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**George Peter Mwanza and Melvin Beene v Attorney General Appeal No. 153/2016 SC
Selected Judgment No. 33 of 2019**

Ellah T.M. Siang'andu¹

The Facts and Legal Arguments

On the 9th December 2019, the Supreme Court of Zambia delivered a landmark decision changing the human rights jurisprudence in the context of protecting and preserving the fundamental human rights of prisoners. The appellants were HIV positive and were both in custody at the Lusaka Central Prison. They petitioned the High Court contending breach of their rights to life and protection from inhuman treatment contrary to the Republican Constitution.² The argument of the appellants was that the State's failure to consider their dietary and health needs, due to the budgetary and logistical restraints, fell short of all prescribed standards for the minimum treatment of prisoners. The appellants argued that their right to life was violated or threatened by being fed an inadequate diet that was contrary to the recommended rations as provided by the law.³

They further argued that they were being held in overcrowded prison cells with inadequate ventilation, coupled with a lack of flushable lavatories. The conditions in which they were held made their environment unsanitary. Consequently, making the inmates more vulnerable to contracting communicable diseases such as pulmonary tuberculosis (TB) and diarrhoea. The duo argued that this worsened their health conditions, and was a threat to their already compromised immune systems. The appellants, aggrieved by the decision of the High Court, appealed to the Supreme Court, arguing in the main that the learned trial judge of the High Court misdirected herself in law and in fact when she held that their claims were not justiciable under the Directive Principles of State Policy contained in Article 112 (d) of the Constitution.

The Holding

The Supreme Court held that: first, adjudication through courts could not be the main means of fulfilling the realisation of the violated economic and social rights of the inmates. The role

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² Article 11, 12 & 15 of the Constitution of Zambia, 1991, (as amended by Act No.18 of 1996 and Amendment Act No. 2 of 2016).

³ Rule 17(2) of the Prison Rules and the First Schedule to the Prisons Act, Chapter 97 of the Laws of Zambia.

of making economic and social rights a reality is restricted to the political branch or independent constitutional bodies like the Human Rights Commission. Within the separation of powers context, the state comprises of two political branches namely the executive and the legislature.⁴ Second, that the state was in breach of the two prisoners' rights to life and protection against inhuman and degrading treatment as provided under the Constitution. Third, that preferential treatment be accorded to prisoners with special dietary needs due to conditions like "HIV, diabetes, high blood pressure, cholesterol problems, allergies, religious dietary requirements or any nutritional concerns,"⁵ in furtherance of their right to life. Thus, the Supreme Court ordered the State to do as follows: immediately take measures to decongest the Lusaka Central Correctional Facility; to report to a session judge at all successive opening days of the Lusaka session of the High Court on actions adopted to decongest the facility; and to increase the allocation of resources to Lusaka Correctional Facility for purposes of improving the dietary needs of prisoners, especially those that are HIV positive and to ensure their diet conforms with the prison rules.⁶

Significance

The case is significant as it raises the following substantial issues; the concept of justiciability of the prisoner's right to food and health; the justiciability of socio-economic rights generally; clarifying the standard of treatment for incarcerated persons; and the role of the State and the judiciary in the realisation of socio-economic rights within the context of the first generation rights addressed in the Constitution.⁷

The notion of justiciability according to the judgement⁸ refers to the capacity to claim a remedy before an independent and impartial body, following a breach of a right or when it is likely to occur. It refers to the ability of individuals to access justice for the purposes of seeking a remedy for the violation of recognised rights. It is thus not a requirement for application of economic and social rights, but due to a violation of a right or where it is likely to occur. Based on the definition, justiciable rights holders have the ability to seek legal recourse to enforce the rights

⁴ J Locke *Second Treatise of the Government: An Essay Concerning the True Origin, Extent and End of Civil Government* (1689).

⁵ George Peter Mwanza, Melvin Beene and Attorney General Appeal No. 153/2016 SC Selected Judgment No. 33 of 2019 para. 16.6.

⁶ *Ibid.* para 16.7 & 16.8.

⁷ n 1, Articles 11 -26.

⁸ n 4, Para 7.5.

when the duty bearer [the state, through the Zambia Correctional Service] fails to uphold those rights.⁹ However, the Supreme Court further qualifies its definition of justiciability by concluding that rights specified in the Bill of Rights of the Constitution are as a matter of fact justiciable.¹⁰ There is no basis provided for the definition. It is thus unclear why and how the notion of justiciability is vital to Courts in the adjudication of socio-economic rights. The readers are thus left to guess how the state, Zambia, can be expected to comply with its own rules on the diet and conditions of incarceration for prisoners at the Lusaka Central Prison. The judgment does not shed light on how the state can address the problem of overcrowding by ensuring that the cell initially built to contain 15 prisoners, does not accommodate 75 or more prisoners.

