

**IN THE MATTER OF:**

**ARTICLE (1), 1(5), 2, 8, 9(1)(a), (b) 128(1)(b),  
128(3)(a) AND 267 OF THE CONSTITUTION OF  
ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF:**

**ALLEGED CONTRAVENTION OF ARTICLE 8(d) OF  
THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF  
THE LAWS OF ZAMBIA BY SECTION 155(a)(c) OF  
THE PENAL CODE ACT, CHAPTER 87 OF THE LAWS  
OF ZAMBIA ON THE BASIS OF DISCRIMINATION,  
UNEQUAL TREATMENT, VIOLATION OF HUMAN  
DIGNITY**



**IN THE MATTER OF:**

**ALLEGED INCONSISTENCY BETWEEN ARTICLES  
8(c)(d) AND 18(8) OF THE CONSTITUTION OF  
ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA  
AND SECTION 155(a)(c) OF THE PENAL CODE ACT,  
CHAPTER 87 OF THE LAWS OF ZAMBIA ON THE  
BASIS OF AMBIGUITY**

**IN THE MATTER OF:**

**INTERPRETATION OF THE EXPRESSION "THE  
ORDER OF NATURE" IN SECTION 155(a)(c) OF THE  
PENAL CODE AS READ TOGETHER WITH  
ARTICLES 8(c)(d), 18(8), 15, 17(1), 19(1), 23(1) AND**



267(1) OF THE CONSTITUTION OF ZAMBIA  
CHAPTER 1 OF THE LAWS OF ZAMBIA

**BETWEEN:**

**ISAAC MWAANZA**

**1<sup>ST</sup> PETITIONER**

**ZAMBIA CIVIL LIBERTIES UNION**

**2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL**

**RESPONDENT**

**Coram: Shilimi- DPC, Mulonda and Mulife JJC**

*For the 1<sup>st</sup> Petitioner: In Person*

*For the 2<sup>nd</sup> Petitioner: In Person*

*For the Respondent: Ms. Nzanzi – Senior State Advocate, Attorney  
General's Chambers*

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**RULING**

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*Mulonda, JC read the ruling of the Court*

*Cases Referred to:*

- 1. Hakainde Hichilema v The Attorney General Appeal No. 4 of 2019*
- 2. Wilson Mwenya v Nkandu Luo and Attorney General 2017/CCZ/009*
- 3. Benjamin Mwewa v Attorney General 2017/CCZ/ 0010*
- 4. Godfrey Miyanda v Attorney General 2016/CCZ/006*
- 5. Kabisa Ngwira v National Pension Authority Scheme 2019/CCZ/17*



6. *Vincent Lilanda and Others v Attorney General 2020/CCZ/004*

7. *Isaac Mwanza v Attorney General 2021/CCZ /0045*

*Legislation Referred to:*

1. *Constitution of Zambia (Amendment )Act No. 2 of 2016*

[1] When we heard the preliminary issue we sat with our brother Justice Mulife who is currently indisposed, and therefore this is a ruling of the majority.

[2] The petition was filed into Court on 31<sup>st</sup> May, 2024 alleging contravention of the constitution as follows:

1. That section 155(a) (c) of the Penal Code is unconstitutional due to its vagueness and ambiguity regarding the concept of “the order of nature” as it pertains to acts of carnal knowledge and contravenes the constitutional principle of legal certainty as guaranteed by Article 18 of the Constitution of Zambia.
2. That section 155(a)(c) of the Penal Code, which pertains to unnatural offences is unconstitutional on the grounds of discrimination due to sexual orientation or vagueness or gender identity thereby contravening the values of non-discrimination and principles of equality as enshrined in Article 8 of the Constitution.



3. That section 155 (a) (c) of the Penal Code is unconstitutional as it contravenes Article 8(d) of the Constitution by violating the value of human dignity and that forensic anal examinations conducted by the State against the will of consenting adults who engage in sexual intercourse violate their dignity as humans, are intrusive, invasive, and constitute cruel, inhuman, and degrading treatment.
4. That by criminalizing consensual sexual acts between adults which are undertaken or which occur in private, the provision unlawfully intrudes upon individuals' private lives in contravention of Articles 17(1) and 19 of the Constitution which provides for a person's right to privacy and freedom of conscience, respectively.
5. That section 155(a)(c) is unconstitutional as it unreasonably restricts the satisfaction of human needs and desires and your Petitioners shall aver that carnal knowledge, like hunger, thirst, sleep, etc. are natural human desires; and that like air, water, food, shelter, and clothing among others, carnal knowledge is a universal natural human need.
6. These desires and needs are essential for the enjoyment of human life and interference with them is a violation of human dignity as provided in Article 8(d).



