

The treatment of homosexuality in the Malawian justice system: *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*

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Summary

On 26 December 2009, two male Malawian nationals were arrested and charged with participating in a pre-nuptial engagement ceremony while of the same sex. This article is a trial observation by the author using the observational methodology of the United Nations Office of the High Commission for Human Rights. The article seeks to present an independent and impartial factual account of the trial of Steven Monjeza and Tiwonge Chimbalanga and to document the reaction to the trial by members of civil society. The aim is to examine the disjuncture between Malawian criminal law and the protection of human rights afforded by Malawi's Constitution, resulting in procedural and legal errors in the trial and the conviction of the two men.

1 Legal status of homosexual practices in Malawi

The trial was the first of its kind on record in the Malawian justice system. The practice of homosexual acts is, accordingly to the Penal Code,¹ illegal in Malawi:²

A person who has carnal knowledge of any person against the order of nature, or ... permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.

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¹ Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi.

² Penal Code (n 1 above) sec 153.

Section 156 of the Penal Code further states that³

[a]ny male person, who, whether in public or private, commits any act of gross indecency with another male person, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.

Despite the unclear definition, what is certain is that homosexual acts are criminalised by Malawian law. In contrast, the Malawian Constitution,⁴ as revised in January 2004, contains a number of pertinent clauses prohibiting discrimination and protecting human rights. Section 20 reads as follows:

Discrimination of persons in any form is prohibited and all persons are, under any law guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property ... or other status.

Although this provision does not specifically outlaw discrimination on the grounds of sexual orientation,⁵ it does prohibit discrimination as a general principle by including at the end of the defined list of protected grounds the wording 'other status'. Other relevant constitutional clauses include section 22, which sets out 'the right of all men and women to marry and that no person over the age of 18 shall be prevented from entering into marriage'.

Further, section 44(1)(g) of the Constitution provides that '[t]here shall be no derogation, restrictions or limitations with regard to ... (g) the right to equality and recognition before the law'. Section 19(1) provides that '[t]he dignity of all persons shall be inviolable' and section 19(5) states that '[n]o person shall be subjected to medical or scientific experimentation without his or her consent'.

In addition, section 21 of the Malawian Constitution also affords the citizens of Malawi the right of privacy – 'Every person shall have the right to personal privacy' – and section 18 guarantees that '[e]very person has the right to personal liberty'.

As for international law, the African Charter on Human and Peoples' Rights (African Charter) was ratified by Malawi on 17 November 1989. The African Charter provides in article 1:

Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the

³ Penal Code sec 156.

⁴ Constitution of the Republic of Malawi (adopted 18 May 1995).

⁵ South Africa is the only country on the continent to legislate against discrimination on the grounds of sexual orientation. In 1998, parliament passed the Employment Equity Act. The law protects South Africans from labour discrimination on the basis of sexual orientation, among other categories. In 2000, similar protections were extended to public accommodations and services, with the commencement of the Promotion of Equality and Prevention of Unfair Discrimination Act.

Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2 states:⁶

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The African Commission on Human and Peoples' Rights (African Commission) has interpreted article 2 of the African Charter as ensuring 'equality of treatment for individuals irrespective of nationality, sex, race or ethnic origin, politics or other opinion, religion or belief ... or age or sexual orientation'.⁷ In addition, article 3 of the African Charter provides for 'every individual to be entitled to equal protection under the law'.⁸

Therefore, it can be seen that there are considerable contradictions within the domestic law of Malawi about the status of homosexuality and homosexual practices. Although the law criminalises such behaviour, the Constitution and the African Charter provide significant non-discrimination clauses, which in the case of the African Charter have been interpreted to include protection from discrimination on the grounds of sexual orientation.⁹

2 Facts of *R v Monjeza and Chimbalanga*

2.1 Arrest and charge

On 26 December 2009, Steven Monjeza and Tiwonge Chimbalanga held an engagement ceremony in a lodge in Blantyre. *The Weekend* newspaper ran an article reporting that the two men were engaged.¹⁰ National television cameras were present at the ceremony; it remains unclear why the television crews were aware of the ceremony.¹¹ The police were alerted to the engagement and, consequently, on 27 December 2009 Steven Monjeza and Tiwonge Chimbalanga were arrested. After their arrest, the suspects were kept in police custody and then charged with three counts: first, carnal knowledge against the

⁶ Taken from the African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5 (entered into force 21 October 1986 and ratified by Malawi on 17 November 1989) art 2.