It could only be understood that the meaning of the term justiciability is based on the Supreme Court's understanding and assumptions about its role and competence. This is further manifested in the case based on the decision of the court to adjudicate on issues concerning issues it initially deemed to be non-justiciable. Aoife Nolan contends that the concept of justiciability based on assumptions about the role and competences of courts is more reason why these assumptions must be subject to questions.¹¹ For instance, is Zambia obliged to provide legal remedies for the rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR)? If so, to what extent does Zambia accept the right to food and health as adjudicable rights?

The judgment establishes nexus between the socio-economic rights to food and health and the civil and political right to life and protection from inhuman treatment. The Court creates competences for itself in upholding the inmates' civil and political rights to life and protection from inhuman treatment. Courts can create their own competence as long as they have the valour to be innovative and a conviction that the principles at stake are legitimate concerns for the judiciary.¹²

⁹ n 4, Para 7.5.

¹⁰ n 1 above, Article 11 – 26.

¹¹ Aoife Nolan *The Justiciability of Social and Economic Rights: An Updated Appraisal* (2007) available at Electronic copy available at: <http://ssrn.com/abstract=1434944>

¹² Craig Scott & Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees?' 141 *University of Pennsylvania Law Review*, Vol. 141 (1992) 1, pp. 35-36.

Nevertheless, courts must be cautious about how the socio-economic rights are enforced. This is due to the nature of the rights in question. Where the court rules that there is a need to recognise socio-economic rights like in the instance case, it would have been necessary to clarify how they must be enforced. For instance, the judgment does not clarify whether the justiciable rights of inmates translate into subjective guarantees, meaning granting them an entitlement to make direct claims as individuals. Or whether there are merely intended to be applied as objective standards, hence, imposing an obligation on the state to act. Other than the latter, the individual may not force the state to act in compliance with its obligations.

There is no consensus on the justiciability of socio-economic rights. Nearly seventy-five years after the adoption of the Universal Declaration of Human Rights, the substance and status of economic and social rights remain contentious. This is despite the fact that socio-economic rights are enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), a treaty that Zambia is a state party to. The rhetoric of justiciability of socio-economic rights demonstrated in the judgment is not restricted to Zambia. The question is whether judges can legitimately pronounce themselves on economic and social issues. The question is whether judges are competent to adjudicate policy issues.

Concerns about justiciability of economic and social rights are based on three assumptions: i) that economic and social rights are innately different from civil and political rights; ii) that it is not legitimate or suitable for courts to intervene into the domain of economic and social policy; and iii) that courts lack the ability to appropriately adjudicate and enforce economic and social rights.¹³ However, scholars have argued that all three of these propositions are highly questionable. For instance, Siegel contends that justiciability does not have a strict and reasonably apparent purpose but several.¹⁴ Thus, purposes of justiciability include: (1) “litigation-enhancement theory” which seeks to improve court performance by rendering litigants a stake in the effect of cases. It is centred around the nature of arguments raised; (2) separation of powers theory which restricts courts from intruding on the prerogatives of other branches of government, particularly the executives and the legislature; (3) passive virtues theory, to allow for the courts to safely evade socially problematic rulings.¹⁵ The fact that there

¹³ Aoife Nolan *The Justiciability of Social and Economic Rights: An Updated Appraisal* (2007) available at Electronic copy available at: <http://ssrn.com/abstract=1434944>

¹⁴ Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007).

¹⁵ *Ibid* 177.

are several purposes for determining the justiciability of the matter implies it is necessary to justify the reasoning for making specific socio-economic rights justiciable.

The judgment clarifies the standard of treatment for incarcerated persons. The Supreme Court has made it abundantly clear that prisoners' rights are human rights first. In the United States, as early as 1979, the United States Supreme Court clarified that prisoners do not forfeit all their constitutional rights.¹⁶ Essentially, all the existing legal provisions and directives of State policy confirm that prisoners should be treated with due respect for their inherent dignity and value as human beings, without any form of discrimination. The judgment highlights the need for Zambia to take effective measures towards the protection of prisoners' fundamental rights in line with its national¹⁷ and international human rights obligations.¹⁸ It is imperative to rethink the archaic position on the justiciability of socio-economic rights. This is because socio-economic rights have been adjudicated upon across the African region.¹⁹

The ruling demonstrates that the Supreme Court is cognisant of its adjudication, rulemaking and gatekeeping roles under the Zambian legal system. To some extent, the courts have a duty to ensure that the rights of prisoners are upheld. The Court acknowledges that international law has asserted the interdependence and indivisibility of economic, social and cultural and civil and political rights.²⁰ The case illustrates how resorting to international instruments both

¹⁶ *Bell v Wolfish*, 441 U.S 520 (1979).

