MAKERERE LAW JOURNAL NOVEMBER 2024

Volume 54 Issue 1

FREEDOM OF ASSOCIATION AND THE LGBTQ+ COMMUNITY IN UGANDA: AN EXAMINATION OF FRANK MUGISHA AND TWO OTHERS V UGANDA REGISTRATION SERVICES BUREAU

John Martin Muwanguzi

Recommended Citation: John Martin Muwanguzi (2024); "Freedom of Association and The LGBTQ+ Community in Uganda: An Examination of Frank Mugisha and Two Others V Uganda Registration Services Bureau" Volume 54 Issue 1 Makerere Law Journal pp. 1- 22

FREEDOM OF ASSOCIATION AND THE LGBTQ+ COMMUNITY IN UGANDA: AN EXAMINATION OF FRANK MUGISHA AND TWO OTHERS V UGANDA REGISTRATION SERVICES BUREAU

John Martin Muwanguzi*

ABSTRACT

This paper explores the resistance faced by the LGBTQ+ community in Uganda in asserting their right to freedom of association. It focuses on two key judicial decisions—one from Uganda and the other from Kenya—alongside rulings from other jurisdictions, to provide a broader perspective on the LGBTQ+ community's right to associate. The Court of Appeal of Uganda took a narrow approach in deciding whether the Registrar of Companies acted lawfully in refusing to reserve the name "Sexual Minorities Uganda." While the court emphasised the Registrar's discretion, the key issue was whether that discretion was lawfully exercised. The paper argues that the decision marked a significant setback in the LGBTQ+ community's efforts to realise their constitutionally guaranteed rights, hindering their ability to organise and associate freely.

1.0 INTRODUCTION

The American pop-star, Selena Gomez has opined in one of her famous songs that "the heart wants what it wants".[1] In the same light, it has been asked in a famous play that *"What is in a name? That which we call a rose by any other*

* Fourth Year Student at Makerere University School of Law, Email: muwanguzijohnmartin@icloud.com

1 Selena Gomez "The Heart Wants What it Wants" available at <https://www.youtube.com/watch?v=ij_0p_6qTss> [Accessed on 6th June 2024]

name would smell as sweet".[2] These phrases point to the concept of romantic love; one which has existed for the entirety of mankind. The notion of love brings out the very best in us (at times even the worst) that to deny its existence, is to be disingenuous. The strength of love as an emotion can be seen from the various movies, songs, books and plays written; leading to the creation of a multibillion-dollar industry across the globe.

Though popular and having been experienced by nearly everyone on the face of the planet, its expression has found its way before the courts of law. The propriety of love has been challenged especially that which is experienced by the LGBTQIA+ community. When love meets the law (particularly same-sex love), the outcomes have differed from jurisdiction to jurisdiction. In some instances, it has been decided that this kind of love is no different, and is in fact protected by the constitution. In other countries, the courts have held that this kind of love is not only immoral, but even those that profess it are not protected by the constitution.

Uganda falls into the latter category. On 3rd April 2024, the Constitutional Court of Uganda delivered its ruling in the case of *Fox Odoi and Others v Attorney General.*[3] In this decision, the court ruled that the Anti-Homosexuality Act, 2023 was constitutional in so far as it criminalised homosexual behaviour. The ruling received mixed reactions from Ugandans, civil society and the international community. Many, such as politicians across Uganda's political divide, welcomed the decision as being a shield to protect the traditional African family, traditional religious beliefs and children; while members of civil society and the international community expressed their disappointment with the ruling as they

---

2 A soliloquy from Romeo and Juliet, spoken by Juliet in Act 2 Scene 2.
3 Consolidated Constitutional Petitions Nos. 14,15,16 and 85 of 2023.

found the law to be draconian. The decision has in fact been described as Uganda's *Dred Scott v. Sandford.*[4]

This paper seeks to review a number of Court decisions that have had an impact on the right to association of assembly of the LGBTQ+ community. It seeks to offer insight into a number of decisions by Uganda's Court of Appeal and Constitutional Court. This is done by examining the Court of Appeal decision of *Frank Mugisha and 2 Others v Uganda Registration Services Bureau*[5] (the SMUG case) and the Kenyan Supreme Court decision of *NGOs Co-ordination Board v Eric Gitari and 5 Others*.[6] These cases are critical in addressing the question of whether the state can lawfully prohibit the association of people on the basis of their sexual orientation. By adopting a comparative jurisprudence approach to this question, we can gain more intimate understanding of the extent of limitation to the expression of same-sex love and the constitutional implications thereof.

