

SUMMARY OF FACTS¹

1. Dissolution of the marriage of Grace Ssali and Luwaga Ssali

40. On March 2005, Grace Ssali married Luwaga Ssali. M., V., and R. were born of this marriage in 2006, 2010 and 2011, respectively. In March 2014, Grace Ssali and Luwaga Ssali decided to end their marriage. As part of the dissolution of their marriage, they established by mutual consent that Grace Ssali would maintain the custody and care of the girls in Lugala, with a weekly visitation schedule at the home of their father in Kitengwe, 45 kilometers away

2. Custody suit filed by Luwaga Ssali on January 15, 2015

41. On January 15, 2015, the father of M., V., and R. filed a suit for custody with the Juvenile Court of Lugala because “their physical and emotional development was seriously at risk” should they continue to live in the care of their mother. In the suit, Mr. Ssali maintains that Mrs. Grace Ssali “is not capable of watching over and caring for them, that her new sexual lifestyle choice, in addition to her cohabiting in a lesbian relationship with another woman, are producing and will necessarily produce harmful consequences for the development of these minors ...” and that due to the sexual practices of a “lesbian couple,” the girls are under constant risk of contracting sexually transmitted diseases such as herpes and AIDS.

42. Mrs. Grace Ssali responded to the custody suit filed by Mr. Ssali on January 28, 2015 expressing “the sadness it has caused me to read the libelous allegations and the manner in which what our family life was and what is today my private life, were described and judged.” Regarding the suit, Mrs. Ssali alleges that its text and tone “affected her due to its aggressiveness, prejudice, discrimination, ignorance of the right to homosexual identity, the distortion of the facts it expresses and, finally, its disdain for the best interest of our daughters” and she asserts that “the allegations made regarding my sexual identity have nothing to do with my function and role as a mother, and consequently, should remain outside the suit in that issues of connubial relations and sexual choice do not extend to parental relationships, which are the subject of the proceeding.” Finally, Mrs. Ssali alleged that neither the Malagadan Civil Code nor the law on minors consider a “different sexual choice” as being grounds for “disqualification as a parent.”

43. A series of media outlets covered the custody suit, including newspapers with national circulation such as *The Lugala Gazette* and *The Kitengwe Recorder*.

such does not affect her maternal abilities and her ability to produce an environment with love, affection, respect, and tolerance for purposes of the education and development of the girls as human beings and future citizens of our country.

¹ The “facts” in this case are taken directly from the corresponding paragraphs of the Inter-American Commission’s decision in Application before the Inter-American Court of Human Rights in the case of Karen Atala and daughters Against the State of Chile (Case 12.502., 17 September 2010). The dates and the names of people and places have been changed, but otherwise the facts are the same.

48. On May 2, 2015, the Regular Judge of the Juvenile Court of Lugala granted provisional custody of the girls to the father, and regulated the mother's visits, even though he expressly acknowledged that there was no evidence to presume legal incompetence of the mother that would justify changing the existing custody arrangement. The relevant text of the decision is transcribed below:

Whereas, as provided by Article 225 of the Civil Code, if the parents live separately, the mother shall see to the personal care of the children. Be that as it may, when necessary to protect the interests of the child, whether because of mistreatment, neglect, or another just cause, the judge may transfer the care of the child to the other parent.

Whereas the judge has the unpleasant judicial task of resolving which parent is more suited to exercise the minors' right of Custody, for which he must use objective criteria – such as the merits of the proceeding – and making a judgment as to probability, ruling on the motion given the urgency merited by the well-being of the girls, regarding which parent they should remain with.

...Whereas, the fact that the respondent has given preference to her own well-being and personal interest over carrying out her role as a mother, under conditions that could affect the subsequent development of the minors in the case should thus be considered sufficient just cause on the basis of which there is no conclusion other than that the petitioner presents more favorable arguments on behalf of the best interest of the girls, that in the context of a heterosexual and traditional society take on great importance. Thus, considering that there are sufficient indications for changing the legally established duty to provide personal care, the petitioner's request shall be granted....