⁷ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

⁸ Art 3 African Charter.

⁹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 7 above).

¹⁰ *The Weekend Nation*, 27 December 2009.

¹¹ The actual act grounding the basis of the charges was a traditional ceremonial engagement called *chinkhoswe*.

order of nature;¹² second, consenting to have sexual acts like wife and husband;¹³ and third, indecent practices in the alternative.

2.2 The trial

The case was heard in the Blantyre Magistrate's Court. The Chief Resident Magistrate in Blantyre, Nyakwawa Usiwa-Usiwa, presided. Mr Mauya Msukwa represented the defendants and police prosecutor, Barbra Mchenga, represented the state. The defendants first appeared on 11 January 2010. The state requested permission for a two-week extension to complete its investigation, but this was refused. An application for bail was brought by the defendants through their lawyer, Mr Msukwa, who acted *pro bono*. The application was refused on the grounds of the 'safety of the accused, as the case had garnered a large amount of public attention'.¹⁴

On 6 January 2010, the men were taken to Queen Elizabeth Central Hospital, where Chimbanga was forced to undergo an involuntary medical examination, including an anal examination, in order to confirm the charges of sodomy.

On 14 January 2010, the trial commenced and three witnesses were called by the state, namely, the owner of the lodge where the ceremony was said to have taken place and two workers at the lodge. These witnesses gave evidence that they had made Tiwonge Chimbanga undress after the ceremony so that they could ascertain whether he was male or female, as Tiwonge claimed to be female. The accused were jeered by the members of the public watching the trial while this evidence was being led.

The following day the trial continued. As Steven Monjeza had fallen ill the defence lawyer requested an adjournment which was not opposed by the prosecutor. The magistrate required the accused to come to court that afternoon to show proof of being ill. Subsequently, Steven Monjeza reported that, while in detention, he had been given access to medical care and had been diagnosed with malaria.

On 25 January 2010 the case was resumed. However, a constitutional application was filed in the morning by the defendants' lawyer at the High Court. The application was for permission to have the case certified constitutional in nature on the grounds that it involved a matter of interpretation of the Constitution and to be heard before the Constitutional Court. In Malawi, the certification of a case as suitable for hearing in the Constitutional Court is determined by the Chief Justice.

Sections 9(2) and (3) of the Courts Act (Cap 3:02) provide as follows:

- (2) Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to or concerns the interpretation

¹² Penal Code (n 1 above) sec 153.

¹³ Penal Code (n 1 above) sec 156.

¹⁴ Magistrate Usiwa-Usiwa, Blantyre Magistrate's Court, 11 January 2010.

or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

- (3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

Rule 3(1)(b) of the Court (High Court) (Procedure on Interpretation or Application of the Constitution) Rules 2008 provides:

The Chief Justice shall certify proceedings under section 9(3) of the Act if the proceedings involve ... the determination of the constitutionality of an Act of Parliament or part thereof.

In addition, a new bail application was made to the High Court. Judgment was reserved on the application, and the hearing did not proceed in the Magistrate's Court as the defendants' counsel, Mr Msukwa, was not present due to his attendance at the High Court. Upon entering the court, the detainees were again jeered by the crowd.

As well, the defence entered an application for the judicial review of the decision to arrest and prosecute the pair on the basis that there was no evidence of any criminal act, and that the arrest was a discriminatory act and was therefore unconstitutional. The first application was refused on the basis that the constitutional certification still had to be decided and thus there was no jurisdiction to hear a judicial review at that stage. The application for 'certification' as suitable for a hearing by the Constitutional Court was rejected on 29 January 2010. At that stage the defence renewed their application for judicial review, but this was again refused. The pending application for bail in the High Court was refused on 28 January 2010. In giving judgment, Justice Roland Mbvundula said that he was concerned for the applicants' safety.¹⁵

The case in the Magistrate's Court was resumed on 27 January 2010 when the Court heard evidence from two further witnesses. The first was a woman who was part of the same church group as the two detainees and who knew Chimbalanga as a woman. Chimbalanga attended Court dressed as a woman. Evidence was given that Chimbalanga used to do what the women of the village did, that is, go to social events together and sleep together as women. It was only when the news broke and Chimbalanga was challenged that it became clear that he was in fact, in biological terms, male.

Further evidence was heard from the photographer hired to record the engagement party. He told the Court that he had been asked to be the marriage advocate by the pair. This was seen as odd as he did not know them and normally one would expect this role to be filled by a close relative, often an uncle. Photographs of the ceremony were produced as exhibits before the Court. The photographer was asked to identify the defendants in the dock. There were no issues of identity in the case.