2.0 FRANK MUGISHA AND 2 OTHERS V. UGANDA REGISTRATION SERVICES BUREAU: A BRIEF BACKGROUND

The appellants applied to the Respondent for the reservation of the name "Sexual Minorities Uganda" (SMUG) with a view to incorporating it as a company limited by guarantee. The respondent however declined to reserve the name on the ground that the name was against public policy and labelled criminal under section 145 of the Penal Code Act Cap.120.

---

4 Dr Busingye Kabumba while analysing the decision in the Observer newspaper has equated the decision to *Dred Scott v Sandford*. His analysis is available at: <https://observer.ug/index.php/> [Accessed on 6th June 2024] *Dred Scott v John F.A. Sandford* [60 U.S. 393] was a landmark decision of the United States Supreme Court that held that the US Constitution did not extend American citizenship to people of black African descent, and therefore they could not enjoy the rights and privileges the constitution conferred upon American citizens. The decision is widely considered the worst in the court's history, being denounced particularly for its racism.

5 Civil Appeal No.223 of 2018.

6 Petition No.16 of 2019.

The Appellant, by way of judicial review, sued the Respondent citing violation of their human rights and freedoms particularly Articles 20, 21, 29 and 42 of the 1995 Constitution of the Republic of Uganda. Their application was dismissed on the basis that the decision was justified as it was taken in public interest, and was within the ambit of Article 43 of the Constitution. The Appellants decided to appeal.

The Court of Appeal decided to limit its finding to whether the Registrar had the mandate to decline reservation of a name. Accordingly, the court found that the Registrar General had the mandate to assess the name presented by interested applicants and had the discretion to disallow it if found undesirable. According to the court, the authorities relied on by the Appellants were quite persuasive but not relevant to the instant appeal. *'The appeal was not about the abrogation of any particular behaviour in our society',* and therefore failed. As this paper will show later, the narrow and restrictive approach adopted by the court led to a result which as shall be elaborated, is considered problematic in light of the human rights framework in Uganda.

The decision of the Registrar and that of the Court of Appeal discussed above, do not come as a surprise to many Ugandans, especially those involved in advocacy for the LGBTQIA+ community. Arimoro for example, points out that criminalisation of LGBTQIA+; particularly same-sex relations is traceable to colonial laws received from Britain.[7] Whereas Britain repealed her anti-homosexuality laws in 1967 following the Wolfenden Commission Report,[8] her former territories such as Uganda continue to criminalise same-sex relations and LGBTQIA+ activities generally.

---

7 Augustine Edobor Arimoro, Interrogating the Criminalisation of Same-Sex Sexual Activity: A Study of Commonwealth Africa (Liverpool Law Review, 42(3) 2021) 379-399.

8 Internet Archive. (19570. The Wolfenden Report of The Committee on Homosexual Offenses and Prostitution Image Large: UK Government: Free Download, Borrow, and Streaming: Internet Archive. [Online] available at <https://archive.org/details/the-wolfenden-report-report-of-the-committee-on-homosexual-offenses-and-prostitution-image-large> [Accessed on 3rd October 2024].

3.0 NGOS CO-ORDINATION BOARD V ERIC GITARI AND 5 OTHERS: A SUMMARY

The petition arose from a letter written by the Appellants refusing to reserve any of the 1st Respondent's proposed names to register a Non-Governmental Organisation (NGO) seeking to champion the rights of Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTIQ) persons in Kenya. The 1st Respondent sought to reserve for registration of an NGO in any of the names: Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy; Gay and Lesbian Human Rights Organisation; Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council; and Gay and Lesbian Human Rights Collective. However, the Appellant's Executive Director declined to approve any of the proposed names on the grounds that Sections 162, 163 and 165 of the Penal Code of Kenya criminalised Gay and Lesbian liaisons.

