocates can use the decisions in this report to raise awareness about women's rights and highlight the importance of litigation as a means of realizing these rights and obtaining redress when they are violated.

Structure of Report

Each chapter begins with a brief introduction explaining the significance of each issue, drawing attention to how certain aspects of the cases advance women's rights, or indicating noticeable trends in jurisprudence. Several text boxes throughout the report also highlight important themes and the cases pertaining to them in order to show how these cases may be used in broader contexts.

The cases are organized by issues or themes. Each case is discussed in the following manner:

- o *Court Holding* briefly highlights key aspects of the decision.
- o *Summary of Facts* outlines the relevant facts.
- o *Issue(s)* identifies the central question(s) addressed by the court. Although some cases address several legal issues, the summaries selectively focus on issues that affect the rights of women, including their sexual and reproductive health and rights.
- o *Court's Analysis* delineates key portions of the court's reasoning.
- o *Conclusion* summarizes the outcome of the case.
- o *Note* addresses a factual or technical error within the court's decision or draws attention to relevant subsequent developments in litigation or legislation.
- o *Commentary* provides additional information on the significance of a case or how it relates to other jurisprudence on similar issues.

Links to the full texts of the cases and helpful online legal resources are listed at the end of the report.

The Center for Reproductive Rights also acts as a resource center in collecting and distributing court decisions. Researchers and other concerned individuals are encouraged to contact the Center to request, or send copies of, relevant cases decided by African courts. Please send your comments and suggestions to <Africancourts@reprights.org>.

Scope and Limitations

The cases in this compilation focus primarily on African Commonwealth countries and Zimbabwe. The report also highlights a groundbreaking decision by the ECOWAS Court of Justice on Niger. Although Niger is not a Commonwealth country, the decision creates precedent for all ECOWAS states, including the Commonwealth countries of Ghana, the Gambia, Sierra Leone, and Nigeria.

While we have made great effort to provide the most up-to-date information, some of the cases may have been appealed or superseded after going to press. Accordingly, the case summaries should be viewed as an initial source of information that can assist in focused independent research when preparing for litigation or advocacy on key women's rights issues.

2. Rights During and After Marriage

A woman's rights within marriage and the family greatly affect her ability to control her life and make voluntary, informed reproductive choices. Equal rights within marriage were among the first human rights pertaining to women's status to be explicitly recognized under international law. According to the Universal Declaration of Human Rights (Universal Declaration), CEDAW, and the International Covenant on Civil and Political Rights (Civil and Political Rights Covenant), men and women have equal rights upon entry into marriage, during marriage, and at its dissolution.² Despite these protections, women may be prevented from enjoying equality with their husbands within marriage. Discriminatory marriage laws can have far-reaching effects on women's lives—some laws, for example, impede a woman's right to manage, own, and inherit property, while others require her to obtain her husband's permission to travel or work outside the home. A number of laws explicitly endorse women's subservience to their husbands.

Legal recognition of a marriage is central to protecting a woman's rights during and after marriage. Should the union dissolve, a woman's right to maintenance and property is determined in large part by the legal recognition of the marriage. As a result, partnership arrangements that are not legally recognized can make it difficult for women to claim the rights and benefits that often accrue with marriage, which can create extreme hardship, especially for socially and economically vulnerable women. *Daniels v. Campbell* and *Hassam v. Jacobs* are examples of South African courts' efforts to protect women from the hardship that may arise upon the death of a partner if the surviving partner is unable to inherit property or collect the deceased's benefits.

Legal Recognition of Marriage

***Daniels v. Campbell NO and Others*
(CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC)
South Africa, Constitutional Court**

COURT HOLDING

The Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance Act), which do not expressly recognize parties to Muslim rites as surviving spouses, are not invalid or unconstitutional as they should be interpreted to recognize parties to Muslim marriages as spouses.

Summary of Facts

The applicant, Juleiga Daniels, had lived in a dwelling owned by the City of Cape Town, along with her first husband, since July 1969. After they divorced in 1976, the city allocated the dwelling to her. The following year, she married her second husband in accordance with Muslim rites and informed the city of her marriage. The city then registered the dwelling in her new spouse's name, according to its policy, as he was the family breadwinner.

In 1990, the city gave the applicant's family the opportunity to purchase the house by installment sale. Ms. Daniels, a domestic worker, contributed towards the household expenses, including the rent for the dwelling

and its purchase price. After her husband's death, the property was transferred to his estate and the outstanding balance on the property was written off. The master of the Cape Town High Court appointed executors to the estate. The master informed Ms. Daniels that she could not inherit from her intestate spouse's estate because she was not a "surviving spouse" under section 1(1) of the Intestate Succession Act, nor a "survivor" under section 2(1) of the Maintenance Act, as her marriage, conducted in accordance with Muslim rites, was not recognized by the Marriage Act 25 of 1961 (Marriage Act). Her claim for maintenance was also rejected on the same basis.

With the support of Women's Legal Centre, the applicant challenged Robin Campbell, the first respondent, and other respondents, including the master, executors, Minister of Justice and Constitutional Development, Registrar of Deeds, and family members of her intestate spouse, in the Cape Town High Court, pleading for a declaration recognizing that she was a spouse of the deceased and therefore his "surviving spouse." In the alternative, she argued that the laws should be declared unconstitutional and invalid since they discriminated against women married under Muslim rites. The High Court concluded that the laws did not expressly recognize Ms. Daniels as a "surviving spouse," and as such were unconstitutional and invalid. It went on to "read-in" words that would remedy the unconstitutionality by recognizing a husband or wife who is married under Muslim rites, and is in fact in a monogamous union, as a "spouse" under the Intestate Succession Act. It also recognized the surviving member of such a union as "survivor" under the Maintenance Act. Ms. Daniels, concerned that the Constitutional Court might refuse to confirm the order of the High Court regarding the unconstitutionality of the laws, thereby leaving her without her desired relief, filed an application with the Constitutional Court asking for leave to appeal against the master's interpretation of "spouse" if the court decides not to confirm the High Court's order.

Before the Constitutional Court, she argued that the word "spouse" should be interpreted to include persons married according to Muslim rites. A narrow interpretation of the term "spouse," which excludes those married according to Muslim custom, would result in discrimination on grounds of marital status, religious practices, and culture, thus violating the right to dignity. Ms. Daniels contended that the word "spouse" should be interpreted in accordance with the constitution, and thereby includes religiously consecrated marriages.

The respondents argued that under the Marriage Act, the word "spouse" did not include persons married in accordance with Muslim rites. They maintained that as Muslim clerics were not barred from concluding a valid marriage under the Marriage Act, the applicant should have availed herself of a marriage arrangement in accordance with the law.

Issue

Were section 1(1) of the Intestate Succession Act and section 2(1) of the Maintenance Act, which did not expressly recognize parties to Muslim rites as surviving spouses, unconstitutional and therefore invalid?

Court's Analysis

The Constitutional Court concluded that the word "spouse" included persons married in accordance with Muslim rites. Excluding parties to a Muslim marriage from the definition of "spouse," the court argued, "emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it." The narrow interpretation was discriminatory, and demeaning to a particular concept of marriage. Although such a discriminatory interpretation was accepted in the past, the existing constitution provided for the values of equality, tolerance, and respect for diversity, and called for a broad and inclusive construction of the word "spouse." Since the Marriage Act provisions should be interpreted to recognize husband and wife in a monogamous marriage conducted according to Muslim rites, the laws were not invalid or unconstitutional. Therefore, they did not need to be struck down.

Conclusion

The phrase "surviving spouse" under section 1(1) of the Intestate Succession Act and section 2(1) of the Maintenance Act should be interpreted to include parties married in accordance with the Muslim rites.

GENDER-BASED DISCRIMINATION IN MARRIAGE

Marriages contracted under religious and customary rites are common in Africa. Yet women who contract such marriages are often not protected by statutory provisions regarding property inheritance and succession—a disadvantage that women whose marriages are registered under the Marriage Act of their respective countries do not face. As a result, the *Daniels* decision, though focusing on Muslim marriages, is relevant to many African countries and has serious implications for the rights of women beyond South Africa. The facts show the extent of these implications: Ms. Daniels, the applicant, had owned and lived in the dwelling with her children before her marriage to her intestate spouse. She had contributed substantially towards the rent and, when the opportunity arose, towards its purchase price. Regardless, she was forced to petition the Constitutional Court to rule that she was entitled to inherit from her dead husband's estate, with the dwelling constituting the main asset. The Constitutional Court's decision afforded Ms. Daniels an effective remedy by holding that she was a "surviving spouse" and entitled to intestate inheritance.

Yet the court refrained from declaring unconstitutional the portions of the Intestate Succession Act and the Maintenance Act on which the master had based his denial of inheritance and maintenance. Finding the laws unconstitutional could have required the South African Parliament to produce clear legislation on the issue and to comply with regional and international human rights obligations. For instance, article 14 of the African Charter on Human and Peoples' Rights (African Charter), which South Africa has ratified, guarantees the right to property. Also, article 21(1) of the Maputo Protocol, which South Africa has ratified, provides that "[a] widow shall have the right to an equitable share in the inheritance of the property of her husband [and] to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it." This provision clearly makes no exceptions based on the type of marriage entered into.

CEDAW, which South Africa has also ratified, protects women's right to inheritance in article 5 by obligating states to modify social and cultural patterns of conduct in order to eliminate prejudices and customary and other practices, which are based on stereotyped roles or on the idea of the inferiority or superiority of either men or women. Article 15 provides for women's equality before the law and requires states to "give women equal rights . . . to administer property." The CEDAW Committee, which interprets and ensures compliance with CEDAW, in General Recommendation 21 concerning equality in marriage and family relations, has observed that "there can be no justification for applying different and discriminatory laws or customs to [women]." The Committee has further observed that laws and practices on inheritance that discriminate against women by, for example, granting them smaller or limited rights to their husband's or father's property at his death "contravene the [CEDAW] Convention and should be abolished." Likewise, in interpreting the Civil and Political Rights Covenant, the Human Rights Committee's General Comment 28 concerning the equality of rights between men and women states that "[w]omen should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses."

The court's decision not to declare the relevant laws unconstitutional means that similarly placed women will need to seek justice from the courts on a case-by-case basis, as was the case in

HIGHLIGHT continued...

July 2008 in *Hassam v. Jacobs N.O, Master of the High Court & Others* (discussed below). The applicant, who had married under Muslim private law and whose husband married again during their marriage, was denied maintenance from her deceased husband's estate by its executor. She was not considered a "survivor" or "spouse" under the Intestate Succession Act or the Maintenance Act since these acts did not recognize polygynous marriages. However, the Cape High Court held that she had a right to inheritance and maintenance based on the constitutional values of human dignity and equality. Likewise, in November 2008, in the case of *Govender v. Ragavayah and Others*,³ the applicant, Saloshinie Govender, relied on *Daniels v. Campbell* in arguing that she was the "surviving spouse" of her deceased husband despite having conducted their marriage under Hindu rites. The respondents, Narainsamy Ragavayah and others, sought to distinguish the facts from the *Daniels* case but the Durban High Court ruled in Ms. Govender's favor based on the *Daniels* decision.

While these cases indicate consistency in court decisions regarding inheritance rights of women like Ms. Daniels, financial constraints could prevent others from bringing their cases to the courts. The possibility of the courts distinguishing or reversing these decisions also remains. A draft Islamic Marriages Bill, which provides for amendment of the definition of "spouse" in the Intestate Succession Act, was prepared in 2003 but has faced considerable delays and has yet to be passed into law.

For this reason, in 2009, the Women's Legal Centre, which supported Ms. Daniels in her case, instituted an action before the Constitutional Court—*Women's Legal Centre Trust v. President of the Republic of South Africa and Others*⁴—urging the court to compel the government to pass a law that would recognize marriages conducted under Muslim rites, no later than 18 months after the court's judgment. In July 2009, the court ruled that it did not have exclusive jurisdiction and that the case should first go before a high court and through other ordinary judicial processes to avoid making the Constitutional Court the court of first and last instance on this difficult and important issue.

Based on the South African courts' consistency in upholding the inheritance rights of women married under Muslim rites, the Constitutional Court's decision in this case could ensure that this issue would no longer have to be determined on a case-by-case basis. It would also resolve the ongoing contentious debate regarding whether passing the Islamic Marriages Bill into law would actually benefit women in Islamic marriages. Courts in other countries could rely on the reasoning in this decision and uphold the right of inheritance of similarly placed women in their jurisdictions based on constitutional, national, and international human rights laws.

Hassam v. Jacobs N.O, Master of the High Court & Others
Case No. 5704/2004, July 18, 2008
South Africa, High Court

COURT HOLDING

The surviving spouse of a polygynous marriage has a right to inheritance and maintenance based on South Africa's constitutional values of human dignity and equality.

Summary of Facts

Fatima Gabie Hassam, the applicant, and Ebrahim Hassam, the deceased, were married under Muslim private law on December 3, 1972. Mr. Hassam bought a house on February 13, 1990, which was the couple's matrimonial home. After almost 26 years of marriage, the couple initiated a divorce process in accordance with Islamic law; the divorce was not finalized because not all of the religious steps for divorce were completed. They continued to live together until his death in August 2001, except for a period in 2000 following his marriage to Miriam Hassam (the third respondent). Mr. Hassam and Miriam Hassam had three children.

After Mr. Hassam's death, his relatives refused to honor an agreement related to the division of his estate. Miriam Hassam, with the help of the Women's Legal Centre Trust (*amicus curiae*), secured the appointment of Johan Jacobs (the first respondent) as executor of the deceased's estate. Fatima Hassam submitted claims to Mr. Jacobs based on the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance Act), respectively. Mr. Jacobs denied her claims on the ground that even if the divorce did not occur, she was not considered a "survivor" or "spouse" under either act. Central to his argument was the lack of recognition of polygynous marriages concluded under the Muslim private law by these two acts. Fatima Hassam then instituted action in court.

Issue

Is the applicant, Fatima Hassam, recognized as a spouse of the deceased, and his survivor, under the Intestate Succession Act and the Maintenance Act?

Court's Analysis

Historically, South African courts have consistently held polygynous marriage as *contra bonos mores* (contrary to good morals) on public policy grounds, because polygyny (having more than one wife at a time) was judged according to the values of the politically dominant section of the society. However, the fundamental values of the current constitution are human dignity and equality. According to the Intestate Succession Act, a surviving spouse is entitled to inherit either a child's share of the deceased's estate or an amount of ZAR 125,000. Under the Maintenance Act, she is also entitled to claim reasonable maintenance from the estate until death or remarriage. In doing so, the two acts seek to protect widows from economic hardship upon the death of their husbands, due to women's limited opportunity to own assets in South Africa's patriarchal society.

Furthermore, interpreting the provisions of the acts to recognize the rights of widows in polygynous Muslim marriages promotes the constitutionally-enshrined values of human dignity and equality. A reasonable interpretation of legislation should be consistent with the constitution. The concepts of "spouse" and "survivor" under the acts are broad enough to accommodate widows of polygynous marriages concluded under Muslim private law.⁵ The court concluded on the following grounds that there is no justification to exclude these widows from the ambit of the Intestate Succession Act and Maintenance Act provisions:

- The law had recognized polygynous marriages under the Recognition of Customary Marriages Act 120 of 1998.
- Several laws define marriage to include Muslim marriages.
- The South African Law Commission had recognized polygynous Muslim marriages in its report *Islamic Marriages and Related Matters*.
- African customary law, which includes polygamous (particularly polygynous) marriage, was recognized as an integral part of South African law to the extent of its consistency with the constitution and the bill of rights.
- It has become judicial policy to recognize polygynous marriages and their legal implications.

In reaching its decision, the court expressed the opinion that while polygynous marriages conflict with international human rights law (such as article 16 of CEDAW), article 6 of the Maputo Protocol requires states to encourage monogamy while also protecting the rights of women in polygynous marriages.

Conclusion

Fatima Hassan is recognized as a spouse of Mr. Hassam and, as his survivor, is entitled to an appropriate claim on his estate.

Singh v. Ramparsad
(KZN 564/2002) [2007] ZAKZHC 1 (22 January 2007)
South Africa, High Court

COURT HOLDING

The South African Marriage Act and Divorce Act, which do not recognize an unregistered religious marriage, are consistent with the South African Constitution.

Summary of Facts

The plaintiff, Suchitra Singh, married the first defendant, Jailall Ramparsad, in 1987 in accordance with the Hindu religion, which does not sanction divorce. The Marriage Act No. 25 of 1961 (Marriage Act) recognizes marriages concluded under religious or customary law; however, the marriage must be registered to have legal validity.

Mr. Ramparsad and Ms. Singh intentionally failed to register their marriage and later separated in 2000. In this petition, Ms. Singh sought an order declaring the provisions of the Marriage Act and the Divorce Act No. 70 of 1979 (Divorce Act) unconstitutional, as they do not recognize unregistered religious marriages as legally valid. (Her maintenance claim would hinge on the legal recognition of her marriage.) She also argued that the Marriage Act and the Divorce Act violated her constitutional rights to equality before the law, dignity, and freedom of religion.

Issue

Did the Marriage Act and/or the Divorce Act violate the plaintiff's constitutional rights by not recognizing an unregistered marriage conducted by religious ritual?

Court's Analysis

Ms. Singh and Mr. Ramparsad intentionally ignored the registration requirement under the Marriage Act. The act, which sets out the formalities necessary for recognizing a marriage, applies to all South African couples, irrespective of color, race, or creed. The registration requirement, one form of ensuring a marriage's legal

recognition, is intended to regulate properties, children, and inheritance. It is also important for maintaining demographic data and records. The Marriage Act respects the right of the couples to marry in accordance with their own religious rituals and bestows legal validity on these marriages. The same principle applies to registered religious marriages under the Divorce Act. Therefore, neither act violates the plaintiff's constitutional rights.

Conclusion

The Marriage Act and the Divorce Act are constitutional.

Maintenance

Botha v. Botha
Case No. 2005/25726 (June 9, 2008)
South Africa, High Court

COURT HOLDING

Spousal maintenance is not a right. It is discretionary, and, when granted, should terminate after a specified period or upon the occurrence of a given event.

Summary of Facts

The plaintiff, Derek Botha, and the defendant, Theresa Mary Botha, married in 1999 and signed an antenuptial contract stipulating that there would be no joint community estate and that each party would retain property acquired before and during the marriage. Any increase in the estate of either party would not sustain a maintenance claim by either party upon the dissolution of the marriage. Mr. Botha filed a divorce petition with the High Court in October 2005. In May 2006, the court granted Ms. Botha an interim order of spousal maintenance of ZAR 15,000 per month and payment of medical expenses. Ms. Botha argued that under section 7(2) of the 1979 Divorce Act, she was automatically entitled to spousal support because of her marriage to Mr. Botha. Mr. Botha argued that this section is discretionary, giving the court authority to determine maintenance based on each spouse's financial situation.

Issue

Is post-divorce maintenance discretionary or a right under section 7(2) of the act?

Court's Analysis

According to the High Court, no spouse, upon divorce, is entitled to maintenance as a right. Section 7(2) of the act does not explicitly provide any maintenance right to a spouse for the sole reason of a marital relationship. The term "may" shows the discretionary nature of the provision, and courts have the power to grant or deny maintenance to a spouse. If a court decides to grant maintenance, it should be either for a specified period or until the occurrence of a given event, such as remarriage of the supported spouse. In this case, the defendant, Ms. Botha, was economically independent prior to and during the marriage. However, subsequent to the breakdown of the marriage—when she was receiving interim maintenance payments—Ms. Botha's spending habits were uneconomical and unnecessary and she was utilizing her maintenance payments for the benefit of third parties. Furthermore, she did not appear to require such maintenance as she had several bank accounts which were in credit at the times when she received the payments. Ms. Botha also did not demonstrate that her earning ability had in any way been compromised or diminished by her marriage to the defendant. The High Court thus did not find it necessary to grant Ms. Botha spousal maintenance.

Conclusion

Post-divorce maintenance is discretionary under section 7(2) of the Divorce Act and the defendant is not eligible for spousal maintenance.

Odgers v. De Gersigny
[2006] SCA 153 (RSA)
South Africa, Supreme Court of Appeal

COURT HOLDING

The common law principle, which provides that spousal support obligations should terminate upon remarriage or death of the receiving spouse, does not apply to parties whose settlement agreements are based solely on contract. Instead, the terms of the contract apply.

Summary of Facts

The appellant, Peter Cecil Odgers, and the respondent, Mary De Gersigny, were divorced on January 21, 1998, after being married for seven years. Their settlement agreement stated that Mr. Odgers would provide certain spousal support, including medical insurance and a housing subsidy to Ms. De Gersigny. The agreement did not state whether the contract would be terminated by her subsequent remarriage or death. On May 2, 1998, Ms. De Gersigny remarried and Mr. Odgers refused to pay spousal maintenance as of May 1998. Ms. De Gersigny sued him in a Magistrate Court for the outstanding maintenance payments. Mr. Odgers argued that since the contract was silent on termination of the maintenance obligation should Ms. De Gersigny marry again, the court should interpret the contract under the common law which holds that the support obligation terminates upon the remarriage or death of the receiving spouse. The Magistrate Court held that the settlement agreement was purely contractual, and thus the obligations it created did not terminate upon Ms. De Gersigny's remarriage. On appeal, the Natal Provincial Division upheld the Magistrate Court's decision. Mr. Odgers then appealed the decisions of these two courts to the Supreme Court of Appeal.

Issue

Did the lower courts err in finding that the maintenance obligation did not terminate upon remarriage of Ms. De Gersigny?

Court's Analysis

The Maintenance Act of 1998 provided Mr. Odgers and Ms. De Gersigny with the ability to stipulate the terms of their settlement agreement. They could set the amount of the maintenance obligation and the circumstances under which maintenance would terminate. The Maintenance Act also allows for such an agreement to be made an order of the court, although this was never done. The common law did not apply in this instance, as the agreement between the parties was purely one of contract, and was to be interpreted in accordance with the rules of contract. The common law principle providing for the termination of a maintenance obligation upon the death or remarriage of the receiving party did not apply in this instance. As the agreement was to be in force for a specified duration without providing for its termination if Ms. De Gersigny remarried or died, the agreement would continue to subsist.

Conclusion

The lower courts did not err in strictly applying the terms of the contract. Mr. Odgers's maintenance obligation would not terminate upon Ms. De Gersigny's remarriage.

Disparate Treatment

Muyambo v. Bere

(HC 1010/05) [2007] ZWHHC 30; HH 30-2007 (16 March 2007)

Zimbabwe, High Court

COURT HOLDING

A customary law marriage is not valid when conducted with a party who is already legally married at the time.

Summary of Facts

The plaintiff, Pauline Muyambo, was married to Godwin Muyambo in accordance with the Marriage Act, Chapter 5:11. Three years into the marriage, Mrs. Muyambo saw her husband on several occasions waiting by their gate and getting into a car with Eunice Bere, the defendant. Mrs. Muyambo tried unsuccessfully to approach Ms. Bere multiple times. Although Mr. Muyambo had denied having an affair with Ms. Bere, Mrs. Muyambo's suspicions were confirmed when she found a message for her husband left by Ms. Bere. Mrs. Muyambo contacted Ms. Bere and informed her that she had a valid marriage with Mr. Muyambo and later confronted and assaulted Ms. Bere at Mr. Muyambo's workplace. Shortly after this incident, Mr. Muyambo left the marital home to live with Ms. Bere. Mrs. Muyambo sued Ms. Bere for adultery and sought monetary damages. As a result, Mr. Muyambo filed a motion for divorce from Mrs. Muyambo. Ms. Bere argued in court that she did not know that Mr. Muyambo was married to Mrs. Muyambo, and that she had married Mr. Muyambo under customary law.

Issue

Was Mr. Muyambo's customary marriage with the defendant, Ms. Bere, valid, or was the relationship between the defendant and Mr. Muyambo adulterous?

Court's Analysis

In order to satisfy the legal requirements for adultery, Mrs. Muyambo must demonstrate that the defendant, Ms. Bere, knew the plaintiff and Mr. Muyambo were married. In addition, Mrs. Muyambo must demonstrate that by engaging in an adulterous relationship with Mr. Muyambo, Ms. Bere caused Mrs. Muyambo damages. The court found the elements satisfied on the basis of the evidence adduced by Mrs. Muyambo, and held that the customary law marriage was invalid. The court also rejected Ms. Bere's claim that the divorce did not result from the adulterous affair. In assessing damages of ZWD 1,500,000, the court noted as aggravating features the breakdown of the marriage, Ms. Bere's persistence and lack of remorsefulness, and her failure to apologize to Mrs. Muyambo.

Conclusion

The defendant, Ms. Bere, was found liable for adultery and was ordered to pay ZWD 1,500,000 compensation to Mrs. Muyambo.

Uganda Association of Women Lawyers and 5 Others v. The Attorney General
Const. Petit. No. 2 of 2003 [2004] UGCC 1(3/10/2004)
Uganda, Constitutional Court

COURT HOLDING

The Divorce Act provisions that provide for disparate treatment of men and women violate the constitution's prohibition of discrimination on the basis of gender.

Summary of Facts

Petitioners filed an action with the Constitutional Court to declare that certain provisions of the Divorce Act (Ch. 249), which provide for disparate treatment of men and women, are unconstitutional. The disputed sections provided that

- a man need only prove adultery to obtain a divorce while a woman must prove aggravated adultery (which requires an additional offense, such as bigamy, incest, cruelty, rape, sodomy, desertion);
- a man must implead the alleged adulterer as a co-respondent, whereas a woman is not required to do so;
- men may seek damages from the co-respondent, whereas women cannot and the co-respondent may be required to pay court costs if adultery has been established against him;
- men may be ordered to pay alimony, but women cannot be so ordered; and
- when divorce is granted on the basis of adultery by the wife, the court may order the whole or part of the marital property to be provided to the husband while no such right exists for women.

The Attorney General argued that the court did not have jurisdiction to nullify these provisions pursuant to section 273(1) of the constitution, which grants the court power only to make necessary modifications, adaptations, qualifications, and exceptions to bring the law in conformity with the constitution.

Issue

Do provisions of the Divorce Act that provide for disparate treatment of men and women violate the anti-discrimination provisions of the Ugandan Constitution?

Court's Analysis

The Constitutional Court concluded that the relevant provisions of the Divorce Act violate the constitution because they discriminate on the basis of gender. Specifically, the court stated that these provisions of the Divorce Act violate women's constitutional right to equality, and negate the concept that equality is a core value of the Ugandan Constitution. In addition, the court noted that the Divorce Act was a colonial relic and represented a time when the concept of family was patriarchal and women were subservient to men. The court then emphasized that times had changed and marriage had become an equal partnership, with the constitution guaranteeing equal rights during a marriage and at its dissolution, and that women's human rights are inalienable and essential for the development of any country.

Furthermore, the court determined that section 273 of the constitution does not deprive the court of jurisdiction because it has the power to rule on the provisions pursuant to the authority granted under section 137(3) of the constitution, which states that "[a] person who alleges that (a) an Act of Parliament or any other law . . . is inconsistent with . . . a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate." The court ruled that the grounds for divorce, as set out under the

Divorce Act, should equally apply to both sexes. Women, like men, should have the right to divorce their spouses for the sole reason of adultery. The compensation for adultery, alimony, and settlement related to the divorce should also equally apply to both sexes.

Conclusion

The provisions of the Divorce Act that provide for disparate treatment of men and women violate the constitution's prohibition of discrimination on the basis of gender. Accordingly, the act's provisions must apply equally to men and women.

Note

Although the court refers to the provisions of section 273(1) of the 1995 Constitution of Uganda, the accurate section is Section 274(1).

