

HYPOTHETICAL CASE

SIR DAWDA KAIRABA JAWARA MOOT COURT COMPETITION 2020

BEFORE THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

BETWEEN

MOVEMENT FOR THE ADVANCEMENT OF KUTOROS (MAK)

AND

THE DEMOCRATIC REPUBLIC OF ZAMANDA¹

1. The Democratic Republic of Zamanda is a West African country with a population of 3 million people. Its capital, Gobe, is in the north of the country along the Atlantic Ocean. Zamanda attained independence on the 26th February 1964 from Britain after about two (2) centuries of colonization. The country has since independence remained relatively peaceful experiencing only one coup d'état in 1985. From the economic perspective, the country has remained among the least developed countries in the sub-region with limited natural resources and consistent budget deficit since independence. The booming tourism industry of the country significantly contributes to over 30% of the GDP; however, the country has a heavy debt burden that is over 60% of its GDP.
2. The Republic of Zamanda operates a tripartite dual and segregated legal system. The courts of Zamanda are empowered by the Constitution to administer both English common law and customary law. The common law courts are presided over by judges trained on common law jurisprudence and are structured in a hierarchy with the Supreme Court being the final appellate

¹ This is a fictional case before the African Court of Human and Peoples' Rights. All participating teams will represent both Counsels for the applicants and the respondent. Parties must prepare written submissions and plead before the Court. The written submissions should address all issues relevant to the case below.

court. The Customary Courts on the other hand, are presided over by persons who are learned on the customs of the community concerned. Customary rules, binding on members of the community to whom they apply, differ from one community to another. There are Customary Courts in all of the seven Districts of Zamanda. While the common law courts apply English common law and principles of equity in resolving disputes, the customary courts apply customary rules in deciding cases brought before them. According to the Constitution of Zamanda, matters bothering on land holding, marriage, divorce, inheritance and child custody are determined according to the customary rules and personal laws of individuals in the respective Districts.

3. Zamanda Ratified the African Charter on Human and Peoples' Rights (African Charter) on the 19 December 1986; the International Covenant on Civil and Political Rights on 18 February 1980 and the International Covenant on Economic, Social and Cultural Rights on the 26 March 1981; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on 8 June 2006; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa on the 9 August 1998; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1990; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on the 2 January 1980; and Convention on the Rights of Disabled Persons (ICRPD) on the 3 March 2010. It also ratified the Protocol on the African Human Rights Court on 18 March 2010 and made article 34(6) declarations on the 17 January 2018; the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child on 14 March 1999 and ILO Convention 182 on the Worst Forms of Child Labour on the 12 December 2003.

4. The Makoi ethnic group is the largest ethnic group in Zamanda and makes up about 70% of the population. The Makois have dominated power since independence and the current President, Jato Batuta, is also of Makoi extraction. The Lendi ethnic group are a minority ethnic group making up about 15% of the total population. They are mostly concentrated in the Bundu District, the most remote District in Zamanda. There have been ethnic tensions between the Makoi and the Lendi ethnic groups over land and grazing rights in the Bundu District resulting in clashes between the two ethnic groups in 2002.
5. The Lendi ethnic group abide by a rigid customary practice designed around a caste system. At the bottom of the pyramid of the Lendi caste system are the “Kutoros” (slaves). The Kutoros are regarded as the descendants of ex-slaves and are required by an obnoxious customary rule to offer free labour to their former slave masters. This has been the practice from generation to generation. The Kutoros are also regarded as impure and are therefore not allowed, by a long standing and binding customary rule, to marry members of the upper castes. The Kutoros are required to marry amongst themselves and any marriage between a Kutoro and a member of the noble or freeborn class is void *ab initio* by virtue of a customary law rule that has come to be known as the “Ashu customary rule”. The Customary Courts have jurisdiction to annul any marriage that violates the Ashu customary rule and the courts have been doing so consistently.
6. According to data from Human Rights Watch (HRW) and Amnesty International (AI), the Bundu District is the poorest District in Zamanda. It is estimated that 70 percent of the inhabitants of the District live below a dollar a day. According to a Report from HRW in 2019, the Kuturos are the most economically deprived of the inhabitants of the District. Schools in