Aggrieved by this decision, the Respondent filed a petition to the High Court of Kenya alleging that the Appellant's refusal to register the intended NGO contravened the provisions of Articles 20(2), 31(3), 27(4), 28 and 36 of the Kenyan Constitution, 2010.[9]

The trial court and the Court of Appeal both found that there had been an infringement of the 1st Respondent's rights under the Kenyan Constitution. On further appeal to the Supreme Court, it was held that Article 36 of the Kenyan Constitution guaranteed the right to freedom of association to all Kenyans, and whereas it is not an absolute right and could be subjected to limitation, the interference with the Respondent's right to freedom of association did not pursue any legitimate aim such as national security or public safety, the prevention of disorder or crime, the protection of health and morals, and the protection of the

[9] Constitution of Kenya, 2010. (n.d.) available at: <https://kdc.go.ke/wp-content/uploads/2021/12/Constitution-of-Kenya-2010-min.pdf> [Accessed on 8 October 2024)

rights and freedom of others. As such, the court held that just like everyone else, LGBTQ have a right to freedom of association which includes the right to form an association of any kind.

It is important to note that the Ugandan Court of Appeal decision is contained in only 19 pages whereas that of the Kenyan Supreme Court is contained in 77 pages. The courts' respective decisions have had a resounding impact on the rights of sexual minorities in both countries; particularly the right to freedom of association. The fairly short decision by Uganda's Court of Appeal calls for the evaluation of the constitutional implications that the decision has had on the LGBTQ community, particularly their freedom of association. An analysis of the ratio decidendi of both courts can provide some insight as illustrated below.

4.0 THE RIGHT OF THE LGBTQ COMMUNITY TO ASSOCIATE IN HUMAN RIGHTS LAW

The 1995 Constitution of the Republic of Uganda protects the right to associate.[10] Every person has the right to associate which includes the freedom to form and join associations or unions, including trade unions and political and other civic organisations.[11] The Constitution of Kenya also recognises the right of every person to associate which includes the right to form, join or participate in the activities of an association of any kind.[12]

It suffices to note that that the right to freedom of association is also recognised in international and regional human rights instruments which Uganda has ratified. The right to freedom of association is provided for under Article 22 (1) of the International Covenant on Civil and Political Rights (ICCPR). It states:

> "*Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*"

10 Article 29(1)(e) of the 1995 Constitution of Uganda.
11 Ibid.
12 Article 36(1) of the Constitution of Kenya.

Similarly, Article 10 (1) of the African Charter on Human and Peoples Rights (ACHPR) provides inter alia:

"*Every individual shall have the right to free association provided he abides by the law*".

The Universal Declaration of Human Rights (UDHR) also recognises that everyone has the right to freedom of peaceful assembly and association.[13]

This therefore begs the question whether, upon the reading of the aforementioned provisions, the *"person(s)"* or *"everyone"* includes LGBTQ persons? The literal reading of those provisions is that LGBTQ persons are not excluded as persons that can associate with one another.[14]

One of the arguments raised by the appellants in the SMUG case was that the right to freedom of association applies to every person including LGBTQ persons, and that it was not criminal to promote and protect the rights of such persons, as Sexual Minorities Uganda sought to do.[15] It was also argued that Uganda was bound by international obligations enshrined in international treaties; specifically, the ICCPR, and ACHPR which all recognised freedom of association.[16] The court however found that the appeal before it pertained to reservation of a name. The court adopted a narrow approach and decided that the appeal was not about the abrogation of any particular behaviour in our society. Accordingly, the Respondent was well within its mandate to disallow the name proposed by the Appellants under section 36(2) of the Companies Act. This was an escapist approach by the learned Justice. Before pointing out the

---

13 Article 20(1) of the UDHR.

14 In *Eric Gitari's* case (supra), the Supreme Court of the Republic of Kenya applied the same reasoning in interpreting Article 36 of the Kenyan Constitution, 2010. The court further found that the right to form an association is an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

15 SMUG case, at p.4.

16 Ibid, 15.

problematic aspects of this reasoning, it suffices to examine section 36 of the Companies Act.

