

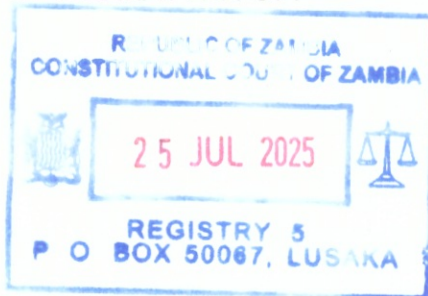
**IN THE CONSTITUTIONAL COURT OF ZAMBIA  
HOLDEN AT LUSAKA**

**2024/CCZ/008**

**(CONSTITUTIONAL JURISDICTION)**

IN THE MATTER OF: ARTICLE 1(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 ARTICLES 17(1),  
19 AND 23(1)(2) AS READ TOGETHER WITH  
ARTICLE 8(d) OF THE CONSTITUTION OF  
ZAMBIA BY SECTION 155(a)(c) OF THE PENAL  
CODE ACT, CHAPTER 87 OF THE LAWS OF  
ZAMBIA ON THE BASIS OF DISCRIMINATION,  
VIOLATION OF HUMAN DIGNITY, THE RIGHT TO  
PRIVACY AND CONSCIENCE.



IN THE MATTER OF: ALLEGED CONTRAVENTION OF AND  
INCONSISTENCY BETWEEN ARTICLE 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  
AND VAGUENESS

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 MWANZA**  
**ZAMBIAN CIVIL LIBERTIES UNION (ZCLU)**

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

**AND**

**THE ATTORNEY GENERAL**

**RESPONDENT**

**FR. EMMANUEL CHIKOYA**  
(as Secretary General of the  
Council of Churches in Zambia (CCZ))

**1<sup>ST</sup> INTERESTED PARTY**

**BISHOP ANDREW MWENDA**  
(as Executive Director of the Evangelical  
Fellowship of Zambia)

**2<sup>ND</sup> INTERESTED PARTY**

**FR. FRANCIS MUKOSA**

(As Secretary General of the Zambia Conference of  
Catholic Bishops)

**3<sup>RD</sup> INTERESTED PARTY**

**CORAM:** Shilimi - DPC, Musaluke, Chisunka, Mulongoti, Mwandenga, Kawimbe and  
Mulife JJC on 8<sup>th</sup> April, 2025 and 25<sup>th</sup> July, 2025

**For the Petitioners:** Mr. Isaac Mwanza, Director - ZCLU

**For the Respondent:** Mrs. B. M. Kamuwanga, Acting Principal State  
Advocate and Mrs N. M. Mbao, Acting Principal  
State Advocate

**For the Interested Parties:** Mr. A. Chuni of Equitas Legal Practitioners

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## **JUDGMENT**

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**Shilimi - DPC**, delivered the Judgment of the Court

**Cases referred to:**

1. Mulundika and 7 Others v The People SCZ Judgment No. 25 of 1995
2. Franklin v State, 257 So. 2d 21 (Fla.1971);
3. City of Akron v Akron Centre for Reproductive Health, 462 U.S. 416 (1983)
4. Grayned v City of Rockford , 408 U.S. 104, 391 (1972).
5. Magaji v The National Army 2-3 SC 32 (2008)
6. Kelvin Hang'andu v Law Association of Zambia SCZ Judgment No. 36 of 2014
7. Communications Authority v Vodacom Zambia Limited SCZ Judgment No. 21 of 2009.
8. Steven Katuka and Law Association of Zambia v Attorney General and others, CCZ, Selected Judgment No. 29 of 2016
9. Braunfeld v Brown, 366 U.S 599 (1961)
10. Canadian Foundation for Children, Youth and the Law v The Attorney General [2004] ISCR
11. Webby Mulubisha v Attorney General 2018/CCZ/0013
12. Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v The Attorney General and Electoral Commission of Zambia, CCZ, Selected Judgment No. 34 of 2017
13. Hakainde Hichilema v Attorney General, SCZ, Appeal No.4 of 2019.



