

CRIMINALISATION OF TRANSMISSION

AIDS Law Project v. Attorney General & 3 Others
[2015] eKLR, Petition No. 97 of 2010
Kenya, High Court

COURT HOLDING

Section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 contains language such as “sexual contact” that is not clearly defined, which makes it difficult to identify with certainty and precision how persons targeted by the section are expected to conduct themselves and in respect of whom. As drafted, the provision is so overbroad that it could even be interpreted to apply to women who expose or transmit HIV to children during pregnancy, delivery, or breastfeeding. Section 24 of the Act therefore does not satisfy the principle of legality which is enshrined in the rule of law and which requires that an offence be clearly defined in law so that it is clear to anyone what acts or omissions make him or her liable.

Section 24 of the Act also requires that those who have HIV disclose their status to their “sexual contacts,” but it does not create any duty for the “sexual contacts” to keep the disclosed information confidential. Section 24 of the Act was therefore held to contravene the constitutional right to privacy stipulated in Article 31 of the Constitution of Kenya, 2010 (Constitution).

Summary of Facts

The Petitioner challenged the enactment of Section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 (the Act), which came into effect on 1 December, 2010 pursuant to Legal Notice No. 180 of 2010. The Petitioner claimed that the cited provision contained language that was vague and overbroad, and should be declared invalid and unconstitutional because it failed to precisely communicate its purpose in law and therefore the law did not have a sufficient degree of certainty. Further, the Petitioner claimed that this provision was unconstitutional as it fosters discrimination (which the state has an obligation to prevent) against persons living with HIV (PLWH) by way of their health status. Such discrimination violates the rights guaranteed under Article 9 of the International Covenant on Civil and Political Rights (ICCPR) which has been incorporated into the Basic Law by Article 27 of the Constitution.

Section 24 of the Act provides as follows:

- (1) *A person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall-*
 - (a) *take all reasonable measures and precautions to prevent the transmission of HIV to others; and*
 - (b) *inform, in advance, any sexual contact or person with whom needles are shared of that fact.*
- (2) *A person who is and is aware of being infected with HIV or who is carrying and is aware of*

carrying HIV shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.

(3) A person who contravenes the provisions of subsections 1 or 2 commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) A person referred to in subsection 1 or 2 may request any medical practitioner or any person approved by the Minister under section 16 to inform and counsel a sexual contact of the HIV status of that person.

(5) A request under subsection 4 shall be in the prescribed form.

(6) On receipt of a request made under subsection 4, the medical practitioner or approved person shall, whenever possible, comply with that request in person.

(7) A medical practitioner who is responsible for the treatment of a person and who becomes aware that the person has not, after reasonable opportunity to do so

(a) complied with subsection 1 or 2; or

(b) made a request under subsection 4,

may inform any sexual contact of that person of the HIV status of that person.

(8) Any medical practitioner or approved person who informs a sexual contact as provided under subsection 6 or 7 shall not, by reason only of that action, be in breach of the provisions of this Act.

The Petitioner had raised both human rights and public health arguments in support of the petition, directed against Section 24 specifically, but also the Act in general with regard to criminalisation of HIV transmission. The Petitioner's human rights arguments were based on several constitutional rights, including Article 27(1) of the Constitution, which guarantees the right to equality of every person before the law, and equal protection and benefit of the law. As for the public health argument, the Petitioner submitted that criminalisation of HIV transmission had negative implications on public health efforts to curb the spread of HIV. The Petitioner argued that the Act was likely to promote fear and stigma as it imposes negative stereotypes about PLWH; in turn, this discourages people from receiving testing to know and be open about their HIV status, especially as that information could be used against them in the criminal justice system, whereas a lack of knowledge of a person's HIV status could be used as a defence to any criminal charges.

In the same argument, the Petitioner claimed that criminalisation of transmission of HIV and the resultant stigma it fuels, creates conditions which promote discrimination against women and vulnerable groups. The Petitioner highlighted how child-bearing women tend to know about their HIV status ahead of their sexual partners, due to the requirement that they undergo HIV-testing as part of their obstetric care.