7. That section 155(a) (c) is unconstitutional as it unreasonably restricts the satisfaction of human needs and desires and that carnal knowledge, like hunger, thirst, sleep, etc. are natural human desires; and that like air, water, food, shelter, and clothing among others, carnal knowledge is a universal natural human need.

[3] The petitioner has further asked the court the following questions for determination:

1. Whether, pursuant to section 155(a)(c) of the Penal Code, read together with Article 18(8) of the Constitution, the general expression of the "order of nature", as it pertains to sexual intercourse, is so vague and ambiguous that it renders the criminal offence unconstitutional due to the lack of a sufficiently clear definition of which sexual acts are either permitted or proscribed by nature.
2. In view of provisions of section 155(a) (c) of the Penal Code as read together with Article 8(d) of the Constitution and the position taken by the Zambia Police Service to the effect that the aforesaid section "criminalises same-sex conduct between consenting adults," whether the law excludes married persons (husband and wife) or other persons of the opposite-sex who consent to engage in sexual intercourse against



the order of nature from liability and still be deemed to be non-discriminatory.

3. Whether punishing persons of the same sex who engage in carnal knowledge deemed to be "against the order of nature" and the non-application of the law to persons of the opposite sex, whether married or not, results in discrimination and inequality thereby resulting in contravention of the principle of non-discrimination and equality under law as provided by Article 8(d) of the Constitution.
4. Whether, in gathering evidence as to whether a person engaged in sexual intercourse and committed an offence against the order of nature under section 155(a) and (c) of the Penal Code, forensic anal examinations conducted by the State on a person without his or her consent, is a violation of their human dignity as provided by Article 8(d) of the Constitution and therefore amounts to inhuman and degrading treatment as provided for under Article 15 of the Constitution.
5. Whether individuals of the opposite or same sex, whether married or unmarried, can be deemed to have committed an offence against the order of nature under section 155(a) and (c) of the Penal Code by engaging in consensual intercourse of any kind in light of their rights to



human dignity, privacy and conscience under Articles 8(d), 17 and 19 of the Constitution.

6. Whether it is reasonable in a constitutional democracy, for the State to regulate or place restrictions or guidelines on how consenting adults must, in their private lives, engage in sexual intercourse in light of a person's fundamental right to privacy.

[4] In light of these allegations, the petitioner sought the following reliefs:

- (i) *A declaration and order that the expression the "order of nature" in section 155(a) of the Penal Code is vague and ambiguous and contravenes the constitutional principle of legal certainty required by Article 18 of the Constitution of Zambia and is thus unconstitutional;*
- (ii) *A declaration that section 155(c) of the Penal Code is unconstitutional on the grounds that it is discriminatory on the basis of sexual orientation, gender, gender identity, and advances inequality of persons under the law in contravention of Articles 8(d) of the Constitution;*
- (iii) *A declaration that section 155(c) of the Penal Code is unconstitutional on the basis that it contravenes Articles 8(d) and 17(1) of the Constitution which provide for the right to privacy, human dignity and equality between adults engaged in consensual sexual relations or sexual activities, and violates and undermines their autonomy and personal freedom;*
- (iv) *In the alternative, a declaration that persons, whether married or not, who consent to engage in different categories of sexual intercourse are excluded from liability for a criminal offence under section 155(a) (c) of the Penal Code.*
- (v) *In the alternative to all the above, an order that should repeal section 155(a) and (c) of the Penal Code for reasons of being vague and ambiguous, or to provide an exhaustive list of the different categories of sexual intercourse activities which can be performed in accordance with the order of nature; and*
- (vi) *Any other relief the Court may deem fit.*



