

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 309 OF 2016

CENTER FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT

(CEHURD) ::: APPLICANT

VERSUS

ATTORNEY GENERAL ::: RESPONDENT

AND

FAMILY LIFE NETWORK ::: INTERESTED PARTY

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

1. The Applicant brought this judicial review application under Article 50 (2) of the Constitution of the Republic of Uganda, 1995, Section 98 of the Civil Procedure Rules and Order 52 rule 1 of the Civil Procedure Rules seeking:
 - i. A declaration that the inordinate delay and omission by the Ministry of Education and Sports (herein after referred to as the Ministry) to issue a policy on comprehensive sexuality education respectively violates the right to access information and education contrary to articles 41, 30, 34(2) of the Constitution, Section 4(1) (c), (g) and (i) of the Children (Amendment) Act, 2016 and Section 4(1)(2) of the Education (Pre-primary, primary and post-primary) Act, 2008 (herein after referred to as the Education Act).
 - ii. An order quashing the ban on comprehensive sexuality education materials in schools in the resolution of Parliament made on the 17th day of August 2016.
 - iii. An order that the ministry comes up with a policy on comprehensive sexuality education within one month after this order is made.
2. Mr. Kabanda David of M/s Dalumba Advocates represented the Applicant. The Respondent was represented by Ms. Susan Akello Apita from the Attorney General's Chambers and Mr. Arthur Mpeirwe of Ms. Mpeirwe & Co. Advocates represented the interested party. The Attorney General is sued in his representative capacity under section 10 of the Government Proceedings Act (Cap. 77) for the actions of the Ministry's officials.
3. The application is supported by the affidavit of Ms. Asasira Joy, the Program Manager of the Applicant. The grounds for the application are briefly that the inordinate delay by the Ministry to issue a policy on comprehensive sexuality education has caused violation of fundamental human rights and freedoms enshrined in the Constitution and guaranteed under international law, the open ban on comprehensive sexuality education materials with no

alternatives leaves children's and young people's rights to life and wellbeing threatened as they are vulnerable to abusive relationships, health risks associated with unintended pregnancies, exposure to sexually transmitted diseases including HIV/AIDS and denies them the right to a proper transition to adulthood and that it is in public interest that a policy on comprehensive sexuality education be immediately issued.

4. The application was opposed by both the Respondent and the interested party. Mr. Ismael Mulindwa, the acting Commissioner in charge of private schools and institutions and health/HIV unit Coordinator at the Ministry swore the affidavit in reply on behalf of the Respondent. In his affidavit, Mr. Mulindwa deponed that the government recognizes sexuality education not comprehensive sexuality education. Further, that the Ministry banned all unacceptable programmes and materials on comprehensive sexuality education for a good reason, considering the issues surrounding it and that the content taught in some of the Ugandan schools raised concerns of liberalization of sex among children and promotion of illicit sexual conduct such as homosexuality and masturbation.
5. Further that on 17th September 2016, Parliament issued an open ban in its resolution on comprehensive sexuality education to save Ugandan children after discovering that the unacceptable programmes, materials and content implemented by partners were illegally used in a number of schools. He also averred that the ban does not have any effect on the right to education, safeguards the rights of parents to educate their children under Article 34 of the Constitution, the ban by Parliament was a timely intervention to halt the Ugandan children from being introduced to unacceptable liberal sex. Parliament instructed the Ministry to come up with the national framework on sexuality education that is age-appropriate, culturally and religiously sensitive to guide the delivery of sexuality education programmes, materials development and content without distortion and that the application is misconceived, vexatious and the same should be dismissed with costs.
6. Mr. Stephen Langa, the Founder and Executive Director of the interested party swore the affidavit in reply on its behalf. He averred that he has vast experience in matters of child care, child rights advocacy and child protection, comprehensive sexuality education is