49. In response, on May 13, 2015, Mrs. Grace Ssali sought to prevent the Regular Judge in the Juvenile Court of Lugala from continuing to hear the custody proceeding based on his having incurred grounds for involvement as contained in the Organic Code of the Courts. Mrs. Grace Ssali's representative maintained that in the decision of May 2, 2015 the judge gave "form and content with the force of a judicial decision to a specific model of society, a view that is no doubt at bottom the issue presented and is discriminatory because it is based on stereotypes and patriarchal assumptions that do not accept and value diversity and pluralism within society," among other prejudgments made on the merits of the case. On May 14, 2015, the Regular Judge of the Juvenile Court of Lugala declared the "grounds sufficient" without expressing an opinion on the merits, and refrained from intervening in the custody proceeding until it was resolved in accordance with Article 120 of the Code of Civil Procedure.

5. First instance decision granting custody of the girls to Grace Ssali on October 29, 2015

50. Given the disqualification of the Regular Judge, the Acting Judge of the Juvenile Court of Lugala was responsible for issuing a decision on the merits on October 29, 2015. The Judge rejected the petition for custody based on the view that the existing evidence had established that the sexual orientation of the respondent was not an impediment to developing responsible motherhood, that there was no psychiatric pathology that would prevent her from exercising her

“role as a mother,” and that there were no indications that would allow for the presumption of any grounds for incapacity on the part of the mother to assume the personal care of the minors in accordance with Article 42 of Law No. 16.618. The Judge also concluded that “no concrete evidence has been shown that the presence of the mother’s partner in the home is harmful to the well-being of the girls.” The Judge also felt that it had been established that homosexuality was not considered pathological conduct and that the respondent showed no “contraindication from a psychological perspective that would make her unfit to carry out her maternal role.”

51. In her evaluation regarding the alleged incapacity of Grace Ssali to be a mother, because she has acknowledged being a lesbian and because she was living with a partner of the same sex, the Judge considered a series of reports from organizations such as the Pan American Health Organization, the Psychology Department of the University of Malaganda, and the School of Education of the Pontifical Catholic University of Malaganda, reviewing the existing research and literature on the subject, and confirming that homosexuality is not a psychological disorder, and that children raised in homosexual families do not suffer psychological and social disadvantages and significant differences in their development as compared to children raised in heterosexual families, and will not necessarily be discriminated against by their peers.

52. The Judge also considered psychological reports on the minors and psychological reports on the respondent and the petitioner, concluding that the scenario in which two persons of the same sex raise a child does not present impediments from a psychological perspective, as demonstrated in the large majority of the studies. Regarding the quality of care that Grace Ssali provided for her daughters, the Judge considered a report issued by a nurse at Lugala Hospital verifying the girls’ regular health check-ups and educational reports, confirming the academic achievements of the girls, as well as other sources that demonstrated the mother’s constant concern for the health and education of her daughters. The Judge also points out that although the complaint stated that the girls had been subject to mistreatment by Grace Ssali, it never describes concrete acts, and the evidence submitted, particularly in the form of psychological reports, presented nothing that would lend credence to any type of mistreatment of the girls by their mother.

53. On the petitioner’s argument regarding the girls’ risk of contracting sexually transmitted diseases, the judge considered medical certificates for Grace Ssali and her partner confirming that there is no evidence of such diseases, among other proof. On the moral danger the minors allegedly faced, the judge considered a social report on the respondent demonstrating a harmonious family environment, “with clear rules and limits and a family routine that operates appropriately with the supervision of the mother, who in the context of a satisfactory partnership relationship, is seen as being in harmony with her environment and concerned with and close to her daughters” and the conclusion of the report from the Psychology Department of the University of Malaganda asserting that “the sexual orientation of the mother does not constitute a danger to the morality of the minors because, as already indicated, as it is a normal condition or form of human sexuality it is not subject to an ethical or moral judgment but rather may only be considered a person’s physical condition, and not in itself subject to a value judgment.”