The Petitioner submitted that better standards were promoted by the Joint United Nations Program on HIV/AIDS (“UNAIDS”) and the World Health Organization that only deliberate transmission of HIV should be criminalised, so as not to create disincentives to testing or adopt measures that result in a disproportionate impact on the vulnerable. In response to the petition, the main argument by The Honourable Attorney General (the First Respondent) was that the Constitution has to be read as a whole and that personal rights and freedoms enshrined in the Constitution are not absolute, but can be deviated from within the limits of the Constitution. He argued that the Constitution therefore “provides a framework for the limitation of various rights and fundamental freedoms.”⁹⁸

The Interested Party in the petition (a non-governmental organization advocating for the rights of children) argued that Section 24 of the Act obliges a PLWH to disclose their HIV status to prevent the transmission of the virus to persons at risk of infection and that if such disclosure is made, the PLWH’s social and economic rights will not be infringed. The Interested Party also claimed that the law should protect children who are unable to protect themselves from contracting HIV from parents who knowingly engaged in unprotected sexual intercourse with infected persons, or from mother to child transmission, including transmission through breastfeeding.

The Center for Reproductive Rights joined as a Friend of the Court, and raised arguments that were along the lines of the Petitioner’s arguments, but with more emphasis on the effect of the whole Act on the rights of PLWH. It argued that several provisions of the Act were contradictory to the legislation’s overall goal of protecting the rights of PLWH and countering discrimination against them. It further argued that the Act should be drafted to align itself with internationally, regionally, and nationally recognised human rights principles.

Issues

The issues for the Court’s determination were:

1. Whether Section 24 of the Act is unconstitutional, for containing language that was vague and overbroad; and
2. Whether Section 24 of the Act violates the rights to privacy under Article 31 of the Constitution.

Court’s Analysis

Article 2(4) of the Constitution provides that any law which is inconsistent with the Constitution is void to the extent of the inconsistency. The Court affirmed its jurisdiction to hear matters pertaining to constitutionality of laws pursuant to Article 165(3) of the Constitution.

The Court stated that both criminal law and human rights law uphold the principle of legality which is that nothing is a crime unless it is clearly forbidden in law. It found that this principle is reflected in Article 50(2)(n) of the Constitution, and also defined under Article 11 of the Universal Declaration of Human Rights (UDHR). The Court recognised general rules of international law have been imported into the law of Kenya in accordance with Article 2(5) of the Constitution, which binds state and non-state organs and persons through the operation of Article 10 of the Constitution. The Court referred to various precedents to clarify the principle of legality and its applicability, including the Kenyan

case of *Keroche Industries Limited v. Kenya Revenue Authority & 5 Others* (Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240) where Naymau, J (as he was then) stated “one of the ingredients of the rule of law is the rule of certainty,” and *Kokkinakis v. Greece* (3/1992/348/421), a decision of the European Court of Human Rights where the majority of the Court agreed as follows:

...only the law can define a crime and prescribe a penalty... it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable.

The Court also referred to the fact that in order to attain legal certainty, the rules should be ascertainable by access to public sources. In support of this, the Court cited Lord Diplock in *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638, who stated that “The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”

Applying the principle of legality to Section 24 of the Act, the Court agreed with the Petitioner that the provision is vague, overbroad, and lacked certainty, especially with regard to the use of the term “sexual contact” (which the Court agreed could include mother to child transmission through pregnancy, delivery, and breastfeeding). The Court held that Section 24 of the Act failed to define the offence in law, meaning that it was not clearly discernible to citizens what acts and omissions will make them liable. The Court therefore held that Section 24 was unconstitutional.

The Court then considered the obligation to disclose a PLWH’s seropositive status to “sexual contacts” and the lack of a duty to keep such disclosure confidential in light of the right to privacy enshrined in Article 31 of the Constitution. The Court examined the conditions set out in Article 24 of the Constitution that need to be met to justify limitation of any fundamental right under the Constitution. It referred to the Ugandan decision of *Obbo and Another v. Attorney General* ([2004] 1 EA 265) to emphasise the point that the Court would take into consideration international human rights treaties and universally accepted principles of democracy, and precedents where courts with similar legal systems have applied such principles in determining what constitutes a reasonable and justifiable limitation of rights in an open and democratic society.

The Court then held that Section 24 of the Act violates the right to privacy protected under Article 31 of the Constitution as it does not guarantee confidentiality of information disclosed by or on behalf of PLWH. It further held that Section 24 of the Act did not satisfy the provisions of Section 24 of the Constitution which permits law to limit fundamental rights to the extent that such limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

The Court refrained from making any determination on the challenge to the Act as a whole, as it was of the view that the petition was specifically directed to Section 24 of the Act. However, it noted that there were problems with the drafting of the Act as raised by the Petitioner, the Interested Party, and the Friend of the Court. It recommended that the relevant authority review the provisions of the Act to avoid further litigation.