Law Advocacy for Women in Uganda v. Attorney General
Constitutional Petitions Nos. 13/05 & 05/06 [2007] UGCC 1 (5 April 2007)
Uganda, Constitutional Court

COURT HOLDING

Section 154 of the penal code is unconstitutional for punishing married women and men differently for adultery. Additionally, several sections of the Succession Act, which provide different inheritance and succession rights based on sex, are unconstitutional.

Summary of Facts

The petition is a merger of two petitions dealing with the constitutional validity of a section of the penal code regarding adultery and sections of the Succession Act (Ch. 162) regarding gender equality in succession and inheritance. The petitioner, Law Advocacy for Women in Uganda (LAW-U), a Ugandan women's rights advocacy group, filed a petition claiming that section 154 of the penal code violated the constitution. Section 154(1) provides that "*Any man* who has sexual intercourse with *any married woman not being his wife* commits adultery. . . ." On the other hand, section 154(2) provides that "*Any married woman* who has sexual intercourse with *any man not being her husband* commits adultery. . ." (emphasis added).

As a result, under this section, a married man having sex with an unmarried woman is not considered to have committed adultery, while a married woman is considered to have committed adultery if she has sex with any man. LAW-U argued that this different treatment of men and women was inconsistent with articles 21 (right to equality), 24 (right to dignity and protection from inhuman treatment), and 31 (rights of the family) of the constitution.

The Attorney General, on the other hand, argued that section 154 of the penal code did not discriminate on the basis of sex and that the different treatment was justifiable under article 43 of the constitution, which seeks to foster the sanctity of marriage. He also insisted that striking the section would encourage immorality and promiscuity, which were contrary to public policy and the spirit of the constitution. In the alternative, if the court found section 154 of the penal code to be inconsistent with the constitution, the attorney general urged the court to modify the section to be consistent with the constitution, rather than strike it.

LAW-U's second constitutional challenge was against sections 2(n)(i)–(ii), 15, 16, 27, 43, and 44 of the Succession Act because these provisions disadvantaged females and female heirs. For example, while section 27 of the act provided that the property of a deceased male would be distributed to his heirs, there was no such provision for

the property of deceased females. Further, section 43 of the act gave only fathers, and not mothers, the right to appoint a guardian; and section 44 of the act allowed male, but not female, relatives to be guardians. The challenge argued that this different treatment based on sex was unconstitutionally discriminatory.

Issues

- Is section 154 of the penal code unconstitutional because of its discrimination against women?
- Are sections 2(n)(i)–(ii), 15, 16, 27, 43, and 44 of the Succession Act unconstitutional because of their discrimination against women?

Court's Analysis

The Constitutional Court found that section 154 of the penal code constituted discrimination based on sex. The court stated that this section of the penal code was inconsistent with the constitutional rights to equality before the law and nondiscrimination on the basis of sex, and with the constitutional guarantee to equal rights between spouses in a marriage and at its dissolution.

As the constitution is the supreme law of the land, according to article 2(1)–(2), it authorizes the court to declare as unconstitutional any law inconsistent with its terms. This section of the penal code discriminated between married men and married women on the ground of sex without any justifiable reasons. As a result, the court found that section 154 of the penal code violated the constitution.

Conclusion

Section 154 of the penal code was declared null and void because it was inconsistent with articles 21(1)–(3), 24, 31(1), and 33(6) of the constitution, which address, among other things, the right to equality and freedom from discrimination, the right to dignity, the right to equality within marriage, and the rights of women. This means that both men and women who are married are considered to have committed adultery if they have sex with an unmarried partner. The court also declared that the challenged sections of the Succession Act were null and void because they were inconsistent with articles 21(1)–(3), 31, and 33(6) of the constitution.

HIGHLIGHT

DISPARATE TREATMENT OF MEN AND WOMEN IN MARRIAGE-RELATED LAWS

Different punishment for men and women who commit adultery is common in Africa, with women facing harsher penalties. This is indicative of the fact that the law privileges male sexuality over female sexuality, and further evident in the widely-accepted practice of polygyny (having more than one wife at a time) without a similar acceptance of polyandry (having more than one husband at a time). Specifically, among countries where shari'a law is practiced, including in parts of Nigeria and Sudan, such disparate treatment is rampant. The law punishes women for adultery more harshly in other countries as well, including in Benin and Côte d'Ivoire. In a case discussed in this chapter of the report—*Muyambo v. Bere*—a Zimbabwean court found a female defendant who had an affair with a married man liable for adultery, and ordered her to pay monetary compensation

HIGHLIGHT continued...

to the man's wife for resulting damages. The decision is remarkable in its complete failure to address the husband's responsibility in having an affair with another woman and leaving his wife. The Ugandan Constitutional Court's decision in the *LAW-U* case may have profound implications for the rights of women both in Uganda and beyond. *LAW-U*'s test litigation efforts also may prove to be an important model for similar efforts in other African countries. The adultery ruling could also have significant implications for other women's rights in Uganda. Divorce is currently very difficult to obtain for women. When section 154 was in effect, men could engage in extramarital sex with unmarried women without facing the threat of divorce. Now that the law on adultery treats men and women equally, divorce may become easier for women to obtain on this ground.

Nevertheless, the legal equality achieved for women based on this decision may not necessarily result in actual equality. Polygyny remains a legal and widely-tolerated cultural practice in Uganda, and adultery remains common. Ugandan courts have not been receptive to litigation challenging polygyny. In order to achieve true equality for women, further outreach and education efforts, in addition to legal action, will likely be necessary.

LAW-U's constitutional challenge of discriminatory inheritance laws also points to a possible trend in women's rights in Africa. The Ugandan Constitutional Court found that several inheritance laws that disadvantage women were unconstitutional. As a result, women in Uganda should be able to inherit more easily under the law. In recent years, other African countries, including Nigeria and Tanzania, have also taken steps to equalize inheritance laws. For example, the Nigerian Court of Appeal in *Mojekwu v. Mojekwu* ruled that women were able to inherit property based on a customary law doctrine. [See case summary in Chapter 3 of this report.] Nevertheless, there remain many countries that have yet to live up to their human rights obligations with respect to sex-discriminatory inheritance laws.

The Ugandan Constitutional Court's adultery and inheritance decisions indicate progress in Uganda's compliance with its international human rights obligations. Article 18 of the African Charter calls on states to eliminate discrimination against women. The Maputo Protocol, which Uganda has signed and is yet to ratify, specifically calls for equal rights for women with regard to marriage and inheritance, in articles 6 and 21, respectively. The decision also signals progress in compliance with articles 2, 15, and 16 of CEDAW, which calls on states to establish legal protection of the rights of women on an equal basis with men, to accord women equal rights to administer property, and to ensure that men and women have the same rights and responsibilities during marriage and at its dissolution. The court's decision is a step in the right direction to comply with Uganda's international obligations and to achieve equality for Ugandan women.

3. Inheritance and Distribution of Property

In many African countries, customary property and inheritance laws regulate the devolution and distribution of property. These laws often privilege male over female members of a family. As a result, women are excluded from inheriting property upon a parent's or spouse's death, and may receive unequal shares of marital property at the dissolution of a marriage. Although they often contain stronger rights guarantees for women, statutory laws sometimes preserve the application of customary laws to certain types of property and to customary or religious marriages.

Excluding women from property inheritance and distribution under customary laws deprives them of shelter, exposes them to physical harm such as sexual violence and abuse, and carries negative social and economic consequences for them and their dependents. It also violates a range of rights, including the rights to property, dignity, and equality and nondiscrimination, and can lead to the violation of their right to health, including their sexual and reproductive health. While national courts have previously upheld such customary laws without considering their impact on woman's human rights, there is now a growing trend towards supporting women's right to share equally in property inheritance and distribution.

Courts are increasingly relying on constitutional, regional, and international human rights guarantees as a basis for protecting women, regardless of contrary customary law requirements. For instance, South African courts have handed down decisions that protect women whose marriages were not recognized under statutory law and who would have been prevented from inheriting from their spouses on this ground. The decisions in *Daniels v. Campbell NO and Others* and *Hassam v. Jacobs N.O, Master of the High Court & Others* [see Chapter 2: Marriage] illustrate this well. The Kenyan decision, *Rono v. Rono*, underscores the difference that national courts can make in upholding women's property rights regardless of contrary customary laws. Finally, the decisions of the Nigerian courts in *Mojekwu v. Mojekwu* and *Mojekwu v. Iwuchukwu* highlight the ongoing need for focused advocacy and legal reform to ensure that national courts continue progressing towards protecting women's right to property inheritance and distribution.

Distribution of Marital Property

***Peter Mburu Echaria v. Priscilla Njeri Echaria*
H.C.C.C. No. 4684 of 1987(O.S.) [2007] eKLR
Kenya, Court of Appeal**

COURT HOLDING

Current law in Kenya does not permit the equal distribution of marital property, taking into account the non-monetary contributions of one spouse, upon the dissolution of marriage. Courts will divide the marital property on the basis of each spouse's direct or indirect monetary contributions.

Summary of Facts

The parties were married on June 12, 1964, while Peter Mburu Echaria was working as a diplomat in Moscow. Mr. Echaria continued to work abroad until he returned to Kenya in 1971. As his wife, Priscilla Njeri Echaria, lived with him during his service abroad, but due to his diplomatic status, she was not allowed to work. Once back in Kenya, she began working for the Ministry of Education in 1972 and was subsequently promoted to senior education officer. She retired in 1986, but continued working as a management consultant.

In 1972, Mr. Echaria bought the disputed property, 118 acres of land, and deeded it in his name alone, secured with a 30-year mortgage. In 1987, he applied to the Superior Court for an injunction alleging that his wife had deserted the matrimonial home, taking with her some household goods and a motor vehicle. Ms. Echaria argued that the disputed property was jointly owned because the property was acquired using the couple's joint funds, and that her non-monetary contributions as spouse and mother should be considered a contribution to the family's property.

Mr. Echaria argued that when the property was bought, his wife was unemployed and that she never made any direct financial payment on the property. The Superior Court, however, recognized Ms. Echaria's status as a diplomatic wife and her domestic duties as contributions to the property, and held that the property in dispute be equally divided between the spouses. Mr. Echaria then appealed this decision.

Issue

Did the Superior Court err in taking into account Ms. Echaria's non-monetary contributions to the disputed property and in granting her an equal share of the property bought in her husband's name?

Court's Analysis

The Court of Appeal surveyed the case law on distribution of marital property in light of a recent decision, which appeared to hold that a presumption exists that marital property should be distributed on the basis of all contributions made by the parties, including non-monetary contributions such as maintenance of the marital home and rearing of the marital children. In analyzing the cases, the court concluded that although some cases did order equal distribution, they did so based upon the direct and indirect monetary contributions of the parties alone. Indeed, the court pointed out, the law does not presently permit the consideration of non-monetary contributions. Such contributions may not be considered until the Parliament changes the law to bring it in line with other jurisdictions, such as the United Kingdom, which do permit consideration of all contributions made by the spouses.

The court indicated that it would be forced to render an unjust decision because its mandate was limited to interpreting the Married Women's Property Act 1882 based on the relevant case law. The court also described the extent to which the act was inconsistent with reality and criticized the parliament for failing to amend it. In this regard, the court noted that Kenya was still relying on outdated English legal precedents, which had been amended in the United Kingdom to reflect changes in women's social status.

The court lamented that Kenyan law remained "shackled to a 125 year-old foreign legislation which the mother country found wanting more than 30 years ago." The court further observed that the current law did not reflect the protections of women's human rights contained in the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant, CEDAW, and the African Charter, all of which Kenya has ratified. However, being limited to current Kenyan law, the court considered only Ms. Echaria's indirect monetary contributions during the period from the property's purchase until dissolution of the marriage, and concluded that she was entitled to 25% of the property. The court awarded her the home and attendant buildings, and a portion of the accompanying farm.

Conclusion

The court held that the Superior Court erred in considering Ms. Echaria's non-monetary contributions and in granting her equal share of the property, since Kenyan law allowed for consideration only of monetary contributions.

CASE COMMENTARY

Despite its final decision, the court's analysis and criticism of the parliament are valuable for law-reform efforts. The case shows how the act can lead to unjust and unfair results by ignoring women's significant contributions to raising children and caring for the household.

Onwuchekwa v. Onwuchekwa
[1991] 5 N.W.L.R. 739
Nigeria, Court of Appeal

COURT HOLDING

The appellant did not contribute to the property that her husband sold without her consent, and therefore could not oppose the sale.

Summary of Facts

Ada Onwuchekwa, the appellant, claimed that she jointly contributed money to purchase land and erect a building with her husband, Ihe Onwuchekwa, the first respondent. She stated that her husband then sold the property to the second respondent without her consent. She sought various remedies, including cancellation of the sale or a declaration that she was entitled to half of the sale's proceeds. However, the first respondent argued that he alone had paid for the property. Furthermore, he asserted, even if a joint contribution had occurred, his wife was not entitled to any legal or equitable interest in the property according to *Isikwuato* customary law, which provides that a wife and her wealth are her husband's property. He argued that, in effect, since Ms. Onwuchekwa was his property, he could exercise full ownership rights over her and whatever shares she had in the property. Ms. Onwuchekwa challenged the existence of this custom, and further argued that even if the court accepted the existence of such a custom, it could not be enforced by the court as it was repugnant to natural justice, equity, and good conscience.

Based on findings of fact, the Trial Court held that Mr. Onwuchekwa had purchased the land and erected the building alone. The court further determined that the *Isikwuato* customary law existed, and, relying on it, held that even had there been a joint contribution, Mr. Onwuchekwa was entitled to the unilateral sale. The Trial Court thus denied Ms. Onwuchekwa's claim and the remedies she sought. She appealed the decision.

Issue

Did the Trial Court adequately evaluate the evidence before it in holding that the appellant did not contribute to the property?

Court's Analysis

In the lead judgment, the Court of Appeal stated that it would not address the legal issue regarding customary law, but would instead focus on whether Ms. Onwuchekwa should have won her claim of joint contribution, since this had been her main claim. The court noted that the Trial Court, which had the privilege of having two versions of evidence regarding joint contribution before it, had found as follows:

I am unimpressed by and reject as false plaintiff's evidence that she made financial contributions towards the cost of the erection of the house. . . . It may well be that as a housewife she contributed her labour in the course of the building of the house, but I find nothing unusual in that conduct.

Since the Trial Court had listened to the witnesses and watched their demeanor, an opportunity which the Court of Appeal did not have, the Court of Appeal declined to interfere with the Trial Court's finding.

In a concurring judgment, one judge chose to address the issue of customary law specifically, noting that Ms. Onwuchekwa had relied on it heavily as a basis for her claim. This judge determined that not only was the Trial Court correct in denying her claim of joint contribution, but that it was also correct to have accepted the existence of the *Isikwuato* customary law. He stated that the repugnancy doctrine was introduced by the British, and that customary law is not repugnant to natural justice, equity, and good conscience merely because it is inconsistent with English law, since "the test of the validity of customary law is never English law."

Conclusion

The Court of Appeal upheld the decision of the Trial Court to dismiss Ms. Onwuchekwa's claim.

Inheritance Rights

***Mojekwu v. Mojekwu*
[1997] 7 N.W.L.R. 283
Nigeria, Court of Appeal**

COURT HOLDING

The *Kola Tenancy* governs the devolution of the house and thus the respondent's daughters can inherit their father's property. Furthermore, the *Ili-Ekpe* custom, which prohibits females from inheriting property, is repugnant to natural justice, equity, and good conscience, and violates the gender equality provisions of the Nigerian Constitution and international human rights law.

Summary of Facts

The appellant, Augustine Mojekwu, relying on the *Ili-Ekpe* custom of some parts of southeast Nigeria, had instituted action against the respondent, Caroline Mojekwu, claiming that he was entitled to inherit her deceased husband's property. The basis for his claim was that the deceased, his paternal uncle, was survived by Mrs. Mojekwu and two daughters, who, as women, were excluded from inheriting property under the *Ili-Ekpe* customary laws.

Mr. Mojekwu argued that the *Ili-Ekpe* custom allowed that if the deceased had no son, the closest male relative was to inherit the property; therefore, he was the rightful owner of the deceased's house situated in the town of Onitsha. Mrs. Mojekwu claimed that her son Patrick, who had predeceased his father (her husband), had fathered an infant son who should inherit the property. Disputing this fact, Mr. Mojekwu claimed that Patrick had died without a son.

Issue

Does the *Ili-Ekpe* custom, which provided that only males can inherit property, violate the Nigerian Constitution's gender equality provisions and relevant international human rights treaties?

Court's Analysis

The Court of Appeal found that the *Kola Tenancy*, a customary law doctrine, governed the inheritance of the house. This doctrine allowed the respondent's daughters to inherit their father's property, rendering irrelevant the question of whether the respondent's predeceased son had a son at the time of his death.

Furthermore, the court determined the *Ili-Ekpe* custom to be repugnant. The court applied the constitution's repugnancy doctrine, which provides that the courts shall not enforce any custom as law if it is contrary to public policy or repugnant to natural justice, equity, and good conscience. The court also pronounced the custom contrary to human rights guarantees in the Nigerian Constitution and in CEDAW, which prohibit discrimination on the ground of sex.

Conclusion

The court concluded that Mr. Mojekwu's claim under the *Ili-Ekpe* custom was invalid and that Mrs. Mojekwu's daughters could inherit their father's property.

**Appeal of *Mojekwu v. Mojekwu* to the Supreme Court of Nigeria:
Mojekwu v. Iwuchukwu
[2004] 4. S.C. (Pt.11). 1.
Nigeria, Supreme Court**

Mojekwu v. Mojekwu was further appealed to the Nigerian Supreme Court. The names of the parties to the case changed because, Caroline Mojekwu, the original party to the case, had died; her daughter, Theresa Iwuchukwu was substituted as a party to the case.

COURT HOLDING

The *Kola Tenancy* was rightly applied by the Court of Appeal and there was no miscarriage of justice. However, the Court of Appeal erred in applying the constitution's repugnancy doctrine to the *Ili-Ekpe* custom.

Issue

Did the Court of Appeal err in holding the *Ili-Ekpe* custom to be repugnant and contradictory to the gender equality provisions provided by the Nigerian Constitution and pertinent international human rights instruments?

Court's Analysis

The Supreme Court held that the *Kola Tenancy* was the applicable principle of law in this case, and that the Court of Appeal need not have considered the repugnancy of *Ili-Ekpe* in order to judge the case. The Supreme Court decided that the rules of procedure precluded the Court of Appeal from determining whether *Ili-Ekpe* was repugnant under the repugnancy doctrine, since neither of the parties to the case brought the validity of the custom as a legal issue before the court. The Supreme Court also criticized the Court of Appeal's decision for "general and far-reaching" language that could lead to criticism of all customs that fail to recognize a role for women. Nevertheless, the Supreme Court upheld the Court of Appeal's judgment because the *Kola Tenancy* was indeed the applicable law, and the Court of Appeal's decision did not result in a miscarriage of justice. The respondent (the widow) and her family were rightfully found to be the owners of the disputed property.

Conclusion

The Court of Appeal erred in applying the constitution's repugnancy doctrine to the *Ili-Ekpe* custom and in finding the custom repugnant to natural justice. However, based on the *Kola Tenancy*, the respondent and her family were entitled to the disputed property.

CASE COMMENTARY

To the extent that the Supreme Court did not overrule the Court of Appeal's decision, the *Mojekwu v. Mojekwu* decision remains important and valid case law. Widows excluded from inheriting their deceased husbands' property solely because they are women can ask the courts to determine whether their right to be free from gender discrimination has been violated.

However, the status of applying human rights analysis to customary practices is now less clear. The Supreme Court's decision raises considerable doubt about whether the apex court would protect women's human rights by finding that discriminatory inheritance customs violate the constitution's equality provisions. Indeed, the decision reveals that similar customs, such as those excluding women from being family heads, would not be invalidated without hearing from the communities in question.

As a result, lower courts may now hesitate to apply human rights standards to customary law. Indeed, the chilling effect may have already occurred—there seem not to have been any later decisions using human rights guarantees to challenge customary law exclusions of women from property inheritance. Until the Supreme Court clarifies its position, women's rights proponents should seek to convince the Nigerian judiciary that human rights laws must always be respected, protected, and fulfilled, despite contradictory customary law requirements.

Mary Rono v. Jane Rono & another
Civil Appeal 66 of 2002 (decided 2005)
Kenya, Court of Appeal

COURT HOLDING

An earlier decision granting greater shares of an estate to sons—because daughters were expected to marry and leave home and not to inherit under customary law—is invalid. Instead, both sons and daughters should receive equal shares in compliance with constitutional and international laws on nondiscrimination.

Summary of Facts

Stephen Rono, a farmer, passed away intestate, and was survived by two wives and nine children who, based on undisputed facts, he had treated equally. The High Court in Eldoret gave letters of administration to the wives and the eldest son, but a dispute arose over the distribution of 192 acres of farmland and the liabilities of the estate.

The first wife, Jane Rono, contended that she and her three sons and two daughters—known as the First House—should have a bigger share of land, with the sons getting more than the female members. In Jane Rono's opinion, this distribution was fair because the land was purchased and developed before the second wife, Mary Rono, and her four daughters—known as the Second House—became part of the family, and because all daughters had the choice of marrying and leaving home. As a concession, the First House was willing to pay off a slightly

greater portion of the estate's liabilities (a ratio of 60:40). The Second House disagreed and asked for an equal distribution of both the liabilities and the land. They argued that Mr. Rono had treated them equally and there was no evidence that the First House worked harder on the land than they did.

The High Court took account of the Law of Succession Act (Cap. 160) and of *Marakwet* customary law, which applied to Mr. Rono. It found that based on customary law, inheritance was patrilineal: distributions in polygamous families were made out to the "house of each wife" regardless of the number of children in it, and daughters could not inherit. Under statutory law, however, daughters could inherit, with distribution to each "house" depending on the number of "units" (persons) within it. Taking both laws into account but using its discretion to award "its own independent distribution," the court held that, although both sons and daughters would have been awarded equal shares of land based on statutory law and in consonance with Mr. Rono's treatment of his children, it would allow the sons a greater share. In the court's opinion, the daughters' ability to elect to marry merited this decision. However, compensating for the bigger share that would go to the First House's sons, the court awarded Jane Rono a smaller share of land (20 acres) and awarded Mary Rono a bigger share (50 acres). It then made an equal distribution of the liabilities between both "houses."

Mary Rono appealed to the Court of Appeal on the ground that the High Court should have considered only statutory law, and, had it done so, would have reached a different conclusion because statutory law prohibits discrimination between male and female children.

Issue

Did the High Court err in considering *Marakwet* customary law or any customary law in determining distribution of an estate, since the estate in question was governed by the Succession Act?

Court's Analysis

Mary Rono contended that section 82 of the constitution did not allow for sex discrimination and that the Succession Act did not discriminate between children based on sex, but rather construed each family member as a "unit" entitled to a share of the estate. It was therefore wrong to deliberate over whether the daughters would marry in the future. In fact, they were either divorced or advanced in age at the time of the High Court's decision, and ten years later, on appeal, their marital status had not changed. Moreover, it was unfair to distribute the liabilities in equal amounts when the assets were not shared equally. Jane Rono argued, on the other hand, that the court had discretionary power to distribute the estate, and was right to hold that the 192 acres of land was subject to customary law and not the Succession Act since it was agricultural land. The court was also correct to give a greater share of that land to the sons in accordance with custom.

In its lead judgment, the Court of Appeal emphasized that it would rely on both domestic and international law to rule conclusively on the core issue of discrimination. The court stated that the Judicature Act (Cap. 8), which governs how courts apply the law, requires courts to recognize customary law if applicable and not repugnant to justice and morality or inconsistent with any written law. The court also mentioned that section 82(1) of the constitution invalidates any law that discriminates on the basis of enumerated grounds, and that "sex" was included as a ground only through a 1997 amendment. However, section 82(4) weakens section 82(1) by excluding its application to laws that govern "devolution of property on death or other matters of personal law" and from customary laws that apply to a particular race or tribe.

The court then stressed that international law was relevant because Kenya had ratified treaties such as the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant, CEDAW, and the African Charter. It noted that these treaties, particularly CEDAW, influenced the decision to prohibit sex discrimination in the constitution, and that Kenya "was moving in tandem with emerging global culture, particularly on gender issues." The court further noted that although Kenya endorsed the common law view that international law must

be domesticated in order to apply at the national level, the theory had shifted to allow national courts to apply international law, domesticated or not, if there is no conflict with national laws. The court referred to principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms to support this assertion: “It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.”⁶

The court also cited a *Zambian* decision, *Longwe v. Intercontinental Hotels*, which stated that “ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty Convention in my resolution of the dispute.”⁷ The court concluded that the draft Kenyan Constitution agreed with this current thinking by acknowledging that Kenyan law includes “[c]ustomary international law and international agreements applicable to Kenya.”

Based on this analysis, the court stated that because the Succession Act became operational before Mr. Rono passed away, the estate was governed by the act, in compliance with section 2(1). This section states that “[e]xcept as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya . . . and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.” However, the land in question was governed by customary law because of sections 32 and 33 of the act, which expressly provide for the application of customary law to agricultural land. The court agreed that the act allowed courts some discretion in distribution of estates, hence the High Court’s use of its discretion in finding that the daughters may marry and should have an unequal share. However, the Court of Appeal contended that such discretion should have a legal or factual basis, which the High Court did not have, since all but one of the daughters were either divorced or advanced in age at the time. Furthermore, the High Court should have factored in Mr. Rono’s equal treatment of his family, especially because it resonated with constitutional and international law dictates. The court further noted that the estate’s liabilities should have been paid off before the assets were shared, but did not disturb the earlier ruling that distributed equal portions of the liabilities to both sides.

Concurring with the decision, the other two judges cautioned that they understood it only to mean that there was no factual reason for unequal allocation of assets in this case, and not that the Succession Act requires all heirs to always inherit equally. Neither did it mean that a court must always apply the principle of equality while exercising its discretionary powers. In their view, an accurate interpretation of section 40 of the Succession Act would allow courts to use their discretion to take account of the number of children in each “house.” Courts should also be able to award unequal shares amongst children—male or female—based on whether they were working and independent of the estates or still minors in need of long-term maintenance and school fees.

Conclusion

Setting the High Court’s award of assets aside, the Court of Appeal awarded equal shares of the estate to the two wives, and smaller but equal shares to the nine children. It also allocated equal portions of the estate’s liabilities between the first and second houses.

THE ROLE OF CONSTITUTIONS IN PROTECTING WOMEN'S RIGHTS

Most countries, as parties to international human rights treaties, have recognized the fundamental rights of women and girls. These rights must be enshrined in national-level constitutions, which carry a force of law superior to other parliamentary and executive acts, and to customary and religious law. A nation's constitution is its law of highest authority, and, accordingly, all legislation and government actions should conform to the norms established in the constitution. Constitutional measures that uphold the rights of women are critical and can shape government practice. Many constitutions provide remedies that can be the basis for litigating violations of women's rights.

Constitutions should be unambiguous in securing the equality of women and men under the law in all matters. The constitutions of Ghana and Uganda, for example, contain provisions that protect women from harmful customary practices. Under Section 26(2) of the 1992 constitution of Ghana, “[a]ll customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited.” Likewise, Section 33(6) of the 1995 constitution of Uganda provides that “[l]aws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.”

However, the effectiveness of such constitutional protections against discrimination and inequality is sometimes severely undermined by retrogressive provisions, often known as “clawback clauses.”⁸ In these instances, some constitutions explicitly declare that guarantees of nondiscrimination are not applicable in matters governed by customary and religious law. For example, article 23(1) of the constitution of Zambia protects from discrimination as follows: “[s]ubject to clauses (4), (5) and (7) no law shall make any provision that is discriminatory either of itself or in its effect.” However, clause 4(d) then provides that “[c]lause 1 shall not apply to any law so far as that law makes provision for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.” Because customary and religious law frequently govern such matters as marriage and inheritance, a government's refusal to enforce women's equality in this context can perpetuate conditions that lead to women's subordination.