predominantly Kutoro towns and villages are underfunded and neglected. One (1) in every three (3) children in the District between the ages of 6-18 years are out of school while the births of about 60 per cent of the children under 9 years are not registered. Figures from a survey conducted by the Bureau of National Statistics (BNS) reveals that a Kutoro is more likely to drop out of secondary school than any other ethnic group largely due to the endemic poverty that besets each generation. Kutoros are required by a rigid customary law to offer free labour to families of their former masters as a recompense for freeing their ancestors from slavery. Kutoro children between the ages of 12-18 years are therefore withdrawn from school by their aging parents to fulfil this customary obligation. Since the labour they render is free, Kutoros make up a large percentage of youth unemployment. The girls among them are married off at an early age, at about 14 years, to ease the stress of poverty on the family and at times to pay off family debts. Since Zamanda is one of the poorest countries in the world, Kutoros therefore have no social security safety net and State owned services and facilities.

7. In terms of religion, the Lendi ethnic group are a majority Muslim ethnic group with a few practicing traditional religion through ancestral worship. The grand central mosque of Dandimayo, the biggest town in Bundu District, was built by the labour of the Kutoros but recent agitation by the Kutoros for equality and anti-discrimination has created tension between the Kutoros and members of the upper castes and the tension came to a boiling point when the Kutoros were banned from praying and worshiping at the Dandimayo Central Mosque for daring to celebrate a festival on a different date. As a way of curtailing the agitations of the Kutoros for equality and cutting them to size, the Imam of the Grand Central Mosque has banned the internment of Kutoros at the Muslim cemetery and designated a place behind the noxious village abattoir for the burial of Kutoros. They are also banned from using the public

tap and accessing the village health post and market. When some members try to lodge a complaint, they are usually arrested and detained.

8. The Government of Zamanda responded to this tension by calling on all the parties to calm down and respect the rule of law. It immediately dispatched a council of elders to mediate between the Kutoros and the upper caste in the Lendi ethnic group. The Police Commissioner in the Bundu District summoned the elders of the relevant communities and advised them to maintain law and order. The President also did a press conference where he was asked about the situation in Bundu District and he responded that:

“We want to remind everyone that the government treats each individual equal. However, it notes that each Zamandan community has its cultural and traditional norms. These practices rely on both our religious and constitutional values. We are aware of the constitutional provision which clearly states that no person shall be held in slavery or servitude or forced labour. These provisions are not violated by the Lendi ethnic group. These cultural values and traditional ways of living are also protected under the Zamanda Constitution.

We will not tolerate attempts by anyone to destabilize norms that have guided peaceful co-existence in our villages for hundreds of years. As far as we are concerned, everyone is free to belong to any caste group without resorting to violence, insults and disturbing the peace in our communities.”

9. As a result of the status quo, Kutoros within Zamanda and abroad formed the **Movement for the Advancement of the Kutoros (MAK)** as a civil society

organization to advocate for the rights and equal treatment of the Kutoros in Zamanda. The MAK has written several petitions to the Government and to the President himself to address the recent developments in Dandimayo, eliciting no response from the Government. The Secretary General of MAK, Mao Jaw, a radical revolutionary of Marxist leaning and an uncompromising character, has led MAK since its founding and was hell-bent on ending the caste-based discrimination in Zamanda. Mao Jaw and his able lieutenant, Karl Foon, planned a protest against the Government of President Batuta for its indifference and inaction in resolving the caste-based discrimination in Dandimayo.

10. To obtain funding for the planned protest, Mao and Karl solicited the support of wealthy Kutoros abroad who are sympathetic to their cause. The Government of President Batuta became very wary of the advocacy of MAK and instructed its spy chief to keep MAK on check. The overzealous head of the National Security Agency instructed officers of the Agency to break into the offices of MAK and plant listening and surveillance devices therein to know what Mao Jaw and Karl Foon were up to. The Agency also succeeded in tapping all the phones and computers of MAK and its leadership. The Agency surveilled and listened to all the conversations between Mao and Karl and those funding the protest. The protest was planned for the 26 February to coincide with the Independence Day.
11. On the 26 February 2018, Mao, Karl and a large number of MAK members assembled at Independence Square to peacefully protest and bring the plight of the Kutoros to national attention. Thirty minutes into the procession, a battalion of Government security forces descended on the protesters and dispersed them with tear gas and the use of force resulting in serious injuries to members of MAK. Mao and Karl were identified and arrested and taken