Conclusion

The Petitioner succeeded in the claim.

Significance

PLWH are vulnerable to stigma and discrimination as a result of their HIV-positive status. An issue of concern in this case, which the Court avoided addressing directly in its determination, was whether criminalisation of HIV transmission fuels stigma and discrimination and causes fear which may discourage people from seeking health services. The Petitioner argued that the Act was drafted in such a way that it perpetuated stigma, which not only undermined public health interventions but also infringed on human rights. Usually, women are blamed for spreading HIV because they are the first to know their status through antenatal testing. The Petitioner further acknowledged that disclosure of a diagnosis can lead to domestic violence, blame, and ostracism.

Whilst it is accepted that states have a right to adopt measures to prevent the spread of HIV/AIDS, cases such as *Cortez and Others v. El Salvador* (Case 12.249 20th March 2009 Report No. 27/09) suggest that in fact the stigma and discrimination against PLWH can lead to a reluctance to seek medical services, which in turn can undermine public health initiatives.

Various human rights and other political bodies have recommended against broad criminalisation of HIV transmission. Current standards of UNAIDS and the World Health Organisation generally limit criminalisation to the deliberate (not reckless or negligent) transmission of HIV transmission, i.e., to circumstances where the person knows that he or she has HIV, acts with deliberate intent to transmit HIV, and does in fact transmit it.

UNAIDS issued a guidance note entitled *Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*⁹⁹ in which it made a number of recommendations. These include that:

- In the absence of the actual transmission of HIV, non-disclosure of HIV status and HIV exposure should not be criminalised.
- Where criminal liability is extended to cases that do not involve actual transmission of HIV, such liability should be limited to acts involving a “significant risk” of HIV transmission.
- Any application of criminal law to HIV non-disclosure, exposure, or transmission should require proof, to the applicable criminal law standard, of intent to transmit HIV.
- Disclosure of HIV-positive status, and/or informed consent by the sexual partner of the HIV-positive person, should be recognised as defences to charges of HIV exposure or transmission.
- All elements of the offence of HIV non-disclosure, exposure, or transmission should be proved to the required criminal law standard.
- Any penalties for HIV non-disclosure, exposure, or transmission should be proportionate to the state of mind, the nature of the conduct, and the actual harm caused in the particular case, with mitigating and aggravating factors duly taken into account.

- Countries should develop and implement prosecutorial and police guidelines to clarify, limit, and harmonise any application of criminal law to HIV.

Should the State Law Office not address the issues highlighted by the Petitioner and the Friend of the Court, the Court's determination has left open the opportunity for further litigation to challenge the Act, including the extent of the criminalisation of HIV transmission.

Rosemary Namubiru v. Uganda
(2014), HCT-00-CR-CN -- 0050-2014
Uganda, High Court

COURT HOLDING

The Appellant, who was living with HIV, was not justified in her contention that she was prejudiced in her defence because of the double charge against her i.e., that giving a patient an injection with a needle that she had inadvertently pricked herself with was not only unlawful but also negligent. The Court held that the burden of proof was on the prosecution, so the defence was not prejudiced.

The trial court had correctly found that the prosecution had proved beyond a reasonable doubt the ingredients of the offence charged, based on the evaluation of the evidence before it.

However, the circumstances of the case required a lighter sentence than meted out by the trial court.

Summary of Facts

The Appellant worked as a nurse at Victoria Medical Centre in Kampala District. One day she was administering intravenous antibiotics to a child. Due to the child's struggles when she tried to insert the needle in the child's arm, the Appellant pricked herself with the needle. However, instead of replacing it with a sterile needle, she continued to use the contaminated needle on the child. The incident was reported to the hospital's management. It was later discovered that the Appellant was living with HIV. The Appellant was charged before the Magistrate Court with the one count of doing a negligent act likely to spread infection of disease. According to the Magistrate Court, the prosecution had to prove that (1) the Appellant unlawfully and negligently infected the toddler, and (2) that she knew or had reason to believe that this could likely cause the spread of the infection of HIV.

The Magistrate Court found that the Appellant's actions were unlawful and negligent in contravention to the relevant penal law. It also found that the Appellant had reason to believe that her act exposed the child to the risk of HIV. She was therefore convicted on the offence charged. She was sentenced to 3 years' imprisonment.

The Appellant appealed to the High Court and raised the following grounds for appeal:

1. The lower court erred in finding the Appellant guilty.
2. The lower court failed to properly evaluate the evidence on record.