The ongoing efforts of many countries to reform their constitutions present opportunities for both gains and losses. Constitutional reform provides the chance to remove discriminatory provisions, including clawback clauses, and to replace them with language that guarantees women's equality, particularly if advocates ensure that women's rights are promoted throughout the reform process. However, there is also the risk that groups may seize the opportunity to introduce provisions that abridge reproductive and sexual rights, such as defining the right to life as starting from the moment of conception or outlawing same-sex marriage.

Brink v. Kitshoff**1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC)****South Africa, Constitutional Court****COURT HOLDING**

One purpose of the Insurance Act is to protect creditors from fraud due to the close relationship between husband and wife. However, the distinction made between married men and women in achieving the purpose is discriminatory and unjustified.

Summary of Facts

A. Brink, the applicant, stated that her husband, P. Brink, bought a life insurance policy valued at approximately ZAR 2 million in 1989. Mr. Brink may have ceded the policy to his wife in 1990. (This fact was in dispute and not decided by the Constitutional Court.) Mr. Brink died in 1994 and A. Kitshoff, the respondent, was appointed executor of his estate. Mr. Kitshoff informed Mr. Brink's creditors that the estate was insolvent, and called upon the assurer to pay into the estate all but ZAR 30,000 of the policy proceeds.

The Insurance Act, 27 of 1943 (Insurance Act) under section 44(1)–(2) provided that if a husband ceded his insurance policy to his wife two years before the sequestration of his estate, she would receive a maximum of ZAR 30,000 from the policy. If the policy was ceded in her favor less than two years from the date of the sequestration, she would receive no benefit and the entire insurance benefit would go to the husband's creditors. The section, however, did not similarly limit a life insurance policy ceded by a wife to a husband. Ms. Brink challenged the constitutionality of section 44 of the act, arguing that it contravened section 8 of the constitution, which guaranteed equality of persons before the law.

She argued that section 44(1)–(2) of the act discriminated against married women on the basis of gender and marital status, and that any type of discrimination should be eradicated from South African society, as the constitution's core value is to realize "equality between men and women as well as equality between people of all races." Ms. Brink also argued that section 44 of the act contravened section 8 of the constitution because it denied married women an insurance benefit to which married men in the same circumstances were entitled.

Issues

- Does the distinction between married men and married women drawn under section 44 of the act conflict with the anti-discrimination provisions of the constitution?
- If so, is such discrimination justifiable under section 33 of the constitution?

Court's Analysis

According to section 33(1) of the constitution, rights provided under chapter 3 of the constitution might be limited in some exceptional cases. Any such limitation, however, must be "reasonable and justifiable in an open and democratic society based on freedom and equality" and "shall not negate the essential content of the right in question." The constitution requires that the court balance the purpose and effects of the limitation against the nature and extent of the infringement caused.

Although one of the Insurance Act's purposes is to protect creditors from fraud that may result from the close relationship between husband and wife—which could serve a valuable public purpose—the distinction made between married men and women was not justified. There was no reason why fraud could not occur when husbands, and not wives, are the beneficiaries of an insurance policy. Drawing a distinction between married men

and married women was not necessary to achieve the purposes of section 44(1)–(2) of the act. The infringements caused by the section were not sufficiently justified.

In reaching its decision, the Constitutional Court extensively considered international human rights treaties to interpret the concepts of “equality before the law” and “discrimination” under South African law. The court referred to provisions of the Civil and Political Rights Covenant, the International Convention on the Elimination of All Forms of Racial Discrimination, and CEDAW—all of which South Africa has ratified—and the Universal Declaration.

Conclusion

Section 44(1)–(2) of the act contravenes section 8 of the constitution, as the discrimination against married women is not justified under section 33 of the constitution.

4. Child Custody, Maintenance, and Adoption

Social and cultural practices and national laws in many African countries often exclude a nonmarital child from inheriting from a biological father who dies without a will, and frequently do not impose parental responsibilities on these fathers, such as providing economic support for a child's maintenance. These practices and laws not only discriminate against these children, based on their parents' marital status at the time they were born, but compromise their well-being and their ability to enjoy other human rights. This is particularly pertinent given that the mothers of these children would bear sole responsibility for their upkeep despite the fact that they may be unable to provide adequately for the children because of their less privileged status and economic dependence—a common factor within many African countries. The Kenyan cases of *RM v. Attorney General*, *JGM v. CNW*, *MW v. KC* and *S.O. v. L.A.M.*, which are discussed in this chapter, highlight how laws that impose immediate or permanent responsibility for a non-marital child solely on the mother negatively affect both children and women.

Laws that seemingly discriminate only against women can also have far-reaching effects on their children. This direct link between discrimination against women and negative impact on children is evident in Chapter 3 on inheritance and distribution of marital property. For example, national laws that do not recognize women's non-monetary contributions while determining how to share property upon a divorce are addressed in the Kenyan case of *Echaria v. Echaria*. The Nigerian cases of *Mojekwu v. Mojekwu* and *Onwuchekwa v. Onwuchekwa* focus on customary laws that exclude women from inheriting property upon the death of their parents or a spouse. These laws and practices often lead to the loss of shelter and means of livelihood, exposing the women and their children—marital or nonmarital—to economic hardship, sexual violence. Economic hardship can also have multi-generational effects, limiting children's educational opportunities and compromising their own ability to be economically self-sufficient and raise a family.

Inheritance Rights for Nonmarital Children

Frans v. Paschke and Others
(PI1548/2005) [2007] NAHC 49 (11 July 2007)
Namibia, High Court

COURT HOLDING

The common law rule denying a nonmarital child the right to inherit his deceased father's estate is unconstitutional.

Summary of Facts

The plaintiff, Lotta Frans, was the nonmarital child of a father who died without a will in 1991. Mr. Frans' father also left behind a daughter born within marriage. Under the centuries-old common law rule, only marital children could inherit from a father who died without a will. Mr. Frans challenged this rule as a violation of the rights to equality, to dignity, to be cared for by parents, and to acquire property under the Namibian Constitution.

Issue

Does the common law rule that prohibits nonmarital children from inheriting a deceased father's estate violate the Namibian Constitution?

Court's Analysis

Article 10 of the constitution provides that no person may be discriminated against on the basis of, among other things, social or economic status. In analyzing a claim of discrimination based on social status, the court considered the following criteria: (i) whether there exists a differentiation between people or categories of people; (ii) whether the differentiation is based on social status; and (iii) whether the differentiation amounts to discrimination. In applying these criteria, the High Court determined that differential treatment exists between marital and nonmarital children, that this difference is based on the social status of nonmarital children, and that this difference results in discriminatory treatment of nonmarital children. Accordingly, the disparate treatment of nonmarital children under the law cannot stand.

Conclusion

The common law rule that prohibits nonmarital children from inheriting the estates of their fathers who die without a will is discriminatory, and therefore unconstitutional. More generally, article 66 of the constitution does not require a court to declare a common law rule unconstitutional. Any common law rule that violates the human rights provisions of the constitution is already invalid and does not require a declaratory judgment to render it so.

Child Custody and Maintenance

Gerber v. Gerber and another
(12166/07; 12691/07) [2007] ZAWCHC 65 (9 November 2007)
South Africa, High Court

COURT HOLDING

Under section 28(2) of the constitution, the best interests of the child are paramount in all matters concerning the child. The court should intervene to protect the interests of the child even though the respondent, the child's father, would generally have the right to determine how he spends his own assets.

Summary of Facts

The applicant, Dale Gerber, and the first respondent, Raymond Gerber, were divorced in 2000. At the time, they had a minor daughter. According to the settlement agreement, Mr. Gerber would pay maintenance of ZAR 1,500 per month for the child. He would further pay all expenses related to the child's primary, secondary, and tertiary education. At the time the agreement was concluded, Mr. Gerber was earning ZAR 43,000 per month. Between September and November 2006, Mr. Gerber spent ZAR 1,000,000 of his assets. By the end of 2006, his drug addiction led him to resign from his job and, as a result of criminal proceedings against him, he was enrolled in a drug rehabilitation program. Ms. Gerber filed an application requesting the court to attach (seize and sell) Mr. Gerber's remaining assets to provide for his daughter's support. Mr. Gerber tendered a lump sum of ZAR 100,000, and also offered to increase the monthly maintenance payment from ZAR 1,500 to ZAR 3,000. He argued that it would violate his right to dignity to attach his assets without considering his living conditions.

Issue

Is it appropriate for the court to attach the assets of the respondent to protect the interests of his daughter?

Court's Analysis

Section 28(2) of the South African Constitution provides that a child's best interests are paramount in all matters affecting the child, including divorce where a minor child is involved. Mr. Gerber had become unemployed and was being treated for drug addiction. Given his spending habits and the unreliability of future income, he was unlikely to be able to support his daughter in the future. The court should intervene to protect the interests of the child even though Mr. Gerber would generally have the right to determine how he spends his own assets.

Conclusion

The sheriff was directed to seize Mr. Gerber's assets in the amount of ZAR 400,000 from a property sale for the support of the child. The property was valued at ZAR 650,000, and Mr. Gerber could use the remaining proceeds of the sale to support himself, given his difficult economic situation.

JGM v. CNW
Civil Appeal No. 40 of 2004 (decided in 2008)
Kenya, High Court

COURT HOLDING

The father has parental responsibility towards his children because there was a valid marriage between him and their mother, and it is in the best interest of the children.

Summary of Facts

The appellant, JGM, the father of the children at issue, and the respondent, CNW, the children's mother, began a conjugal relationship in October 2000. In January 2001, they signed a sworn statement declaring that they had married in 1996 under customary law. When CNW gave birth to twins in February 2003, JGM chased her out of his house and she moved to another house owned by JGM. When he failed to provide her with maintenance and child support, CNW filed a suit in a Magistrate Court.

JGM denied the existence of a marriage and argued that since the children were born out of wedlock, he did not have any parental obligation to support them. Under section 24 of the Children Act of 2001, if a child is born out of wedlock, the mother is the primary person responsible for the child's care until a court determines, in accordance with section 25(1) of the act, the father's parental responsibility. The magistrate held that the combination of the documents submitted by the children's mother, including the sworn affidavit of marriage and the children's birth certificates, plus the fact that CNW and JGM had lived together as husband and wife for years and had children, amounted to marriage. The magistrate also held that the children's father had a duty to support his children. JGM then appealed the magistrate's decision.

Issues

- o Did the children's parents have a marital relationship?
- o Did the father have parental responsibility towards his children?

Court's Analysis

The marriage laws, particularly those enacted during the colonial period, did not recognize mere cohabitation as a valid marriage. In reality, however, many Kenyans cohabit and have children. In times of conflict or when a partner dies, it is usually women who shoulder the burden of raising the children and need to turn to the courts for justice. Precedent case law has established that the courts normally presume the existence of a marriage if the partners have cohabited for a considerable period of time. For example, in *Machani v. Vernoor*, the Court of Appeal held that courts “can presume existence of a marriage where there has been a ceremony of any form followed by cohabitation or under customary law and the respondent has to show their marriage fits in any of the two.”⁹ Moreover, in cases involving a child, the best interest of the child is of supreme importance. Therefore, the magistrate was correct in holding that JGM had parental responsibility towards the children because there was a valid marriage between the couple and because the best interest of the children calls for the father’s parental responsibility.

The case reveals the shortcoming of section 24 of the Children Act, which excuses a father from an immediate parental obligation to support his children born out of wedlock until he applies for parental responsibility under section 25(1). The High Court held that such a law discriminates against nonmarital children and noted that it would not comment further, except to call for the legislature to consider amending the act.

Conclusion

There existed a marital relationship between the appellant (the children’s father) and the respondent (the children’s mother), and the appellant had a duty to support his children.

Note

While this case referred to section 24(1) of the Children Act as the section that excuses fathers from immediate parental obligation to support children born out of wedlock, the appropriate reference is section 24(3).

RM v. Attorney General
Civil Case 1351 of 2002 [2006 eKLR]
Kenya, High Court

COURT HOLDING

A provision in the Children Act stating that mothers are solely responsible for the care of children born to unmarried parents does not result in unequal treatment of nonmarital children in violation of the anti-discrimination provision of the Kenyan Constitution.

Summary of Facts

RM, the plaintiff, was born to unmarried parents in September 2000. RM’s mother and putative father cohabited prior to her birth and for approximately four months thereafter. The putative father paid the hospital expenses for the birth, named the baby after his mother, and shaved the baby’s head in accordance with *Kisii* custom. Approximately four months after RM’s birth, the putative father disappeared. RM’s mother, with the assistance of public interest law groups, filed an action to declare section 24(3) of the Children Act of 2001 unconstitutional because it discriminates against children born to unwed parents. Under section 24(3), when parents are unwed and do not cohabit for at least one year, the putative father is not legally obligated to support the child until paternity is established. RM argued that excluding nonmarital children from automatically receiving parental support from the father amounted to discrimination based on the social origin, birth, and status of the child.

RM also argued that the law contravened both the preamble and article 2(1) of the Convention on the Rights of the Child (Children’s Rights Convention), which prohibit discrimination on the basis of social origin, birth or other status, and article 18(1), which requires states to establish recognition of the principle that both parents are responsible for the upbringing of a child and to ensure the promotion of the child’s best interest. The act was also inconsistent with article 3 of the African Charter on the Rights and Welfare of the Child (African Children’s Charter), which proscribes discrimination on the grounds of ethnic group, national and social origin, birth, or other status; article 4, which states that the best interest of the child should be the primary consideration; and article 18(3), which expressly provides that “no child shall be deprived of maintenance by reference to the parents’ marital status.” Furthermore, RM argued that the act was contrary to article 2 of CEDAW, which requires states to modify or abolish laws, customs, and practices that discriminate against women, and article 16(1)(d), which provides parents the same rights and responsibilities—regardless of their marital status—in matters affecting their child, based on the child’s best interest.

Issues

- o Does section 24(3) of the Children Act, which provides that children born to unwed parents are the sole responsibility of the mother, violate the anti-discrimination provisions of the Kenyan Constitution, in itself or in its effect?
- o Does section 24(3) of the Children’s Act contravene international and regional instruments ratified by Kenya, particularly articles 2 and 3 of the Children’s Rights Convention and articles 2 and 3 of the African Children’s Charter? If so, is Kenya subject to these instruments?

Court’s Analysis

Section 82(2) of the constitution prohibits discrimination based on race, tribe, place of origin or residence or other local connections, political opinions, color, creed, or sex. Under the Children Act, women with nonmarital children carry the burden of fulfilling the immediate needs of the child, while married women are automatically supported by their husbands. The High Court reasoned that although the law treats children differently on the basis of the marital status of their parents, this differential treatment would not be discriminatory if there is a reasonable basis for the distinction. Unwed mothers and their children are treated differently under the Children’s Act for the purpose of locating parental responsibility.

The main purpose of this section was to protect the child by obliging the immediately available parent (the mother) to provide support without delay. In cases where married couples are involved, both parents are automatically responsible for the support of a child born of the marriage. If a child is born out of wedlock, however, the mother is the only person available to take care of the child at once. The process of paternity determination in court takes time and the child could not stay without support until the final decision. Section 24(3) of the constitution does not prohibit the putative father from asserting paternity. However, when an alleged father denies his paternal relationship with a child, the section imposes the full responsibility for the child’s care on the mother until the court resolves the issue of paternity. Accordingly, the court ruled, the differential treatment provided by the statute is not arbitrary or unreasonable, given its objective of locating parental responsibility for the child’s immediate needs.

The court further reasoned that marital status is not an enumerated protected class in the constitution. The court is prohibited from adding an additional classification to section 82(2) of the constitution, because this would amount to “usurpation of the work of the Constitutional framers.” Moreover, section 82(2) was amended in 1997 to include “sex” as a new ground of discrimination. Other grounds would have been added during that amendment had it been necessary to do so.

Focusing on whether the Children Act is subject to international and regional conventions that Kenya has ratified, and whether the act contravened these conventions, the court first observed that the general principle of law was that unless a national law expressly allowed for the automatic domestication of conventions, they would not apply

in a country until domesticated by the government. The court then noted that in common law countries, courts have an obligation to uphold a national law that is clear but inconsistent with international obligations. Courts should, however, inform “appropriate authorities” of inconsistencies since the “supremacy” of national laws does not alleviate a country’s breach of international obligations. Based on this reasoning, the court stated that the provisions of the constitution and statutes in Kenya are intended to be in conformity with international conventions and treaties. However, if the provisions of the constitution or statutes are unambiguous, the courts have no option but to find that local laws prevail over the international instruments, irrespective of any conflict. The court further reasoned that an international convention would supercede a national law only if the law was enacted in the first place to bring the convention into effect and was then found to be ambiguous.

Conceding that article 2 of the Universal Declaration prohibits any type of discrimination and makes no room for exceptions, the court stated that Kenyan law did not support such a “restrictive interpretation.” It argued that the “margin of appreciation” that permits for variations based on differences within states allowed for this departure from international instruments. The court further argued that even if it were to consider the international instruments, the Human Rights Committee, charged with monitoring compliance with the Civil and Political Rights Covenant, in defining discrimination, had declared in General Comment No. 18 that discrimination is permitted in circumstances where it is based on reasonable and objective criteria. Section 24(3) of the Children Act was in line with this accepted principle of international law since the difference in treatment permitted under it had an objective and legitimate purpose.

Conclusion

Section 24(3) of the Children Act does not discriminate against illegitimate children of its self or in its effect because it serves a legitimate non-discriminatory purpose, which is to locate immediate parental responsibility. Clear national laws should be upheld by courts even if their provisions are inconsistent with international obligations.

Note

The issue of a father’s immediate parental obligation to support a child who is born out of wedlock was subsequently addressed by a Kenyan High Court in *JGM v. CNW* [also summarized in this chapter]. The *JGM* court held that the Children Act provision excusing a father from an immediate parental obligation to support nonmarital children until he applied for parental responsibility was discriminatory. However, the *JGM* court would not comment further on issue but called upon the legislature to consider amending the act.

CASE COMMENTARY

The *RM* case raised more issues than it resolved. Though the court justified section 24(3) as a way to locate immediate parental responsibility, it failed to recognize that without support from the father, single mothers may encounter economic hardship in trying to provide for their child. In the above case, for example, the mother and her child depended on “the charity of others” to survive. Given women’s economic status in Kenya, this case calls for a thorough reconsideration of the process of paternity determination and a method of immediate interim paternal support in some cases.

The reasoning in this case also emphasizes the importance of putting pressure on governments to domesticate regional and international human rights instruments. Such domestication would ensure that courts feel empowered to enforce the rights that states have obligated themselves to respect, protect, and fulfill.

S.O. v. L.A.M.
Civil Appeal 175 of 2006 [2009 eKLR]
Kenya, Court of Appeal

COURT HOLDING

There is no reason to modify the lower court's decision granting custody to the mother and requiring the father to provide maintenance.

Summary of Facts

The respondent, L.A.M., and the appellant, S.O.—both parents of L.O., who was born in December 1998—were engaged in a dispute over custody. In October 2003, L.A.M., the child's mother, instituted action before the Resident Magistrate's Court in Nairobi (Trial Court) seeking custody of the child and maintenance from S.O., the child's father. L.A.M. stated that her marriage to S.O. was conducted under the Marriage Act (Cap. 150) and that she subsequently gave birth to L.O. She asserted that S.O. had provided neither maintenance nor support for her and the child, that he had been cruel, and that he had attacked her in the child's presence. She sought maintenance and provided evidence to show that S.O. had the means to support them, highlighting that he was a Member of Parliament who earned KES 485,000 a month while the upkeep of the child, apart from accommodation, would cost only KES 65,000.

S.O. denied the assertions and claimed instead that he had actual custody since January 2003, and possessed the "moral standing," means, and disposition to care for the child. He contended that L.A.M. was unemployed, "unemployable," and threw uncontrollable tantrums, which made her unsuitable to have custody. S.O. further contended that L.A.M. had committed adultery with his cousin in the child's presence, had practiced witchcraft on the child, and had neglected the child so that he became adept at stealing. However, questions about L.A.M.'s character were not raised when she was cross-examined.

L.A.M. asserted that S.O. had actual custody of the child since January 2003 because he forced her out of their home after which his girlfriend moved in, and the Trial Court had cause to believe her. In L.A.M.'s view, it was in L.O.'s best interest if he lived with her because he suffered from tuberculosis and S.O. "did not care much about the welfare of the child."

The Trial Court held that there was no reason to deny L.A.M. custody. It relied on applicable legal principles and authorities, which provide that while dealing with custody of a child "of tender age," the mother would be granted custody except when exceptional circumstances exist. It also relied on article 16(1) of the African Children's Charter, which protects against child abuse and neglect. The Trial Court recounted examples of "exceptional circumstances"—the mother is unsettled, has taken a new husband, or her living quarters are unsuitable for young children—and found that they did not apply. The Trial Court granted legal custody to both L.A.M. and S.O. and held that L.A.M. would be in charge of actual care and control while S.O. would be responsible for L.O.'s maintenance (KES 10,000 per month), housing (KES 20,000), school fees, and medical expenses. S.O. appealed to the Superior Court, which upheld the decision and also observed that S.O. had not refuted the allegation that he committed adultery—presumably by forcing his wife out and allowing his girlfriend to move in with him instead. Further, the Superior Court noted that S.O. had entered a claim before it that L.A.M. committed adultery but that the claim was made late and deprived L.A.M. of the opportunity to contest it. The Superior Court dismissed S.O.'s appeal, which he then took to the Court of Appeal. As a second appeal, the court stated that it could consider only issues of law, and not fact, in keeping with Kenyan law.

Issues

- Did the Superior Court fail to note down in the court record all arguments raised by S.O.'s counsel in the appeal?
- Did the Superior Court's mention in its judgment that S.O. and L.A.M. had obtained a divorce in the course of their suit lead to prejudice, since neither of them raised it?
- Did the Superior Court fail to address the issue of L.A.M.'s misconduct?
- Did the Superior Court fail to address the absence of a probation officer's report to support L.A.M.'s case, and the absence of witnesses to support her claims?
- Did the Superior Court err in law by validating the Trial Court's order that S.O. should provide finances for his son's accommodation when neither of the parties requested it in their pleadings?

Court's Analysis

Reviewing the first issue, the Court of Appeal found that although S.O. argued that he had brought up the issue of the propriety of the plaint before the Superior Court, S.O. did not include this argument in the initial pleadings submitted to the Superior Court. Accordingly, he would not have been permitted to raise the issue even if the Superior Court had noted it in its record.

On the second issue, the court held that although S.O. argued that the Superior Court focused unduly on matters that were not at issue during the child custody appeal—such as the marital status of the parties, which led to prejudice—determining the custody of children comes up only when their parents are either divorced or separated. As such, it did not find it surprising that the fact that both parties obtained a divorce in the course of their suit was mentioned in the Superior Court decision and noted that S.O.'s counsel did not identify the prejudice this could have caused him.

Regarding the third issue, the court found that while S.O. had testified about L.A.M.'s misconduct, L.A.M. was not given the opportunity to rebut the allegations because she had already closed her case by then. She was also not cross-examined on the allegations and there was no explanation for not doing so. Furthermore, the misconduct was not included in the pleadings, which would have given her notice and enabled her to address them.

On the fourth issue, the court turned to S.O.'s argument that the Trial Court failed to obtain a report from a probation officer before entering judgment in L.A.M.'s favor, even though at the close of S.O.'s defense arguments, it had ordered that such a report be filed. In addition, the Superior Court had ignored this issue and reached a decision without relying on either a probation officer's report in support of L.A.M. or on witnesses who could support her claims.

The Court of Appeal found that neither L.A.M. nor S.O. had called witnesses in support of their case, and that although the Trial Court had ordered a report from either a social worker or a probation officer, the records did not show whether such a report was ever filed. Considering that either of the parties could have benefited from the contents of the report, and that it was the duty of their counsel to remind the Trial Court that the report had to be filed before a judgment date could be fixed, the court stated that S.O.'s counsel could not ask for the Superior Court's decision to be vacated on this ground. Finally, the court found that under the law, custody issues could be settled based on the testimony of one witness. Since both the Trial Court and the Superior Court considered the evidence and testimony of the parties, and decided in favor of L.A.M., they did not err by failing to call supporting evidence to the testimonies.

Concerning the fifth issue, the court agreed with the order that S.O. would pay for accommodation and stated that it complied with section 98 of the Children Act of 2001. Since L.A.M., who was awarded actual custody, was unemployed and lacked appropriate accommodation, which S.O. could afford to provide, to not make such an order would jeopardize the best interest of the child.

The court considered the remaining grounds of appeal collectively and focused particularly on S.O.’s argument before the Superior Court that under *Teso* custom—applicable to S.O. and L.A.M.—children belong to their father because of the patrilineal nature of the *Teso* society. Rather than address this issue, the Trial Court took account of article 16(1)(a) (equality in marriage) of CEDAW and articles 3 (right to nondiscrimination) and 14 (right to health and health services) of the African Children’s Charter.

The court rejected S.O.’s contention that article 16(1)(a) of CEDAW was not relevant to the welfare of children, and that articles 3 and 14 of the African Children’s Charter had not been domesticated. The court found that article 16(1)(a) of CEDAW was indeed relevant, since discounting it would mean applying *Teso* custom instead, which would lead to discrimination against women in matters relating to marriage. The court also held that while determining whether the African Children’s Charter had been domesticated was a question of fact, articles 3 and 14 of the charter were applicable because a national law—the Children Act—clearly identified the charter as its guiding principle, its provisions were a “re-echo” of the charter, and its principles had been “rehashed” in the Children Act.

Conclusion

The court concluded that there was no reason to modify the Superior Court’s decision to grant actual custody of L.O. to his mother and to require his father to provide for his maintenance. Further, applying *Teso* custom, which construes children as belonging to their fathers, would violate the right of women to nondiscrimination in matters relating to marriage and family relations guaranteed in CEDAW.

MW v. KC
Misc Application 105 of 2004, [2005 eKLR]
Kenya, High Court

COURT HOLDING

The applicant was entitled to a court order requiring the respondent to take a DNA test to determine if he was the father of the applicant’s child. Failing to grant the order would render ineffective the child’s rights to equal protection of the law, guaranteed by the constitution and international human rights laws. It would also deprive the child of the enjoyment of his rights under the Children Act, such as that the child’s best interest should be the paramount consideration in all matters that affect him.

Summary of Facts

MW, the applicant, gave birth to JN in 2002. In 2004, she obtained a birth certificate in which she identified KC, the respondent, as the child’s father. That same year, she filed a suit against KC in the Children’s Court at Kakamega, seeking “orders for custody and maintenance” of JN. However, KC denied paternity, and while the case was pending, MW filed an application before the High Court based on sections 6 and 22 of the Children Act of 2001, asking that KC be ordered to take a DNA test. MW’s grounds for the application were as follows: (i) that the respondent denied paternity of JN in the case before the Children’s Court, although they cohabited and she became pregnant before the respondent forced her to move out; and (ii) that as “part of the human rights of every individual,” JN had a right to know his father and to be cared for by both of his parents, and a DNA test would determine whether the respondent was his father. The respondent called for the application to be dismissed, arguing that the court did not have jurisdiction and that the application was “incompetent” and “misconceived,” and violated his rights.

Issue

Is the applicant entitled to a court order requiring the respondent to take a DNA test?