¹⁵ Justice Roland Mbvundula, Blantyre High Court, 28 January 2010.

In addition, Dr Makanani, a gynecologist working in Queen Elizabeth Central Hospital, Blantyre, gave expert evidence that he had been asked to investigate two matters; firstly, whether Chimbanga was male and, secondly, whether the pair had had sexual intercourse. The doctor confirmed that he believed Chimbanga to be biologically male. He also testified that he was unable to give an opinion on the second matter as it was outside of his expertise.

The defence objected to his evidence as having been collected through means of torture¹⁶ in that the accused had not consented to the examination and thus the pair had been forced to undergo a medical examination, and that the examination was thus unconstitutional. The state argued that the examination was necessary due to the nature of the case. The Court did not allow the objection, finding that the accused had not been tortured. The Court ruled that evidence should be heard without giving any further reasons.

An application was made by the state to bring a further two witnesses, a doctor specialising in psychiatry, and the investigating police officer. The application was allowed as it was deemed important in the interests of justice to hear the witnesses. This had the effect of prolonging the trial and delaying the hearing, which was again adjourned until 3 February 2010. At that date the hearing was adjourned again due to a change in the rules concerning the licence to practise of the defence counsel. When the trial was resumed, Tiwonge asked to be heard by the Court. His request was granted, whereupon he made a renewed application for bail, explaining that conditions at the prison were deteriorating and that no one was coming to visit him and that he was suffering. He said: 'We cannot run away, we are Malawians, no one can harm us, we are safe.'¹⁷ The Court refused the request on the basis that the High Court had already decided the matter.

On 5 February 2010, the last of the state evidence was heard, namely that of the investigating officer. The prosecution closed their case, after which counsel for the defence made a submission that there was no case to answer. On 22 March 2010, the Court dismissed the submission that there was no case to answer on the basis that '[o]n a balance of probability the state has established a *prima facie* case against the two as charged',¹⁸ and thus there was a charge to be answered. The date of 3 April 2010 was set for the Court to reconvene for the full trial. The Court actually reconvened on 6 April 2010 when the defence was able to make submissions in support of their case before the Court retired to consider its judgment.

¹⁶ The Malawian Constitution (as amended) in art 19(5) guarantees that 'no person shall be subjected to medical or scientific experimentation without his or her consent'.

¹⁷ Tiwonge Chimbanga, Blantyre Magistrate's Court, 3 February 2010.

¹⁸ Reuters <http://www.news24.com/Africa/News/Malawi-gay-couple-has-a-case-20100322> (accessed 30 September 2010).

On 18 May 2010 the Court handed down its judgment, finding the defendants guilty on all three charges. The prosecution asked the magistrate to mete out a harsh punishment because the couple had left a 'scar on morality' in Malawi. 'They showed no remorse, they showed no regret of their action ... they seemed to have been proud of their action.' The defence argued that as they were first offenders, they should not be given a custodial sentence. This was a technical offence and the defence was convinced the convicts had already paid for the offence.¹⁹

On 20 May 2010, the Court reconvened and the two defendants were sentenced to 14 years' hard labour, the maximum sentence allowed. Nyakwawa Usiwa-Usiwa said: 'I will give you a scaring sentence so that the public be protected from people like you, so that we are not tempted to emulate this horrendous example.' He continued: 'To me this case counts as the worst of its kind and carries a sense of shock against the morals of Malawi. Let posterity judge this judgment.'²⁰ As the accused left the courthouse, onlookers shouted 'You got what you deserve!' 'Fourteen years is not enough, they should get 50!' and 'You deserve death!'

On 29 May 2010, the accused were pardoned after President Bingu wa Mutharika met Ban Ki-moon, the United Nations (UN) Secretary-General. However, when announcing the pardon, President Bingu stated: 'These boys committed a crime against our culture, our religion and our laws.'²¹ He said: 'I have done this on humanitarian grounds, but this does not mean that I support this.'²² He added: 'We do not condone marriages of this nature. It is unheard of in Malawi and it is illegal.'²³

After the two accused were released, it emerged that they had separated and that one of the men now allegedly had a female partner. Monjeza, who faced hostility from his family about his relationship with Chimbanga, said that he no longer wanted to be associated with homosexuality. 'I have had enough,' he said. 'I was forced into the whole drama and I regret the whole episode. I want to live a normal life ... not a life where I would be watched by everyone, booed and teased'.²⁴

The accused were held at Chichiri Prison, Blantyre, and reported that they were able to have access to their lawyers when they needed to.²⁵ However, they reported that they had been treated violently by the police when being questioned after arrest and refused police bail, and

¹⁹ Barbra Mchenga and Mauya Msukwa, respectively, Blantyre Magistrate's Court, 18 May 2010.