14. Wilson Mwenya v Nkandu Luo and Attorney General 2017/CCZ/009
15. Benjamin Mwelwa v Attorney General 2017/CCZ/0010
16. Godfrey Miyanda v Attorney General 2016/CCZ/006
17. The South Indian Corporation (P) Ltd v The Secretary, Board of Revenue, Trivandrum and Another, (1964) AIR 207
18. Mildred Luwaile v Attorney General 2023/CCZ/0022
19. Mutazu John v Anthony Hubert Kabungo and Others 2024/CCZ/006
20. Charles Chihinga v New Future Financial Company Limited 2020/CCZ/003
21. Martin Chilekwa v Attorney General 2022/CCZ/0030

**Legislation referred to:**

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act, No. 2 of 2016
2. The Constitution of Zambia Act, No. 1 of 2016
3. The Penal Code, Chapter 87 of the Laws of Zambia

**Works referred to:**

1. Black's Law Dictionary, 10<sup>th</sup> Edition, by Bryan A. Garner
2. N. S. Bindra's Interpretation of Statutes, 9<sup>th</sup> Edition, by Markandey Katju and S. K. Kaushik.

## **1.0 Introduction**

- 1.1 The Petitioners challenged the constitutionality of sections 155 (a) and (c) of the Penal Code Chapter 87 of the Laws of Zambia (Penal Code). Their challenge is premised on Article 8(d) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution), which provides for the national values and principles on human dignity, equity, social justice, equality and non-discrimination and the rights to privacy, fair trial,

freedom of conscience and protection against discrimination assured in Articles 17(1), 18(8), 19 and 23 of the Constitution.

1.2 Section 155 (a) and (c) of the Penal Code criminalises sexual conduct expressed as being “against the order of nature”. The Petitioner argues that in so far as the phrase “order of nature” is undefined in the Penal Code, the provision is vague, ambiguous and overbroad. The provision, it is claimed, contravenes the constitutional principle of legal certainty as guaranteed by Article 18(8) of the Constitution.

1.3 According to the Petitioners, the application of section 155 (a) and (c) of the Penal Code in a manner that only tends to criminalise same sex conduct between consenting adults is not only discriminatory and in contravention of Article 8(d) and Article 23 of the Constitution, but is also a contravention of the right to privacy and freedom of conscience. The Petitioners therefore, argued that the provisions be struck down for being inconsistent with the Constitution.

1.4 The Respondent and the three interested parties have opposed the Petition maintaining that section 155(a) and (c) of the Penal Code is definitive on the proscribed sexual conduct and does not defy the Constitution as it merely reflects the moral values of Zambia as a Christian nation.



## **2.0 Petitioners' Case**

- 2.1 In the Amended Petition filed on 7<sup>th</sup> November, 2024 and Affidavit Verifying Facts, the Petitioners averred that section 155 of the Penal Code provides for unnatural offence for a person who has carnal knowledge of another person against the order of nature. They averred that by failing to define the two terms “carnal knowledge” and “order of nature”, the section does not specify the acts or categories of carnal knowledge considered to be against the order of nature. Exhibit marked “IZ-1” was produced to show the different categories of sexual acts that the Petitioners considered could fall under section 155 (a) and (c) of the Penal Code.
- 2.2 This, the Petitioners claimed, leads to arbitrary enforcement of the section and creates a risk of discriminatory application, a threat to the rule of law and principles of fairness and justice.
- 2.3 The Petitioners also took issue with the manner in which section 155(c) of the Penal Code is couched. According to the Petitioners, the section only targets male-driven carnal knowledge by prohibiting ‘male on male’ or ‘male on female’ sexual activity to the exclusion of female-driven carnal knowledge such as ‘female on female’ or ‘female on male’ carnal knowledge against the order of nature. Further that this gender specific language, results in unequal

treatment and discrimination. An extract of the Penal Code was produced as exhibit "IZ-2".

2.4 Paragraphs 17-30 of the Petition and paragraphs 18-29 of the Affidavit Verifying Facts chronicle instances which, according to the Petitioners, highlight the increasing public debates and developments around the application of section 155 (a) and (c) of the Penal Code. Exhibits marked "IZ-3" – "IZ-13" relate to these assertions. We will not reproduce the said debates and developments as they are not key to the determination of the issue before us.