Court's Analysis

The court observed that the case had caused it “some anxiety” because of the new ground raised by the applicant and the lack of precedents. It outlined relevant provisions of the Children Act, such as section 2, which provides that “a parent of a child is the mother or father of a child and includes any person liable by law to maintain a child or is entitled to his custody.” It noted that the rights guaranteed by section 6(1) of the act include a “child’s right to live with and be cared for by his parents.” Further, section 22(1) provides that “if any person alleges that any of the provisions of sections 4 to 19 has been, is being or is likely to be contravened in relation to a child, *then without prejudice to any other action with respect to the same matter which is lawfully available*, that person may apply to the High Court for redress on behalf of the child” (emphasis added). Under section 22(2) of the act, the court was obligated to allow an application made under subsection 1 and to make appropriate orders.

The court then stated that the applicant must meet four requirements in order for the court to grant the order: (i) show sufficient cause (this would be satisfied by showing that there’s a “likelihood” that the respondent was JN’s father); (ii) show that the respondent’s refusal of a DNA test had violated JN’s right to know his father; (iii) show that such refusal was unreasonable because it had taken away JN’s enjoyment of rights protected in the act; and (iv) show that the court had jurisdiction to compel the respondent to take a DNA test.

Determining whether the applicant had met the requirements, the court took account of section 4(2) of the act, which mandates courts to make the child’s best interest their primary consideration in matters that affect children. It further emphasized that apart from section 6(1), which guarantees a child’s right to live with and be cared for by the parents, a child also has a right to education, health, and medical care. The court also observed that, in line with the act, the Universal Declaration mandates states to ensure equal social protection of children regardless of whether they are born in or out of wedlock (article 25), and to particularly provide equal protection of the law to children and all persons. Also, article 26 of the Civil and Political Rights Covenant, which Kenya has ratified, and section 70(a) of the constitution provide equal protection of the law to all.

Based on these considerations, the court stated that providing protection of the law to a child should include the child’s right to enjoy the benefits of the act. It noted that if a child could not enjoy proper parental upbringing, education, and health care because he was born out of wedlock and his putative father had denied paternity, the act’s protections would become a “dead letter” unless the courts could compel such putative fathers to take DNA tests. It did not matter that the applicant and the respondent had a “come we stay relationship,” which meant that the respondent did not have a legal obligation to meet any parental responsibilities.

The court then held that it had jurisdiction based on section 22(2) of the act to require the respondent to take a DNA test, and that to conclude otherwise would render meaningless the constitution and the highlighted international law provisions. Further, since the parties had been in a relationship, it was possible that the respondent was JN’s father, and it was unreasonable for him to refuse to perform his parental responsibilities because JN was born out of wedlock and there was no DNA test to prove paternity. The respondent’s refusal would also deny JN his rights under the act and the entitlement to know if KC was his father. Accordingly, sufficient cause had been shown as to why the respondent should take the DNA test. Conceding that its interpretation in this case was susceptible to abuse, the court stressed that in reaching such a decision, it must be established with certainty that an application under section 22 of the act is made in good faith, that there is sufficient cause, that it is not triggered by malice or intended to economically exploit or embarrass, and that it does not result in abuse of the court process.

Conclusion

Having found that the applicant met all of the requirements, the court granted an order requiring the respondent to take a DNA test to determine JN's paternity, and emphasized that the test was necessary to ensure that JN's right to equal protection under the law and that the benefits he was entitled to under the act were realized. The court also ordered the applicant and the respondent to bear the costs of the test equally.

Adoption

***AD and Another v. DW and Others*
(CCT 48/07) [2007] ZACC 27 (7 Dec. 2007)
South Africa, Constitutional Court**

COURT HOLDING

The Children's Court has jurisdiction to adjudicate adoption, as it deals exclusively with issues pertaining to children. The High Court has jurisdiction only in exceptional circumstances.

Summary of Facts

In November 2004, a newborn baby girl, Baby R, was found abandoned and taken into foster care by the first and second respondents, DW and CW, founders and managers of a sanctuary for children in need of care. During a visit with DW and CW, the applicants, AD and DD, an American couple, established a relationship with and resolved to adopt Baby R. The applicants were informed by their South African attorneys that their bid to adopt Baby R would likely fail, as the international and regional human rights principle of subsidiarity, which provides that intercountry adoption should be considered only when it is clear that a child cannot be suitably cared for if adopted within the child's country of origin, would likely be interpreted to preclude inter-country adoption. They were thus advised to apply to the High Court for sole custody and sole guardianship of Baby R, and thereafter adopt Baby R in the United States. The High Court dismissed the applicants' petition for sole custody and sole guardianship on the basis that using such High Court proceedings to effect an adoption would usurp the power of the Children's Court. The Children's Court had been established under the Child Care Act No. 74 of 1983 to determine a child's best interests in matters such as adoption.

The applicants' appeal of this decision to the Supreme Court of Appeal was dismissed on the basis that allowing the application would have the effect of sanctioning adoption through means other than those set out in the applicable legislation.

The applicants then appealed to the Constitutional Court, seeking an order to set aside the Supreme Court of Appeal's decision and to grant sole custody and sole guardianship of Baby R to the applicants. Before the Constitutional Court examined the case's merits, the parties and concerned government authorities reached an agreement on, among other things, the following terms:

- o that the Children's Court declare Baby R to have been abandoned;
- o that the Children's Court hear the adoption process within 30 days;
- o that the Department of Social Development waive its right to oppose adoption owing to Baby R's unique situation and the principle of subsidiarity; and
- o that the concerned government authorities agree to facilitate adoption.

The parties then requested the Constitutional Court to grant an order confirming the settlement.

Issue

Does the High Court have the authority to grant sole custody and sole guardianship where it would have the effect of sanctioning an adoption, bypassing the authority of the Children's Court?

Court's Analysis

The Children's Court has jurisdiction to adjudicate the case, as it deals exclusively with issues pertaining to children. Until 2000, inter-country adoption was definitively prohibited under section 18(4)(f) of the Child Care Act unless one of the adoptive parents was a South African citizen. However, in the *Minister of Welfare and Population Development v. Fitzpatrick and Others*, the Constitutional Court found that provision unconstitutional.¹⁰

Inter-country adoption is regulated at national and international levels. Central to the adoption mechanism is ensuring a child's best interests. According to the principle of subsidiarity, inter-country adoption is used only if a child cannot be placed in a foster or adoptive family in his or her country of origin. The principle of subsidiarity is set out in various international instruments, including article 17 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, and article 21(b) of the Convention of the Rights of the Child.

The Constitutional Court held that there were procedural mechanisms in place that should prevent the use of the principle of subsidiarity to prohibit all inter-country adoptions. As each case is different, a child's best interest cannot be evaluated through a pre-determined formula of general application. By the time this case reached the Constitutional Court, Baby R had lived with the applicants for approximately three years and had developed a strong bond of mutual affection with them. Generally applicable laws and regulations may not contemplate such a unique factor.

The impact of the settlement between the parties is limited to the case at hand. The Constitutional Court's duty is not to secure peace between the parties but to enforce the values enshrined in the constitution and the relevant statutes, and to apply them in reality. Once the parties were allowed to settle, the court did not need to discharge this duty. Yet the court found no factor in the settlement that would negatively affect Baby R's best interest.

Conclusion

The Children's Court is the correct forum for the adjudication of adoption matters. The High Court, as the upper guardian of all children, has jurisdiction only in exceptional circumstances.

5. Violence Against Women

Violence against women is one of the most widespread human rights abuses and public health problems, and is a manifestation of the social, sexual, and economic inequalities between men and women. It affects women and girls of every age and occurs in all settings, including within families, workplaces, educational institutions, and health facilities. Violence against women includes any gender-based violence, such as rape (including marital rape), sexual harassment and assault, domestic violence, and some harmful traditional practices such as female genital mutilation.¹¹ It involves physical, psychological, or sexual abuse—or threats of such abuse—and results in devastating long-term consequences for women’s physical and mental health; sometimes it even results in death.¹² Moreover, its wide-ranging social effects jeopardize the social development of children in the household, the social fabric of communities, and the general well-being of society.¹³

Various regional and international instruments and declarations have recognized violence against women as a violation of women’s human rights. For example, the Maputo Protocol provides for strong protections against violence against women and incorporates its elimination under the scope of women’s rights to life, integrity and security of the person, and the right to dignity. Specifically, article 3, which guarantees the right to dignity, provides that “States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.” Likewise, article 4, which protects the rights to life, integrity, and security of the person, requires in subsection 2(b) that states “adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women.” In subsection 2(c), the protocol urges states to “identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;” and in subsection 2(f) it mandates them to “establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.”¹⁴

The Declaration on the Elimination of Violence against Women calls for states to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”¹⁵ With regards to children, the Children’s Rights Convention requires states to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”¹⁶

The cases in this chapter demonstrate that gender-based violence is perpetrated in a wide range of settings by strangers, family members, and those who have a duty to protect. A Zambian case, *Rosaria Katakwe, a minor, By and Through her Guardian, Petronella Mwamba v. Hakasenke and Others*, underscores the prevalence of sexual violence perpetrated in educational institutions. This case and the South African case *N K v. Minister of Safety and Security*, in which police officers raped a woman whom they had offered to assist, underscore the importance of developing the doctrine of vicarious liability for sexual violence at the hand of state actors. *N v. The State*, a South African case in which a girl was raped by a male friend, and the case from Swaziland, *Malambe Solomon Petros v. Rex*, in which a father

raped his nine-year-old daughter, highlight the extent of women’s vulnerability to violence. The South African case of *WB v. The State*—in which a man raped his six-year-old daughter, yet the court found that being a “caring and loving” father and a “sober-minded member of society” constituted mitigating circumstances—shows the importance of sustained public awareness and education around the human rights implications of violence against women.

The South African case of *Coetzee v. the State*, in which the perpetrator of sexual violence sought to rely on an evidentiary rule that in the past required a judicial officer to treat with caution the testimony of a victim of sexual violence, underscores the importance of gender-sensitive legal reform. Known as the cautionary rule, this common law principle applied particularly in cases of a sexual nature, and was designed to warn judicial officers to treat the uncorroborated evidence of victims with circumspection. Given that there were usually no witnesses to sexual violence such as rape, and that women are disproportionately affected by sexual violence, as in this case, the decision illustrates the importance of ensuring that evidentiary rules do not result in further discrimination against women and in the denial of justice.

This chapter also includes a groundbreaking 2008 ECOWAS Court of Justice decision brought against Niger by a woman who was sold as a slave to a tribal chief who abused her. It represents the first time a sub-regional court decided a case that hinged on the protection of women’s rights to dignity, equality, and nondiscrimination in their personal lives. It also constitutes the first time such a court addressed state responsibility for women’s rights violations within the private sphere. While the court missed a glaring opportunity to hold Niger accountable for failing to fulfill the right to nondiscrimination, it did find Niger liable for the violation of Ms. Koraou’s right to be free from slavery. The court’s reasoning around women’s equality in marriage or in similar personal relationships highlights the potential of sub-regional courts for future litigation on sexual and reproductive health and rights.

Sexual Violence

Coetzee v. the State
Case No. (AR348/07) [2008] ZAKZHC 40 (24 June 2008)
South Africa, High Court

COURT HOLDING

The magistrate did not err in imposing prison sentences for the crimes of indecent assault and unlawful and intentional violation of dignity and privacy for which the appellant was convicted. It also did not matter that the evidence that formed the basis for his conviction was presented by an individual complainant, since the cautionary rule—a rule that requires a judicial officer to regard a complainant’s testimony in sexual offense cases with caution—was no longer applicable to sexual offense cases.

Summary of Facts

The appellant, Marthinus P. Coetzee, a pastor, was convicted of four counts of indecent assault and two counts of *crimen iniuria* (unlawful and intentional violation of dignity and privacy). He had committed the crimes by improperly touching young women’s breasts, thighs, and vaginas when they approached him for pastoral counseling. Mr. Coetzee was sentenced to six years’ imprisonment for indecent assault, of which the final two years were suspended for a four-year probation period. He was also sentenced to 18 months’ imprisonment for the

counts of *crimen iniuria*, half of which were suspended for a three-year probation period. Mr. Coetzee appealed the convictions and sentence to the High Court.

Mr. Coetzee argued that the magistrate erred in not approaching the complainants' evidence with sufficient caution and contended that had the magistrate been more circumspect in regarding the evidence, he would have found it insufficient to sustain the allegations. Mr. Coetzee further argued that there was no "hue and cry"—that is, that the complainants did not immediately raise alarm regarding his alleged conduct, and therefore, their evidence should be considered with caution. In doing so, he was apparently suggesting that there were no witnesses and was seeking to rely on the cautionary rule.

Issue

Did the Magistrate Court rely too much on the complainants' evidence and too little on the evidence of the accused, and thus err in imposing the sentence?

Court's Analysis

The High Court considered the evidence that had been given by the complainants and by the appellant. The court concluded that while there were some inconsistencies in their evidence, the complainants' actions, for the most part, would not be considered unusual considering their circumstances. The court stated that it is very unusual for a witness's evidence to be entirely consistent. The court also found that there were many unfavorable aspects of the appellant's evidence.

The court emphasized that the cautionary rule no longer applies to sexual offense cases, and that the state needs only to prove the guilt of the accused beyond a reasonable doubt. The court found that the magistrate had correctly considered the totality of the evidence, giving it appropriate and justifiable weight, and thus upheld the convictions of the Magistrate Court.

Conclusion

The court concluded that the magistrate did not err in imposing the sentences for the crimes for which the appellant was convicted.

Note

The cautionary rule was discountenanced in *S v. Jackson*,¹⁷ where the court stated that "the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable."

***Egglestone v. The State*
(297/2005) [2008] ZASCA 77 (30 May 2008)
South Africa, Supreme Court of Appeal**

COURT HOLDING

The state succeeded in proving the appellant's guilt regarding various counts of rape and indecent assault because the appellant's actions of indecently touching and engaging in sexual intercourse with the complainant(s), despite their consent to accompany him to his place of business, violated their dignity and integrity. However, the lower court erred in convicting the appellant of kidnapping because the complainant voluntarily accompanied him to his place of business and did not leave when she had the opportunity to do so. Furthermore, the lower court erred in its assault conviction.

Summary of Facts

The appellant, Malcolm Egglestone, owned an escort agency that provided, among other things, sexual services to its clients. Through his employees, Mr. Egglestone distributed flyers to high school girls, offering employment as lingerie models. The complainants, L, N, W and DS, all from impoverished communities, responded to the flyers and approached the appellant for a job interview. During each of their respective interviews, the appellant informed the complainants that the work may include sexual services, but that they could choose to work as receptionists and/or lingerie models, which excluded sexual activities. However, regardless of the job they chose, they would still be “trained” as all-inclusive escort agency prostitutes. The appellant did not provide details. As part of L’s interview, Mr. Egglestone took L to the premises of the company, the Stables, where he undressed her, provided her with lingerie to wear, and fondled her breasts and genitals. She was later taken home and she accepted the offer of employment as a sex worker. When she started her “training,” Mr. Egglestone had vaginal, anal, and oral sex with L, referring to it as role playing as a client. On one occasion, L charged that the appellant slapped her on the face. During W’s interview, the appellant instructed her to undress and he touched her breasts. W declined the job offer. DS chose to sell gifts, such as teddy bears, for the appellant in certain public places. One time while she was selling his items, he kissed her on the mouth and rubbed her leg and stomach.

Mr. Egglestone was charged with a total of 11 counts of rape, indecent assault, assault, and kidnapping. The Regional Court convicted Mr. Egglestone on one count of rape, five counts of indecent assault, one count of assault, and one count of kidnapping, and sentenced him to twelve years in prison. The Cape High Court set aside the convictions on two of the indecent assault charges and re-sentenced the appellant to 10 years’ imprisonment rather than 12. The High Court also granted Mr. Egglestone leave to appeal the convictions on the one count of kidnapping and one of the indecent assault counts to the Supreme Court, but denied leave to appeal his convictions for each of the remaining counts. Later, the Supreme Court granted Mr. Egglestone special leave to appeal the remaining four counts. Mr. Egglestone therefore appealed the following convictions: rape, indecent assault by anal penetration, assault, and kidnapping of L; indecent assault of W; and indecent assault of DS.

Issue

Did the lower courts appropriately determine the guilt of Mr. Egglestone in convicting him on various counts of rape, indecent assault, common assault, and kidnapping?

Court’s Analysis

The Supreme Court of Appeal found that the facts supported a conviction on the rape of L and indecent assault of all three women. The court set aside the conviction for the assault of L because the facts did not support her claim that Mr. Egglestone slapped her. It also set aside the conviction for the kidnapping of L because it determined that she voluntarily went to the Stables and stayed of her own free will, despite numerous opportunities to leave.

The crux of Mr. Egglestone’s argument against the conviction for rape and indecent assault of L was that L voluntarily attended the interview sessions and was informed that the nature of the company’s operations required that job applicants are “trained” for a full range of sexual activities, which, according to the appellant, necessarily included sexually intimate contact and vaginal, anal, and oral sexual intercourse, as client role play. The court however, vehemently disagreed. The court found that although L voluntarily stayed at the Stables, and agreed to dress in lingerie and take part in the “training,” these actions were not evidence that she consented to sexual intercourse with the appellant. The court found that L was a credible witness and believed her testimony that she never willingly engaged in any type of sexual intercourse with the appellant. Further, the court highlighted L’s desperate need for a job, stating that the appellant’s position as a prospective employer significantly diminished her ability to freely consent to sexual intercourse and other sexual advances and contact perpetrated by the appellant. The court stated that conditioning employment on having sex with her would-be employer did not give L any meaningful choice to decline Mr. Egglestone’s sexual advances, irrespective of her feelings or inclinations.

The court then addressed the indecent assault of W and DS. It cited *S v. Kock*, holding that the test for indecent assault is objective, not subjective. Therefore, it did not matter whether the complainants objected to the alleged assault. The legally determining factor was whether the conduct was objectively indecent. The court found that the appellant's touching of W's breasts and rubbing of DS's leg and stomach were objectively indecent, and the fact that they voluntarily accompanied him to the Stables did not permit him to violate their dignity and integrity in this manner. However, the court believed the appellant's testimony that the kiss with DS was an accident and did not include this in the indecent assault charge.

The Supreme Court found, however, that the High Court erred in upholding the kidnapping conviction, as L had stayed in the appellant's premises voluntarily. The conviction of kidnapping was therefore set aside. The court noted that ten years' imprisonment for rape was a lenient punishment, but was not "so light that it induces a sense of shock" that would call for changing the sentence. However, setting aside the kidnapping charge did shorten the sentence from ten to eight years in prison.

Conclusion

The lower courts erred in convicting the appellant of the kidnapping and assault of L. However, the appellant was properly convicted of the charges of rape and indecent assault of L, and indecent assault of W and DS.

Fanuel Sitakeni Masiya v. the Director of Public Prosecutions (Pretoria) and Minister of Justice and Constitutional Development
CCT 54/06 [2007] ZACC
South Africa, Constitutional Court

COURT HOLDING

The definition of the crime of rape should be prospectively developed to include nonconsensual anal penetration of females.

Summary of Facts

The 44-year-old applicant, Mr. Masiya, was charged with having anal intercourse with a 9-year-old girl without her consent. Pursuant to the common law at the time of the crime, nonconsensual anal penetration of a female was considered indecent assault and not rape and therefore carried a lesser sentence. Under the definition of rape, nonconsensual penetration was limited to vaginal intercourse. The Regional Court held that drawing a distinction between these two crimes under these circumstances was irrational and senseless, because both cases resulted in repugnant consequences. It concluded that the common law definition of rape should be developed to include nonconsensual anal penetration of both women and men. According to the Regional Court, this was done in an effort to promote constitutional goals and objectives, since the parliament was delayed in promulgating associated legislation. Applying this broad definition of rape retroactively, the Regional Court convicted the applicant of rape and transferred the case to the High Court in Pretoria for confirmation and sentencing. The High Court confirmed the applicant's conviction. The case was subsequently brought before the Constitutional Court for confirmation and as an application for leave to appeal by the applicant.

Issue

Should the common law definition of rape, which is limited to nonconsensual sexual penetration of the male sexual organ into the vagina, be developed to include nonconsensual penetration of the male sexual organ into the anus of another person?

Court's Analysis

The court found that the definition of the crime of rape should be developed to include nonconsensual anal penetration of females, to reflect the spirit, purpose, and objectives of the bill of rights and the constitution. The court noted that this case involved a number of constitutional rights, including the rights to dignity, equality, and freedom and security of the person, as well as children's rights. It briefly spoke of the history of the crime of rape: the definition of rape was based on the notion of protecting the interests of society in avoiding unchaste behavior rather than protecting the interests of rape victims. In particular, "patriarchal societies criminalized rape to protect property rights of men over women." Under the current constitution, however, rape is viewed in light of the rights of female victims, such as the rights to bodily integrity and security of the person, as well as the right to be protected from degradation and abuse. The court found that the current rape laws which consider nonconsensual sexual intercourse to be the penetration of a woman's vagina by the male penis were not unconstitutional but needed to be developed to include other similar sexual degradations.

To demonstrate the evolution of the common law crime of rape as a result of society's changing understanding, the court highlighted statutory extensions such as the 1987 abolition of the presumption that a boy is incapable of committing rape and the 1993 abolition of the marital rape exemption. Ultimately, the court found that although a victim may react differently to nonconsensual vaginal penetration than to nonconsensual anal penetration, the humiliation, degradation, and physical harm associated with the former are no less than those associated with the latter. Extending the definition of rape would harmonize the common law with the objectives of the bill of rights, protect the rights of the victims, and reflect a societal rejection of sexual violence in general.

However, the court limited the development of the law to include only females, a traditionally vulnerable and systematically disadvantaged group, and not males, because the facts of the case at hand only included the nonconsensual penetration of a female. It explicitly left this development of the law open for further consideration once a case with appropriate facts is presented.

Additionally, the court limited the development of the law so that it was not applied retrospectively to the applicant, holding that the retrospective extension of the definition of a crime inherently contradicts the principle of "legality" found in section 35(3) of the constitution. This section sets out fair trial rights, including the right of a person "not to be convicted for an act or omission that was not an offense under either national or international law at the time it was committed or omitted." Therefore, although the court decided to develop the crime of rape, it determined that it could not apply such development retrospectively to the applicant.

Conclusion

The common law definition of rape is not invalid under the constitution. However, it is extended to include nonconsensual penetration of the male sexual organ into the anus of a female. The court refrained from deciding whether nonconsensual anal penetration of a male constitutes rape. The development is prospective in nature so that the applicant is charged not with rape but rather indecent assault.

GENDER-NEUTRAL DEFINITIONS OF RAPE IN INTERNATIONAL LAW

The court in *Masiya* should be commended for expanding the definition of rape to include anal penetration of women. The court recognized that anal penetration is no less invasive or degrading than vaginal rape. However, by limiting itself to the facts of the case, the court intentionally left open the issue of whether the definition of rape should include the nonconsensual anal penetration of men.

In doing so, the court failed to consider international standards on the definition of rape, which would have dictated the inclusion of anal penetration of men. Section 39(1)(b) of the South African Constitution places a duty on courts to consider principles of international law when interpreting the bill of rights. This provision has been interpreted by courts to mean that binding and nonbinding public international law may be used as tools of interpretation.¹⁸

Rape was only recently defined in a concrete manner under international law, and a gender-neutral definition has become the norm. The International Criminal Tribunal for Rwanda (ICTR), in *Prosecutor v. Akayesu*, defined rape in a broad and gender neutral way as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”¹⁹ Shortly afterwards, the trial chamber of the International Criminal Tribunal for Yugoslavia replicated the gender neutrality of the ICTR’s rape definition by defining rape as “the penetration of the vagina, anus or mouth by the penis, or of the vagina or anus by other objects.”²⁰ In addition, the UN Special Rapporteur on Sexual Slavery has said that rape is defined in gender-neutral terms because both men and women are victims of rape.²¹

The court in *Masiya* should have considered these international law developments when deciding whether to extend the definition of rape to include anal penetration of males. The decision would have been more comprehensive had the court at least commented more extensively on the need to develop the law in this regard so as to provide guidance and dicta for future cases and legislation. Fortunately, in December 2007, the Criminal Law (Sexual Offences and Related) Matters Amendment Act came into effect, expanding the definition of rape to include nonconsensual anal or oral sex, notwithstanding the gender of either the victim or the perpetrator. It provides in section 3 that “[a]ny person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.”²²

Other African countries like Botswana and Namibia expanded their legal definitions of rape in a similar manner in 1986 and 2000, respectively.²³ Some have done so more recently; for instance, in 2005, Liberia passed the Rape Amendment Act, which amended the Liberian Penal Code. The new act provides that rape is committed if a perpetrator “intentionally penetrates the vagina, anus, mouth or any other opening of another person (male or female). . . .”²⁴ In 2006, Kenya passed the Sexual Offences Act, which provides that a person commits rape if “he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; [and] the other person does not consent. . . .”²⁵ The Democratic Republic of Congo similarly expanded its definition of rape in 2006.²⁶

***NK v. Minister of Safety and Security*
(CCT 52/04)[2005] ZACC 8; 2005 (6) SA 419 (CC) (13 June 2005)
South Africa, Constitutional Court**

COURT HOLDING

The definition of vicarious liability should be developed to promote the spirit, purport, and objectives of the constitution.

Summary of Facts

NK, the applicant, alleged that three police officers raped her after she accepted their offer of a ride home because she was stranded at a petrol station in the middle of the night. When she informed the driver that he was heading in the wrong direction, the other two policemen threatened her to stay quiet. When she began to scream, they put a jacket over her head and held it tight. They also punched her sharply in the stomach and threatened to kill her if she kept resisting. Eventually they stopped the car, undressed the applicant, and raped her on the back seat of the car. They finally left her in a bush near her home and drove away. The Johannesburg High Court convicted the policemen and sentenced them to life imprisonment for rape and ten years for kidnapping.

NK also pursued a civil claim for damages in the High Court against the policemen (which she subsequently abandoned) and the respondent, the Minister of Safety and Security, under the principle of vicarious liability, arguing that the minister was legally responsible for the wrongdoing of the three policemen. The applicant further argued that if the minister was found not to be responsible under the existing rule of vicarious liability, the Constitutional Court should develop the common law so that the rule would respect the applicant's constitutional rights. NK argued that such a development of the rule would make it consistent with the spirit, purport, and objects of the constitution.

The High Court dismissed the applicant's claim, but granted her leave to appeal to the Supreme Court of Appeal, which subsequently dismissed the appeal. NK then submitted for leave to appeal to the Constitutional Court.

Issue

Should the court develop the common law rule of vicarious liability, which holds an employer liable for wrongful actions of its employees if committed within the course and scope of employment, in order to promote the spirit, purport, and objectives of the constitution?

Court's Analysis

The Constitutional Court found that the definition of vicarious liability should be developed to promote the spirit, purport, and objects of the constitution. It set aside the lower courts' orders and found the Minister of Safety and Security vicariously liable. The court discussed its power to take such actions, noting that the constitution expressly allows for such development. It described the constitution as a creed that embodies normative values that are to be considered when deciding whether the common law should be developed.

The court then moved to whether vicarious liability law should be developed. Given the mandate of the constitution, the court noted the need to include both factual and legal or normative principles in its analysis, contrary to traditional vicarious liability analysis, which focused mainly on facts. While recognizing that in some cases it might be inappropriate, the court stated that normative values and social policy are appropriately applied to vicarious liability law.

The court then discussed the existing tests for vicarious liability. The general rule holds an employer liable for the delict (wrongful act) of his or her employees if committed within the “course and scope” of employment or while “engaged with the affairs of his master.” However, where the employee deviates from the normal performance of her or his duties, the applicability of liability becomes difficult. The court noted that the analysis becomes even more difficult when, as in this case, the deviation is not only intentional, but an intentional wrong.