Section 36 of the Companies Act, 2012 states that:

1. *The registrar may, on written application, reserve a name pending registration of company or a change of name by an existing company, any such reservation shall remain in force for thirty days or such longer period, not exceeding sixty days as the registrar may, for special reasons, allow and during that period no other company is entitled to be registered with that name.*
2. ***No name shall be reserved and no company shall be registered by a name, which in the opinion of the registrar is undesirable***.
3. *Upon registration, a limited liability company shall add the initials "LTD" or the word "Limited" at the end of its name.*

A reading of section 36(2) of the Act reveals that the law confers upon the registrar wide discretion to reject names which are *"undesirable".* The Act does not define what would amount to undesirable. Is the standard objective or subjective? Is the law giving the registrar leeway to include their moral convictions in decision making? In the SMUG case, the registrar declined to register the name on grounds that the activities of the LGBTQ community were against government policy and were considered unlawful in Uganda. The basis of the decision was that the Penal Code criminalises homosexual conduct; and therefore, the organisation was intending to promote unlawful conduct. The court accepted this argument too and ruled that the right to freedom of association of the LGBTQ community was justifiably limited. Again, this was a problematic interpretation and application of the law.

It is important from the onset to acknowledge that the right to freedom from association is not an absolute right. It can be limited in a number of situations. Limitation of rights is provided for under Article 43 of the 1995 Constitution of Uganda. It states:

1. *In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*

2. Public interest under this article shall not permit-
a) Political persecution;
b) Detention without trial;
c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this constitution.

The parameters of legislative limitation with regard to the right to associate has engaged the minds of judges in many jurisdictions, in both international and domestic courts. The standard against which every limitation on the enjoyment of fundamental rights and freedoms as set out in Article 43(2) (c), is an objective one. This legal principle was enunciated in the case of *Onyango-Obbo & another v Attorney General.*[17] Mulenga JSC who wrote the lead judgment with which other members of the court, said that:

> *"The provision in clause 2(c) clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those principles and values, and therefore, to that standard. While there may be variations in applications, the democratic values remain the same."*

The learned justice further stated:

> *"Under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. The court must be guided by the values and principles essential to a free and democratic society. In Mark Gova & Another v Minister-of Home Affairs & Another; [S.C.36/200: Civil Application No.156/99] the Supreme Court of Zimbabwe formulated the following summary criteria, with which I agree for justification of law imposing limitation on guaranteed rights-*
> *The legislative objective which the limitation is designed to promote must be sufficiently important to warrant over riding a fundamental right;*
> *The measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*
> *The means used to impair the right of freedom must be more than necessary to accomplish the objective."*

---

[17] Constitutional Appeal No.2 of 2002.

In the case of *Sidiropoulos and Others v Greece,*[18] the European Court of Human Rights (ECJ) held that:

> *"The Court points out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly, States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions."*

Furthermore, the Supreme Court of Canada in the case in *R v Oakes*[19] developed principles for consideration when determining whether a limitation of a right is justifiable, namely; a) there has to be a pressing and substantial objective for the law or government's action; b) the means chosen to achieve the objective must be proportional to the burden on the rights of the claimant; c) the objective must be rationally connected to the limit on the Charter right; d) the limitation must minimally impair the Charter right; and e) there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

It should also be remembered that according to the Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights,[20] clause 3 and 4 in the General Interpretative principles relating to the justification of limitations section, provides that *"all limitations shall be interpreted strictly and in favour of the right at issue and in the light and context*

---

18 (57/1997/841/1047).

19 [1986] 1 S.C.R 103.

20 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights American Association for the International Commission of Jurists. (n.d.), available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> [Accessed 3 Oct 2024]

concerned."[21] The burden of justifying a limitation upon a right guaranteed under the ICCPR therefore lies on the state.

In *S v Makwanyane and Another*,[22] Chaskalson, P stated that (at paragraphs 103 & 104):

> "*The criteria prescribed by section 33(1) for any limitation of the rights contained in section 11(2) are that the limitation must be justifiable in an open and democratic society based on the freedom of equality, it must be both reasonable and necessary and it must not negate the essential content of the right…The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. … The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question*".

In the *SMUG* case, the registrar declined to reserve the appellant's name *"SMUG (Sexual Minorities Uganda*)" for reasons that the company was formed to advocate for the rights and wellbeing of lesbians and gays among others, which persons are engaged in activities labelled criminal under section 145 of the Penal Code Act. The same reason was fronted in the *Eric Gitari* case by the appellant in declining to register the 1st Respondent's organisation. According to the Appellants, Sections 162, 163 and 165 of the Kenyan Penal Code criminalise[d] gay and lesbian liaisons as the same goes against the order of nature. As pointed

---

21 Ibid.

22 [1995] ZACC 3.

out earlier, the courts came to different conclusions; with the latter's marking a step in the right direction for the protection and recognition of LGBTQ rights in Kenya, while the former's decision served as a setback to the rights of sexual minorities in Uganda.