destructive to children because they are introduced to concepts of sexual and reproductive health rights yet the terms 'sexual and reproductive health rights' encompass almost anything including Lesbian, Gay, Bisexual and Transgender (LGBT) rights, abortion, explicit and graphic pornographic images to children as young as five years. Further that Parliament issued the ban to save Ugandan children after being alerted through the parents' petition of 17th June, 2016 after discovering that the curriculum that was illegally used in a number of schools under the program, "The World Starts With Me" by SchoolNet introduced children to erotic sex, homosexuality as well as masturbation among other illicit sexual activities. Mr. Langa also averred that the ban on comprehensive sexuality education has had a positive impact because it has rescued Ugandan children from being indoctrinated into sexual liberalism, in which they are made to think that they have sexual rights which mean the right to have sex with anyone or anything anywhere and at any time. He also averred that the ban does not have any effect on the right to education but instead safeguards the constitutional rights of parents to educate their children appropriately.

7. In rejoinder to Mr. Mulindwa's affidavit, Ms. Asasira deponed that the affidavit is speculative, argumentative, filled with hearsay and fatally defective. Further that there is no justification for a ban on comprehensive sexuality education in all of Uganda if the intention is to specifically stop the promotion of LGBT agenda and other illicit sexual conduct such as masturbation, contraception and abortion among children in Uganda. She also deponed that there is no clear indication if the ministry has any deliberate effort or any definitive end in sight in the process of developing, approving and implementing the policy on comprehensive sexuality education which has been under development for the past ten years.

Analysis

8. I have considered all the pleadings and submissions of the parties. The Applicant's case as I understand it, is built on two cornerstones; an inordinate delay by the ministry to issue a comprehensive sexuality education policy and the ban by parliament without alternatives for

the same. In effect, the Applicant is protesting the void that exists in respect of sexuality education for Uganda's young generation.

9. On the other hand, the Respondent's defence, as I fathom it, is that the government recognizes sexuality education not comprehensive sexuality education. Further, that the ministry banned all unacceptable programmes and materials on comprehensive sexuality education for a good reason, considering the issues surrounding it and that the contents taught in some of the Ugandan schools raised concerns of liberalization of sex among children and promotion of illicit sexual conduct such as homosexuality and masturbation. The interested party agrees with the Respondent to object, and makes many generally well sounding claims but with no demonstrable evidence to their proof.
10. It is instructive to unpack sexuality education if only to ensure that both the bar and bench are on the same page on this issue. The right to sexuality education has been confirmed by the United Nations Committee on the Rights of the Child which provides that, "Adolescents have the right to access adequate information essential for their health and development and for their ability to participate meaningfully in society. It is the obligation of States parties to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours. This should include information on the use and abuse, of tobacco, alcohol and other substances, safe and respectful social and sexual behaviours, diet and physical activity." (CRC/GC/2003/4, para 26). The same is recognised by the Committee on the Elimination of Discrimination against Women in General Recommendation No. 28 on the Core Obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. On its part, the Committee on Economic, Social and Cultural Rights interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to health-related education and information, including on sexual and reproductive health." (Committee on Economic, Social and Cultural Rights, General Comment No.14, para. 11.

11. The United Nations Convention on the Rights of Persons with Disabilities provides that States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. Accordingly, Article 25 stipulates that, "States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall, under Article 25 (a), "Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population based public health programmes."
12. Sexuality education is advocated for in the 1994 Programme of Action of the International Conference on Population and Development which in (paragraphs 4.29, 7.37, 7.41, 7.47) explicitly calls on governments to provide sexuality education to promote the well-being of adolescents and specifies key features of such education. It clarifies that such education should take place both in schools and at the community level, be age-appropriate, begin as early as possible, foster mature decision-making, and aim to advance gender equality. In addition, the Programme of Action urges governments and non-governmental organizations (NGOs) to ensure that such programmes address specific topics – including gender relations and equality, violence against adolescents, responsible sexual behaviour, contraception, family life, and STIs, HIV and AIDS prevention.
13. The significance of sexuality education has been underscored by the United Nations Special Rapporteur on the Right to Education in a 2010 report to the United Nations General Assembly devoted exclusively to this topic (see: A/65/162, 2010. Report of the United Nations Special Rapporteur on the right to education) and by the European Court of Human Rights in 2011 where four families had lodged a complaint because they opposed mandatory sexuality education in Germany. The Court stated that the neutral transmission of knowledge is a prerequisite for developing one's own moral standpoint and reflecting society's influences in a critical way. The Court ruled in favour of Germany (see: European Court of Human Rights, 2011).