to two separate detention centers. A few weeks after the protest, Mao was charged with organizing a protest without a permit contrary to section 5 of the Public Order Act 1945. Karl was kept incommunicado and has not been seen or heard from by members of his family. When confronted about his disappearance, the National Security Agency and all the heads of other security outfits denied having him in their custody. His wife and children have been calling on the Government to either charge him with an offence or release him but their pleas fell on deaf ears. His lawyers were also denied access to see him and the writ of habeas corpus they filed on his behalf at the Supreme Court has never been heard. Unfortunately, there are fears that he has died in detention. Mao was charged and convicted by the High Court and the conviction was upheld by both the Court of Appeal and the Supreme Court.

12. The Public Order Act (Act), passed in 1945, was a colonial legislation meant to curtail anti-colonial agitations. The Act requires any person that wishes to embark on a protest to apply for, and obtain a permit from the Inspector General of Police. The Act criminalizes the conduct of protests without a permit. In 1960, the founding fathers of Zamanda were arrested and charged under the Act and their conviction under the Act was a watershed moment in the march for independence. Since independence, politicians have vowed and made series of promises to either repeal the Act or abrogate it altogether. During his election campaign, President Batuta had publicly vowed that if elected, the Act would be the first legislation he will repeal having been a victim of the Act himself. But since his election four years ago, he has remained coy about repealing the Act. When reminded about his commitment to repeal the Act, he argued that the Act is “not as bad as people make it” and that the Act “is necessary to maintain the peace and tranquility of Zamanda”.

13. Professor Nfonso, a legal luminary, widely acclaimed as among the leading human rights law scholars in Zamanda, has over the years been very critical of the caste system in Zamanda. His most recent publication recommended to the Government of Zamanda that it should take general and specific measures to combat discrimination based on work and descent and establish a monitoring mechanism to effectively promote equality and non-discrimination. On the 9th October 2012, he filed a class action in the High Court of Zamanda arguing that the practice of the caste system in the Lendi ethnic group is inconsistent with Zamanda's international human rights obligations. He further argued that the practice of caste system is an obstacle to participation in politics, social, economic and cultural life of communities. This case was widely followed by major human rights organizations in Zamanda. A civil society organization "**We Are All Equal**" commended Professor Nfonso for "bringing the concerns of Kutoros to the limelight after decades of Government indifference on the issue."
14. The High Court, presided over by Justice Sabantah, dismissed the application on the grounds that the petitioner does not have standing to bring claims on behalf of the Kutoros. The Court relied on section 37 of the Zamanda Constitution which provides that any person who alleges his/her rights are violated in relation to himself or herself may apply to the High Court for a redress. Professor Nfonso filed his appeal in the Court of Appeal out of time and the court refused to grant him leave to file out of time. The matter was later heard by the Supreme Court which upheld the High Court's decision.
15. Professor Nfonso in a recent interview with the media on the Supreme Court's decision, said that:

“ the rules of standing are connected with and can profoundly impede or facilitate access to justice for marginalized communities. In our case, the rules on standing provides a barrier that prevents individuals from accessing courts and justice. This impacts negatively on the protection of human rights in Zamanda.”

16. On the 10 October 2020, MAK and Mao Jaw submitted joint application to the African Court on Human and Peoples’ Rights to rule as follows:

- 1) That section 5 of Zamanda’s Public Order Act violates the African Charter and other relevant human rights treaties;
- 2) That the failure of Zamanda to prosecute anyone for the disappearance of Karl Foon violates the African Charter and other relevant human rights treaties;
- 3) That the failure of the Government of Zamanda to criminalize the caste system in Zamanda violates the African Charter and other relevant human rights instruments;
- 4) That the unlawful surveillance and wiretapping of MAK offices and its members violates the African Charter and other relevant human rights treaties.

17. The parties are expected to first address the Court on jurisdiction and admissibility.