Drawing on the law of various other jurisdictions, the court ultimately decided to adopt the two-part test regarding deviation set forth in *Minister of Police v. Rabie*: (i) “whether the wrongful acts were done solely for the purposes of the employee,” a subjective consideration of the employee’s state of mind and a purely factual question, and (ii) whether, even if the first question is answered in the affirmative, “there is nevertheless a sufficiently close link between the employee’s acts for his own interests and the purposes and the business of the employer.”²⁷ This second element is an objective question, a mixture of both fact and law. The court explained that in defining “sufficiently close,” courts should consider the spirit, purpose and objectives of the constitution as well as other normative and societal values.

Applying the Rabie test to the facts of this case, the court found that, despite a clear deviation from the policemen’s normal duties, there was a sufficiently close link between their acts and the purpose and business of the Ministry of Safety and Security. First, the policemen had a constitutional and statutory duty to protect society, in particular the applicant, from crime. Second, the police offered assistance, which the applicant accepted because of their station in society and their duty to protect. Finally, the police officers’ actions included both a commission (raping the applicant) and an omission (their failure to protect her from crime).

Conclusion

The court found that the common law rule of vicarious liability should be developed to promote the constitutional rights of victims in accordance with the spirit, purport, and objectives of the constitution. The court based the development on the Rabie test, which allows for both factual and normative analysis. As a result, the Minister of Safety and Security was found liable for a rape perpetrated by three policemen.

Rosaria Katakwe, a minor, By and Through her Guardian and Next Friend, Petronella Mwamba v. Hakasenke and Others
2006/HP/0327
Zambia, High Court

COURT HOLDING

By defiling his student who was a minor, the first defendant not only committed a strict liability offense by having a sexual relationship with a person who could not consent to one based on age, but also breached the duty of care that a teacher owes to his student. Likewise, the school and relevant government authorities were vicariously liable for this breach because employers are generally liable for the civil wrongs that employees commit in the course of employment, and a government is responsible for schoolchildren left in the care of its agents.

Summary of Facts

The minor plaintiff, Rosaria Mashita Katakwe, sued the first defendant, Edward Hakasenke, through her aunt and guardian, Petronella Mwamba. The second, third, and fourth defendants were Woodlands ‘A’ Basic School (Woodlands School), the Ministry of Education, and the Attorney General, respectively. Ms. Katakwe, a student at Woodlands School, stated that in February 2000 she asked Mr. Hakasenke, her civics and history teacher, for

past examination papers in those subjects. After forgetting to bring the papers at least three times, he eventually suggested that Ms. Katakwe come to his home to collect the papers. When she did so, one afternoon, he raped her.

Mr. Hakasenke told Ms. Katakwe not to tell anyone about the rape and warned that any disclosure would result in her expulsion and his firing. As a result, she did not tell anyone. After the rape, she sought and received medical treatment for a sexually transmissible infection (STI). She became increasingly stressed and her grades suffered. When she told Mr. Hakasenke about the STI, he said that he had not been sick and could not understand why she was sick. She then told her English teacher, who urged her to tell her aunt and guardian, Ms. Mwamba. When Ms. Katakwe did not tell Ms. Mwamba, her English teacher and another teacher did and encouraged Ms. Mwamba to report the matter to the school and commented that Mr. Hakasenke had been sexually abusing students for a while.

Ms. Mwamba reported the rape to the school authorities, including the headmaster (Mr. Mulongo) and the deputy head teacher. The authorities questioned Mr. Hakasenke, who claimed that Ms. Katakwe was his girlfriend, although he acknowledged that she was a minor. When the authorities asked if he had sex with Ms. Katakwe, he noted that this was a difficult question to answer. Ms. Mwamba reported the crime to the police and was instructed to take her niece to a hospital where she received HIV testing and counseling; the test results were negative. The police arrested Mr. Hakasenke but did not bring criminal charges against him.

Ms. Katakwe instituted a civil action through her aunt, claiming damages for negligence caused by Mr. Hakasenke's breach of the duty of care owed to her; a declaration that the Zambian government is responsible for students in the care of government agents (in this case, teachers and other school employees); and damages for personal injury and emotional distress suffered as a result of the rape, for which Woodlands School, the Ministry of Education, and the attorney general are vicariously liable.

Ms. Mwamba told the court that her niece's experience had caused an emotional scar that would not heal. She emphasized that the school authorities knew Mr. Hakasenke's history of sexually abusing students but did not prevent further abuse. Ms. Katakwe's lawyer noted that this case would give "Zambian courts a chance to move the Zambian Government by judge-made law to strengthen its school policy on the protection of the girl child against sexual abuse." He highlighted the fact that girls were susceptible to contracting STIs such as HIV from "unscrupulous teachers/headmasters."

In his defense, Mr. Hakasenke testified that he and Ms. Katakwe were very close but that no sexual acts took place. Initially, he claimed that she had pursued him and was accusing him of rape only because he had refused to enter into a relationship with her. Upon cross-examination, however, he admitted that he had referred to Ms. Katakwe as his girlfriend when he was questioned by the school authorities, but claimed that this was because they had indeed been in a brief relationship during February.

Issues

- o Can Mr. Hakasenke's claim that Ms. Katakwe consented to the sexual act be sustained?
- o Did Mr. Hakasenke and the headmaster, Mr. Mulongo, act negligently as employees of Woodlands School?
- o Should Woodlands School, the Ministry of Education, and the Attorney General (the second, third and fourth defendants) be held vicariously liable for the personal injury and emotional distress that Ms. Katakwe suffered as a result of the rape?

Court's Analysis

The High Court addressed the three issues as follows:

The court rejected Mr. Hakasenke's defense that he had engaged in a consensual relationship with Ms. Katakwe and that the doctrine of *volenti non fit injuria* (no injury is done to a person who consents) meant that she could not complain about any sexual act that occurred. The court found as a matter of fact that Mr. Hakasenke and Ms. Katakwe had an "amorous affair" when he was 25 and she was 13, from which Ms. Katakwe contracted an STI. The court was shocked by Mr. Hakasenke's argument that a girl of that age could consent to any sexual relationship with her teacher. The court held that allowing this defense would violate an act that repealed a penal code provision allowing those charged with defiling a girl to enter as a defense a belief that the girl was above 16 years. The court also relied on article 4 of the Maputo Protocol, which requires states to prohibit violence against women, such as unwanted or forced sex. The court concluded that Mr. Hakasenke purposely forgot to bring the exam papers and tricked Ms. Katakwe into going to his home in order to rape her.

Holding that Mr. Hakasenke was negligent, the court relied on evidence that "the duty of a school teacher [is] to take care of his pupils as a reasonable careful father would take care of the children of the family." Mr. Hakasenke breached his duty of care to Ms. Katakwe by engaging in sexual acts with her, causing her to contract an STI. The resulting damages were the persistent itch she developed and her lower grades. In finding that the headmaster acted negligently as well, the court noted that he knew Mr. Hakasenke's history with female students. In a previous case, Mr. Mulongo had transferred the victim to a different school and gave only a warning to Mr. Hakasenke, allowing him to remain at the school. The court doubted that Mr. Mulongo would have acted the same if his daughter was the victim.

In determining that the school, the Ministry of Education, and the Attorney General (the second, third and fourth defendants) should be held vicariously liable for Mr. Hakasenke's actions, the court relied on the argument that an "employer is liable for the torts [civil wrongs] of the employee...committed in the course of the employee's employment." The court noted that the government was responsible for schoolchildren left in the care of its agents while schools are in session. As a result, the court found these defendants vicariously liable for Mr. Hakasenke's actions.

Conclusion

The court expressed its disappointment in the police for failing to prosecute Mr. Hakasenke, in spite of having evidence, thus leaving Ms. Katakwe with the option of bringing only a civil action. In determining damages, the court concluded: "the case is novel, however society's indignation has to be reflected. An abus[ed] girl either gets in an abusive relationship or may not trust a partner, the effects are long term. The healing process is long and lonely and the emotional scars never heal. There is enduring psychological brutalization." The court awarded Ms. Katakwe ZMK 45,000,000 in damages, which included an award for permanent mental torture, and pain and suffering.

Note

The Attorney General has appealed against this decision to the Supreme Court and the appeals process is underway.

Ntaka v. The State
(469/2007) [2008] ZASCA 30 (28 March 2008)
South Africa, Supreme Court of Appeal

COURT HOLDING

Although the minority decision was that the Magistrate Court did not err in imposing a six-year prison sentence—rather than correctional supervision—on a 17-year-old who committed the crime of rape, the majority held that the sentence was inappropriately severe and would hinder the appellant's integration into society.

Summary of Facts

The appellant and the complainant, both 17 years old, were friends who attended the same high school and lived in the same neighborhood. In 2004, the appellant asked the complainant to visit him in his house, where he then assaulted and raped her. After the incident, the complainant attempted suicide by cutting her wrist with a razor and overdosing on pills. She told her mother what had happened and the appellant was then arrested.

The appellant was convicted of rape by a magistrate. The pre-sentence reports, prepared by a probation officer and a correctional officer, attested that the appellant showed no remorse for the crime. The correctional officer stated that the appellant did not realize the extent of the damage he had inflicted on the complainant, and that therefore he would not benefit from correctional supervision. Correctional supervision, executed within the community to the benefit of the community, encompasses a variety of activities, such as house arrest, community service, monitoring, and rehabilitation programs. It constitutes a lighter sentence than imprisonment and relieves the offender from the negative influences found in prison. The probation officer similarly reported that the appellant had declined to cooperate with her and that a sentence of imprisonment would be appropriate.

The magistrate sentenced the appellant to ten years' imprisonment, four years of which were suspended, resulting in an effective sentence of six years' imprisonment. The appellant appealed the decision to the Grahamstown High Court, which dismissed the appeal. He then appealed only the sentence to the Supreme Court of Appeal, arguing that the magistrate's sentence was excessive. Since he was only a child, the appellant argued, imprisonment was not in accordance with international and regional instruments dealing with administration of justice on child offenders, or section 28(1)(g) of the South African Constitution, which states that "[e]very child has the right not to be detained except as a measure of last resort, in which case . . . the child may be detained only for the shortest appropriate period of time."

Issue

Did the Magistrate Court and the High Court err in imposing a prison sentence on the 17-year-old appellant?

Court's Analysis

In a minority decision by one judge, the Court of Appeal noted that correctional supervision punishment has various advantages, but should not be exercised in cases involving very serious crime. In this case, the appellant never showed remorse for his crime, exhibited an arrogant attitude, and did not cooperate with the probation officer. The appellant failed to empathize with the agony the complainant experienced because of his actions. The harshness of the sentence imposed upon the appellant sends not only a message of retribution for the complainant, but also a message of deterrence to society at large. The interests of society should be taken into consideration in determining the sentence.

An appropriate balance should be achieved between the competing factors of the interests of society and the victim, and the interests of the child offender appellant. The profound physical and emotional consequences the victim suffered far outweighed the mitigating factors in the case, including the appellant's young age. Correctional supervision lacks the necessary retribution and deterrence elements to be used in rape cases. The judge concluded that the sentence imposed by the magistrate is therefore appropriate.

However, in the two-judge majority decision, the court decided that the sentence imposed by the magistrate was inappropriately severe. Outlining the basis for this decision, the majority stated that while the appellant's crime was "horrible" and though his actions afterwards were arrogant, his crime was unplanned and was the result of a "terrible, but impulsive, error of judgment." The majority also considered the appellant's young age, noting that he was deemed a child under the constitution; therefore, prison must be the "last resort."

Noting that a prison sentence could not be avoided, because of the need for courts to punish and deter the serious crime of rape, the majority stated that the six-year sentence imposed by the magistrate treated the appellant as if he were an adult at the time of the crime. This sentence, the majority argued was not individualized, and deprived the appellant of the possibility of resocialization and re-education, afforded him by his young age. Further noting that the appellant was only nine months away from becoming 18—an adult—at the time he committed the crime, the majority argued that being nine months older could have prevented him from the error of judgment that led to the crime of rape.

Conclusion

The majority held that the sentence imposed by the magistrate was inappropriately severe, and would hinder the appellant's integration into society. It thus substituted the effective six-year sentence imposed by the magistrate with a five-year sentence, imposed under section 276(1)(i) of the Criminal Law Amendment Act 105 of 1997, which provides a minimum 10 months' imprisonment after which the appellant would be eligible for correctional supervision based on his behavior.

Malambe Solomon Petros v. Rex
(59/1999) [2003] SZCA 5
Swaziland, Supreme Court

COURT HOLDING

The law does not require full penetration or ejaculation to prove penetration as a necessary element of the crime of rape.

Summary of Facts

Malambe Solomon Petros, the appellant, was convicted of aggravated rape of his nine-year-old daughter. The daughter testified that one evening her father returned home inebriated and forcibly raped her that night and again in the morning. When she cried, he told her he would kill her if she did not stop. That day, she told her aunt what had happened and was taken to a doctor. The attending physician testified that girl's hymen had been broken, but he estimated it to have occurred approximately one week prior. The doctor also testified that there were no extra-genital injuries, but there were some bruises; that the examination was painful for the complainant; and that although there were no bleeding or spermatozoa present, there was a yellowish odorous discharge.

The girl's mother returned home two days later, at which time the crime was reported to the police. At trial, Mr. Petros testified that he was not at home when the attack allegedly occurred and alleged that the story was fabricated by his wife and children, who were angry because he had a mistress. The trial court convicted Mr.

Petros and cited as aggravating factors under section 185 of the Criminal Procedure and Evidence Act 67/1938 the fact that Mr. Petros is the biological father of the victim and that she was only nine years old when the crime was committed. Mr. Petros was sentenced to the minimum prison term of nine years. On appeal, he argued the conviction should be overturned on a number of grounds, including the failure of the prosecutor to prove penetration (a statutory requirement), and the failure to apply the cautionary rule with regard to the complainant's age and the unreliability of uncorroborated testimony of sexual offenses.

Issues

- Was sufficient evidence adduced at trial to prove penetration of the victim?
- Did the lower court fail to properly evaluate the complainant's testimony given her age and the nature of the crime alleged?

Court's Analysis

On whether the government had proved penetration as a necessary element of the crime, the Court of Appeal first noted that the law requires only that "the male organ is in the slightest degree within the female's body." The law does not require full penetration or ejaculation. The court then concluded that the evidence regarding the complainant's ruptured hymen and bruising was sufficient to prove penetration, notwithstanding the physician's testimony that the rupture may have occurred a week prior to the crime. In this regard, the court noted that "doctors have time and again stated that all they can do is estimate. . . ." The court similarly found that there was sufficient corroborating evidence to support the complainant's testimony. However, the court did reduce the appellant's sentence to seven years because the trial court's jurisdiction did not permit it to impose a sentence greater than seven years.

Conclusion

The court found that the law does not require full penetration or ejaculation to prove penetration as a necessary element of the crime of rape. In addition, the court found that the trial court exceeded its jurisdiction in imposing a sentence greater than seven years.

Note

If the prosecution had filed the charge in the higher court, extra sentencing time could have been added to reflect the aggravating factors. Alternatively, the magistrate could have convicted the appellant for aggravated rape and then referred the case to the High Court for sentencing.²⁸

R v. Dlamini
(Criminal Appeal No. 4/2007) SZSC 2 (12 November 2007)
Swaziland, Supreme Court of Appeal

COURT HOLDING

The High Court committed harmless error during sentencing in treating as an aggravating factor the allegation that the appellant failed to use a condom while committing rape, when no evidence was adduced at trial to support the allegation.

Summary of Facts

The appellant, Moses Gija Dlamini, was convicted on one count of the rape of S., a nine-year-old girl, the complainant. At trial, it was adduced that Mr. Dlamini repeatedly raped the complainant without a condom. The

Magistrate Court also determined that S. was HIV-positive, although no evidence was adduced at trial to indicate how she contracted HIV. The court referred the matter to the High Court for sentencing. The High Court cited the following aggravating factors in imposing its sentence: S.'s youth, the violation of family trust by Mr. Dlamini, the number of incidents of sexual assault, Mr. Dlamini's failure to use a condom on at least some occasions, and the prevalence of rape in Swaziland. Mr. Dlamini was sentenced to twenty years' incarceration, and appealed his conviction and sentencing to the Supreme Court of Appeal.

Issue

In imposing a sentence, did the High Court err in considering the absence of condom as an aggravating factor, when no evidence was adduced at trial to support the allegation?

Court's Analysis

The Supreme Court found that overwhelming evidence was presented at trial to convict Mr. Dlamini. With regard to sentencing, the lower court has sole discretion, which should not be overturned absent a showing that there was a misdirection, that the sentence was wrong in principle, or that it was so harsh as to induce a sense of shock. Although the High Court committed a misdirection by considering the alleged absence of a condom as an aggravating factor, because no evidence was presented to support this allegation, the misdirection did not "greatly motivate" the sentence that was imposed. Instead, focus was placed on relevant aggravating factors such as S.'s youth and the prevalence of rape, which made it necessary to lay down a sentence that would send a message to the public. As a result, though severe, the High Court's sentence cannot be viewed as shockingly harsh.

Conclusion

The High Court's sentence of twenty years' incarceration for the appellant was affirmed.

S v. Karenga
(CR637/05) [2007] NAHC 39 (25 Jan. 2007)
Case No. CR 637/05
Namibia, High Court

COURT HOLDING

The court may amend a charge for attempted rape wrongly brought under the Combating of Rape Act 2000 to a common law charge of attempted rape, provided there is no prejudice to the accused.

Summary of Facts

The state, as the plaintiff, charged the accused, Max Karenga, with three offenses under section 2(1)(a) of the Combating of Rape Act: attempted rape, assault by threats, and common assault. Mr. Karenga pleaded guilty to attempted rape but pleaded not guilty to the other two charges. The magistrate convicted and sentenced him to 20 years' imprisonment on the attempted rape charge, holding that the crime was committed under coercive circumstances according to section 2 of the act. Mr. Karenga was found not guilty on the remaining charges on the basis of the rule against duplication of convictions, which prevents a person from being convicted twice on the same facts.

Issue

Did the magistrate err in convicting the accused of attempted rape and in sentencing him to 20 years' imprisonment under the act?

Court's Analysis

The act does not expressly set out attempted rape as a crime. Instead of being charged with attempted rape, the accused could have been charged with rape under the act, which would have permitted conviction for attempted rape as a lesser included offense pursuant to section 256 of the Criminal Procedure Act No. 51 of 1977. Alternatively, the accused could have been charged with common law attempted rape. Courts of appeal have the authority to amend charges as long as the accused is not prejudiced by the amendment. In the present case, Mr. Karenga admitted the charge of attempted rape and was found guilty. Thus, it would be a waste of judicial resources to remand the matter to the magistrate to recharge the common law offense.

Conclusion

As the accused cannot be prejudiced by an amendment to the charge, the conviction was amended to reflect conviction on the common law charge of rape. In addition, as the sentence was determined under the act and not the common law, the conviction was amended to three years' imprisonment.

CASE COMMENTARY

The prevalence of rape in Namibia and the accompanying sense of impunity resulted in the enactment of sexual violence legislation. The Combating of Rape Act broadened the definition of rape to include marital rape and coerced anal sexual acts, among others; extended protection from rape to males by using gender-neutral language; and prescribed minimum prison sentences more severe than those provided for in other relevant laws. It also imposed special duties on the police and public prosecutors when handling rape cases to ensure that adequate protection and information are made available to the complainant. However, the act did not provide for attempted rape.

This case demonstrates the impact of the legislature's failure to include attempted rape as a statutory crime under the act. Although the court had recourse to the common law crime of attempted rape, the difference in sentencing between the two laws undermines the legislature's intent to respond to the seriousness of the crime of rape and ensure appropriate sentencing.

WB v. The State
Case No. CA 352/2006
South Africa, High Court

COURT HOLDING

Notwithstanding that the appellant raped his six-year-old daughter, the imposition of a life sentence—the maximum sentence for rape—is disproportionate given the existence of substantial and compelling circumstances justifying a lesser sentence.

Summary of Facts

On December 29, 2004, the appellant, WB, was at home with his two daughters while his wife was at work. The appellant raped his eldest daughter, then six years old; she reported the incident to her mother and was taken for medical examination, which confirmed the rape. WB pleaded guilty to and was convicted of rape at the Humansdorp Regional Court. The pre-sentence report showed that WB was a “caring, and loving husband and father” whose marriage was characterized by mutual respect and happiness. In determining the sentence, the judge weighed the facts surrounding the rape incident, including the age of the victim and the appellant's parental

relationship with her. The judge found that there were no substantial and compelling circumstances that would justify the imposition of a lesser sentence than the statutorily prescribed life imprisonment. WB appealed the decision to the High Court.

Issue

Did the Regional Court err in giving little weight to the appellant's prior good character in determining the sentence?

Court's Analysis

The appellant's rape of his six-year-old daughter was shocking, perverted, and unnatural. However, the Regional Court appeared to give little weight to the mitigating circumstances concerning the appellant's character prior to the incident. WB was a sober-minded member of society until the rape incident. The High Court was of the opinion that WB was capable of rehabilitation and that the imposition of the maximum sentence would be disproportionate to the crime, the criminal, and the needs of society. As such, substantial and compelling circumstances justifying a lesser sentence existed. Nevertheless, the nature of the crime was such that a lengthy term of imprisonment was necessary. The life imprisonment sentence was set aside and replaced with 15 years' imprisonment.

Conclusion

The Regional Court erred in ignoring the mitigating circumstances and the sentence was reduced to 15 years' imprisonment.

S v. Shipandeni
(CC02/2007) [2007] NAHC 28 (9 May 2007)
Namibia, High Court

COURT HOLDING

The state does not have the burden to disprove an alibi defense; it need only proffer sufficient evidence to prove the elements of the crime.

Summary of Facts

The state charged the accused, 21-year-old Halweendo Melali Shipandeni, under the Combating of Rape Act No. 8 of 2000 for raping KM, an 11-year-old girl, when he was 16. In the alternative, he was also charged under section 7(1) of Act 21 of 1980, as amended, for committing a sexual act with a woman younger than 16. The accused, who according to witnesses was living with KM and her uncle and aunt when the alleged rape occurred, denied the charges and presented an alibi. Mr. Shipandeni testified that he was at work in a different place at the time of the alleged rape and that KM was falsely accusing him because of a previous conflict. He also argued that the state has the onus of proving that he was at the place where the rape was committed. KM was the only witness to the actual rape, though the court heard testimony from other witnesses, including testimony about KM's physical condition during medical examination.

Issues

- Does the state have the burden of disproving a defendant's alibi in a rape case?
- Was there sufficient evidence for a conviction when the complainant, KM, was the only actual witness?

Court's Analysis

The High Court noted that the state has the onus to show that an accused committed the alleged crime. The accused does not have to prove an alibi; the alibi is sufficient if it is reasonably true. However, if there is sufficient evidence that an accused may have committed the crime, his alibi can be rejected.

In this case, the court found that the evidence presented at trial was sufficient to prove that Mr. Shipandeni committed the crime and that his alibi was false. The court assessed evidence from before and after the alleged rape by considering the testimony of a number of witnesses, including KM and the headman (traditional leader) to whom KM's aunt had reported the alleged rape. In assessing the evidence of the rape itself, the court stated that it was treating the complainant's evidence with caution because it was not corroborated by other witnesses. However, the complainant gave a detailed account of the rape and no contradiction or inconsistency could be found in her testimony. Furthermore, there was no contradictory evidence and the medical examination results showed that KM had been sexually penetrated.

Based on the evidence presented, the court convicted Mr. Shipandeni of rape. At sentencing the court noted the following aggravating circumstances: the seriousness of the offense, the interests of society, KM's age and innocence, societal expectations, and abuse of trust. The court imposed a 15-year sentence, with five years' suspended sentence because of Mr. Shipandeni's young age (21) and the possibility of his rehabilitation. Although the court had the authority to impose a lesser sentence because Mr. Shipandeni was less than 18 years old at the time of the crime, it did not do so because of aggravating circumstances.

Conclusion

The accused was found guilty of rape because the state was able to prove the elements of this crime, and was not required to specifically rebut the accused's alibi defense.

Geldenhuis v. The State
(470/2007) [2008] ZASCA 47 (31 March 2008)
South Africa, Supreme Court of Appeal

COURT HOLDING

The distinction between the legal age of consent for heterosexual and same-sex sexual acts in section 14 of the Sexual Offences Act 23 of 1957 is unconstitutional. It is reasonable to set 16 years as the age of consent to sexual activities.

Summary of Facts

The state charged the male appellant, Izak Andreas Geldenhuis, before the Regional Court with committing sexual offenses against the underage male complainant. Mr. Geldenhuis was a friend of the complainant's family. The alleged sexual relationship began when the complainant was 14 and continued until he reached age 16. Mr. Geldenhuis was charged under section 14(1)(b) of the Sexual Offences Act, which prohibited "immoral or indecent" heterosexual or same-sex acts with a person under the age of 19. The charge was brought under this subsection because both Mr. Geldenhuis and the complainant were of the same sex. On the other hand, section 14(1)(a) of the act prohibited consensual heterosexual acts with a person under the age of 16. [It follows that the effect of these subsections is to make the age of consent for same-sex acts 19 years, while the age for heterosexual acts is 16 years.] Mr. Geldenhuis claimed that the charges were false; however, the regional magistrate convicted and sentenced him to eleven years in prison.

Mr. Geldenhuys appealed the conviction and the sentence to the High Court in Pretoria and raised a new ground of appeal. He contended that section 14(1)(b) of the act was discriminatory on the basis of gender and sexual orientation, and contrary to section 9(3) of the constitution, because it criminalizes sexual acts between two people where one of them—whether male or female—is 12 years or older, has the capacity to form an intention, and voluntarily participates in the sexual acts. This argument was based on the fact that under the common law a girl 12 years or older has the capacity to form an intention, and can voluntarily engage in sexual intercourse without her sexual partner being guilty of rape.

The appellant contended that it was a “necessary implication” of section 9(3) of the constitution that a boy 12 years or older would have the same capacity to form an intention and consent to sexual acts. He further argued that by categorizing such acts as “immoral” or “indecent” when a person has the capacity to voluntarily engage in sexual conduct at the age of 12, section 14(1)(b) of the act discriminated against such girls and boys by denying them the right to make their own decisions regarding sexual activity. Furthermore, the same provision also indirectly discriminated against a person who engages in voluntary sexual acts with such boys and girls since it criminalized their conduct. Such discrimination and criminalization contravened section 9(3) of the constitution. Although the High Court dismissed his appeal against the conviction, including the constitutional challenge, it reduced his sentence to seven years.

Mr. Geldenhuys then appealed the conviction to the Supreme Court of Appeal. He contended that the Regional Court and High Court did not attach sufficient weight to the inconsistency and unreliability of evidence given by the complainant and other state witnesses. He also raised the same constitutional challenge he had previously raised before the High Court. Based on the challenge, the Supreme Court of Appeal gave the Minister of Justice and Constitutional Development the opportunity to intervene in the appeal. The court also drew the attention of the minister and both parties to an additional issue that arose from Mr. Geldenhuys’ constitutional challenge, which is whether section 14 of the act was unconstitutional because it arbitrarily provided two different legal ages of consent, 16 and 19 years respectively, for heterosexual and same-sex relationships. The court also requested specific non-governmental organizations to address the issue as *amici curiae* and present justifications, if any, for the different legal ages of consent. The minister intervened in the proceedings and conceded that such a difference amounted to discrimination based on gender and sexual orientation, in contravention of section 9(3) of the South African Constitution. None of the non-governmental organizations intervened as an *amicus curiae*.

Issues

- Did the lower courts err in not placing sufficient weight on inconsistencies in the complainant’s evidence?
- Did the act’s setting of the statutory age of consent over the age of 12 contravene section 9(3) of the constitution by disenfranchising individuals from making decisions regarding their sexual conduct?
- Was section 14 unconstitutional in setting out different legal ages of consent for heterosexual and same-sex intimate relationships?