- [5] When the matter came up for a preliminary hearing we asked the parties to address the Court on whether the Court has jurisdiction to entertain this petition which is anchored on Part III of the Constitution. We also asked the parties to address the Court on whether it has jurisdiction to interpret the constitution, having come by way of a petition.
- [6] The 1<sup>st</sup> petitioner, Mr. Mwanza, in addressing the Court submitted that this petition was standing on three limbs. The first being an allegation that an Act of Parliament has contravened Article 8(d) of the Constitution. Secondly, the petitioners allege that a provision of the law, that is section 155(a) (c) of the Penal Code, is inconsistent with both a protective provision of the Constitution, specifically, Article 18 (8) of the Constitution and another provision outside Part III, namely Article 8(c) and (d) of the Constitution.
- [7] The petitioners finally sought the interpretation of Articles 15, 17 (1), 18 (8), 19 (1) and 23(1) under Part III of the Constitution as well as Articles 8(c) and (d) and 267 of the Constitution.
- [8] Mr. Mwanza submitted that the petitioners had framed three questions that would assist the Court in determining its jurisdiction to hear and determine this petition as follows:



- i. *Given provisions of Articles 28 and 128 of the constitution, which Court has the jurisdiction to interpret provisions of the Bill of Rights;*
- ii. *Which court has the jurisdiction to hear a matter as to whether a law is inconsistent with any of the Articles under Part III of the Constitution; and*
- iii. *Which court has the jurisdiction to hear a matter involving an allegation that an Act of Parliament or Statutory Instrument has contravened Part III of the Constitution.*

[9] It was the petitioners' submission that the jurisdiction of a Court can only be determined on a case by case basis. It was submitted that Article 128 has been made subject to Article 28 of the Constitution. The petitioners submitted that in view of Article 128 of the Constitution, the High Court enjoys exclusive jurisdiction on the entire Bill of Rights to the exclusion of the Constitutional Court or any other Court. The Court was referred to the case of *Hakainde Hichilema v The Attorney General*<sup>1</sup> where the Supreme Court of Zambia was faced with a similar question. It was submitted that the Supreme Court in that case, on pages J76 to J77, stated that it was not in dispute that Article 128 had been subject to Article 28 of the Constitution therefore in case of any conflict in jurisdiction between the two Articles the provisions of Article 28 would prevail.



- [10] It was the petitioners' submission that the jurisdiction of the High Court to determine an alleged contravention of rights and liberties is well set out in Article 28. The Supreme Court in the case of *Hakainde Hichilema*<sup>1</sup> thoroughly examined Article 28 and arrived at the conclusion that the High Court, in this respect, has to be moved by an aggrieved person or one who fears or is apprehensive that his or her rights under the Bill of Rights may be infringed in relation to him or her. That such a person may apply for redress under Article 28 (1) of the Constitution.
- [11] The petitioners contended that there is nowhere where Article 28(1) has bestowed the High Court with exclusive jurisdiction to interpret the provisions of the Bill of Rights. It was submitted that the High Court can only be moved under Article 28 for purposes of enforcing or securing the enforcement of the provisions of the Bill of Rights. It was further submitted that the Court in the *Hakainde Hichilima* case went on to state that this meant that the High Court could only interpret the rights in the context of what is alleged to be contravened or likely to be contravened in the application for redress under article 28 (1) without prejudice to any other action.
- [12] It was further argued that in the *Hakainde Hichilima case*<sup>1</sup>, the Supreme Court definitively stated that the Constitutional Court is empowered under



Article 128 to interpret the entire Constitution. However, it emphasized that the Constitutional Court cannot entertain applications aimed at enforcing or ensuring enforcement of provisions outlined in Article 28(1) of the Constitution. Further, that regarding the enforcement of protective provisions within the Bill of Rights, the Constitutional Court is required to defer to the jurisdiction of the High Court as per Article 28 of the Constitution.