2.5 Apart from the alleged constitutional contraventions the Petitioners also sought the interpretation of the following questions:

2.5.1 Whether, pursuant to section 155(a) and (c) of the Penal Code, read together with Article 18(8) of the Constitution, the general expression "the order of nature" as it pertains to sexual intercourse, is so overbroad, vague and ambiguous that it renders the criminal offence unconstitutional due to lack of a sufficiently clear definition of which sexual acts are either permitted or proscribed by nature;

2.5.2 In view of the provisions of section 155 (a) and (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 opposite sex who consent to engage in sexual intercourse against the order of nature from liability and still be deemed to be non-discriminatory;

2.5.3 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 this law to persons of opposite sex, whether



married or not, results in discrimination and inequality in application of the law, thereby resulting in contravention of the principle of non-discrimination and equality under the law as provided by Article 8(d) of the Constitution;

2.5.4 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) by engaging in consensual sexual 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;

2.5.5 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.

2.6 As a consequence of the alleged contraventions of the Constitution and the questions posed, the Petitioners claim the following relief:

2.6.1 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 Article 18(8) of the Constitution of Zambia and is thus unconstitutional;

2.6.2 A declaration that section 155(c) of the Penal Code is unconstitutional on the grounds that it is discriminatory on the basis of sex and advances inequality of persons under the law in contravention of Articles 23(1)(2) as read together with Article 8(d) of the Constitution;

2.6.3 A declaration that section 155(a) and (c) of the Penal Code is unconstitutional on the basis that it contravenes Article 17(1) and 19 as read with Article 8(d) of the Constitution which provides 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;

2.6.4 In the alternative, a declaration that persons, whether married or not, who in exercise of their right to privacy and conscience, consent to engaging in different categories of sexual intercourse

are excluded from liability for a criminal offence under section 155 (a) and (c) of the Penal Code;

2.6.5 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 categories of sexual intercourse which can be performed in accordance with the order of nature;

2.6.6 A declaration that the expression “the order of nature” as it relates to sexual intercourse in section 155 (a) and (c) of the Penal Code is vague, overbroad, ambiguous and contravene Article 18(8) of the Constitution.

2.6.7 Any other relief the Court may deem fit.

2.7 In their Skeleton Arguments, the Petitioners submitted that carnal knowledge as defined in **Black’s Law Dictionary** refers to sexual intercourse, an aspect of nature which is yet to be fully understood and is informed by societal concepts, customs and beliefs. In the Petitioners’ view, nature cannot be rigidly defined so as to exclude diversity of human experiences and practices.

2.8 Noting the fact that the enactment of section 155 of the Penal Code predated Zambia’s first Constitution in 1964, the Petitioners contended that the legislature did not have a Constitution to serve as a measure. With the passing of the 1964 and the subsequent constitutional orders, the provision has to be measured against the Constitution.

2.9 The Petitioners submitted that the provision fails the constitutional test in a number of ways. It flounders when measured against Article



18(8) of the Constitution that proscribes conviction on an undefined offence. The Petitioners argued that section 155(a) and (c) of the Penal Code has no clear boundaries, specific limits or objective standards. To be definitive, the section has to explicitly state who it regulates, the conduct prohibited and the penalty.

2.10 It was pressed that section 155 (a) and (c) of the Penal Code is excessively broad as it captures individuals beyond its intended targets. It criminalises any individual or couple who engage in sexual intercourse with another person or permits a male individual to have sexual intercourse with them “against the order of nature.” That this makes any sexual intercourse between persons unlawful unless it is done in accordance with the order of nature. According to the Petitioners, this includes sexual intercourse between husband and wife, male and female, female and female or male and male. The Petitioners argued that section 155 (a) of the Penal Code therefore broadly encompasses all individuals engaged in sexual intercourse, irrespective of their sexual orientation.

2.11 This, according to the Petitioners, went against the reasoning of the Supreme Court in **Mulundika and 7 Others v The People**<sup>1</sup>. Three other authorities from United States of America namely; **Franklin v State**<sup>2</sup>; **City of Akron v Akron Centre for Reproductive Health**<sup>3</sup> and **Grayned v City of Rockford**<sup>4</sup> were also cited on this point.