²⁰ Magistrate Nyakwawa Usiwa Usiwa, Blantyre Magistrate's Court, 20 May 2010.

²¹ President Bingu wa Mutharika, speaking on 29 May 2010 <http://www.malawivoice.com/national-news/bingu-pardons-the-gay-couple> (accessed 30 September 2010).

²² President Bingu wa Mutharika, speaking on 29 May 2010, Reuters <http://www.alertnet.org/thenews/newsdesk/LDE64S0A4.htm> (accessed 30 September 2010).

²³ n 21 above.

²⁴ <http://www.guardian.co.uk/world/2010/jun/08/malawi-steven-monjeza-tiwonge-chimbanga> (accessed 30 September 2010).

²⁵ Reported to Victor Mhango of the Centre for Human Rights Education Assistance and Advice (CHREAA), in an interview at Chichiri Prison, 10 February 2010.

consequently had been transferred to prison.²⁶ It was also reported by the defence that the prosecution had coached their witnesses and the defence had not been allowed access to state witnesses as would be the normal pre-trial procedure.²⁷ This prevented the defence from being able to properly cross-examine and to properly know the state's case against the defendants prior to the trial. However, this matter was not raised before the Court.

3 Debate among members of civil society

The trial fostered considerable debate in Malawi as to the position of homosexual persons within society. The reaction of civil society was played out in the national media. In addition to reporting on the trial, the national press ran numerous opinion pieces and articles reviewing and debating the acceptability of homosexuality. Examples include an article published in *The Nation* on 6 January 2010, which reported on an interview with a senior sociology lecturer from Chancellor College, who argued that Malawians should know that homosexuals are not different from any other people and should have their human rights respected.²⁸ On 8 January 2010 *The Nation* reported that Amnesty International had condemned the detention of the Malawian couple²⁹ and in reaction a government spokesperson responded by stating that 'people of same sex marrying or being involved in sexual exploits is not normal. It is absolutely unacceptable. The Malawi society does not condone this type of behaviour.'³⁰

A further opinion was penned by a legislator under a pseudonym that condemns acts of homosexuality as 'alien cultures from the West', and that 'the Western world has a tendency of imposing its culture upon Africa'.³¹ The article continued: 'God never designed marriage to take that form [same sex] but to be between a man and a woman' and that the pressure to legalise homosexuality 'is coming mostly from the West'.³²

By the end of January 2010, the debate concerning the case culminated in notices appearing on lamp posts in Blantyre city centre stating 'Gay rights are human rights!' By 1 February 2010, these notices had been taken down and the man who was alleged to have put them up, a

²⁶ Reported to the International Secretariat of the World Organisation Against Torture (OMCT); see report at <http://www.omct.org/index.php?id=APP&lang=eng&actualPageNumber=1&articleSet=Appeal&articleId=9190> (accessed 22 September 2010).

²⁷ Interview with Mr Mauya Msukwa, counsel for the defence, 15 February 2010.

²⁸ *The Nation* 6 January 2010.

²⁹ Amnesty International http://www.amnesty.org.uk/actions_details.asp?ActionID=682, as reported in *The Nation* 13 January 2010.

³⁰ *The Nation* 13 January 2010.

³¹ As above.

³² As above.

21 year-old called Peter Sawali, was arrested for a 'breach of the peace'. His arrest took place after a 'tip-off' from the public. He was reported to have said on his arrest that he was fighting for gay rights.³³

The debate within the press had a significant impact on the trial. The most obvious was that the courtroom was full of journalists. The physical presence of the media made everyone intensely aware that each new development was being observed in detail, while openly-hostile sentiments and opinions publicly expressed provided the background against which the trial was played out. This included President Bingu expressing his opinion against homosexuality³⁴ the day before Chimalanga and Monjeza were due to be sentenced. Such fierce and high-profile opposition to homosexuality – both politically and publically articulated – created pressure upon the court to convict the two men.