- [13] The petitioners implored the Court to follow the *Hakainde Hichilema*<sup>1</sup> case even though its weight was only for persuasive value as it was good law.
- [14] The petitioners further sought to distinguish the cases of *Wilson Mwenya v Nkandu Luo and Attorney General*<sup>2</sup> and *Benjamin Mwewa v Attorney General*<sup>3</sup> from the current petition on account that in the latter cases, the petitioners had sought to enforce their rights which as there was an alleged contravention of the protective provisions.
- [15] It was further submitted that in the case of *Godfrey Miyanda v Attorney General*<sup>4</sup>, the Constitutional Court was moved to deal with fundamental rights and freedoms under Articles 11, 20, 21 and 23 of the Constitution among others. The Court in that case had the jurisdiction to hear the allegations and proceeded to determine the matters on merit. That this Court dealt with an allegation that section 18 (2) of the Constitution of



Zambia Act No. 1 of 2016 contravened Article 21 of the Constitution. It was contended that the Court also determined an allegation that Article 98(4) of the Constitution was ultra vires Article 11 of the Constitution.

[16] The Petitioners further submitted that this Court's Jurisdiction as bestowed by Article 128(3) (c) was exercised in the *General Miyanda*<sup>4</sup> case. They contended that the Constitutional Court has the jurisdiction to hear a matter, where an allegation has been made that a provision of the law is either inconsistent with the Constitution or has contravened the Constitution. The petitioner further contended that it is the provision that is alleged to have contravened the Constitution that seeks attendant interpretation.

[17] As regards whether the matter is properly commenced for interpretation, the petitioners submitted that this Court has had the occasion to pronounce itself on the mode of commencement in the case of *Kabisa Ngwira v National Pension Authority Scheme*<sup>5</sup>, where the Court said all matters brought before this Court, ought to be commenced by way of petition. This applies to matters that contain a combination of issues arising from an alleged breach or contravention of a constitutional provision. The petitioner added that in that case, this Court held that the Court would go through the rigorous process of interpreting a provision in



dispute before arriving at a decision, as to whether a provision has been contravened or not. The same principle was reiterated by the Court in the cases of *Vincent Lilanda and Others v Attorney General*<sup>6</sup> and *Isaac Mwanza v Attorney General*<sup>7</sup>.

[18] The petitioners reiterated that they are not alleging any contravention of the Bill of Rights in relation to themselves or to anyone else. They contended that there would be a vacuum if this Court had no jurisdiction to hear a matter where the claim alleges that provisions of the law are in breach of the Constitution inclusive of the protective provisions.

[19] They submitted that the High Court's jurisdiction on this matter is not tenable because they were not alleging that their personal rights had been violated.

[20] In response to the petition, the respondent submitted that this matter is improperly before this Court as Article 128 of the Constitution is clear with regard to the jurisdiction of the Constitutional Court. The respondent argued that the petitioners are seeking interpretation of the mentioned Articles of the Constitution which they cannot do because there is no factual basis for the said interpretation.



[21] In Reply, the petitioners submitted that what they sought was the interpretation of provisions which would help the Court to determine the constitutionality of the Penal Code.

[22] We have considered the petition before us and the submissions by the petitioners regarding the jurisdictional issues we raised. Our primary focus in this preliminary assessment revolves around determining whether the Constitutional Court possesses the necessary jurisdiction to entertain the petitioners' petition. In determining this sole issue, our starting point will be considering the provisions of Article 128 of the Constitution which provides as follows:

*(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—*

*(a) a matter relating to the interpretation of this Constitution;*

*(b) a matter relating to a violation or contravention of this Constitution;*

*(c) a matter relating to the President, Vice-President or an election of a President;*

*(d) appeals relating to election of Members of Parliament and councillors; and*

*(e) whether or not a matter falls within the jurisdiction of the Constitutional Court*

*(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court. (3) Subject to Article 28, a person who alleges that:*



(a) an Act of Parliament or statutory instrument;

(b) an action, measure or decision taken under law; or

(c) an act, omission, measure or decision by a person or an authority.

The above provisions define the scope of the Court's jurisdiction. We note the issues raised by the petitioners which are, on the face of it, distinguishable from the issues considered before this Court in the cited cases. With that in mind, we are of the considered view that the petition raises issues that can only be determined after a full hearing of the matter. It is therefore the Court's position that the matter be scheduled for a full hearing of the Court before a single judge.



A. M. SHILIMI

DEPUTY PRESIDENT- CONSTITUTIONAL COURT



P. MULONDA

CONSTITUTIONAL COURT JUDGE