- 2.12 In reference to the right to privacy, freedom of conscience and protection against discrimination, the Petitioners argued that Section 155 (a) of the Penal Code fails the constitutional test because it gives the State authority to intrude upon individuals' private choices regarding sexual conduct within their homes or property. It also gives excessive discretion to law enforcement officers and courts to define what sex against the order of nature is.
- 2.13 While admitting the derogations applicable to rights and freedoms based on public safety, public order, public morality or public health, the Petitioners contended that the Constitution does not define the standard of morality to be applied in limiting individual freedoms.
- 2.14 That the imposition of a moral code by the State, as expressed through the criminalisation of private consensual sexual acts by section 155 (a) and (c) of the Penal Code is an intrusion into individuals' rights to determine and live by their own moral and ethical beliefs. This prohibition disregards the pluralistic nature of society.
- 2.15 It was the Petitioners' further argument that disparity in treatment perpetuates inequality by subjecting individuals to inconsistent and biased enforcement of the law. By criminalising undefined "unnatural" acts, the section undermines constitutional protections



against discrimination and fosters a legal environment that is inherently unjust.

2.16 The Petitioners therefore prayed that section 155 (a) and (c) of the Penal Code be declared void for vagueness and for its inconsistency.

2.17 In briefly orally augmenting their written submissions, the Petitioners submitted that section 155 (a) and (c) of the Penal Code is vague and ambiguous as it has been drafted in an overly broad manner. That, to that effect they had laid sufficient authorities to show that this Court and indeed any other constitutional courts around the world can declare the provisions of the law unconstitutional.

### **3.0 Respondent's Case**

3.1 The Respondent's Answer and Affidavit in support of Answer denied that section 155 (a) and (c) of the Penal Code contravenes the Constitution. To the Respondent, the said section prohibits the practice of carnal knowledge against the order of nature by persons of the same sex or between male and female. Morality was said to be the basis for criminalising carnal knowledge against the order of nature as the conduct is considered unethical, immoral and completely against the national values and ethics.

- 3.2 The Respondent maintained that gay, lesbian, bisexual and transgender rights are not included or defined in Zambian law.
- 3.3 In his skeleton arguments the Respondent reiterated that morality is the basis for criminalisation of carnal knowledge against the order of nature as the conduct is considered to be unethical, immoral and completely against the national values and ethics. Article 8 of the Constitution was referenced.
- 3.4 The Respondent also argued that section 155 (a) and (c) of the Penal Code had met the constitutional measure as it defined the prohibited conduct and the penalty. As to the meaning of “against the order of nature”, the Respondent adverted to a Nigerian case of **Magaji v The National Army**<sup>2-3</sup><sup>5</sup> in which the Supreme Court stated:

While carnal knowledge is an old legal euphemism for sexual intercourse with a woman, it acquires a different meaning in section 81. The section 81 meaning comes to light when taken along with the proximate words “against the order of nature”. The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people.

- 3.5 According to the Respondent, sexual intercourse between two persons of the same sex is against the order of nature and is illegal.
- 3.6 As regards the alleged contravention of the right to privacy, freedom of conscience and protection against discrimination, the



Respondent argued that the said rights were not absolute. The case of **Kelvin Hang'andu v Law Association of Zambia**<sup>6</sup> was cited as authority.

3.7 Lastly, the Respondent argued that this was not a proper case in which to grant declaratory reliefs sought by the Petitioners as no useful purpose would be served. This was submitted in line with **Communications Authority v Vodacom Zambia Limited**<sup>7</sup>.

3.8 In orally augmenting his submissions, the Respondent's Counsel referred the Court to the case of **Steven Katuka and Law Association of Zambia v Attorney General and others**<sup>8</sup> in which this Court stated that Article 267 of the Constitution entails that we interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes its purpose, values and principles. Further that, what this means is that this Court must have in mind the broad objects and values that underline any particular subject matter.

3.9 Counsel for the Respondent also referred the Court to Article 18(8) of the Constitution, which it was submitted, provides that a person shall not be convicted of a criminal offence unless that offence is defined and a penalty is prescribed in a written law. It was submitted that in terms of the law, there can be no conviction of a person unless the offence is defined and the penalty is prescribed. It was further submitted that section 155 (a) and (c) of the Penal Code have

clearly defined the offence and the penalty prescribed and thereby making the provision constitutional.

3.10 Counsel for the Respondent further submitted that section 155 (a) and (c) are found in Chapter 15 of the Penal Code titled “**Offences against morality**”. That the marginal note under section 155 is titled “**unnatural offences**”. Consequently, the natural and right way of sexual conduct is between man and woman performed in a natural way that may result in procreation as originally intended by God. For this reason, Counsel prayed that the relief prayed for by the Petitioner be dismissed.