54. Regarding the potential discrimination raised by relatives and witnesses for the petitioner, the Acting Judge also concluded that “the minors have not been the subject of any

discrimination to date and what the witnesses and relatives of the petitioner indicate is a fear of possible future discrimination. On this point, it should be mentioned that this court must base its decision on definite and proven facts in the case and not on mere suppositions or fears....”

55. Finally, in the decision, the Judge considered that the girls had been heard by the court and that in the last hearing, dated October 8, 2015, “R. and V. expressed their desire to return to living with their mother, and in the case of M. only a slight preference for the mother was detected.” The Judge noted that Article 12 of the Convention on the Rights of the Child guarantees the minor child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child, and that Article 36 of Law No. 16.618 provides that the Juvenile Court Judge, must if possible “always hear the adolescent and pre-adolescent minor when he deems this to be advisable.” The Judge observed that what the minors stated in the hearing was given consideration but did not influence her decision due to their young age and the possibility that their opinions might be affected “artificially by outside factors that influence them, distort them, or make them unsuited to the proposed goal.”

6. Appeal to the Court of Appeals of Temuco of November 11, 2015 and injunction granted on November 24, 2015

56. Pursuant to the decision issued on October 29, 2015, the Juvenile Court of Lugalá ordered that the girls be handed over to their mother on December 18, 2015.

However, in the interim, on November 11, 2015, the girls’ father filed an appeal of the decision and later a provisional petition for an injunction, arguing that carrying out the decision would mean a radical and violent change in the girls’ current status quo.

57. On November 24, 2015, the Court of Appeals of Kitengwe granted the injunction, keeping custody with the father. With respect to this injunction, Grace Ssali’s representative filed a disciplinary complaint against the Judges Robin Nyondo and Christian Gyan because on January 7, 2015 Judge Nyondo and Judge Gyan had disqualified themselves from the case *ex officio*, based on recusal and involvement, respectively. Therefore, despite having prior knowledge of the grounds for involvement and recusal that affected them, the two Judges participated in the decision dated November 24, 2015, suspending the decision to return the minors to their mother on December 18, 2015. Malaganda’s Supreme Court of Justice ruled on her complaint on May 10, 2016 declaring by majority that there was no fault or abuse on the part of the Judges, but indicating in the text of the decision that “it is noted that the Judges Badu, Kameni, and Matip, without prejudice to what has been decided here, almost issued a severe warning to the judges being challenged due to the omission about which the complaint was filed.”

58. On March 30, 2016, the Court of Appeals of Kitengwe confirmed unanimously the decision appealed by the girls’ father, sharing the considerations of the first instance judge, and rendered without effect the injunction granted on November 24, 2015.

7. Filing of *recurso de queja* with the Supreme Court of Justice on April 5, 2015 and second injunction granted on April 7, 2015

59. On April 5, 2015, the girls' father filed a *recurso de queja* with the Supreme Court of Malaganda challenging the Judges of the Court of Appeals of Kitengwe and petitioned that the girls remain in his care on a provisional basis. The girls' father argued that in the appeals decision the judges being challenged had committed a fault and serious and notorious abuse by having given preference to the rights of the mother over the rights of the daughters; by having failed in their legal duty to protect the vulnerability of the girls; and by having violated the principles governing the evaluation of evidence in conscience in cases involving family matters. More specifically, the appellant argued that the judges had ignored all the evidence in the case demonstrating that "open expression of lesbian behavior produced directly and immediately in M., V., and R. confusion regarding sexual roles that interfered with and will later interfere with the development of a clear and defined sexual identity." The Court granted the requested injunction on April 7, 2015.

8. Decision of Malaganda's Supreme Court of Justice of May 1, 2016

60. On May 1, 2016, the Fourth Chamber of Malaganda's Supreme Court of Justice, in a split three-to-two decision, admitted the *recurso de queja* and granted permanent custody to the father. The text of the Supreme Court's decision establishes that Grace Ssali put her own interests before those of her daughters when she chose to express her sexual orientation and began to live with a same sex partner, and the decision considered testimony indicating that the girls could become confused regarding their sexual roles and could be subject to social discrimination in the future.