4 Conclusion

The criminalisation of homosexual acts in Malawi reflects a general trend in Africa where 38 of the continent's 53 states criminalize homosexual acts.³⁵ The prosecution of Chimalanga and Monjeza highlighted the tension within Malawian society regarding homosexual practices. The trial of Chimalanga and Monjeza illustrates that it remains unclear what the position of the law of Malawi is regarding homosexuality. There is an obvious tension between the Penal Code, on the one hand, and the Constitution, which protects citizens from discrimination, on the other.

The public reaction to the trial illustrated that there is overwhelming hostility to those who are openly gay in Malawi, and the arbitrary implementation of the law itself during the trial reflects the strength of this feeling. The case itself was weak; the act upon which the charges were based was the holding of a pre-nuptial engagement ceremony which does not fit easily within the definition of carnal practices as set out under the Penal Code. Although the legal boundaries of the definition of carnal practices are untested, there was never any evidence that the two detainees had had sexual relations. Thus, no charges of sodomy should ever have been proven on the evidence before the Court.

The procedure followed during the trial was arguably also unconstitutional.³⁶ The defence counsel was not afforded the opportunity to speak with the prosecution witnesses prior to the trial; medical evidence obtained without consent was admitted; and the detainees complained about being beaten by police (although not in open

³³ *The Nation* 2 February 2010.

³⁴ http://www.southernafrialitigationcentre.org/news/item/Malawi_Malawi_President_slams_homosexuality (accessed 30 September 2010).

³⁵ See information on website of International Lesbian and Gay Association, <http://www.ilga.org> (accessed 23 September 2010).

³⁶ Sec 42 of the Malawian Constitution guarantees the right to a fair trial.

court). These factors led to the unsafe convictions of the two accused which could have been appealed had a pardon not been granted.

The trial of Chimbalanga and Monjeza and the debate it sparked shed light on the numerous political and social forces which present significant barriers to the acceptance of homosexuality in Malawi. In particular, the reporting of the case indicated that religion,³⁷ identity³⁸ and history³⁹ played prominent roles in rejecting homosexuality. If Malawi is to fulfil the human rights standards it has ratified and codified in its Constitution it will need to amend its Penal Code and to continue to address issues regarding the acceptance homosexuality in public life. It is unfortunate that the constitutionality of the relevant provisions was not addressed due to the failure of the Chief Justice to certify that the matter involved a 'determination of the constitutionality of an Act of Parliament or a part thereof'.

³⁷ 80% of the population of Malawi are Christian; US Department of State, Malawi, International Religious Freedom Report 2007, Bureau of Democracy, Human Rights and Labour, <http://www.state.gov/g/drl/rls/irf/2007/90107.htm> (accessed 30 September 2010). After the judgment, Malawian cleric Canaan Phiri of the Malawi Council of Churches hailed the court for 'upholding the law because homosexuality is a sin'. He added: 'The judgment was within the law ... Malawi has followed the rule of law because having a sexual orientation is not a sin, but practising is sin.'

³⁸ The use of language surrounding the trial and the public reaction suggested that to be homosexual was considered to be 'un-African', and a Western practice. The depth of this feeling was reflected in the comments of President Bingu when pardoning the accused: 'These boys committed a crime against our culture, our religion and our laws' and this can be seen again in the language used at the sentencing of the accused, where the court, giving judgment, stated that this was not seen as simply a breach of the Penal Code, but termed it as a 'crime against Malawi's culture'.

³⁹ The press reporting of this case clearly illustrated that some within Malawian society perceived homosexuality as a Western cultural concept, and the imposition of its acceptance was seen to be an external cultural imposition. The media reporting of the case included considerable interest in the pressure and condemnation the arrest and sentence from the international society and Western nations. Eg, on 1 February 2010, it was reported in *The Nation* that 35 NGOs from African countries, under the banner of the Aids and Rights Alliance for Southern Africa, called for the repeal of secs 153 and 156 of the Penal Code, stating that the trial was undermining the fight against the spread of HIV. The press release from the Alliance quoted a study published in *Lancet* in 2009 that found that 'political and social hostility were endemic against men having sex with men' and that 'the response to (gay) male sex needed rapid and sustained national and international commitment to ... action to reduce structural and social barriers to make these accessible'; <http://www.southernafricalitigationcentre.org/news/Malawi/page/2> (accessed 30 September 2010). It was reported in *The Nation* on 23 March 2010, that the United States State Department commented that it was 'a step backwards in the protection of human rights'. In addition, press statements on homosexuality reported it as being an 'unwelcome influence from the West'; *The Nation* 23 March 2010.