Section 145 of Uganda's Penal Code Act provides that:

> *Unnatural offences*
> *Any person who-*
> *a) Has carnal knowledge of any person against the order of nature;*
> *b) Has carnal knowledge of an animal; or*
> *c) Permits a male person to have carnal knowledge of him or her against the order of nature, commits an offense and is liable to imprisonment for life.*

From the foregoing provision, although section 145 prohibits any person from committing acts that go against the order of nature; the said section does not distinguish between heterosexual or homosexual offenders. The section does not limit the perpetrators of such acts to persons who are LGBTQ; indeed, the words, *"any person",* connote a potential offender under the section who may very well be heterosexual, homosexual, intersex or otherwise.

The Supreme Court of Kenya in the *Eric Gitari* case followed the same reasoning as pointed out above and found that although sections 162, 163, and 165 of Kenya's Penal Code prohibit any person from committing acts that go against the order of nature, the sections did not exclusively apply to the LGBTQ community. They did not in any way express the intention to limit LGBTQ's right to freedom of association. Likewise, the sections did not specify the nature and extent of the limitation of the freedom of association, if any.[23]

Frank Mugisha and Others intended to register an organisation to champion for the rights of LGBTQ. There was no correlation whatsoever with the offenses articulated under section 145 of the Penal Code. It has already been pointed out

[23] Ibid (n6), 62-64.

that the power of the Registrar to reject a name on the basis of its undesirability is wide and can be used arbitrarily; as can be seen in the instant case. The Registrar in declining to reserve a name was not pursuing any legitimate aim such as national security or public safety, the prevention of disorder or crime, the protection of health and morals and the protection of the rights and freedom of others.

Other jurisdictions have also considered the right to freedom of association of LGBTQ persons. In *Gay Alliance of Students vs. Mathews*,[24] the Court held that the University's refusal to register the Alliance hindered its efforts to recruit the new members and denied to the Alliance the enjoyment of the University's services, which other registered student organisations was afforded, thereby violating their freedom of association. Furthermore, the European Court of Human Rights in *Zhdanov and Others vs. Russia,*[25]found that the Russian courts' decisions refusing registration had interfered with the freedom of association of the Applicant organisations and their founders or presidents, the individual applicants. The Court was not convinced that refusing to register the organisations had pursued the legitimate aims of protecting morals, national security and public safety, and the rights and freedoms of others. The only legitimate aim put forward by the authorities for the interference, which the Court assumed to be relevant in the circumstances, was the prevention of hatred and enmity, which could lead to disorder. In particular, the authorities believed that the majority of Russians disapproved of homosexuality and that therefore the Applicants could become the victims of aggression.

In the *People v. Siyah Pembe Üçgen Izmir Association ("Black Pink Triangle")*,[26] the Court observed that it was not possible to characterise as immoral the fact that someone had a particular involuntary sexual orientation or the use of words such as lesbian, gay, bisexual, travesty or transsexual nor was being gay,

---

24 United States Court of Appeal [4th Cir. 1976)
25 Application No. 12200/08, 35949/11 and 58282/12.
26 Izmir Court of First Instance No. 6, Turkey.

lesbian, travesty or transsexual prohibited under national law, therefore the use of such terms in Black Pink Triangle's statute could not be considered immoral or contrary to law. The Court also reasoned that, to characterise an association's aims as immoral, it had to be shown that those aims were against strictly determined morals that are accepted by the whole society. The general aim of the Black Pink Triangle was to strengthen solidarity among LGBT persons, cultivate a freer environment in society, and end discrimination against LBGT individuals. In declining to dissolve the association and affirming that lesbian, gay, bisexual, travesty, and transsexual individuals have the same rights as everyone else to form an association, the court noted that Turkish laws did not prevent LGBT persons from forming an association.