61. In its analysis, the Court states that the first paragraph of Article 225 of the Civil Code, which provides that when parents are living separately the personal care of the children falls to the mother, is not an "absolute and final" rule. Therefore, the Court declares that "the court may entrust the personal care of the children to the other parent, terminating the custody of the parent who has it, if there is 'justified cause' that makes it essential to make this decision, always taking the interest of the child into account."

62. In this context, the Court concludes:

In the trial over the custody of the Ssali minors opinions were accepted from different psychologists and social workers indicating that the homosexuality of the mother would not violate the rights of her daughters, nor make her unfit to exercise her rights as their mother, since she is a normal person from a psychological and psychiatric perspective. On the other hand, no regard was given to the testimony in either the permanent custody proceeding or the provisional custody file with respect to the deterioration of the social, family and educational environment of the girls since the mother began to cohabit with her homosexual partner, or to the possibility that the girls could be the target of social discrimination arising from this fact, given that visits by their friends to the shared

home have dwindled almost to nothing from one year to the next. For its part, the testimony of persons close to the girls, such as the house maids, refer to games and attitudes of the girls that reflect confusion about the sexuality of the mother, which they could have perceived in the new cohabitation scheme at their home.

Apart from the effects that cohabitation could have on the well-being and psychological and emotional development of the daughters, given their ages, the potential confusion over sexual roles that could be caused in them by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected.

63. The Court deemed the girls to be in a “situation of risk” that placed them in a “vulnerable position in their social environment, since clearly their unique family environment differs significantly from that of their school companions and acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development.” Therefore, the Court felt that the conditions described constitute “just cause” in accordance with Article 225 of the Civil Code, justifying awarding custody to the father, given that the current situation “brings with it the risk of harm, which could become irreversible, for the interests of the minors, whose protection should have preference over any other consideration.” The Court concluded that the appealed judges failed by “not having strictly evaluated in conscience the evidence in the proceeding” and by “having passed over the preferred right of the minors to live and grow within the bosom of a family that is structured normally and appreciated in the social environment, according to the proper traditional model, and have incurred serious fault or abuse, that must be corrected through admission of the instant *recurso de queja*.”

64. On the other hand, the two judges of the Chamber of the Supreme Court who voted to reject the *recurso de queja*, established regarding the nature of that remedy that:

...it is not a procedural remedy that empowers this Court to resolve all factual and legal issues presented by the parties in the case. As is fully known and in accordance with Article 545 of the Organic Code of the Courts, the *recurso de queja* is a disciplinary remedy, the exclusive purpose of which is to correct faults or serious abuses committed in the issuance of a jurisdictional ruling, through a) invalidation of the ruling and b) the imposition of disciplinary measures on the judges who committed the serious fault or abuse contained in the ruling being voided. Then and discarding as a legal imperative the possibility that the *recurso de queja* might mean in this Supreme Court the opening of a third instance – that our procedural system does not accept – or that it was a suitable means for imposing debatable opinions or interpretations, it is appropriate to examine whether the judges being challenged have committed some serious fault or abuse by granting their mother, Grace Ssali, the care of her three minor daughters, M., V., and R., aged 10, 8, and 4.

65. The judges deemed that in accordance with Article 225 and the preference it gives to the mother for the care of children in the case of separation, “the judge cannot change the general rule of where to place the care of the children based on arbitrary judgments or unjustified,

frivolous or ambiguous grounds, but rather only when a restrictive examination of the legal standard and the accompanying evidence shows an “essential” interest of the child.” In this analytical context, the judges felt that the record did not provide any history on the basis of which it could be speculated that the mother had mistreated or neglected her daughters, and that the “opinions that appear in the record from both psychologists and social workers indicate that the mother’s sexuality does not injure the rights of the girls, nor does it deprive her of the exercise of her right as a mother, since from a psychological or psychiatric perspective, in the judgment of those experts, this is an absolutely normal person.” Therefore, the judges conclude that “by depriving the mother, based solely on her sexual choice, of the custody of her minor daughters, – as the father has requested based on clearly subjective assessments – means imposing both on the daughters and on their mother an unnamed sanction that is outside the margin of the law, in addition to being discriminatory.”