Court’s Analysis

Concerning the first issue, the Supreme Court of Appeal conceded that there had been some inconsistencies in the evidence given by the complainant and other state witnesses. However, the evidence was reasonably consistent, particularly as the complainant was testifying about conduct that had occurred five years before the trial. The court found that the lower courts had adequately weighed the competing evidence given by the complainant and Mr. Geldenhuys, and had reached the correct conclusion. The court thus dismissed this argument.

Focusing on the second issue, the court stated that the South African government has an obligation, both under the constitution and regional and international human rights instruments, to protect children from sexual exploitation. The court referred to article 34 of the Children’s Rights Convention and article 17 of the African Children’s Charter

in this regard. The court looked at ages of consent globally, and found that 16 was the average age of consent within Europe. It was not convinced that 12 was a reasonable age to consent to sexual activity. The court found that even though there may be individual cases in which a child may voluntarily participate in sexual acts, as a general principle, the age of consent was justifiable. It thus dismissed Mr. Geldenhuys' appeal on these grounds.

On the third issue, taking into account constitutional and international obligations to protect children from sexual exploitation, the court found that section 14 clearly discriminated between heterosexual and same-sex relationships by providing different legal ages of consent. The supremacy of the constitution meant that the act was unconstitutional the day the constitution came into effect. As a result, the court deemed itself to be merely declaring invalid what had already been invalidated under the constitution. Therefore, subject to the confirmation of the Constitutional Court, the court declared section 14(1)(b) of the act unconstitutional and invalid with effect from April 27, 1994. Although this declaration did not automatically invalidate any previous convictions for contraventions of section 14(1)(b), it provided a ground of appeal for such convicted persons. The court overturned Mr. Geldenhuys' conviction for sexual acts that occurred when the complainant had already turned 16 and had voluntarily participated, and adjusted his prison sentence in keeping with the High Court's method.

Conclusion

The court held that the evidence given by the complainant and state witnesses was reasonably consistent despite some variation, that it was appropriate to set 16 years as the age of consent to sexual activities, and that section 14 of the act was unconstitutional to the extent that it unfairly discriminated based on sexual orientation.

Note

The Supreme Court of Appeal's decision was brought before the Constitutional Court, which confirmed that the relevant provisions of section 14 were indeed unconstitutional in November 2008. The Constitutional Court further noted that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 had repealed these provisions.

Bail and Protection Orders in Gender-Based Violence Cases

Uganda DPP v. Col RTD Dr. Kizza Besigye
Ref. No. 20 of 2005 9/25/2006
Uganda, Constitutional Court

COURT HOLDING

The High Court and subordinate courts have power to determine whether bail should be granted to an applicant detainee.

Summary of Facts

In accordance with article 23(6)(a) of the constitution, which provides that the High Court may grant bail to an applicant detainee, the respondent, who was charged with treason and rape, applied to the High Court for bail. The Director of Public Prosecutions (DPP) opposed the bail petition on the ground that, per the Trial on Indictments Act, No. 9 of 1998, Cap.23, the court may grant bail only when exceptional circumstances warrant exercise of the court's discretion. The DPP also argued that conflicting decisions in the lower courts had created confusion about when bail is an automatic right and when it is discretionary. The court granted "interim bail" and referred the question to the Constitutional Court.

Issue

Does a defendant have a right to bail, or is the decision whether or not to grant bail subject to the court's discretion?

Court's Analysis

The Constitutional Court found that the language of constitutional article 23(6)(a) states that an accused may apply for bail and the court may exercise discretion as to whether to grant bail. The court also found that article 23(6)(b) requires that an accused held on an offense triable by the High Court and a subordinate court must be granted bail once he has been in custody for 60 days.

In considering a bail application, the court should weigh the favorable and unfavorable factors of the case. Some of the unfavorable factors include the likelihood that the accused may fail to appear in court, commit a crime while on bail, or interfere with witnesses, which is particularly important in rape cases. While gravity of the offense is a factor to consider, an applicant should be presumed innocent until proven guilty, and bail should not be used as a punishment.

Conclusion

Article 23(6)(a) of the constitution is discretionary. The High Court and subordinate courts have power to determine whether or not bail should be granted.

S v. Gaseb
(157106) [2007] NAHC 22 (11 May 2007)
Namibia, High Court

COURT HOLDING

A reviewing judge should not set aside a decision unless the judge is convinced the decision was wrong. Also, the court may deny bail to a person accused of a serious crime, in the public interest or the administration of justice, even if the accused does not pose a flight risk or a risk to witnesses or the police investigation.

Summary of Facts

The appellant was charged with the rape of a nine-year-old girl and was detained. His application for bail was opposed by the state for the following reasons: (i) the administration of justice would be prejudiced, considering the public interest in the matter; (ii) the accused might interfere with the witnesses; (iii) the accused might commit further and/or similar offenses while on bail; (iv) the offense was serious and there was the possibility of a long imprisonment sentence if the appellant were found guilty; and (v) there was a strong *prima facie* case against the appellant. The magistrate denied the bail application and the appellant appealed.

Issues

- What is the appropriate standard of review of a lower court decision to deny bail?
- May the court deny bail in the public interest and in the interest of the administration of justice?

Court's Analysis

The High Court articulated the appropriate standard of review of a lower court's decision regarding the denial of bail. The court should not set aside the decision "unless the Court or judge is satisfied that the decision was

wrong.” Although the reviewing court may take a different view than the magistrate, the reviewing court should not substitute its own view unless the magistrate wrongly exercised her discretion.

The court addressed the appellant’s claim that the magistrate abused her discretion by relying “mainly” on the administration of justice and public interest to refuse the bail request. The court cited the relevant provision of the Criminal Procedure Act of 1991, which grants the magistrate the right to deny bail in the interest of justice or the public interest, particularly in the case of serious crimes. The act’s purpose was to ensure that persons accused of serious offenses stand trial. Accordingly, courts are given wider discretion to refuse bail on the basis of the public interest or the administration of justice when the accused is charged with a serious crime.

The court rejected the appellant’s claim that the claimant was the sole witness whose testimony, for that reason, should be treated with caution. The court found the magistrate reasonable in concluding that there was a strong case against the appellant.

Conclusion

The court held that the magistrate had the authority to deny bail in the public interest and the administration of justice, even if it is unlikely the appellant would abscond or interfere with witnesses or police investigations.

Ahmed Raffik Omar v. The Government of South Africa and Others
CCT 47/04 [2005] ZACC 17
South Africa, Constitutional Court

COURT HOLDING

The Domestic Violence Act, which authorizes courts to issue a protection order with an arrest warrant without giving notice to the alleged perpetrator of violence, is not unconstitutional.

Summary of Facts

Ahmed Raffik Omar, the applicant, married Halima Joosab, the third respondent, under Islamic Law. Mr. Omar allegedly abused his wife and a protection order was issued against him under section 8 of the Domestic Violence Act 116 of 1998. The section provides a court with the power to issue a protection order with an arrest warrant. These arrest warrants, which would be suspended on the condition that there is no breach of the protection order, were usually issued without notice to the alleged perpetrator of the violence.

Mr. Omar and Ms. Joosab agreed to a draft order. The provisions of the order prohibited Mr. Omar from threatening, assaulting, harassing, intimidating, stalking, or abusing Ms. Joosab or their children. The order also prohibited Mr. Omar from entering Ms. Joosab’s residence and from communicating with her, except about the welfare of the children and his obligation to support the family. When Mr. Omar allegedly violated the terms of the order, the warrant was executed.

The applicant applied for leave to appeal directly to the Constitutional Court on the basis that section 8 of the act was unconstitutional.

Issues

- Did the act violate the right to a fair trial under section 34 of the constitution by authorizing the court to issue a protection order and arrest warrant without the knowledge of the person the order and warrant were issued against?

- Did the act violate the right to be free from arbitrary arrest provided under section 12(1) of the constitution?
- Did the act, by shifting the burden of proof to the respondent and determining a criminal charge on a “balance of probabilities” standard, infringe on the right to a fair trial guaranteed under section 35(3) of the constitution?
- Were there less restrictive means to achieve the purpose of the act under section 40 of the Criminal Procedure Act No. 51 of 1977?
- Were the provisions of the act open to misuse, exploitation, and manipulation?

Court's Analysis

The Constitutional Court noted that domestic violence demanded an adequate legal response because of its high prevalence in South Africa, and also the psychological and social damage it created. Though men could also be victims of domestic violence, women and children were more at risk due to their particular vulnerabilities. The domestic violence legislation was enacted following the criminal justice system's failure to address family violence. Domestic violence significantly offends the founding values of the constitution, such as nondiscrimination, human dignity, equality, and protection of human rights. The constitution provided the right to freedom and security of the person, which included the right to be free from domestic violence. It also set out the rights to dignity, life, equality, and privacy.

The court was tasked with determining whether the applicant, Mr. Omar, should be granted the right to appeal the decisions of the lower courts, looking at the five challenges to the act set out above:

The act did not violate a person's right to access to the courts, as the execution of the arrest warrant was suspended so long as he complied with the terms of the order. Central to the objectives of the act was protecting Ms. Joosab, from further domestic violence. In such an instance, it is a reasonable limitation on Mr. Omar's rights for a court to issue an interim protection order (with a suspended warrant) without giving him notice. The purpose of this provision is to protect the person applying for the protection order from abuse by the perpetrator. This purpose could be defeated if the perpetrator had knowledge of the protection order before it was issued. The protection order is not a final order of the court. Mr. Omar has an opportunity to give reasons to the court why such an order should not be made final.

The act did not violate the right to be free from arbitrary arrest. Mr. Omar contended that the act allowed a person to be imprisoned without actual knowledge of the judgment or hearing. The court found that the act is aimed at immediate protection of vulnerable people and envisages an eventual criminal trial. The court looked at this provision in light of historical inadequacies in the criminal justice system with regard to the protection of victims of domestic violence. Furthermore, when conducting an arrest under an interim or final protection order, a peace officer is required to analyze the situation and can arrest a suspect only on a reasonable suspicion that the complainant faces imminent harm. In addition, a suspect would be protected from intentional false allegations in an affidavit by the criminal penalty for making a false sworn statement. The court thus found that the act did not lead to the arbitrary loss of freedom.

The act did not violate the right to a fair trial, as it did not create a risk of criminal conviction on a “balance of probabilities” rather than “beyond a reasonable doubt.” The execution of an arrest warrant under the interim protection order is not an imposition of sentence, but rather a temporary measure to ensure compliance with the terms of an order.

There were no less restrictive means to achieve the purpose of the act. Section 40 of the Criminal Procedure Act would provide less protection to Mr. Omar because it did not require a notice or a sworn affidavit to issue an arrest warrant; a reasonable suspicion was adequate reason for the police officer to arrest. Further, whereas the Domestic Violence Act requires the issuance of suspended arrest warrant, section 40 of the Criminal Procedure

Act provides a police officer with the power of arresting persons without a warrant. The mere fact that the process was open to “misuse, exploitation and manipulation” did not render it invalid. The possibility that the act may be misused was outweighed by the benefits it would afford victims of domestic violence.

Conclusion

The applicant was thus denied leave to appeal the decisions of the lower courts, as he did not have a reasonable prospect of succeeding in his appeals. The applicant failed to show that section 8 of the Domestic Violence Act, which was enacted to address a unique social problem, contravened any provisions of the constitution.

Gender-Based Violence Involving State and Non-State Actors

Joyce Nakacwa v. Attorney General and Others
Constitutional Petition 02 of 2001 [2002] UGCC 1
Uganda, Constitutional Court

COURT HOLDING

The Constitutional Court has competent jurisdiction on matters if a constitutional issue is raised, notwithstanding additional claims that do not implicate the constitution.

Summary of Facts

The petitioner, Joyce Nakacwa, delivered a baby by the roadside near the Naguru Kampala City Council Clinic, the second respondent. While the baby was still attached to the placenta, she went to the clinic’s maternity home to complete the delivery, where she never received any care. She then was forced to proceed on foot to seek help. Feeling dizzy, she sat by the roadside and was later rescued by a pedestrian who escorted her back to her home at the Nakawa Trading Center, where residents and the chairman of the center (the third respondent) accused her of stealing the child. The center chairman and another person subjected her to a vaginal examination using plastic bags in front of a group of men and women to determine whether she had given birth.

The police, who had been called by the chairman, took Ms. Nakacwa back to the Naguru Clinic for medical examination. The clinic confirmed that she had visited the facility that morning with a baby attached to the placenta. The chairman did not accept the confirmation and convinced the police to detain Ms. Nakacwa; her child was later taken away from her and she was not permitted to see or breastfeed her baby. After five days’ detention, the police ordered Ms. Nakacwa to undergo a medical examination by the police surgeon, which showed that she had given birth a few days prior. Following her release, she learned that her baby had died. She requested the court to declare that her constitutional rights under articles 22(1) (right to life), 24 (respect for human dignity and protection from inhuman treatment), 33(3) (rights of women), 27(1)(a)–(b) (right to privacy), 23(4)(a) (protection of personal liberty), and those of her child under article 34(1) (rights of children) were violated. She also requested compensation for unlawful imprisonment, loss of her child, and pain and suffering.

The respondents filed preliminary objections to the Constitutional Court’s jurisdiction, claiming that the petition did not raise any question requiring constitutional interpretation.

Issue

Can the Constitutional Court assert jurisdiction over a claim for unlawful imprisonment and loss of a child where the plaintiff raises a violation of constitutional rights?

Court's Analysis

The Constitutional Court is obliged to entertain any petition that alleges a violation of constitutionally-guaranteed rights and freedoms.

Conclusion

The Constitutional Court has jurisdiction over the case.

Slavery

Hadijatou Mani Koraou v. The Republic of Niger
Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008
ECOWAS Court of Justice

COURT HOLDING

Niger had an obligation to protect the applicant from slavery and did not take sufficient steps to do so, even when its administrative and judicial bodies had the opportunity. The harm suffered by the applicant entitles her to reparation.

Summary of Facts

The applicant, Hadijatou Mani Koraou, is a citizen of Niger, a member of ECOWAS. When she was 12, she was sold to a 46-year-old tribal chief, El Hadj Souleymane Naroua, under the local custom of *Wahiya*, in which a young girl is sold to a man as a servant and an unofficial wife. In local custom, the woman is known as Sadaka—the fifth wife—because under Islamic law a man can legally marry only four women. Less than a year later, Mr. Naroua raped her and continued to have forcible sex with her. She bore four children within nine years, two of whom survived.

Slavery was criminalized in Niger in 2003. On August 18, 2005, Mr. Naroua gave Ms. Koraou a certificate of liberation from slavery, signed by both of them and the village chief. Ms. Koraou wanted to leave Mr. Naroua's household to establish her own. Mr. Naroua objected, arguing that she was his wife; subsequently, however, she traveled to visit her mother and used the opportunity to leave. Thereafter, in February 2006, she filed a complaint with the Civil and Customary Tribunal of the town of Konni.

In March 2006, the tribunal held that Ms. Koraou and Mr. Naroua were not properly married because he did not pay a dowry and they did not conduct any religious ceremony. Accordingly, Ms. Koraou was free to move on with her life. Mr. Naroua appealed to the Court of First Instance of Konni, which, in June 2006, set aside the tribunal's decision. Instead, the court held that under customary law a female slave automatically became a master's wife after he liberated her, so the Ms. Koraou could not leave. Ms. Koraou appealed to the Judicial Chamber of the Supreme Court of Niamey, requesting "the application of law against slavery and slavery-like practices." While the case was pending, she returned to her father's home and, with her brother's help, married Ladan Rabo.

In December 2006, the Supreme Court of Niamey quashed the decision of the Court of the First Instance on procedural grounds without addressing the issue of slavery, and sent the case back for review. In April 2007, the Court of First Instance ruled that Ms. Koraou be divorced from Mr. Naroua on the condition that she wait three months before remarrying. Challenging the divorce ruling, Mr. Naroua filed an appeal with the Final Court of Appeal.

Aware of Ms. Koraou's marriage to Mr. Rabo, Mr. Naroua also filed a criminal complaint against her. The Criminal Division of the Court of First Instance convicted the applicant, her new husband, and her brother of bigamy based on article 290 of the Niger Criminal Code. The court issued an arrest warrant against them and sentenced each of them to six months in prison and a fine of CFA 50,000. Ms. Koraou and her brother were thereafter detained.

While in detention, Ms. Koraou appealed the bigamy conviction to the Criminal Division of the Final Court of Appeal, which entered an interim order in July 2007 releasing Ms. Koraou and her brother from prison, and withdrawing the arrest warrant against Mr. Rabo, pending the final decision on the divorce issue by the divorce judge of the same court. (Mr. Naroua had earlier appealed the Court of First Instance's divorce ruling to the Final Court of Appeal.)

On December 14, 2007, Ms. Koraou lodged a complaint against Niger with the ECOWAS Court of Justice. She sought a declaration that Niger, by failing to take appropriate measures to abolish slavery and discrimination against women based on their social origin, had violated African Charter articles 1 (obligation of states to give effect to the guaranteed rights), 2 (freedom from discrimination in enjoyment of guaranteed rights), 3 (equality before the law/equal protection of the law), 5 (right to dignity), 6 (right to liberty and security of the person), and 18(3) (elimination of discrimination against women).

She sought fair reparation for the damage she suffered during the nine years of slavery with Mr. Naroua. Further, she asked the ECOWAS Court of Justice to urge the government to abolish harmful customs and practices based on the perceived inferiority of women; revise legislation that regulates courts and tribunals to enable them to adequately protect victims of slavery; and adopt legislation that protects women from discriminatory customary practices around marriage and divorce.

The defendant, the government of Niger, raised preliminary objections to the admissibility of the complaint on the grounds that the applicant lacked standing on the issue of slavery because she was no longer a slave when she filed the complaint, and that domestic remedies had not been exhausted as a case was still pending before a domestic court. Niger acknowledged that the ECOWAS Court of Justice was not bound by the exhaustion of domestic remedies rule but argued that the gap should be filled by practice to enable the court to determine how effectively a state is protecting human rights.

Niger further argued that based on article 4(g) of the Revised ECOWAS Treaty, which mandates member states to comply with the principles of protecting human rights in accordance with the African Charter, the court should apply article 56 of the charter, which requires the African Commission to admit complaints only when domestic remedies have been exhausted.

Issues

- Did the ECOWAS Court of Justice lack jurisdiction because all domestic remedies had not been exhausted by the applicant?
- Was Ms. Koraou qualified to file the complaint even though she was no longer a slave?
- Did Niger violate the African Charter by failing to take appropriate measures to end slavery and discrimination based on social origin?
- Was Ms. Koraou's right to be free from discrimination, as guaranteed under the African Charter and the constitution, violated?
- Was Ms. Koraou held in slavery in violation of article 5 of the African Charter and other international human rights laws?
- Was Ms. Koraou eligible for fair reparation for the damage she suffered as a result?

Court's Analysis

Regarding admissibility, the ECOWAS Court of Justice stated that article 4(g) of the Revised ECOWAS Treaty calls for compliance with the fundamental principles of the African Charter and not with the particular mechanisms set up under the charter—such as the procedures of the Commission—to ensure its implementation. The court explained that its admissibility rules do not include exhaustion of domestic remedies and that imposing conditions of admissibility more burdensome than those actually provided for would infringe on individual rights. The two grounds expressly provided for inadmissibility are anonymous applications and a case pending before another international court for adjudication.

The court also held that Ms. Koraou was qualified to file the complaint as the Court of Justice had jurisdiction to adjudicate issues of human rights violations allegedly committed in any member state of the ECOWAS.

Focusing on the third issue, the court declared that it did not have the jurisdiction to review ECOWAS member states' laws abstractly; it could only ensure the protection of the rights of alleged victims of rights violations by reviewing the actual cases before it. The general review of human rights laws was already being conducted by a number of regional and international bodies.

Regarding discrimination, the court focused on whether Ms. Koraou had suffered from the *Wahiya* practice or from being a “fifth wife,” and determined that the core issue was whether both practices infringed upon women's equal rights in marriage and the equality between men and women in the enjoyment of rights. The court noted that Mr. Naroua neither complied with the requirements necessary for a proper marriage to Ms. Koraou under either customary or civil regulations nor did he free her despite having granted her a liberation certificate. Moreover, limiting Ms. Koraou to “fifth wife” status meant that she did not enjoy the status that the other wives did. The court concluded that the discrimination experienced by Ms. Koraou was perpetrated by Mr. Naroua, who was not a party to the case, and could not be attributed to the government. On this basis, the court concluded that this particular claim must fail.

Examining the slavery issue, the court decided that despite Niger's argument that the applicant was accorded the status of a wife, Ms. Koraou was in fact a slave, irrespective of the extent of material support she received from Mr. Naroua. Citing article 1 of the Slavery Convention of 1926, the court emphasized that slavery is a gross violation of human dignity that is prohibited by international and regional human rights laws and by the Niger Crim. The court noted that it was undisputed that Ms. Koraou was sold to Mr. Naroua, was subjected to psychological abuse, sexual exploitation, hard labor, physical violence, and to constant control of her movements. Further proof lay in the liberation certificate that clearly mentioned her slave status. Even if Mr. Naroua had fed, clothed, and comfortably housed the applicant, or treated her as his wife, and even if she bore him children, she was still his slave for nine years until she was officially liberated. The court highlighted that states have an absolute obligation to abolish slavery under international law, which is owed by all states towards the community of states as a whole. The court found that although Ms. Koraou's slavery was perpetrated by an individual, Niger's administrative and judicial bodies failed to reverse the applicant's situation when she brought a complaint before them, thereby making the government responsible. The court concluded that the physical, psychological, and moral harm experienced by the applicant called for reparation and ordered Niger to pay CFA 10,000,000.

Conclusion

The court decided that Niger was responsible for Mr. Naroua's violation of the applicant's right to be free from slavery and that she was entitled her reparation.

STATE RESPONSIBILITY FOR RIGHTS VIOLATIONS BY PRIVATE ACTORS

While the *Koraou* court adequately addressed slavery, it failed to do so with discrimination. Its reasoning appears to be inconsistent between the two issues. Although the court held that Niger was not liable for discrimination committed by an individual, it noted that although the slavery was perpetrated by an individual, Niger was accountable because its administrative and judicial bodies failed to protect the applicant. It is well established under the African human rights system and international law that states have a three-fold obligation to respect, protect, and fulfill rights, and that the obligation to “protect” requires states to take positive measures to ensure that non-state actors or private persons do not violate the human rights of others. Such positive measures include adopting legislative and other measures to prohibit private persons from violating the human rights of other individuals. For instance, article 1 of the African Charter provides that states “shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.” Article 4(2) of the Maputo Protocol requires states parties to take appropriate measures to ensure the prevention, punishment, and eradication of all forms of violence against women and to punish perpetrators of violence against women.

The African Commission, which interprets and oversees state compliance with the African Charter and its Protocols, has recognized jurisprudence from other regional systems and has affirmed that governments can be held responsible for violations by non-state actors, including situations where the state has failed to prevent or punish those violations. In *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*,²⁹ the complaint claimed that the government of Chad violated the African Charter by failing to protect the rights of citizens from third-party actors who harassed, tortured, and murdered journalists. The commission noted that in order to “give effect to” the rights contained the charter, a state party must ensure these rights for all of its citizens, “even if the State or its agents are not the immediate cause of the violation.”³⁰ Therefore, the commission held that the government of Chad violated article 1 of the charter because it failed “to secure the safety and liberty of its citizens, and to conduct investigations into murders.”³¹

Further, in *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*,³² the complaint alleged that the Nigerian government facilitated an oil consortium in the exploitation of oil reserves, violating the local community’s right to health and a clean environment. The African Commission declared that a state party has a positive duty to protect its citizens from human rights abuses committed by private actors.³³

Similarly, the Human Rights Committee has stated in paragraph 8 of General Comment 31 that “the positive obligation on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations . . . by its agents, but also against acts committed by private persons or entities. . . .”³⁴ It has confirmed that there may be instances when a state’s failure to protect the rights of individual citizens from other individuals could result in state responsibility for resulting human rights violations. According to the committee, these instances include “failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”

HIGHLIGHT continued...

In this instance, Niger knew about the local custom of *Wahiya* and did not take legislative, judicial, or other measures to prevent this practice which subjects young women to physical harm, sex discrimination, and other rights violations. Even when Ms. Koraou instituted action against Mr. Naroua, one court reinforced *Wahiya* and held that, under customary law, a female slave automatically became the master's wife after he liberated her. Also, when Ms. Koraou married a man of her choice, a criminal court convicted her of bigamy for not waiting three months before remarriage and detained her.

Accordingly, Niger failed in its legal obligations to protect Ms. Koraou's rights, including her right to be free from discrimination even when perpetrated by an individual, and should have been held responsible for this by the court.

6. HIV

HIV is pandemic in Africa, affecting over 25 million people, with women making up a disproportionate number of those affected. Women's vulnerability to the pandemic is a result of a number of factors, including physiological susceptibility, gender-based violence, early marriage, and low economic status. With the high prevalence of HIV in the African region, national courts are increasingly grappling with whether and how a person's HIV status should be considered in certain circumstances. The case summaries in this chapter focus on the different ways that courts have handled HIV and sentencing, confidentiality, treatment, employment, education, and other issues that have come before them.

The South African case of *Memory Mushando Magida v. The State*, and the Zimbabwean courts' decisions in *Mpofu v. Commissioner of Gwanda Prison* and *S v. JM*, illustrate the divergent ways courts deal with the health implications of incarcerating HIV-positive persons in prisons that cannot provide required treatment. These cases indicate areas of HIV legislation that require clarification in many countries and support the need for courts to play an active role in ensuring that legislative gaps on treatment of HIV-positive prisoners do not further harm this already vulnerable group. These and other decisions also give urgency to state obligations to provide prison inmates with immediate access to anti-retroviral drugs and other relevant treatment.

A South African court's decision in *NM and Others v. Smith and Others* addresses HIV-related stigma, confirms that HIV status remains a prohibited ground for discrimination, and emphasizes the obligation to exercise due diligence to ensure respect for the privacy and confidentiality of affected persons. In addition, a Kenyan case, *J.A.O. v. Homepark Caterers LTD & 2 Others* highlights the importance of consent to HIV-testing and disclosure of results. This case and another from Botswana, *Lemo v. Northern Air Maintenance (PTY) Ltd*, indicate that termination of employment based on HIV status is discriminatory and may affect other rights as well.

Although the cases in this chapter do not expressly include decisions on disturbing trends such as coercive sterilization of HIV-positive women and criminalization of HIV transmission that, read broadly, may punish transmission by a mother to her child, some of these issues are currently before national courts.

HIV and Sentencing

Memory Mushando Magida v. The State
Case No: 515/2004 [2005] ZASCA 68 (26 Aug. 2005)
South Africa, Supreme Court of Appeal

COURT HOLDING

The High Court erred by failing to consider on appeal the HIV/AIDS status of the appellant and the fact that, while in prison, she would be unable to receive treatment comparable to what she could receive in a hospital.

Summary of Facts

The Bellville Magistrate Court sentenced the appellant, Memory Mushando Magida, to sixteen years and three months' imprisonment for 99 counts of fraud brought by the state, the respondent. All but five years, five months and two days of the sentence was suspended. After she was sentenced, Ms. Magida learned that she was HIV-positive and had developed AIDS. Subsequently, she appealed to the Cape High Court to modify her sentence based on her health status and the lack of available treatment in prison. After the High Court dismissed her appeal, she appealed this decision to the Supreme Court of Appeal.

Issue

Did the High Court err by failing to consider the appellant's HIV status and that while in prison she would be unable to receive treatment comparable to what she could receive in a hospital?