Closer to home, within the African continent, the Court of Appeal of Botswana in case of the *Attorney General of Botswana v. Thuto Rammoge and 19 Others,*[27] grappled with a similar question. The case concerned the constitutionality of the refusal by Botswana's Department of Civil and National Registration to register a civil society group, Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) which had sought to register as a society under Botswana's Societies Act. The refusal to register LEGABIBO was on the basis that same-sex conduct was at the time criminalised by sections 164 and 167 of the Penal Code of Botswana. The Court held that the right to freedom of assembly and association protected the rights of Lesbians, Gays, Bisexuals and their supporters to register a society to promote the rights of the members of the grouping and to lobby for legal reform. Significantly, the Court noted that even though Botswana's Penal Code then prohibited same-sex sexual acts, that did not extend to preventing gay and lesbian individuals from associating with one another.

It should therefore be pointed out that the Registrar under the Companies Act is a public officer who is mandated by the Constitution to uphold national values and principles of governance such as human dignity, equity, social justice,

---

27 Civil Appeal No. 128 of 2014.

inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised. It is in that spirit that the Constitution provides that the rights and freedoms of the individual and groups enshrined therein shall be respected, upheld and promoted by all organs and agencies of government and by all persons.[28] The freedom of association is vital to the functioning of any democratic society as well as an essential prerequisite enjoyment of other fundamental rights and freedoms.

A comparison of the highlighted cases from other jurisdictions and the SMUG case shows no stark differences. The Court of Appeal's approach in determining whether the Registrar could decline to register a name was narrow. The question before the learned justices was not whether the Registrar had the power to decline to reserve the name but rather that in the exercise of that power, they acted arbitrarily and unlawfully. The court, with all due respect resolved an issue not put before it. Clearly, the appellants were aware of the power to reserve the name as is conferred by the Act. They sought to examine the propriety of the exercise of that power.

As the above discussion reveals, the Registrar was duty bound to recognize that the freedom to associate is inherent in everyone irrespective of whether the views they are seeking to promote are popular or not. It cannot be legal, let alone constitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the Applicants. The refusal by the Registrar to register the name of the Appellants was not only an improper exercise of discretion, it was also unreasonable and justified. The Court of Appeal should have overturned the decision of the High Court. What section 145 of the Penal Code criminalises is sexual acts (carnal knowledge); had the Appellants engaged in such sexual acts as prohibited by the section, then perhaps the Registrar could have been justified in declining to register the name. What was done in this instance, in the opinion of the author, was retrogressive,

[28] Article 20(1) Constitution of Uganda 1995.

and clearly unconstitutional; the Appellants were convicted before they contravened the law.

5.0 DEVELOPMENTS AFTER THE SMUG CASE

At the time of writing this paper, Uganda's Constitutional Court rendered its judgment regarding the constitutionality of the Anti-Homosexuality Act and found it to be constitutional. The Act essentially renders the right of the LGBTQ community to associate nugatory. The Act criminalises the *"promotion"* of homosexuality and provides for a punishment of up to 20 years imprisonment.[29] The law criminalises the advertising, publication, printing, broadcasting of any material promoting or encouraging homosexuality.[30] Whereas it is beyond the scope of this paper to offer an insightful critic of this decision, it remains to be said that the said decision is a legal restraint placed upon the homosexual community to organise and associate with one another in a bid to raise their voices and enjoy the other rights and freedoms as enshrined in the constitution and other human rights instruments.

Further exploration of the challenges faced by the LGBTQIA+ community reveals that the marginalisation of the LGBTQIA+ community in Uganda is not only a legal issue but also a deeply cultural and religious one. There is no gainsaying the fact that religion plays a major role in the way of life of most Ugandans. Religion influences the public discourse on sexuality in general and on views regarding homosexuality. It is indeed trite that Ugandans are notoriously religious. This religious influence could have contributed to the nature of the decision of the High Court, the Court of Appeal as well as that of the Registrar of URSB.

---

29 Section 11 (2)(a) of the Act in particular states; *a person promotes homosexuality where they encourage or persuade another person to perform a sexual act or do any other act that constitutes an offense under the Act.*

30 Ibid.

Arimoro notes that there is no universally accepted definition of the term 'religion.'[31] For simplicity, we can define it as belief in deities. Religions in Uganda and globally preach concepts such as eternal life, immortal battles of good versus evil, as well as, a devotion to that which is considered divine. Religions in fact involve mundane aspects of everyday human behaviour, and activities such as sexual behaviour. From the foregoing, it can be inferred that is why LGBTQIA+ activities are criminalised; they are reduced to mere sexual activity which is against religious beliefs that are held dear by many Ugandans.

