

subject of specific and separate provision, in section 29. The latter derives its status from its inclusion as a principle of state policy. It is not included as a Chapter II right (even in the terms in which its comparator is under the Constitution of South Africa: see *Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC)*; *Government of the RSA v Grootboom 2001 (1) SA 46 (CC)*).

29. The appeal is accordingly dismissed. No order as to costs was made by the Court *a quo*. Although the respondents sought an order of costs on appeal in their heads of argument, this was not pressed in oral argument, evidently in accordance with the general approach in constitutional matters that a court will be disinclined to make an order of costs in a substantial challenge of a public nature (see *Transvaal Agricultural Union v Minister of Land Affairs 1997 (2) SA 621 (CC)*; *Sanderson v Attorney General, Eastern Cape 1998 (2) SA 38 (CC)*).

NIGERIA

Odafe and Others v Attorney-General and Others

(2004) AHRLR 205 (NgHC 2004)

Festus Odafe, Tumba Terry, David Martins, Ekun Oluwatosin v Attorney-General of the Federation, Controller General of Prisons, Deputy Controller of Prisons Kirikiri Medium Prison, Lagos, Minister for Internal Affairs Federal High Court of Nigeria, Port Harcourt judicial division, 23 February 2004, suit FHC/PH/CS/680/2003

Judge: Nwodo

Extracts

Equality, non-discrimination (discrimination on the grounds of HIV status, 14, 29, 30)

Fair trial (access to justice, enforcement of human rights, 15, 16, 21-23; presumption of innocence, 17; trial within reasonable time, 18, 20, 38)

Health (non-treatment of prisoners with HIV/AIDS, 25-27, 33-35, 38)

Torture (non-treatment of prisoners with HIV/AIDS, 31-35)

Interpretation (international standards, 37)

Socio-economic rights (costs, 38)

Judgment

[1.] Sequel to the grant of leave on 25 November 2002 to the applicants to enforce their fundamental rights in respect of the relief stated in the statement in support of the application. The applicants by motion of notice dated 29 November 2002 and filed on 2 December 2002 prays the Court for the following relief:

1. A declaration that the continuous detention and the consequent segregation and discrimination of the applicants as confirmed HIV/AIDS patients is an infraction of the applicants' constitutionally guaranteed rights to dignity of the human person and their right to freedom from discrimination provided for in sections 34(1)(a) and 42(1) of the 1999 Constitution respectively.
2. A declaration that the applicants as confirmed HIV/AIDS patients have a right to proper medical treatment while in prison custody sequel to the Prisons Act, the Prisons Regulation Law and the United Nations Standard Minimum Rules for the Treatment of Prisoners.
3. A declaration that the failure of the officers, servants, agents and

privies of the respondents to give the applicants as confirmed HIV/AIDS patients proper medical attention while in prison custody amounts to inhuman and degrading treatment and an infraction of their fundamental rights as guaranteed under section 34 and section 42 of the 1999 Constitution of the Federal Republic of Nigeria, and article 5 of the African Charter on Human and Peoples' Rights.

4. A declaratory order directing the said authorities to relocate the applicants to designated government owned hospitals for proper medical attention.

[2.] The applicants relied on the affidavit of John Oziegbe and the statement in support of the motion *ex-parte* for leave.

[3.] The respondents did not file counter affidavit. The affidavits of service filed by the bailiff of court and which is part of Court's record is evidence of service of the motion on notice, enrolled court's order, the process, hearing notices and written address on the respondents respectively. Despite service none of the respondent appeared nor reacted in the application.

[4.] The learned counsel for the applicants, O Fapohunda, on application filed a written submission on 22 July 2003 and dated 21 July 2003 and 15 January 2004. He adopted the submission as his argument and with leave addressed the Court further orally.