#### **4.0 Interested Parties**

4.1 Fr Emmanuel Chikoya (as Secretary General of the Council of Churches in Zambia), Bishop Andrew Mwenda (as Secretary General of the Evangelical Fellowship of Zambia), and Fr. Francis Mukosa (as Secretary General of the Zambia Conference of Catholic Bishops), were on 9<sup>th</sup> December, 2024, on their application, admitted to the proceedings as Interested Parties. (The Interested Parties).

4.2 Their admission as Interested Parties was in their capacity as representatives of the Institution of the Church, an institution that is a guardian of the principles of public morality, ethics, human dignity



and individual rights and freedoms which are at the heart of the Petition.

- 4.3 In their skeleton arguments, and with regards to the Petitioners' argument that the phrase "order of nature" is undefined in the Penal Code and that the provision is vague, ambiguous and overbroad, it was the Interested Parties' submission that the provision is neither broad, vague nor ambiguous. Further, that it does not in any way contravene Article 18 (8) of the Constitution.
- 4.4 It was also submitted that on 29<sup>th</sup> December, 1991, the then Republican President of Zambia, Frederick T. J. Chiluba declared Zambia a Christian nation. That President Chiluba's intention by this declaration was that as a Christian nation, Zambia would be governed by the righteous principles of the word of God and that righteousness and justice would prevail at all levels of authority. This declaration, it was submitted, has equally been enshrined in the Constitution's preamble which declares the Republic a Christian Nation.
- 4.5 The Interested Parties further submitted that the phrase "offences against the order of nature" and/or "unnatural offences" is not only used in Zambian Legislation but is also found in the Bible in Romans 1:26-27, as well as in the Legislation of several other countries, like Ghana, Nigeria, Kenya, Tanzania, Malawi etc.

- 4.6 With regard to the Petitioners' argument that the impugned sections infringe on the citizens' right against discrimination, it was submitted that this argument is without merit and they do not infringe on one's right to freedom of conscience as envisaged under Article 19 of the Constitution.
- 4.7 It was argued that section 155 (a) and (c) of the Penal Code does not in any way counter one's right to freedom of conscience as envisaged under Article 19 of the Constitution. That Article 19 of the Constitution clearly shows that the freedom of conscience envisaged under this provision relates to one's right to express their religion and not one's sexual desires. It was further argued that in any case and even assuming that the said provision encompasses such "sexual desires", the Legislature has the authority to restrict the exercise of such freedoms. The case of **Braunfeld v Brown**<sup>9</sup> was cited in support of this argument.
- 4.8 Finally, it was the Interested Parties' submissions that the provisions of section 155 (a) and (c) of the Penal Code are valid, definitive and do not contravene any provision of the Constitution and prayed that the Petition be dismissed for lack of merit.
- 4.9 In orally augmenting their written submissions, and with regard to the issue of the jurisdiction of the Court, Counsel for the Interested Parties submitted that in accordance with Article 128 of the



Constitution, a matter that is alleged to contravene the Bill of Rights should be commenced in the High Court. It was noted that the Petition shows that several questions arising therein allege the infringement of provisions under the Bill of Rights. To this effect, therefore, it was argued that this Court lacks jurisdiction to entertain this Petition.

4.10 With regard to the substance of the Petition, it was submitted that a law can only be said to be overly broad and vague if it can cover too many situations such that even the innocent can be convicted of a crime through an inadvertent act. In this respect, the Court was referred to the Canadian case of **Canadian Foundation for Children, Youth and the Law v The Attorney General**<sup>10</sup>, in which the court stated that to be unconstitutional, a law must be so unintelligible that people could agree that they have no reasonable idea what the law could mean. It was the Interested Parties submission that this was not the case with section 155 of the Penal Code and neither was the term unnatural offences a stranger to the laws of many jurisdictions across the world.

4.11 It was also argued by the Interested Parties that section 155 of the Penal Code has been in existence since 1<sup>st</sup> November, 1931, close to a century, and that any fear of arbitrary application of the law was

therefore merely hypothetical. That this Court cannot invalidate a law based on hypothetical considerations.

- 4.12 It was finally submitted that the Petitioners had failed to demonstrate the unconstitutionality of section 155 of the Penal Code and it was their prayer that the same be maintained.