The main religions in Uganda include the Abrahamic faiths (Christianity and Islam) and African traditional beliefs. Whereas African traditional beliefs have experienced decline in their practice over the years, the Abrahamic faiths influence the law-making process. Christians refer to several Biblical passages which include Noah and Ham;[32] Sodom and Gomorrah;[33] Levitical laws also condemn same-sex relationships such as Leviticus 18:22 which states that: *"Do not have sexual relations with a man as one does with a woman; that is detestable".* In the New Testament, 1 Corinthians 6:9–10 states:

> "*…Or do you not know that wrong doers will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral…nor men who have sex with men [emphasis mine] … will inherit the kingdom of God."*

1 Timothy 1:9-10 also says;

> "*We also know that the law is made not for the righteous but for law breakers…for the sexually immoral, for those practicing homosexuality…"* [emphasis mine].

The foregoing verses indicate the strong intolerance for homosexuality.

It is therefore difficult to foresee a situation where lawmakers will accept a change of the law as far as the criminalisation of homosexual behaviour is concerned. Politicians, particularly the Members of Parliament, fear that they

---

31 Ibid (n 7).
32 Genesis 9:20–27 of the Bible.
33 Genesis 19:1–11 of the Bible.

will lose the support of the electorate if they decide against the wishes of the people. Arimoro therefore concludes that the rights of sexual minorities continue to be sacrificed on the altar of religious beliefs.[34] Uganda goes further to declare homosexuality unconstitutional.[35] Ironically, Uganda holds itself out as a secular state.

Article 7 of the 1995 Constitution of Uganda unequivocally states that Uganda shall not adopt a State religion. Clearly, the framers of the constitution entrenched the position that the adoption of a state religion would be unconstitutional. It should follow as well that given the secular nature of Uganda, religion should not form the basis of the criminalisation of an act or omission especially if the prohibition of the act or omission violates the fundamental rights of citizens even if they happen to be a minority.

Consequently, the theory that has developed in Uganda's social circles is that homosexuality is un-African. For example, a Ugandan tabloid (Rolling Stone) published the names, addresses and photographs of alleged homosexuals under the banner 'Hang Them'. This led to the killing of several alleged homosexuals including David Kato, a Ugandan gay-rights activist who was bludgeoned to death in his home in 2011.[36]

Therefore, the court's decision to deny registration to SMUG citing the promotion of illegal activities, perpetuates institutional homophobia and undermines the constitutional guarantee of equality and human rights. By upholding discriminatory laws and policies, the judiciary reinforces a system that denies LGBTQIA+ individuals their fundamental human rights, including the right to

---

34 Ibid (n7), 387.

35 Article 31(2)(a) of the Constitution of Uganda provides that marriage between persons of the same sex is prohibited.

36 This culminated into the tabloid being sued in *Kasha Jacqueline Vs Rolling Stone Limited & another,* Misc. Cause 163 of 2010 wherein the High Court of Uganda ruled that Rolling Stone threatened the Applicants' rights to human dignity and protection from inhuman treatment, as well as their right to privacy of the person and home. The Court issued the injunction sought by the applicants, restraining the Respondents from publishing more information about the identities and addresses of Ugandan gays and lesbians.

associate, assemble, and express themselves freely. This not only perpetuates a culture of fear and marginalisation, but also contributes to a broader societal attitude that views LGBTQIA+ individuals as second-class citizens. Such decisions have far-reaching consequences, emboldening further discrimination and violence against the LGBTQIA community.

6.0 CONCLUSION AND RECOMMENDATIONS

The right to freedom of association is a fundamental human right that allows individuals to join groups, organisations and unions. It enables one to associate with those with whom he or she shares the same ideas, interests, beliefs and way of life. This right inheres in everyone irrespective of sexual orientation. The powers conferred upon the registrar of companies under the Companies Act though discretionary must not be exercised arbitrarily. This Article finds that the approach adopted by the Court of Appeal in Uganda in dealing with refusal by the registrar to register the Appellants' name was very restrictive and escapist when compared to that of our neighbour, Kenya. It argues that the Court was duty bound to address the elephant in the room and find whether the registrar had acted arbitrarily in refusing the name. The Appellants never argued that the registrar did not have the power to refuse reservation of the name. Throughout their submissions, they maintained that the power to refuse the reservation was exercised arbitrarily and had no rational basis.