[5.] In his written address he raised two issues for determination. On issue 1 he poised: 'Do the applicants have legal rights to seek the relief set out for determination by this honourable Court.' He submitted that the applicants have legal rights to seek the relief set out for determination by this honourable [Court] that the applicants' fundamental rights are guaranteed under sections 34(1)(a) and 42(1)(a) of the 1999 Constitution. He stated applicants are awaiting trial inmates and are presumed innocent until there is a conviction.

[6.] He submitted that the continuous detention of the applicants without trial in their physically disabled state having been confirmed as HIV/AIDS patients amounts to torture, whilst the refusal and or restriction from treatment and the discrimination by prison officials (agents for the respondent) and inmates as a result of the physical disabilities in their opinion would amount to discrimination. He submitted that the concept of torture has been held by the courts to include mental or psychological trauma referred to the case of *Uzoikwu v Ezeonu* 1991 6 NWLR pt 200 708. He submitted that the continuous detention, segregation and discrimination of the applicants amounts to torture and the condition under which they are held is inhuman, degrading and an infraction of the applicants' fundamental rights as provided for in section 34(1) of 1999 Constitution.

[7.] On issue 2 he poised: 'Has there been an infringement or infraction of the applicants' legal rights as contained in the provisions of the Constitution of the Federal Republic of Nigeria 1999, the Prisons Act, and the Prisons Regulation Law and The United Nations Standard Minimum Rules

for the Treatment of Prisoners'. He contended that the infringement and infraction of the applicants' legal rights flow from their continuous detention without trial and as awaiting trial inmates the applicants are entitled to the constitutional safeguard of their rights and having been diagnosed as carriers of HIV/AIDS patients they ought to be given proper medical treatment and should not be discriminated against.

[8.] He submitted that the prison authorities under section 8(1) to (3) of the Prison Act are given the responsibility of removing and taking prisoners to hospital, either private or government owned, for proper medical treatment but that this was not done.

[9.] Awaiting trial inmates who have not been convicted of any offence have a right to life and the failure of the respondents to give them proper medical attention is a deprivation of that right to life.

[10.] He submitted that applicants being Nigerian citizens although restrained under the law for allegedly committing various offences are presumed innocent until the allegations against them are proven.

[11.] Finally the Court has the duty to jealously protect and guide the citizens against flagrant infringement either by individuals or government officials. He relied on the case of *Mwojekwu v Ejikeme* 2000 5 NWLR pt 657, 402 at 410 *ratio* 7.

[12.] In adopting his written submission, learned [counsel] orally addressed the Court further. He contended that the applicants are awaiting trial and presumed innocent. He referred to section 8(1) of the Prison Act and submitted the applicants are seeking relief known to law since the subsection refers to prisoners with serious illness. He submitted that HIV can appropriately be defined as a serious illness.

[13.] I have carefully considered the affidavit in support of the application, the submissions of the learned counsel and the authorities and statutes cited. The learned counsel formulated two main issues for determination. I will adopt those two issues in the determination of the relief sought.

Issue 1: Do the applicants have legal rights to seek the relief set out for determination by this Honourable Court?

[14.] The applicants are awaiting trial inmates currently at Kirikiri Medium Prison in Lagos detained on the orders of some magistrate in Lagos for various offences ranging from armed robbery and murder. Whilst applicants were in detention they were diagnosed and tested positive to HIV/AIDS. Exhibit LK1 is the medical report ... and applicants averred in the affidavit that they are discriminated against because of their ailment.

[15.] On whether awaiting trial accused persons have a legal right to seek redress, section 46(1) of the 1999 Constitution provides that '[a]ny person who alleges that any of the provisions of this Chapter (four) has been, is

being or is likely to be contravened in any state in relation to him may apply to a High Court having jurisdiction in that area for redress'.

[16.] The word 'any person' I respectfully hold means that anybody without any distinction has a legal right to enforce the provisions of Chapter 4.