## **5.0 Petitioners' Reply**

- 5.1 The Petitioners maintained that section 155 (a) and (c) of the Penal Code does not state which sexual acts are considered against the order of nature, whether between a male and female or persons of the same sex. **Magaji v Nigerian Army 2-3<sup>5</sup>** cited by the Respondent was said to set two tests for determining sexual intercourse against the order of nature. The divine or God law test and the public morality test.
- 5.2 The first test was controverted on the premise that God only endorses sex between married persons and for the purpose of procreation. Given this, all forms of sexual intercourse other than in a marriage setting and for procreation purposes would be sexual acts against the order of nature.
- 5.3 In equally controverting the second test of public morality, the Petitioners contended that there are no clear rules of correct sexual conduct in the Zambian society. They submitted that the common



thread in sexual activities appears to be mutual consent and to support this position, sections 132, 138 and 139 of the Penal Code were given as examples. The Petitioners thus maintained that section 155(a) and (c) of the Penal Code was vague and urged us to strike it down as we did with certain provisions in the Chiefs Act in **Webby Mulubisha v Attorney General**<sup>11</sup> and the Electoral Process Act in **Godfrey Malembeka (Suing as Executive Director of Prisons Care and Counselling Association) v The Attorney General and Electoral Commission of Zambia**<sup>12</sup>.

- 5.4 The Petitioners also urged us to draw a distinction between public interest and public sentiment. To them, the former lies in ensuring that the Constitution is protected and not a reflection of popular sentiments. That this Court ought to ensure that legislative action remains consistent with the Constitution.
- 5.5 Further that, considerations of the effect that the striking down of section 155 (a) and (c) of the Penal Code would have on law enforcement were extraneous on the strength of **Mulundika and 7 Others v The People**<sup>1</sup>. We were urged to strike down section 155(a) and (c) of the Penal Code so that Parliament can enact laws that are precise, unambiguous, and proportionate to their intended purpose.

5.6 With regard to the jurisdiction of this Court over the Bill of Rights, the Petitioners submitted that Article 128 of the Constitution makes the jurisdiction of the High Court very limited on constitutional matters. It was argued that a person can only approach the High Court if they allege that an act contravenes any of the provisions of the Bill of Rights in relation to that person. The Supreme Court case of **Hakainde Hichilema v The Attorney General**<sup>13</sup>, was cited in support of this argument.

5.7 It was further argued that if the allegation is that a particular law violates the Constitution and is not in relation to a person, the High Court will not have the jurisdiction. It further submitted that it is the aggrieved party that must move the High Court because their rights have been violated, but in a case like that of the Petitioners, where they are simply saying a law violates the Constitution, then the right forum is this Court.

## **6.0 Analysis and Determination**

6.1 We begin by restating the jurisdiction of this Court as provided for in Article 128 of the Constitution as follows:

**128 (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 the law; or
  - (c) an act, omission, measure or decision by a person or an authority;
- contravenes this Constitution, may petition the Constitutional Court for redress.
- (4) A decision of the Constitutional Court is not appealable to the Supreme Court.

6.2 We have carefully considered the Petition before us, the Answer, Affidavit evidence and arguments advanced by the parties. While the Petition at hand alleges that section 155(a) and (c) of the Penal Code contravenes Article 8 (d) of the Constitution, it also alleges a contravention of Articles 17, 18, 19 and 23 of the Bill of Rights. Accordingly, before proceeding to the substance of the Petition, we have to satisfy ourselves that we do have jurisdiction to adjudicate on this Petition.

- 6.3 We had earlier invited the parties to submit on this question. The Petitioners' submissions on the issue of jurisdiction was that this Court has jurisdiction to interpret the whole Constitution in line with Article 128(3)(c) thereof and that what is reserved for the High Court is the enforcement of the Bill of Rights. They based this submission on the decision of **Hakainde Hichilema v Attorney General**<sup>13</sup>.
- 6.4 Distinguishing the cases of **Wilson Mwenya v Nkandu Luo and Attorney General**<sup>14</sup> and **Benjamin Mwelwa v Attorney General**<sup>15</sup> which had been dismissed on the basis of this Court's lack of jurisdiction on the Bill of Rights, the Petitioners submitted that the two cases alleged contravention of protective provisions unlike the Petition at hand that alleges contravention of the Bill of Rights by an Act of Parliament. **Godfrey Miyanda v Attorney General**<sup>16</sup> was cited as an example of a matter in which this Court dealt with the merits of the case notwithstanding that it was moved to deal with fundamental rights and freedoms under Articles 11, 20, 21 and 23 of the Constitution. It was explained by the Petitioners that in that case, 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 and that Article 98(4) of the Constitution was *ultra vires* Article 11 of the Constitution.