Court's Analysis

The Supreme Court of Appeal found that although no illness will, by itself, entitle a convicted person to escape imprisonment if it is the appropriate punishment, the court should consider the totality of a convicted person's circumstances when rendering a sentence. This consideration includes whether a sentence may be relatively more burdensome as a result of the convicted person's health. The court pointed out the wealth of precedents detailing the importance of this approach, referring to it as the "individualisation of sentence."

As a matter of procedure, the court stated that it should remand the case to the Magistrate Court for reconsideration of the sentence and order the Magistrate Court to consider the appellant's HIV status and the treatments available in prison. However, the court determined that, given the facts of the case, it was important to decide the sentence more promptly. Therefore, the court upheld the appeal, set aside the trial court's sentence, and modified the sentence so that Ms. Magida would not have to undergo any further period of imprisonment.

Conclusion

The High Court erred by failing to consider on appeal the HIV status of the appellant and the lack of available treatment in prison.

Mpofu v. Commissioner of Gwanda Prison and Others
(HC 1478/06) [2006] ZWBHC 76; HB 76/06
Zimbabwe, High Court

COURT HOLDING

The court may order the release of a prisoner due to terminal illness only upon proffer of sufficient evidence proving the seriousness of the prisoner's illness and the prison's inability to provide adequate medical care to the prisoner.

Summary of Facts

The applicant, Lucy Mpofu, was the aunt of Batholwezwe Ndlovu, an HIV-positive male serving a 17-month prison sentence. Ms. Mpofu filed a petition with the High Court to compel the Commissioner of Gwanda Prison (first respondent), the Attorney General (second respondent), and the Minister of Justice (third respondent) to release her nephew because he required medical care that the prison was unable to provide. In support of the motion, Ms. Mpofu proffered Mr. Ndlovu's HIV test result, a prescription for a vitamin complex, and a hospital medical card that indicated his temperature, blood pressure, and weight. Ms. Mpofu also testified that she had provided her nephew with necessary medication at her own expense during his imprisonment. At the time of this application,

Mr. Ndlovu had been admitted to a hospital for treatment. The applicant based her petition on section 116 of the Prisons Act (Chapter 7:11), which authorized the Commissioner of Gwanda Prison, to release a terminally ill prisoner under specified conditions.

Issue

Under what evidentiary showing may the court order the release of a terminally ill prisoner under the Prisons Act?

Court's Analysis

At the outset, the High Court noted that the determination whether to release a terminally ill prisoner under the Prisons Act rests with the executive branch and that the courts should not unnecessarily interfere with this power. The court, however, does retain inherent jurisdiction to intervene if the facts presented justify intervention. Citing a medical article, the court defined terminal illness to require three conditions: (i) a diagnosis of terminal illness must exist; (ii) the advent of death must be certain and not too far off; and (iii) the medical and nursing effort must have turned from curative to palliative. The court then considered the evidence proffered by the applicant to determine whether these conditions were met. The court found that Mr. Ndlovu's HIV test result did not prove that he was terminally ill, as many HIV-positive people "lead positive and normal lives." Similarly, the vitamin complex prescription and hospital medical card were insufficient to satisfy the applicant's burden of proof. The court identified the types of evidence that would support a finding of terminal illness—for example, an affidavit from personnel responsible for the prisoner's care, such as his doctor, pharmacist, and prison attendants.

Conclusion

The applicant, Ms. Mpofu, failed to adequately demonstrate that her imprisoned nephew was terminally ill and was not receiving adequate medical care. Therefore, the nephew's sentence would not be modified.

S v. JM
(HC 2845/07) [2007] ZWBHC 86; HB 86/07 (9 Aug. 2007)
Zimbabwe, High Court

COURT HOLDING

The defendant's HIV-positive status and the likelihood that she would be a burden to the prison authorities are not a proper basis for reconsideration of her prison sentence, for these are administrative issues. However, the magistrate should have considered community service in lieu of a prison sentence, as the court has instructed the lower courts in several cases.

Summary of Facts

A magistrate convicted JM, the defendant, of assault and sentenced her to eight months' imprisonment, half of which was suspended for five years. After rendering the sentence, the magistrate learned that the defendant was HIV positive and taking anti-retroviral drugs, her supply of which would run out while she was in prison. The magistrate stated that, had he known the defendant's health condition, he would have sentenced her to community service. Believing the sentence to be inappropriate, he referred the case to the High Court for review.

Issue

Is a defendant's HIV-positive status a relevant factor in determining sentence?

Court's Analysis

The magistrate should not consider JM's HIV-positive status in determining the sentence. The fact that her anti-retroviral treatment would be a burden to prison authorities is an administrative matter to be dealt with through the Ministry of Justice, Legal and Parliamentary Affairs under the Prisons Act (Chapter 7:11). As a result, the magistrate did not err in imposing the sentence without considering the defendant's HIV-positive status. However, the sentence was not appropriate on different grounds. In previous cases, the High Court had held that magistrates should seriously consider community service when imposing prison sentences of less than 24 months. Accordingly, the magistrate's failure to do so constituted reversible error.

Conclusion

The court confirmed the conviction, but set aside the magistrate's sentence. Instead, the defendant was sentenced to eight months' imprisonment, which was suspended for five years. Though the High Court had the discretion to impose community service, it opted to sentence her to prison. Suspending the sentence would mean that the defendant would not be in prison, would be subject to probation conditions, and could take care of her health.

Access to Treatment

EN & Others v. The Government of the Republic of South Africa & Others
Case No 4576/06
South Africa, High Court

COURT HOLDING

The government and the other respondents were in contempt of an interim implementation order, pending a final appeal, which required them to submit an affidavit describing how they planned to provide anti-retroviral treatment to prisoners. Filing for leave to appeal from the interim implementation order did not stay the order's effect, so the respondents should have complied with it.

Summary of Facts

On April 10, 2006, the applicants, the AIDS Law Project and 15 HIV-positive prisoners at Westville Prison, filed a petition requesting the High Court of South Africa to order the government and its concerned institutions, the respondents, to provide anti-retroviral treatment (ART) to prisoners in need of such treatment. The High Court granted the petition and ordered, *inter alia*, that the respondents (i) remove the restrictions that prevent certain applicants and other similarly situated prisoners from accessing ART at an accredited public health facility; (ii) provide ART in accordance with the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa; and (iii) file an affidavit describing their detailed plan to implement the provision of ART, including a list of all prisoners requiring such treatment, on or before July 7, 2006. On July 6, 2006, the respondents applied for leave to appeal against the court's order (the Main Order).

On July 20, 2006, the High Court heard the respondents' application for leave to appeal the Main Order. It also heard the applicants' application for interlocutory execution/implementation of the Main Order, pending the respondents' appeal, pursuant to High Court Rule 49(11). The rule provides that "[w]here an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on application of a party, otherwise directs."

The Court granted the respondent's leave to appeal the Main Order. Additionally, granting the applicants' application based on Rule 49 (11), it ordered that the Main Order be implemented pending the outcome of the appeal, although it gave the government additional time to file its affidavit detailing its ART provision implementation plan. However, the government failed to meet this new deadline and filed another appeal. The AIDS Law Project filed for a declaration stating that the government still needed to file its affidavit on how it would provide ART to prisoners needing treatment. The government challenged this request for a declaration claiming that it was an irregular step in the litigation process and therefore should not be considered.

Issue

Does filing for leave to appeal from an interlocutory implementation order issued by the court constitute compliance with such order?

Court's Analysis

The High Court denied the respondent's appeal of the interim order, citing case law stating that the applicant for a leave to appeal against an interim order has the burden of proving that the applicant would suffer irreparable harm if the appeal of the interim order were not granted. In addition, such harm must be weighed against any irreparable harm suffered by the respondent to the appeal of the interim order. In weighing the possibility for irreparable harm for the two parties, the court found that any irreparable harm suffered by the government could not compare with the irreparable harm suffered by the prisoners, which would involve a risk to their health and lives. The court also noted that the government did not claim that it lacked the resources or that it faced other difficulties in complying with the interim order of filing the affidavit.

As the health and lives of the prisoners were at issue, the court ordered the Main Order and the Rule 49(11) Order to be implemented forthwith and the date for compliance with the part of the Main Order, which required the respondents to file an affidavit describing their detailed plan to implement the provision of ART, to be extended to September 8, 2006.

Conclusion

The court dismissed leave to appeal the Rule 49(11) Order and ruled that the respondents were in contempt of that order because of their failure to implement it. Unfortunately, the court found that no legal mechanism exists to enforce court decrees. The court then established September 8, 2006, as the date by which the respondents must submit their affidavit.

HIV AND ACCESS TO TREATMENT

South African courts, in accordance with regional and international human rights conventions, have made tremendous strides in respecting, protecting, and fulfilling the right to health of people living with HIV. *EN & Others v. The Government of the Republic of South Africa & Others* is particularly commendable for its insistence that the government provide immediate ART to prisoners in need. General Comment 14 of the Economic, Social and Cultural Rights Committee, which elaborates upon the right to health in article 12 of Economic, Social and Cultural Rights Covenant, indicates that individuals, particularly vulnerable and marginalized groups, such as prisoners living with HIV/AIDS, are entitled to “timely and appropriate” health treatment and care.

In *EN & Others*, the court recognized the importance of ensuring timely access to ART, in ruling that the respondents must immediately comply with the interim order of the court to provide ART to prisoners at the correctional facility in accordance with the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa. The delay in providing such treatment to these HIV-positive prisoners was a matter of life and death. Similarly, the Constitutional Court of South Africa, in *Minister of Health v. Treatment Action Campaign*³⁵ required the government to comply with the court’s interim order to make Nevirapine, an anti-retroviral drug, available to HIV-positive pregnant women, mothers and their newborn children in public health facilities under certain circumstances and conditions, despite the government’s appeal from this order.

However, despite the importance of these decisions upholding the right to health of people living with HIV, the inability of South Africa’s court to enforce government compliance with its orders has the potential to undermine the impact of these rulings. In *EN & Others*, Justice Nicholson noted that until section 3 of the State Liability Act 20 of 1957—which indicates that a respondent cannot issue an attachment, execution, or like process in an action against the property of the state—is declared unconstitutional, a legal mechanism to enforce court decrees against the government does not exist.³⁶ Instead, South African courts must rely on the government’s commitment to act in accordance with its “moral obligation” to uphold a decree of the court.³⁷ Justice Nicholson even indicated that the refusal of the government to adhere to the court’s order could create a “grave constitutional crisis involving a serious threat to the doctrine of separation of powers.”³⁸

Fortunately, in a recent decision, *Nyathi v. MEC of Health, Gauteng and Department of Justice*,³⁹ the Constitutional Court ruled that section 3 of the State Liability Act is unconstitutional because it places the government above the law and prevents the state from being forced to honor court orders.⁴⁰ The June 2, 2008, judgment suspended the order of constitutional invalidity to allow the South African parliament to adopt legislation in accordance with this decision. Thus, the *Nyathi* decision will provide South African courts with an enforcement mechanism to ensure that the government upholds the human rights of its citizens.

Discrimination and Violations of the Right to Informed Consent and Confidentiality

NM and Others v. Smith and Others
Case CCT 69/05 [2007] ZACC
South Africa, Constitutional Court

COURT HOLDING

The publication of the names and HIV-positive status of the three applicants without their consent breached their constitutional rights to privacy, dignity, and psychological integrity and constituted a violation of the common law rule of *actio iniuriarum* (invasion of privacy).

Summary of Facts

In August 1999, a University of Pretoria doctor recruited volunteers—including three HIV-positive women, NM, SM and LH, the applicants—to participate in clinical trials of a combination of medicines that were developed to reduce a patient's "HIV level." The three women, who were unemployed and lived in informal settlements, signed consent forms indicating that they had been informed of the nature, benefits, and risks of the clinical trials. In addition, the consent forms permitted only limited disclosure of their identity and HIV-positive status for the purposes of the clinical trials.

Soon after the trials began, complaints were raised by the volunteers, particularly the applicants, regarding illnesses and fatalities related to the clinical trials. A number of inquiries followed these complaints. Patricia De Lille, the second respondent, a member of parliament, who after learning of the complaints, met with the applicants and other relevant volunteers, took their statements, and initiated investigations that culminated in several inquiries. Professor S.A. Strauss, who headed an external inquiry into these complaints, exonerated the University in a May 2001 report (the Strauss Report). This report, which gave the applicants' full names and HIV-positive status, was forwarded to Ms. De Lille without the annexure that contained the terms of consent and restricted disclosure of the identity of the volunteers. The Strauss Report was also forwarded to some journalists.

In November 2001, Charlene Smith, the first respondent, was commissioned to write a biography of Ms. De Lille, including a chapter on her HIV/AIDS activism, and obtained a copy of the Strauss Report without the annexure. In March 2002, Ms. Smith's book was published by New African Books, the third respondent, disclosing the applicants' names and their HIV-positive status.

The respondents opposed the attempts of NM, SM and LH to obtain a judicial decree in the Pretoria High Court prohibiting the book's publication, and the applicants subsequently withdrew the application. In July 2002, NM, SM and LH sent a letter requesting that the respondents remove their names from the book. Ms. Smith and Ms. De Lille denied any accountability to the applicants, while New African Books did not reply.

NM, SM and LH then sued the respondents in the Johannesburg High Court, alleging that their names and HIV-positive status had been published in the book without their consent. They argued that their constitutional rights to privacy, dignity, and psychological integrity had been violated and sought damages based on the common law rule of *actio iniuriarum*. In May 2005, the High Court held New African Books liable and directed the company to delete references to the applicants' names from every unsold copy of the book, and to pay each applicant ZAR 15,000. However, it dismissed the claims against Ms. Smith and Ms. De Lille. After the High Court's refusal of the application by NM, SM and LH to appeal this dismissal, and after the Supreme Court of Appeal's dismissal of

their application for leave to appeal, the Constitutional Court granted the application and admitted the Freedom of Expression Institute as *amicus curiae* in the case.

Issues

- Was the publication of the applicants' names and HIV-positive status a wrongful publication of a private fact and therefore a breach of their right to privacy?
- Was it also a violation of their dignity and psychological integrity?
- Should the common law rule of *actio iniuriarum*—which consists of the following three elements: (i) impairment of a person's privacy, (ii) wrongfulness, and (iii) intention—be developed to promote the spirit, purport, and objects of the constitution, and impose liability on the *negligent* (and not only intentional) publishing of confidential medical information?

Court's Analysis

The Constitutional Court observed that the applicants had based their claims on the common law rule of *actio iniuriarum* because the Constitutional Court's reasoning in an earlier decision precluded bringing a constitutional claim. However, the Constitutional Court decided that the provisions of the constitution would still guide the court's decision.

In the majority decision, the judges found that (i) the publication of the applicants' names and HIV-positive status was a wrongful publication of a private fact and therefore a breach of their right to privacy; (ii) the publication of the same violated their dignity and psychological integrity; and (iii) the common law rule of invasion of privacy should not be developed to impose liability on the *negligent* publishing of confidential medical information. Since the court was not addressing the issue of negligent publishing, there was no need to address whether freedom of information would be inhibited by such a development.

In making these findings, the majority relied on a definition of private facts as matters that, if disclosed, would “cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private.” Additionally, the court noted that “[p]rivate and confidential medical information contains highly sensitive and personal information about individuals” reflecting “delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy.” The majority further stated that failure to respect such confidentiality could jeopardize the patient–provider relationship, especially in the HIV/AIDS context, since protection of medical information encourages individuals to freely seek timely medical attention.

Focusing on the South African context, the majority noted that there was significant need to prevent indiscriminate disclosure of a person's HIV status because of the prevalence of stigma and potential intolerance and discrimination. As a result, it concluded that there should be protection from unauthorized disclosure of private and confidential medical information, and denounced the assumption that other people could rightfully gain access to a person's confidential medical information simply because the information was no longer known only by the authorized physicians or health-care personnel. The majority also noted that there had to be a “pressing social need” for the right to privacy to be violated in this context, and there was no such need in this case. Disagreeing with the High Court's finding that Ms. Smith and Ms. De Lille were not liable, the majority found that by not sufficiently attempting to establish if the requisite consents had been obtained for disclosure and not using pseudonyms, they wrongfully published such private facts, therefore violating the applicants' right to privacy. In fact, it determined that Ms. Smith and Ms. De Lille were either aware that the applicants had not consented to the public disclosure of their names and HIV-positive status or at least foresaw the possibility that the applicants had not consented. As experienced HIV/AIDS activists, the respondents understood the need for privacy and sensitivity and knew the wrongfulness of their conduct in not obtaining express informed consent.

Regarding whether the publication of these private facts had also violated the applicants' right to dignity, the majority stressed that being HIV-positive was not shameful in any way, since it was "a disease like any other"—but because of its social construction and associated stigma, disclosure of HIV-positive status could lead to a life of fear, public degradation, and discrimination. Consequently, disclosure of an individual's HIV-positive status without consent was in fact a violation of the right to dignity. The majority also noted that because of the many years of oppression where the right to dignity was denied in South Africa, it was now viewed as the very foundation of the constitution. Not only did the High Court fail to be sensitive to the disadvantaged circumstances of the applicants and to give adequate weight to the social construction of an HIV-positive status, it treated the applicants as poor, uneducated people from an informal settlement, and concluded that the publication of their status would not go beyond their place of residence.

In conclusion, the majority held that Ms. Smith and Ms. De Lille did not successfully rebut the presumption that the publication was not done with the intent to harm the applicants, thus finding that all three elements of the common law rule of *actio iniuriarum* had been met. The majority awarded each applicant ZAR 35,000 in damages, noting that the sum included the amount awarded against the third respondent by the High Court.

A dissenting opinion focused on the relationship between the right to privacy and freedom of expression, which were both constitutionally guaranteed. Acknowledging that privacy is an important right, upon which others hinge, such as the right to dignity, the dissenting judge noted that legitimate limitations could still be imposed on this right. Based on this, the judge argued that while the right to privacy may prohibit the publication of certain facts, freedom of expression could require the publication of those very facts. He concluded that the respondents did not intend to violate the rights of the applicants.

In a third opinion, however, another judge stated that emphasis should be on harmonizing both rights to the highest extent allowed under the context, and making them proportional, instead of seeking to determine if one ought to surpass the other in precedence and courts should require the media to take reasonable steps in verifying information that they intend to publish. The judge noted that while disclosing the applicants' actual names added little weight to the story, it caused great devastation to the applicants. Therefore the disclosure was not reasonable.

Conclusion

The court held that the applicants' HIV-positive status was a private fact and that releasing such information without their consent was a violation of their rights to privacy, dignity, and psychological integrity. They further found that it was not necessary to develop the common law rule of *actio iniuriarum* (invasion of privacy) to impose liability for negligence in this case and that the first and second respondents had violated the common law rule.

THE RIGHTS TO PRIVACY AND DIGNITY OF PEOPLE LIVING WITH HIV/AIDS

It is well established that the stigma and social exclusion experienced by people living with HIV impede their access to adequate treatment and other health-care services, reduce the quality of their lives, and often result in the violation of their human rights. These human rights violations are particularly evident within the health-care sector, where nonconsensual HIV-testing, inadequate counseling, and lack of respect for confidentiality violate the rights to health, equality and nondiscrimination, privacy and informed consent, dignity, and life. Women often bear the brunt of these violations while seeking maternal health-care services. However, the facts of this case go beyond the health-care context to involve private actors, who, by raising a human rights defense, compelled the court to balance any competing rights.

In *NM and Others v. Smith and Others*, the majority found that the rights of these vulnerable women, the applicants in this case, were violated, although the respondents argued that such a finding would unjustifiably limit the right to freedom of expression. The majority relied on constitutional rights guarantees, the personal and intimate nature of health information, the history of HIV in South Africa, and the role of cultural factors. These considerations led the majority to conclude that the privacy interests of individuals should be protected and that competing reasons for access to information, including the fundamental right to freedom of expression, must be carefully weighed against the imperative reasons for protecting privacy interest—in this case, to prevent discrimination and other human rights violations. Although the court did not refer to them, key international and regional human rights instruments support the validity of the decision.

For example, the preamble of the Civil and Political Rights Covenant provides that all rights guaranteed within it derive from the inherent dignity of the human person. In the African context, article 5 of the African Charter, which South Africa has ratified, guarantees the right to dignity. Further, article 3 of the Maputo Protocol, also ratified by South Africa, specifically mandates states to protect the right to dignity of “every woman.”

Article 17 of the Civil and Political Rights Covenant guarantees the right to privacy. In interpreting this right, the Human Rights Committee has explained in General Comment 16 that states and natural and legal persons alike are prohibited from interfering with the right to privacy, except if permitted by law. The law on which such interference is based must also be consistent with the provisions and objectives of the covenant. Further, while article 19 of the covenant guarantees the right to freedom of expression, it expressly provides that this right may be restricted “for respect of the rights or reputations of others.”

In addition, the International Guidelines on HIV/AIDS and Human Rights emphasize the necessity of ensuring the right to privacy and confidentiality in the context of HIV, including “all information relating to a person’s HIV status,” because the stigma and discrimination faced by those whose HIV status is disclosed makes it compelling to do so. It further requires states to protect their nationals from “arbitrary interference with their privacy in the context of media investigation and reporting.”

J.A.O. v. Homepark Caterers LTD & 2 Others
Civil Case No. 38 of 2003 (decided in 2004)
Kenya, High Court

COURT HOLDING

The respondent's suit, which contends that her rights to privacy, confidentiality, and nondiscrimination were violated when a doctor and hospital tested her for HIV and disclosed the results to her employer without her consent, resulting in her dismissal, shows a reasonable cause of action and will not be struck out.

Summary of Facts

J.A.O., the respondent, filed an originating summons arguing that the first applicant, Homepark Caterers, and two other applicants—a doctor and a hospital—violated her human rights. She asserted that the doctor and the hospital violated her rights to privacy and confidentiality by testing her for HIV without her consent and disclosing her HIV status to her employer without informing her. She also asserted that the doctor contravened his professional and statutory duty to counsel her and to disclose her HIV test results to her. She further contended that Home Park Caterers violated her right to nondiscrimination by terminating her employment based on her HIV status. The applicants petitioned the court to strike out the suit, arguing that (i) it was scandalous, frivolous, and vexatious; (ii) it was an abuse of the court process; and (iii) it disclosed no reasonable cause of action. J.A.O. entered a preliminary objection against the applicants' petition, and a judge who partly heard the case rejected the applicants' petitions that the case was frivolous or an abuse of court process, but allowed them to argue the third ground before a different judge.

Issue

Does the respondent's originating summons disclose a reasonable cause of action?

Court's Analysis

The High Court emphasized that because the case was about possible human rights violations, it had considered the issue and all of the relevant authorities in detail. The court recounted that Homepark Caterers had argued that J.A.O.'s suit did not disclose any cause of action because of a discrepancy in the sequence of events in her allegation. The discrepancy was that she asserted that she was terminated from her employment on April 30, 2002, because of the contents of a medical report that was dated May 2, 2002. Homepark Caterers had also contended that it neither participated in J.A.O.'s medical examination nor in the issuance of the medical report, and that her employment was terminated due to "prolonged absenteeism on medical ground."

The court also noted that the doctor and hospital had claimed that the court had to consider the sequence of events as declared in the pleadings and affidavit in order to determine whether there was a cause of action. They further maintained that J.A.O. did not have a reasonable cause of action since the medical report, which formed the basis for her suit, was issued only after her employment had already been terminated.

The court noted that, on the other hand, J.A.O. had argued that this was "a test case in the constitutional development of Kenya" and should be struck out only for not disclosing a cause of action "when it is so hopeless that the court cannot determine . . . what relief the plaintiff seeks and where not even an amendment can cure the defect." J.A.O. had further declared that her complaint, which would require the court to examine the facts of her dismissal, was obviously an issue for trial. Finally, she asked the court to dismiss the applicants' petition and instead to refer the case to the chief justice for a constitutional reference.

The court reviewed relevant case law, including *D.T. Dobie & Co. (K) Ltd v. Muchina & Another*,⁴¹ which held that a case should not be summarily dismissed unless there was no obvious cause of action and this could not be amended, and called for the court to “very cautiously and carefully consider all the facts of the case . . . before dismissing a case for disclosing no reasonable cause of action.” The *Dobie* decision also outlined the applicable principles in determining whether to strike out a suit, and defined a reasonable cause of action as one “with some chance of success when only the allegations in the Plaint are considered.”

Taking these earlier decisions into consideration, the court stated that although the applicants argued that the primary issue of J.A.O.’s claim for relief was the termination of her employment, there were other issues, such as that the doctor and hospital had violated her right to privacy by performing an HIV test without her consent. The disclosure of her HIV status without her knowledge constituted another issue, as well as whether the doctor violated his professional and statutory duty to counsel and disclose her HIV status to her. The court cited J.A.O.’s pleadings asking for “redress and relief for the violation of [her] human rights,” and determined that this was the cause of action.

In determining whether the cause of action was reasonable, the court acknowledged that courts would not readily strike out a pleading that raises difficult or important points of law and questions of general importance. Therefore, it examined specific human rights provisions in the constitution, including section 70 (scope and limits of protection of fundamental rights and freedoms of the individual), section 74 (protection from inhuman treatment), section 82 (protection from discrimination), and section 84 (enforcement of protective provisions). It observed that section 70 did not provide a cause of action, but that if the respondent’s dismissal was based on her HIV status, it could amount to inhuman treatment and would provide a cause of action. It also noted that the complaint about discrimination under section 82 may not hold up because the dismissal did not occur while the applicants were acting in accordance with a written law or in the performance of the functions of a public office or a public authority. But it confirmed that section 84 supported J.A.O.’s case because it permits anyone whose rights under sections 79 to 83 are being, or are likely to be, violated to apply to the High Court for redress.

Conclusion

The court concluded that because of “the nature of this case, the universality of HIV/AIDS pandemic and the development of human rights jurisprudence together with the ongoing attempts at the harmonization of the relevant conventions with domestic law,” the originating summons should be considered reasonable even if a constitutional reference would not succeed.

Note

In a separate hearing, the court considered the prevalence of stigma and discrimination on the basis of one’s HIV status and protected J.A.O.’s identity by allowing the use of only her initials, as a pseudonym.⁴² Permitting pseudonyms in cases that hinge on the disclosure of private matters, such as HIV status, could facilitate litigation by victims of HIV discrimination who would otherwise fear public exposure of private information.

In 2008, in an out-of-court settlement approved by the court, Home Park Caterers and the doctor agreed to pay J.A.O. compensation of KAS 2,250,000.⁴³

Lemo v. Northern Air Maintenance (PTY) Ltd
IC No. 166 of 2004
Botswana, Industrial Court

COURT HOLDING

An employer may not terminate an employee on the basis of HIV status. The employer must demonstrate that the employee is unable to complete his job duties and the employee must be given a fair hearing.

Summary of Facts

The applicant, Mr. Lemo, was employed by Northern Air Maintenance (NAM) to work as a trainee aircraft engineer. During the first four years of employment, Mr. Lemo's health deteriorated significantly, resulting in the exhaustion of all his annual leave and paid sick leave. Mr. Lemo also applied for and was granted unpaid leave on several occasions. On January 28, 2004, NAM met with Mr. Lemo and suggested that he consult a private doctor to assess his fitness for employment. The applicant declined the request, informing NAM that he thought the personnel at a public hospital were better suited to attend to his medical care because they were familiar with his medical history. NAM then insisted that Mr. Lemo see a private doctor of its acquaintance.

The following day, Mr. Lemo informed NAM that he was HIV-positive. One day later, NAM terminated Mr. Lemo's employment "because of his continual poor attendance over the last three years." The applicant then filed a complaint with the district labor office, claiming that he was unfairly dismissed due to his HIV status. The labor office granted his complaint and awarded compensation. Mr. Lemo then appealed the case to the Industrial Court seeking reinstatement and an increase in the amount of compensation.