The realisation of human rights for the LGBTQIA community remains an elusive dream when religion, culture, and discriminatory laws converge. This toxic mix perpetuates a culture of intolerance, further marginalising an already vulnerable group. It is imperative that the courts, as guardians of the constitution, construe laws in a manner that brings them into conformity with the guarantees of equality and expression. By doing so, they can help dismantle the institutional barriers that prevent the LGBTQIA community from enjoying their fundamental human rights. The judiciary must rise to the challenge, upholding the

constitution's promise of equality and justice for all, regardless of sexual orientation or gender identity.

The Article was completed at the time the Constitutional Court of Uganda had declared the Anti-Homosexuality Act to be constitutional and concedes that the right to associate of the LGBTQ community is going to suffer a larger setback. It nevertheless intended to contribute to the continuing struggle by the LGBTQ community to be recognised in their various capacities and enjoy the various rights as are spelt out in the Constitution and international human rights law.

Public interest litigation, has been utilised in the context of enforcement of other rights, such as health, women's rights among others, and it has provided welcome results. Its utilisation in enforcing the rights of the LGBTQIA+ community is bound to deliver positive results in the long run. Strategically litigating and advocating for rights such as association, will elevate the LGBTQIA+ community to in Uganda to the same level of constitutional equality and dignity like the rest of the citizens.

LIST OF REFERENCES

Arimoro, A.E. (2021) 'Interrogating the criminalisation of same-sex sexual activity: A Study of Commonwealth Africa', Liverpool Law Review, 42(3), pp. 379–399. doi:10.1007/s10991-021-09280-5.

Constitution of Kenya (2010) Parliament of Kenya, available at: <http://www.parliament.go.ke/the-senate/constitution-2010> [Accessed on 5th October 2024]

The Observer -Uganda, Dr. Kabumba B. (2024) Uganda's Dred Scott v Sandford – part 4: Fox Odoi and others v Attorney General, and Academic Freedom in Uganda, available at: <https://observer.ug/index.php/viewpoint/81528-uganda-s-dred-scott-v-sandford-part-4-fox-odoi-and-others-v-attorney-general-and-academic-freedom-in-uganda> [Accessed on 6th June 2024]

Dred Scott v. Sandford, 60 U.S. 393 (1856) (no date) Justia Law, available at <https://supreme.justia.com/cases/federal/us/60/393/> [Accessed on 7th June 2024]

Gitari v. Non-Governmental Organisations Co-ordination Board (2017) Global Freedom of Expression, available at <https://globalfreedomofexpression.columbia.edu/cases/gitari-v-non-governmental-organisations-co-ordination-board/> [Accessed on 7th June 2024]

Chapter Four, Legal analysis of the Hon. Fox Odoi-Oywelowo & 21 others case, available at <https://chapterfouruganda.org/resources/reports-analysis/legal-analysis-hon-fox-odoi-oywelowo-21-others-case> [Accessed on 2nd September 2024]

Penal code Kenya Law, available at <https://new.kenyalaw.org/akn/ke/act/1930/10/eng@2023-12-11> [Accessed on 14th July 2024]

Selena Gomez – the heart wants what it wants (no date) Genius, available at <https://genius.com/Selena-gomez-the-heart-wants-what-it-wants-lyrics> [Accessed on 6th June 2024]

Siracusa principles on the limitation and derogation, available at <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> [Accessed on 5th July 2024]

The Wolfenden Report of the committee on homosexual offenses and prostitution image large: UK government, available at <https://archive.org/details/the-wolfenden-report-report-of-the-committee-on-homosexual-offenses-and-prostitution-image-large> [Accessed on 3rd June 2024]

Human Rights Watch, Ugandan Appeals Court shutters LGBT rights group (2024), available at <https://www.hrw.org/news/2024/03/21/ugandan-appeals-court-shutters-lgbt-rights-group> [Accessed on 10th June 2024]