- 6.5 It was also the Petitioners' submission that the Petition at hand did not allege any contravention of the Bill of Rights in relation to themselves or to anyone else. We were urged to consider the merits of the case as not doing so would create a vacuum in the law as to which Court is to hear a matter which alleges that provisions of the law are in breach of Part III of the Constitution. The Petitioners submitted that they sought this Court's intervention in determining the constitutionality of the Penal Code.
- 6.6 The Respondent on the other hand argued that Article 128 of the Constitution is clear on this Court's jurisdiction. Further that the Petition lacked a factual basis for purposes of seeking interpretation of specific Articles of the Constitution.
- 6.7 We rendered a Ruling in which we observed that the Petition had raised issues that could only be determined after a full hearing of the matter which we now do. The position taken did not address the question of jurisdiction but left it to determination after the parties had ventilated their arguments on the merits. The parties' substantive position having been laid before us, this is an opportune time to deal with the question.
- 6.8 Article 128 (3) of the Constitution gives this Court power to adjudicate upon a Petition that alleges that an Act of Parliament or

Statutory Instrument has contravened the Constitution. The said Article provides that-

**(3) Subject to Article 28, a person who alleges that—**

**(a) an Act of Parliament or Statutory Instrument;**

**(b) ...;**

**contravenes this Constitution, may petition the Constitutional Court for redress.** (emphasis ours)

6.9 Our jurisdiction to adjudicate on an alleged contravention of the Constitution is therefore subject to the provisions of Article 28 of the Constitution. Article 28 still reposes jurisdiction in relation to the Bill of Rights on the High Court at first instance and the Supreme Court on appeal.

6.10 The intentional use of the words 'subject to' in Article 128(1) and (2) of the Constitution, entails that when executing its Constitutional mandate under Article 128, this Court must give deference to the High Court when dealing with matters that fall under the Bill of Rights.

6.11 The Constitution defines the Bill of Rights in Article 266 as follows:

**'Bill of Rights' means the human rights and fundamental freedoms set out in part III, and includes their status, application, interpretation, limitations, derogations, non-derogations and enforcement.** (emphasis ours)

6.12 When a constitutional or any other statutory provision is made 'subject to' another provision, this conveys the idea of a provision yielding to the other provision to which it is made subject. The Indian



Supreme Court affirmed this position in the case of **The South Indian Corporation (P) Ltd v The Secretary, Board of Revenue, Trivandrum and Another**<sup>17</sup>, where it held:

The expression 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject.

6.13 Article 128 of the Constitution has been made subject to Article 28 of the Constitution. Article 128 of the Constitution therefore, yields to Article 28 of the Constitution to which it is made subject.

6.14 We have consistently maintained that this Court's jurisdiction does not include the Bill of Rights. In **Mildred Luwaile v Attorney General**<sup>18</sup> among others, we indicated that our jurisdiction is to resolve issues relating to the Constitution except the Bill of Rights. These include matters relating to the interpretation, violation or contravention of the Constitution.

6.15 The Petitioners argue that Article 28 of the Constitution only provides for enforcement of rights by a person seeking enforcement of their rights and that it does not extend to alleged contravention by an Act of Parliament as is the case before us. Further that in the manner that Article 128(3) of the Constitution is couched, this Court is the right forum for dealing with an alleged contravention of the Constitution by an Act of Parliament.

6.16 We were faced with a like argument in **Mutazu John v Anthony Hubert Kabungo and Others**<sup>19</sup>. In that case, a Petitioner argued that provisions of the Defence Force (Procedure) Rules, a schedule to the Defence Act, Chapter 106 of the Laws of Zambia had flouted Article 18 of the Constitution. When we invited the parties to address us on the question of jurisdiction, the Petitioner in that case argued among others that, this Court by virtue of Article 128(3) of the Constitution had the jurisdiction to deal with the Petition as it alleged a contravention of the Bill of Rights by a piece of legislation.