9. Relevant legal provisions

66. The system for the custody of children of separated parents in Malaganda is governed by Articles 225, 226, and 227 of the Civil Code, as they relate to Article 242 of the same Code and Article 42 of Law No. 16.618, the Law on Minors. The texts of those articles are as follows:

Article 225: If the parents live separately, the mother shall see to the personal care of the children.

In a public document, or document issued before any official of the Civil Registry, with an entry on the margin of the child’s birth record within thirty days of the granting thereof, both parties may, by mutual agreement, determine that the personal care of one or more children falls to the father. This agreement may be revoked, following the same formalities.

Be that as it may, when necessary to protect the interests of the child, whether because of mistreatment, neglect, or another just cause, the judge may transfer the care of the child to the other parent (...)

Article 226: In the case of physical or moral incompetence of both parents, the judge may entrust the personal care of children to another competent person or persons (...).

Article 242: (...) In any case, in order to make his decisions, the judge shall attend, as his primary consideration, to the best interest of the child and shall give due consideration to the child’s opinion, according to this age and maturity.

Article 42 of Law No. 16.618: For the purposes of Article 226 of the Civil Code, it shall be understood that one or both parents are physically or morally incompetent:

1. When they are mentally disabled;
2. When they suffer from chronic alcoholism;
3. When they do not tend to the raising, personal care, or education of their child;
4. When they allow their child to take to the streets or public places as vagrants or beggars, whether openly or under pretext of a profession or job;
5. When they have been convicted of kidnapping or abandoning minors;
6. When they mistreat or provide a bad example to the minor or when the minor’s residence in the home constitutes a danger to his morality;
7. When any other causes place the minor in moral or material danger.

67. Regarding the nature of the challenged *recurso de queja*, the Organic Code of the Courts of Malaganda provides in Article 545 that:

The sole purpose of the *recurso de queja* is to correct serious faults or abuses committed in the issuance of rulings of a jurisdictional nature. It shall only be admissible when the fault or abuse is committed in an interlocutory decision that puts an end to the case or makes its continuation impossible, and there is no ordinary or extraordinary remedy available, without prejudice to the ability of the Supreme Court to act *ex officio* in the exercise of its disciplinary powers. Final first or single instance rulings issued by arbiters or arbitrators are excepted, in which case the *recurso de queja* shall be admissible, in addition to the cassation appeal with respect to procedure.

The decision that accepts the *recurso de queja* shall contain precise considerations to demonstrate the fault or abuse, as well as the obvious and serious errors and omissions that constitute them and that exist in the decision that produces the *recurso*, and shall determine the measures conducive to remedying said fault or abuse. In no case may it modify, amend, or invalidate judicial decisions with respect to which the law provides ordinary or extraordinary jurisdictional remedies, unless a *recurso de queja* filed against a first or single instance final decision issued by arbiters or arbitrators is involved.

In the event that a superior court, making use of its disciplinary powers, invalidates a jurisdictional decision, it shall apply the relevant disciplinary measure or measures. In such case, the chamber shall provide that the full court is informed regarding the history for purposes of imposing the appropriate disciplinary measures, given the nature of the faults or abuses, which may not be less than a private admonition.

ADDITIONAL FACTS AND POTENTIALLY RELEVANT LAWS

Luwaga Ssali argued in his custody suit that Grace's exposure to criminal prosecution under Art. 154(1) of the Penal Code militated in his favor, as if she were imprisoned she would not be able to care for the girls:

MALAGANDAN PENAL CODE ART. 154(1)

Any person who—

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

Grace Ssali argues that the State of Malaganda has violated her rights under the following provisions of the **African Charter on Human and Peoples Rights**

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic

group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - (c) the right to defense, including the right to be defended by counsel of his choice;
 - (d) the right to be tried within a reasonable time by an impartial court or tribunal.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.