[17.] It is settled law that a prisoner on death row has rights enforceable under the Constitution. This was the legal position in the case of *Peter Nemi v State* 1996 6 NWLR pt 452 at 42. Equally, it is my respectful view that the Constitution, having stipulated that an accused awaiting trial is presumed innocent until proven guilty, the accused also enjoys similar enforceable rights under the provision of section 46(1) of the Constitution.

[18.] It is also pertinent to note at this stage that the evidence before the Court in exhibit LK1 reflects that the first applicant has been awaiting trial for three years eleven months, the second applicant for four years eight months, the third applicant for two years four months whilst the fourth applicant (reported dead) three years eight months. These reports are as of 2002 when the report was signed. Clearly the applicants have respectfully been awaiting trial for a period of not less than two years. The 1999 Constitution, in safeguarding the rights to personal liberty of every person, provide under section 35(1)(c) and subsection (4) that any person arrested and detained upon reasonable suspicion of having committed an offence shall be arraigned before a court of law within a reasonable time and if not tried within two months from date of arrest or detention shall be released on bail unconditionally or upon such conditions as are reasonably necessary. Reasonable time was defined as a period of two days or such reasonable time as may be considered by court.

[19.] Furthermore under section 36(1) of the Constitution a person shall be entitled to a fair hearing within a reasonable time by a court.

[20.] It is indisputable that applicants have been awaiting trial for an unreasonable period without trial. This is condemnable and the blame will go the first respondent, the chief legal officer in the country.

[21.] Therefore the Constitution recognises that accused persons detained awaiting trial has a right of access to court by virtue of the provision of section 36(1) and section 35(1)(c) and (4) and section 46(1) of the Constitution.

[22.] Furthermore the appellate Court has ruled in *Peter Nemi v State supra* that a prisoner on death row still has rights enforceable under the Constitution. I therefore respectfully hold that the present applicants awaiting trial are conferred with rights under the Constitution and article 7 of the African Charter on Human and Peoples' Rights Cap 10 to seek redress of court for any infringement of those rights.

[23.] Mr Fapohunda submitted that the continuous detention of the applicants without trial in their physical disabled state amounts to torture, whilst the refusal of treatment and discrimination by prison officials and

inmates amount to discrimination. I have earlier on condemned the fact that applicants have been awaiting trial for the period of not less than two years. Whether they are confirmed as HIV/AIDS patients or not, every detained accused is entitled to a fair hearing.

[24.] Obviously in the instant case applicants were diagnosed with HIV/AIDS whilst in detention.

[25.] Further, whether applicants are arraigned before a court or not each have a right under sections 7 and 8 of the Prisons Act Cap 366 to be treated for any serious illness once certified and the medical officer recommends his removal to a hospital. Exhibit LK1 issued by Dr Nebo Kingsley, the medical officer in prisons, has a list of 11 inmates awaiting trial and their special conditions.

[26.] The prison officials having been placed on sufficient notice by the contents of that document (exhibit LK1) are under a duty to [observe] the conditions set out in section 8 for removal of sick prisoners to hospital. The second and third respondents, though they were served did not appear nor [did they] file a counter affidavit to contradict the facts averred. I therefore deem the facts averred in the affidavit as correct. Consequently I hold the second and third respondents have not taken legal step to that effect.

[27.] On whether HIV/AIDS is a serious illness to fall within the provisions of section 8 of the Prison Act, it is my respectful view that AIDS is an understatement to use the word serious. This is because it is deadly. In the South African case of *Minister of Health and Others v Treatment Action Campaign and Others* [(2002) AHRRLR 189 (SACC 2002)] the Constitutional Court of South African described HIV/AIDS as one of the many illness that requires attention and that it is the greatest threat to public health in their country.

[28.] The government HIV/AIDS & STD strategic plan for South Africa 2000 to 2005 in the same report had this to say:

During the last two decades, the HIV pandemic has entered our consciousness as an incomprehensible calamity. HIV/AIDS had claimed millions of lives, inflicting pain and grief, causing fear and uncertainty and threatening the economy.