¹⁷ The Prison Act and Regulations, Chapter 97 of the Laws of Zambia, the constitution,

¹⁸ the 1957 United Nations Standard Minimum Rules for the Treatment of Prisoners Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the 1990 Basic Principles for the Treatment of Prisoners, the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice, the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (known as "JDL's" or 'Havana Rules'), and the 1997 Guidelines for Action on Children in the Criminal Justice System, the Bangkok Rules, or officially, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders Adopted in United General Assembly Resolution A/RES/65/229 December 2010.

¹⁹ *Purohit and Moore v. Gambia*, Communication 241/200. Decided at 33rd Ordinary Session of the African Commission, 15-29 May 2003 (dealing with the right health of mental health patients); *SERAC and CESR v. Nigeria* African Commission on Human Rights, Case No. 155/96, Decision made at 30th Ordinary Session, Banjul, The Gambia, from 13th to 27th October 2001 (dealing with the right to health and the implied rights to food and housing). For more on the Commission's treatment of social and economic rights, see Joe Olaka-Onyanga, 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa', *California Western International Law Journal*, Vol. 26 (1995), 1.

²⁰ Vienna Declaration and Programme of Action (1993) (Article 5) and the Proclamation of Tehran (1968) (para 13). For a discussion of the concept of interdependence in the context of human rights, see C. Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall LJ*, Vol. 27 (1989), 769, 779-790.

binding,²¹ and non-binding²² and the judgments of foreign superior courts can greatly assist Zambian the courts to perform their interpretive function in a conversant and equitable manner. The role of courts must also evolve with the changing understanding of fundamental rights. Courts must be able to respond to new challenges and problems that arise due to governance of the correctional facilities and human rights generally.

The Supreme Court's decision to proceed to adjudicate on the matter at hand implies that the court recognises its role in protecting and enforcing the fundamental rights of the prisoners. In effect, the court engaged in a constructive role of recognition of the plight of HIV positive prisoners. Hence, affording an opportunity for access to justice for prisoners. Such an approach has the potential to enhance equality for other disadvantaged prisoners who may feel that their human rights has been neglected or likely to be violated by the duty bearer. Socio-economic rights are key in upholding the principles of equality and non-discrimination which are both recognised in the Constitution.

Adopting a narrow application of the interpretation of the judgment implies that the orders of the Court are restricted to improving the prison conditions at the Lusaka Central Prison only. No reference is made to other correctional facilities countrywide. What about the other prisons in Zambia? Can the state even afford to meet its own rules on the conditions of prisons and prisoners at the Lusaka Central Correctional Facility and correctional facilities elsewhere in Zambia? The Supreme Court approaches the issue of prison conditions from a narrow perspective and does not account for the harsh prison conditions that are prevalent in prisons countrywide.

The narrow interpretation approach if adopted would not only exclude but also disregard other vulnerable prisoners such as elderly prisoners, women incarcerated with children, who have the extra responsibility of having to care for their children while in prison; and breast feeding mothers, in need of an adequate diet in order to be able to provide sufficient food for their newly born child. These categories of prisoners are also equally in need of their social-economic rights to food and health to be realised. The exclusion of other vulnerable prisoners

²¹ International Covenant on Economic Social and Cultural Rights 1966, entered into force 1976, the International Covenant on Civil and Political Rights 1966, entered into force 1976.

²² Article 20 (1) of the Standard Minimum Rules for the Treatment of Prisoners 1955, the Universal Declaration of Human Rights 1948.

would be contrary to the fundamental principles of equality and non-discrimination enshrined in the Constitution.

The decision could imply that the state or the prison authorities can no longer continue to violate the fundamental rights of prisoners generally. Most importantly, it prevents the state from continuing to violate the rights of prisoners on the basis of restricted resources. As quite rightly pointed out by the Supreme Court, the Human Rights Committee, in its General Comment 38 years ago,²³ stated that a state cannot invoke a lack of adequate material or financial resources or financial difficulties as a justification for inhuman treatment. Therefore, the state is obliged to provide detainees and prisoners with services required to gratify their specific needs.

²³ General Committee No. 9/16 of 27th July, 1982