6.17 Observing the subjection of Article 128 to Article 28 of the Constitution and the definition of “Bill of Rights” laid out in Article 266 of the Constitution, we refused to entertain the argument on the basis that Article 28 of the Constitution as read with Article 266 of the Constitution rests jurisdiction on the Bill of Rights with the High Court and this power extends to interpretation of the Bill of Rights in the face of an alleged contravention by a piece of legislation. We stated thus-

**In the absence of a referendum conducted in accordance with Article 79(3) of the Constitution, we reiterate, the status of Part III remains as it was prior to the 2016 constitutional amendments. Accordingly, it follows that the Constitutional Court or indeed any court aside of the High Court and Supreme Court, cannot be introduced into Part III of the Constitution otherwise than by a referendum conducted in accordance with Article 79(3).**

**Further, in light of the definition of the term 'bill of rights' under Article 266 of the Constitution, we are taken aback by Colonel**



Nhamboteh's suggestion that Articles 1(5) and 128 of the Constitution, have stripped the High Court of jurisdiction to interpret and invalidate statutory enactments for contravening Part III. The definition of the term is comprehensive enough as to include the powers which counsel is alleging, the High Court has now been stripped of.

6.18 We still hold this position as regards this matter as well. The Petition at hand challenges the constitutionality of section 155 (a) and (c) of the Penal Code largely on the premise of Part III, a portion of the Constitution that falls outside this Court's jurisdiction.

6.19 The Petitioners cited the case of **Godfrey Miyanda v Attorney General**<sup>16</sup> as an example of a matter in which the Court dealt with an alleged contravention of the Bill of Rights. We have taken time to examine the said decision in which a Petitioner had challenged the constitutionality of the 2016 Constitutional Amendments on the basis of repealed constitutional provisions, Article 79 and aspects of Part III of the Constitution. As regards Part III, the Petition called on us to determine the consistency of the definition of discrimination under Article 266 with that given in Article 23; the consistency of Article 50 with freedom of expression under Article 20; compliance of section 18 of the Constitution of Zambia Act with Articles 11 and 21 and validity of Article 98(4) in the light of Article 11.

6.20 From our assessment, in the **Godfrey Miyanda v Attorney General**<sup>16</sup> case, this Court was being called upon to decide on the constitutionality of certain constitutional provisions that were within

national values and principles when interpreting the Constitution. The national values and principles by themselves are not justiciable. A litigant that comes to this Court must cite a provision of the Constitution that needs interpretation or which has allegedly been breached. It is only during the interpretation process that the Court is called upon to do so in such manner that will promote the Constitution's purposes, values and principles. The values and principles are also to be considered in the development and implementation of state policy.

6.22 In **Martin Chilekwa v Attorney General**<sup>21</sup>, we reiterated this position. A mere reference to Article 8 of the Constitution does not invoke this Court's jurisdiction as the national values and principles are not justiciable in themselves.

6.23 In light of this position, arguments pertaining to Section 155 (a) and (c) of the Penal Code contravening Article 8(d) of the Constitution are untenable. This position also applies to the interpretative questions 2.5.2 and 2.5.3. We further wish to state here that these questions are misplaced as the only issues that can be dealt with in a Petition are allegations of contraventions of the Constitution. The Court will in determining the alleged contraventions inevitably go through the rigorous process of interpreting the relevant constitutional provisions in dispute before arriving at a decision as to whether a provision has been contravened or not.

6.24 That said, this petition fails for lack of merit.



6.25 In light of the significant constitutional issues that have been raised  
in this matter, we order the parties to bear their own costs.



A. M. SHILIMI  
DEPUTY PRESIDENT – CONSTITUTIONAL COURT



M. MUSALUKE  
CONSTITUTIONAL COURT JUDGE



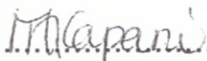
M. K. CHISUNKA  
CONSTITUTIONAL COURT JUDGE



J. Z. MULONGOTI  
CONSTITUTIONAL COURT JUDGE



M. Z. MWANDENGA  
CONSTITUTIONAL COURT JUDGE



M. M. KAWIMBE  
CONSTITUTIONAL COURT JUDGE



K. MULIFE  
CONSTITUTIONAL COURT JUDGE