[29.] So presented clearly applicants who have been so diagnosed, as HIV/AIDS are afraid and also sick from the prognosis of the virus. Because of lack of sufficient awareness it is yet to be generally appreciated how contagious the virus is and the level of contact required before a person will contract the illness. It is therefore not strange nor am I surprised that the prison officials are discriminating against the applicants from the averments in the affidavit which has not been contradicted.

[30.] However, the right to freedom from discrimination as enshrined in section 42(1) of the Constitution did not cover discrimination by reason of illness, virus or disease. For emphasis I produce section 42(1): a 'citizen of

Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person ...'

[31.] Therefore from the above category specified, applicants cannot invoke section 42(1) on the contention that they have a right to exercise under that section. The concept of torture has been succinctly described by the appellate Court in *Uzoukwu v Ezeonu supra* to include mental or psychological trauma.

[32.] Justice Nasir in the same case defined torture to include mental agony whilst inhuman treatment means any barbarous act or acting without feeling for the suffering of the other.

[33.] Justice Niki Tobi JCA observed that torture could mean mental torture where the person's mental orientation is disturbed so that he cannot think and do things rationally as a rational human being. Applying this definition to the present case it is my respectful view that an average person diagnosed with HIV/AIDS ... will be greatly disturbed and will live in perpetual fear of the enemy attack. The second and third respondents are under a duty to provide medical help for applicants. Article 16 of African Charter Cap 10 which is part of our law recognises that fact and has so enshrined that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health'.

[34.] Article 16(2) places a duty on the state to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. All the respondents are federal agents of this country and are under a duty to provide medical treatment for the applicants.

[35.] I therefore hold that the state having failed to provide medical treatment for the applicants who are diagnosed as HIV/AIDS carriers, their continuous detention without medical treatment amounts to torture.

On issue 2

[36.] I have already held that the respondents failed to comply with the provisions of section 8(1) and (3) of the Prisons Act and article 16 of the African Charter. ...

[37.] The applicants ... have a right to life; however, the fact is that the applicants are in the custody of the second to fourth respondents awaiting trial and suffering from illness. The second to fourth respondents are under a duty to provide medical attention for them; failure to do so is non-compliance of the provisions of section 8 of the Prison Act and article 16 of the African Charter on Human and Peoples' Rights. The nature and detailed consequences of the virus are not placed before the Court for me to arrive at the conclusion that the non-compliance is an infringement of their right to life. In other words, that if treatment is provided they

will live, if not provided they will die. This is for an expert in the medical area concerned to tell the Court and there is no expert evidence before me. From the foregoing I conclude as follows: The government of this country has incorporated the African Charter on Human and Peoples' Rights Cap 10 as part of the law of the country. The Court of Appeal in *Ubani v Director SSS 1999 11 NWLR pt 129* held that African Charter is applicable in this country. The Charter entrenched the socio-economic rights of a person.

[38.] The Court is enjoined to ensure the observation of these rights. A dispute concerning socio-economic rights such as the right to medical attention requires the Court to evaluate state policy and give judgment consistent with the Constitution. I therefore appreciate the fact that the economic cost of embarking on medical provision is quite high. However, the statutes have to be complied with and the state has a responsibility to all the inmates in prison, regardless of the offence involved, as in the instant case where the state has wronged the applicants by not arraigning them for trial before a competent court within a reasonable time and they have been in custody for not less than two years suffering from an illness. They cannot help themselves even if they wanted to because they are detained and cannot consult their doctor.

[39.] I therefore declare as prayed in [prayers for] relief 1, 2, 3 and in respect of 4 I order the authorities to comply with the provision of section 8 of the Prison Act and relocate the applicants after the precondition has been complied with, to a hospital in accordance with section 8 of the Prison Act..

[40.] I award N100 000.00 costs in favour of the applicants.