14. In the revised edition of the 'International Technical Guidance on Sexuality Education' which was commissioned by the United Nations Educational, Scientific and Cultural Organization (UNESCO)¹ at page 15, comprehensive sexuality education (CSE) is defined as, "a curriculum-based process of teaching and learning about the cognitive, emotional, physical and social aspects of sexuality. It aims to equip children and young people with knowledge, skills, attitudes and values that will empower them to: realize their health, well-being and dignity; develop respectful social and sexual relationships; consider how their choices affect their own well-being and that of others; and, understand and ensure the protection of their rights throughout their lives."
15. Article 41 (1) of the Constitution stipulates that every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person while Article 41 (2) provides that Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information. Article 30 provides for the right to education for all citizens while Article 34 (2)) provides that a child is entitled to basic education which shall be the responsibility of the State and the parents of the child. Read together with the international law and jurisprudence on sexuality education and comprehensive sexuality education, articles 30, 34 (2) and 41 of the Constitution, in my considered view, would be violated if there existed a void in terms of the education needs of our nation's children. For avoidance of doubt, I am not arrogating myself the task of constitutional interpretation as that privileged duty is reserved for the Constitutional Court of Uganda under Article 137.
16. I have only been invited by way of the application before me, to consider whether an inordinate delay by the ministry to come up with a comprehensive policy on comprehensive sexuality education violates the stated provisions of the constitution and if this court finds in the affirmative, to order that the said policy be put in place.

¹ UNESCO (2018). 'International Technical Guidance on Sexuality Education' accessible via <https://www.unfpa.org/sites/default/files/pub-pdf/ITGSE.pdf> (accessed on 12 August 2020).

17. I have carefully considered the passionate arguments of the interested party which sought to fortify the position of the Respondent and find that they bend towards the substance of comprehensive sexuality education materials that parliament banned and the whole idea of comprehensive sexuality education for children in general. In effect, those arguments, with due respect, do not adequately answer the grievances of the applicant. The Applicant, as I understand its case, has no qualms with parliament and the ministry, in their wisdom, banning material it has considered unfit for consumption by the children of Uganda.
18. Uganda is party to the above international conventions which unequivocally require government to enact a policy that comprehensively provides for sexuality education. The inclusion or exclusion of the term "comprehensive" is a simple matter of form that should never derail the substance of this process.
19. Parliament and the interested party appear to consider that in framing such framework, societal, cultural, national and other values must be taken into account. This court considers that in fact relevant stakeholders and professionals must be involved in the process to avoid having a policy that does not competently address all the issues at hand.
20. Based on all the above, I find no justification and the inordinate delay and/or omission of over ten years to develop a comprehensive sexuality education policy in Uganda is a violation of Uganda's obligations under international law cited above and Articles 30, 41 and 34(2) of the Constitution; sections 4(1) (c), (g) and (i) of the Children (Amendment) Act 2016; section 4 (1) (2) of the Education (pre - primary, primary and post primary) Act 2008.
21. Accordingly the ministry is directed to develop a comprehensive sexuality education policy. In so doing, it must identify and work with the breadth of relevant stakeholders and address all issues competently.

22. This policy must be completed within two years, with the ministry reporting on progress to the registrar of this court every six months. Each party shall bear its own costs.

I so order.

A handwritten signature in black ink, appearing to be 'Lydia Mugambe', written in a cursive style with a long horizontal stroke at the end.

LYDIA MUGAMBE

JUDGE

24TH AUGUST 2020