Issue

Under what circumstances may an employer terminate an HIV-positive employee with a history of absenteeism?

Court's Analysis

The Industrial Court concluded that termination of an employee solely on the basis of HIV status violates the constitutional right to dignity, embedded in section 7(1) of the constitution. The court also reviewed international standards on workplace discrimination and propounded that employers should refrain from discriminatory and unfair practices towards an HIV-positive employee and should treat him in the same manner as an employee suffering from any life-threatening illness. The court also noted that an HIV-positive employee may "for years, even decades," experience no interference in performance of job duties, especially given the treatment currently available.

An employee may be terminated only if he is incapable of performing his duties (for example, is absent for prolonged periods of time) and has been given a fair hearing. The determination about whether an employee's absences are reasonable should include consideration of the nature of employee's job; the extent to which the employer's business is suffering; and the prospect of the employee's recovery. A fair hearing should include a discussion of relevant factors, including the nature and cause of the employee's incapacity; the likelihood of recovery, improvement, or recurrence; the period of absence; the effect of absence on the employer's business; and any other relevant factors.

The court determined that NAM used Mr. Lemo's absences as a pretext to terminate him when the real reason for the termination was his HIV status alone. The court found that the employer could have taken the decision to

dismiss Mr. Lemo only when the employer was satisfied that “there was no prospect of him recuperating in time without the employer incurring significant loss in its business.” The court also specifically noted that Mr. Lemo was not obligated to disclose his HIV status to his employer.

The court declined to order reinstatement, which was requested by Mr. Lemo, because such a remedy is discretionary and should not be granted if reinstatement would be disruptive to the employer’s business. The court concluded that reinstatement of the applicant “may” be disruptive, but it did not provide further explanation.

Conclusion

NAM unfairly terminated the applicant because of his HIV-positive status and it must therefore pay the applicant six months’ salary.

CASE COMMENTARY

The court’s failure to honor the applicant’s request for reinstatement is problematic since it expressly found that the applicant was terminated solely because of his HIV status. Consequently, the remedy awarded is very limited, given that no evidence was adduced to show that the applicant could no longer do his job satisfactorily, and there was no substantive evidence that he would disrupt NAM’s business or cause it to incur significant loss.

Earlier decisions by other courts and comparative jurisdictions have handled employment termination based on HIV status more comprehensively and in line with regional and international norms. Dealing with similar facts, the South African Constitutional Court in *Hoffmann v. South African Airways*⁴⁴ held that denial of employment because of a person’s HIV status violated the constitutional prohibition against unfair discrimination. [See case summary in Chapter 3 of the first volume of *Legal Grounds*]. The court noted that while the employer’s commercial interests were legitimate concerns, they could not constitute a valid justification of prejudicial or stereotypical treatment. In reaching its decision, the court relied on comparative jurisprudence, including the Indian case of *Bombay Indian Inhabitant v. M/S ZY and another*⁴⁵ which states that a failure to address employment discrimination against HIV-positive people would essentially condemn them to “economic death.”

Similarly, the Constitutional Court of Colombia in *XX v. Gun Club Corporation et al.*⁴⁶ held that terminating XX’s employment because of his HIV status violated his rights to equality, employment, privacy, health, and social security. The court ordered the Gun Club to compensate XX for the damages caused by his termination and to continue providing the same level of benefits it had provided before the termination, such as making payments to the Institute of Social Security on his behalf. The court also required the Institute of Social Security to provide XX with an illness pension. In reaching this decision, the court stated that “[t]he extent of a society’s civilization is measured, among other things, by the manner in which it assists the weak, the sick and in general the more needy, and not, to the contrary, by the manner in which it permits discrimination against them or their elimination.” It found that although employers were not obligated to retain an employee indefinitely, an employee “may not be dismissed for being HIV-positive, as this motivation implies a serious social segregation, a form of medical apartheid and ignorance of the equality of all citizens and the right to non-discrimination.” The court expressly noted that it would not order a reinstatement for a number of reasons, one of which being that XX had not requested this. Finally, in *MX v. ZY*,⁴⁷ an Indian court reinstated the employment of MX, who had been terminated due to his HIV status, and awarded him damages for lost income.

7. Abortion and Fetal Interests

African countries have some of the most restrictive abortion laws in the world, with serious consequences for women's reproductive health and rights, such as increased numbers of unsafe abortion and maternal death and disability. However, there has been a growing trend towards liberalization of national laws, which has been aided by the Maputo Protocol, the first regional or international treaty to explicitly articulate the right to abortion. Article 14 of the protocol, expressly requires governments to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest” and when the pregnancy threatens the life or mental or physical health of the woman. In the landmark decision *KL v. Peru*, the Human Rights Committee establishes that denying access to a therapeutic abortion violates women's most basic human rights, including the right to be free from cruel, inhuman, and degrading treatment. The CEDAW Committee has repeatedly framed unsafe abortion, which leads to maternal mortality, as a violation of the right to life⁴⁸ and has criticized restrictive abortion laws,⁴⁹ especially those that prohibit abortion without exceptions,⁵⁰ and has noted that such laws force women to obtain illegal and unsafe abortions.⁵¹ Furthermore, women's rights to privacy, non-discrimination and self-determination, guaranteed by both regional and international laws, are violated when restrictive abortion laws prevent them from accessing abortion services.

Yet restrictive abortion laws persist. The Kenyan case *Republic v. Nyamu and Others* accentuates the difficulties that can arise for health-care practitioners charged with providing abortion services, while the South African case *Stewart v. Botha* indicates a judicial reluctance to take on the complexities of a wrongful life claim. The *State v. Mashumpa and Best* provides an insight into the complex relationship between abortion and claims of fetal interests.

Abortion and Wrongful Life

Stewart v. Botha
(340/2007) [2008] ZASCA 84 (3 June 2008)
South Africa, Supreme Court of Appeal

COURT HOLDING

The court could not establish a wrongful life cause of action, given the social and political nature of the question.

Summary of Facts

The appellants, a woman and her husband, had a son, Brian, who was born with severe congenital defects. Although they consulted a medical practitioner and an obstetrician/gynecologist, the first and second respondents, during the pregnancy, the parents were not informed of any fetal anomaly. The woman, as first plaintiff, instituted a wrongful life claim in the Cape High Court, arguing that the health-care professionals' failure to inform her of the fetal anomaly was negligent and that she was therefore entitled to maintenance, special schooling, and all medical expenses related to her son's condition.

The husband, as second plaintiff, instituted in the alternative a delictual claim asserting a civil wrong or negligent act that gives rise to a legal obligation—although there was no contract between the parties—on behalf of Brian, and requesting the same compensation as his wife for the consequences of the congenital defects. They argued that had the respondents advised the couple of the congenital defects, the woman would have terminated her pregnancy, and Brian would not have been born and consequently have to suffer from his severe mental and physical disabilities. The court dismissed the claim with leave for appeal to the Supreme Court of Appeal.

Issues

- Is there liability in delict for a wrongful life cause of action, where medical professionals negligently failed to inform a pregnant woman of her fetus' severe defects, resulting in her inability to terminate her pregnancy and in her child therefore living with severe congenital defects?
- Is there a viable cause of action for wrongful life?

Court's Analysis

The Supreme Court of Appeal found that the lower court had correctly refused the delict claim on exception and therefore dismissed the appeal. Two elements inherent to the law of delict are wrongfulness and loss or damage. A case is straightforward if wrongful *actions* result in physical damage. However, when a person suffers pure economic loss due to negligent *omissions*, the wrongfulness of the omission is determined on the availability of a legal duty not to act negligently. Whether or not to impose such a legal duty depends on factors related to public or legal policy in accordance with the constitution.

The court discussed a number of cases to determine the legal suitability of a wrongful life cause of action, which asks whether it is better for the disabled person not to have been born than to live with the severe disability. By way of comparison and analysis of the relevant issues and social policy, the court cited case law establishing wrongful birth claims. For instance, it cited *Pinchin v. Santam Insurance Co Ltd*,⁵² in which “the action of a child to recover damages for an injury done to it whilst in utero was recognised.” Likewise, *Friedman v. Glicksman*⁵³ established “[t]he claim of a mother against a medical practitioner for not having detected and informed her of the congenital defects in her foetus which she would have aborted had she known was recognised. . . .” It also cited *Administrator, Natal v. Edouard*,⁵⁴ where the court granted a “claim by parents, against a hospital that agreed and failed to perform a surgical tubal ligation in order to render the mother sterile,” and ordered the hospital to bear “the cost of maintaining and supporting” the child the mother delivered as a result. In the current case, however, the court found that the wrongful life claim was not a valid cause of action. The main issue of whether it would be better for Brian not to have been born than to live with serious mental and physical disabilities involves a complex debate saturated with various social mores and values. The court particularly noted that since section 11 of the South African Constitution gives everyone the “right to life,” an award on this type of claim would violate this principle because it would proclaim that Brian’s life is worse than the possibility of his non-existence. The court concluded that this was a question entrenched in the ideas of life, death, and non-existence and therefore should not be determined by the court.

Conclusion

The appeal was dismissed because the court would not determine the issue of whether the child would have been better off had he not been born. The court found that the legislature should address the issue of the legal duty of professionals who negligently fail to inform prospective parents of the congenital defects of their fetuses.

Status of the Fetus in Criminal Law

The State v. Mashumpa and Best
(CC27/2007) [2007] ZAECHC 23 (11 May 2007)
South Africa, High Court

COURT HOLDING

The current common law definition of murder does not include the intentional killing of a fetus in a pregnant woman's womb, and the court cannot develop the common law of murder to include such conduct retrospectively or prospectively.

Summary of Facts

On February 14, 2006, Melissa Shelver, a pregnant woman, and David Best, the father of the fetus, visited her gynecologist. The examination revealed that the fetus was in good condition and that birth was imminent, as Ms. Shelver was 38 weeks pregnant. After Ms. Shelver and Mr. Best left the gynecologist's office and entered their car, Ludwe Mashumpa also entered the car, threatened the couple with a gun, and ordered Mr. Best to drive to an isolated area. When the car stopped, Mr. Mashumpa and Mr. Best got out of the car, and Mr. Mashumpa shot Mr. Best in the shoulder. Mr. Mashumpa then returned to the car and shot Ms. Shelver twice in her abdomen, took Mr. Best's watch, wallet, and cell phone—but did not take any of Ms. Shelver's items—and left the area. Mr. Best got back into the car and drove to an emergency medical aid station where the couple received medical help. However, the emergency medical aid station was unable to save the fetus, which, as a result of the incident, was stillborn.

For personal reasons, including terminating the pregnancy, the crime was instigated and planned by Mr. Best and Andile Tukani, and executed by Mr. Mashumpa. Mr. Best was shot in the shoulder so that he would appear to be a victim of the robbery. The state charged Mr. Best and Mr. Mashumpa with the murder of the fetus, attempted murder of Ms. Shelver, and other crimes related to the incident.

Issues

- Does the common law definition of murder, which is limited to the unlawful and intentional killing of another person, include the intentional killing of a viable fetus in the pregnant woman's womb?
- If the common law definition of murder does not include the intentional killing of a viable fetus in the pregnant woman's womb, then should it be developed to include such conduct to be applied prospectively and/or retrospectively?

Court's Analysis

Murder is defined as the unlawful and intentional killing of another person. It has always been understood that the person killed must have been born alive. The court briefly discussed the laws in other jurisdictions, noting that the "born alive" principle has not been discarded in England where murder remains a common law crime. The court cited *Keeler v. Superior Court*, a United States case, while noting that the "born alive" principle had not been discarded by courts in jurisdictions with statutory homicide laws, unless those laws expressly provide as much. According to the court, the trend that developed instead was to criminalize the killing of a fetus by enacting the crime of "feticide," in order to punish the killing of a fetus by third parties and not by a pregnant woman. The court ultimately concluded that the killing of the fetus in the pregnant woman's womb, albeit viable, did not amount to the common law crime of murder. However, the court noted that "the aggravation of the assault on the mother, in the form of harm to the foetus in her stomach, may suitably be taken into consideration at the sentencing stage."

Citing the holding in *Fanuel Sitakeni Masiya v. the Director of Public Prosecutions (Pretoria) and Minister of Justice and Constitutional Development*,⁵⁵ the court noted that despite the constitution's express expectation of the courts to develop the common law in order to bring it into line with the foundational values enshrined in the constitution and the bill of rights, the retrospective extension of the definition of a crime inherently contradicts the principle of "legality" found in section 35(3) of the constitution. This section sets out fair trial rights, including a person's right "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted." Therefore, even if the court decided to develop the crime of murder to include the facts of the case at hand, it determined that it could not apply such development retrospectively to the accused.

Addressing the prospective development of the law, the court pointed to substantive and pragmatic concerns. With regard to the substantive concerns, it again cited the *Masiya* case; however, on this point it distinguished the facts. The court found that in the *Masiya* case, the court properly prospectively developed the common law to "extend the ambit of protection from the crime [rape] to an existing class of persons in society, namely women." As noted by both courts, rape infringes on numerous fundamental rights, including dignity, privacy, and physical integrity. This court held that since the constitution does not provide for the protection of any rights of a fetus, there are no rights to be developed or extended. The pragmatic concerns evolve from the difficulty in determining a precise definition of when a fetus is considered a "person," within the meaning of the law and other procedural hurdles.

Conclusion

The court found that the killing of a fetus is not considered murder under the common law definition, and that it would not develop the law retrospectively or prospectively emphasizing that it would be the legislature's role to reform the law if required. Mr. Best and Mr. Mashumpa were convicted of the attempted murder of Ms. Shelver and other counts related to the incident with which they were charged.

HIGHLIGHT

VIOLENCE AGAINST PREGNANT WOMEN AND CLAIMS OF FETAL INTERESTS

The *Mashumpa* case illustrates the sensitive nature of legal issues relating to harming or causing the death of a fetus during a violent or criminal act. While one who perpetrates criminal attacks against a pregnant woman, injuring or causing the death of her fetus in the process, should be held accountable, does this require construing the death of the fetus as murder, separate from the crime committed against the pregnant woman, as was argued by the state?

Although South African courts have gained a reputation for being willing to develop the law to better protect the human rights of women, as evidenced in the *Masiya* case, the court in this case rejected the state's invitation to develop the common law definition of murder to include the unlawful and intentional killing of a fetus. The court noted some of the complications that would result from such a construction by stating that formulating a reasonably precise definition of murder that includes the killing of a fetus would be difficult. Furthermore, it would involve determining complex issues such as whether the unborn fetus was viable at the time, and

HIGHLIGHT continued...

whether to limit the definition of when a fetus is a “person” who can be killed to acts committed by a third party, among other issues.

The facts of this case are relevant within the African continent and the court’s reasoning could guide other courts in future decisions. There are other key issues apart from the ones that the court raised in addressing why it would not develop the law as requested. For instance, construing the crime of murder to include the killing of a fetus does nothing to protect women who are often subjected to violence and abuse while pregnant. Instead, it could inevitably pit fetal interests against women’s human rights, with grave implications for pregnant women themselves.

One implication has to do with the right to abortion. In South Africa, this right is guaranteed through the Choice on Termination of Pregnancy Act 92 of 1996, which specifies when a pregnancy can be legally terminated. Creating an adversarial relationship between a pregnant woman and the fetus risks setting back gains that have been made in securing the right to abortion on specified grounds in some African countries that until recently had little or no exceptions to broad legal prohibitions of abortion. These restrictive abortion laws had resulted in many women dying or becoming disabled as a result of turning to unsafe, clandestine abortion.

Another grave implication of developing the crime of murder to include injuring or causing the death of a fetus is that it could punish women for their behavior during pregnancy, such as drug or alcohol use and addiction. Punishment does not treat women with drug or alcohol addiction or deter substance abuse but could discourage women from seeking antenatal care, an indispensable strategy for preventing maternal and child mortality. Penalizing women for fetal harm could also result in serious consequences for the rights of HIV-positive women. For example, some recent HIV legislation in the region either implicitly or explicitly criminalizes the transmission of HIV by a woman to a fetus during pregnancy or to her child through delivery and breastfeeding. The unavailability and inadequacy of HIV prevention and treatment programs in the African region has caused mother-to-child transmission of HIV to remain prevalent. The combination of criminalizing legislation and poor access to health care could lead to a woman being charged with murder, or another serious crime, for passing the virus to her fetus.

Courts have explored alternative ways to hold a person accountable for injuring or causing the death of a fetus while perpetrating a criminal act against a pregnant woman. The court in this case found that the lack of inclusion of the killing of a fetus within a definition of murder does not leave the act unpunished, since the harm to the fetus could be considered as an aggravating factor in determining the sentence for the crime against the pregnant woman. Further, the harm to the fetus could be considered while deciding whether to grant parole to a convicted prisoner. Focus could also be placed on reducing violent attacks and crimes against women when they are pregnant by increasing efforts aimed at reducing domestic violence and other types of violence against women.

Republic of Kenya v. Nyamu and Others
Case No. 81 of 2004
Kenya, High Court

COURT HOLDING

The accused were not guilty of murder because the evidence against them was inadequate and their alleged victims—two fetuses—were born dead and therefore not persons capable of being killed.

Summary of Facts

The state, as prosecutor, charged doctor John Nyamu and two nurses, M. Kibathi and M. Mathai, under sections 203 and 204 of the Kenya Penal Code, with murdering an unidentified female fetus that weighed 3,012 grams, and an unidentified male fetus that weighed 2,232 grams. To prove its case, the state called 13 witnesses. After the state had presented its case, the accused argued that the state had been unable to show any evidence that they committed murder and asked the court to find them not guilty without going further with the trial. The court declined to do so, noting that while it could be appropriate for a subordinate court to end the case at that stage, a High Court was expected to ensure that the defense accounted for any gaps in the state's case.

Issues

- Were the two fetuses persons who were capable of being killed?
- Did the evidence show that all or any of the accused persons murdered the fetuses?

Court's Analysis

Regarding the first issue, the High Court noted that section 203 of the penal code provides that “[a] person who, with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” The court further noted that section 214 of the penal code provides the following:

A child becomes a person capable of being killed when it has completely proceeded in a living state from its mother whether it has breathed or not, and whether it has an independent circulation or not and whether the navel-string is severed or not.

Though the state argued that the operative part of section 214 should be “whether it has breathed or not, and whether it has an independent circulation or not,” the court found the operative part to be “when it has completely proceeded in a living state from its mother.” The state's witness—also considered an expert witness by the court—who autopsied the fetuses testified that they were “born dead” and had not proceeded in a living state from the womb. This evidence was not contradicted and the court held that the fetuses were not persons capable of being killed.

On the second issue, the court looked at the state's evidence claiming that the accused had dumped human fetuses and incriminating documents from the health clinics where the fetuses were aborted. The court found that the state had not adduced enough evidence for a number of reasons, including the following: (i) some of the witnesses were not impartial; (ii) substantial discrepancies were evident in some of their statements; (iii) some were not credible based on the responses they gave during cross examination; and (iv) the veracity of certain documents was uncertain.

The court also found that evidence did not show whether any of the accused were on duty at the clinics on the days the alleged murders occurred or whether the documents that were allegedly recovered from the scene linked

Dr. Nyamu, the first accused, to any offense. The court therefore found that the state's case had wide gaps that could not be explained. It also found that there was no murder since, based on uncontradicted evidence from the expert witness, the two fetuses were born dead. The court thus found the accused persons not guilty.

Conclusion

The court concluded that it would have been within its rights to end its analysis after finding that the fetuses were not persons capable of being killed, as provided under section 214 of the penal code, because they were born dead. However, due to the tragic facts involved, the court viewed it necessary to also determine whether the accused persons had committed murder. However, the evidence against them was inadequate and their alleged victims were not capable of being killed.

Online Legal Resources

AFRICAN HUMAN RIGHTS RESOURCES

<http://www1.umn.edu/humanrts/africa>

Provides a collection of human rights resources specially related to Africa. These include, for example, various international human rights instruments, sites relevant to the African Commission on Human and Peoples' Rights, and Africa-related non-governmental organizations.

CONSTITUTIONAL COURT OF SOUTH AFRICA

<http://www.constitutionalcourt.org.za/site/home.htm>

Provides both full-text and summarized judgments, court records, and information on forthcoming hearings of the Constitutional Court of South Africa.

INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN RIGHTS (INTERIGHTS)

<http://www.interights.org>

Provides case summaries of decisions by Commonwealth courts and international tribunals.

KENYA LAW REPORTS

<http://kenyalaw.org/update>

Provides judgments, rulings, and opinions of Kenya's superior courts of record, as well as access to various Kenyan laws and a range of legal resources.

LAWAFRICA

<http://www.lawafrica.com>

Provides summaries of the latest cases from East Africa (e.g., Kenya, Tanzania, and Uganda). Subscriptions to Law Africa Reports and to East Africa Law Reports are available through this website.

LEGAL ASSISTANCE CENTRE (WINDHOEK)

<http://www.lac.org.na>

Provides full-text decisions of Namibian cases concerning HIV/AIDS, gender, land, and the environment.

NIGERIA INTERNET LAW REPORTS (NILR)

<http://www.nigeria-law.org/LawReporting.htm>

Provides selected judgments of the Supreme Court of Nigeria.

SOUTHERN AFRICAN LEGAL INFORMATION INSTITUTE (SAFLII)

<http://www.saflii.org>

Provides full-text decisions by courts in Southern and Eastern Africa and links to various legal resources such as legislation and law journals. It also provides links to applicable sub-regional courts and tribunals, inter-governmental organizations, and non-governmental organizations.

SUPREME COURT OF APPEAL OF SOUTH AFRICA

<http://www.justice.gov.za/sca>

Provides decisions of the Supreme Court of Appeal of South Africa.

WOMEN'S HUMAN RIGHTS RESOURCES PROGRAMME

<http://www.law-lib.utoronto.ca/diana>

Provides information on women's human rights law, with an emphasis on selected international and Canadian topics.

Full Citation Information and Case Links

<i>AD and Another v. DW and Others</i> (CCT 48/07) [2007] ZACC 27 (7 December 2007) (South Africa, Constitutional Court)	http://www.saflii.org/za/cases/ZACC/2007/27.html
<i>Botha v. Botha</i> Case No. 2005/25726 (June 9, 2008) (South Africa, High Court; Witwatersrand Local Division)	http://www.saflii.org/za/cases/ZAGPHC/2008/169.html
<i>Brink v. Kitshoff</i> 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) (South Africa, Constitutional Court)	http://www.saflii.org/za/cases/ZACC/1996/9.html
<i>Coetzee v. the State</i> Case No. AR348/07 (24 June 2008) (South Africa, High Court; Natal Provincial Division)	http://www.saflii.org/za/cases/ZAKZHC/2008/40.html
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<i>Peter Mburu Echaria v. Priscilla Njeri Echaria</i> [2007] eKLR H.C.C.C. No. 4684 of 1987(O.S.) (Kenya, Court of Appeal)	http://www.fidakenya.org/cases/Echaria%20v%20Echaria.pdf
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<i>J.A.O. v. Homepark Caterers LTD & 2 Others</i> Civil Case No. 38 of 2003 (decided in 2004) (Kenya, High Court in Nairobi)	http://www.kenyalaw.org/CaseSearch/view_preview.php?link=60623376518438121707053&words

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Hadijatou Mani Koraou v. The Republic of Niger App. No. ECW/CCJ/APP/08/08; Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008 (ECOWAS Court of Justice)	www.interights.org/documentbank/index.htm?id=533
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Mary Rono v. Jane Rono & another Civil Appeal 66 of 2002 (judgment delivered in 2005) (Kenya, Court of Appeal)	http://www.kenyalaw.org/CaseSearch/case_search_one.php?casParties=rono+v+rono&casSubject=&casNumber=&casCourt=&casJudges=&casType=&casAdvocates=&casCitation=&casYear=&check_submit=1&submitter=Searching+.+.+
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<p>Stewart v. Botha (340/2007) [2008] ZASCA 84 (3 June 2008) (South Africa, Supreme Court of Appeal)</p>	<p>http://www.saflii.org/za/cases/ZASCA/2008/84.html</p>
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<p>WB v .The State Case No. CA 352/2006 (South Africa, High Court)</p>	<p>http://www.saflii.org/za/cases/ZAEC HC/2007/37.pdf</p>

Endnotes

1. Michael Kirby, "The Growing Rapprochement Between International Law and National Law," in *Visions of the Legal Order in the 21st Century: Essays to Honour His Excellency Judge CJ Weeramantry*, available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm#FOOTBODY_1. In discussing the benefits of the application of regional and international law and jurisprudence in national courts, Honorable Justice Michael Kirby references Judges Weeramantry and Higgins, former judges of the International Court of Justice, who "enjoy the perception of the growing importance of international law and the need for it to respond to lessons drawn from the approaches of the principal legal systems of the world, reflecting the varied forms of civilisation which make the world up."
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3. *Govender v. Ragavayah and Others* 6715/08 [2008] ZAKZHC 86; 2009 (3) SA 178 (D) (6 November 2008).
4. *Women's Legal Centre Trust v. President of the Republic of South Africa and Others* Constitutional Court of South Africa (CCT13/09) [2009] ZACC 20; 2009 (6) SA 94 (CC) (22 July 2009).
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10. *Minister of Welfare and Population Development v. Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC).
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12. *Id.*
13. *Violence Against Women: The Health Sector Responds* (2003), available at <http://www.paho.org/English/DPM/GPP/GH/VAWhealthsector.htm> (last visited December 22, 2009).
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46. *XX v. Gun Club Corporation et al.* Constitutional Court of Colombia, Judgment No. SU-256/96 (1996).
47. *MX v. ZY* AIR 1997 Bom 406 (High Court of Judicature, 1997).
48. See, e.g., Committee on the Elimination of Discrimination Against Women, Concluding Observations on Belize, contained in Report of the Committee on the Elimination of Discrimination against Women on the work of its twentieth session, para. 56, U.N. Doc. A/54/38 (1999); Colombia, para. 393, U.N. Doc. A/54/38 (1999).
49. See, e.g., Committee on the Elimination of Discrimination Against Women, Concluding Observations on Mauritius, para.30, U.N. Doc. CEDAW/C/MAR/CO/5 (2006); Zimbabwe, contained in Report of the Committee on the Elimination of Discrimination against Women on the work of its eighteenth and nineteenth sessions, para. 159, U.N. Doc. A/53/38 (1998).
50. See, e.g., Committee on the Elimination of Discrimination Against Women, Concluding Observations on Chile, para. 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006).
51. *Id.*
52. *Pinchin v. Santam Insurance Co Ltd* 1963 (2) SA 254 (W).
53. *Friedman v. Glicksman* 1996 (1) SA 1134 (W).
54. *Administrator, Natal v. Edouard* [1990] ZASCA 60; 1990 (3) SA 581 (A).
55. *Fanuel Sitakeni Masiya v. the Director of Public Prosecutions (Pretoria) and Minister of Justice and Constitutional Development* CCT 54/06 [2007] ZACC (South Africa, Constitutional Court).

Gender-based discrimination remains one of the greatest threats to women's health and lives worldwide, despite domestic, regional, and international human rights guarantees of equality, reproductive and sexual rights, and a range of other rights. Such guarantees remain empty promises if not recognized and reinforced by national courts. *Legal Grounds: Sexual and Reproductive Rights in African Commonwealth Courts, Volume II* continues to provide much-needed information about whether and how national courts of African Commonwealth countries apply human rights laws in decisions that affect the rights of women. The case summaries and thematic highlights can be useful resources for women's rights advocates seeking to further develop litigation and advocacy strategies.

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The Center for Reproductive Rights uses the law to advance reproductive freedom as a fundamental right that all governments are obligated to protect, respect, and fulfill.

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