VII. HIV

More than three decades into the HIV epidemic, Sub-Saharan Africa remains the epicentre. While significant progress has been made in curbing the spread of the epidemic in the region—with a decline in new HIV infections and significant increase in access to antiretroviral treatment—HIV remains the leading cause of death in Sub-Saharan Africa.[94] Moreover, the region continues to face serious social, legal, and policy challenges, including stigma, discrimination, gender inequality, and other negative norms and practices that render people vulnerable to HIV and hinder access to HIV services. Stigma and discrimination remain barriers to curbing the spread of the epidemic in many African countries. Laws and policies that target vulnerable and marginalised groups tend to fuel HIV-related stigma and discrimination as well as lead to human rights violations. For instance, laws and policies that criminalise certain sexual acts such as same-sex relationships or sex work may hinder access to HIV services for people engaged in these acts.

Sometimes key populations or marginalised groups are denied access to treatment or services they require. Access to life-saving medications is an essential component of the right to health.[95] In addition, realising access to HIV treatment for those in need will ensure the fulfilment of the right to life. States are obligated to respect, protect, and fulfil access to HIV medications for people in need. This requires states to ensure that they create an enabling environment that will facilitate access to life-saving medications for people infected or affected by HIV. In this regard, states must refrain from adopting laws and policies that will hinder access to affordable, available, and quality anti-retroviral drugs for people living with HIV. This requires states to set standards for the development and manufacturing of vaccines and drugs to address HIV. In an attempt to curb the spread of HIV in Africa, states have resorted to adopting laws, policies, and programmes that may have implications for human rights of those infected and affected by HIV.[96] This brings to the fore again the tension between public health and human rights approaches.

This chapter discusses court decisions relating to the nexus between human rights and HIV in Africa. These include issues of access to HIV treatment by prisoners in *P.A.O. and 2 Others v. The Attorney General & Another, Attorney General and Others v. Tapela and Others,* and *In re: Attorney General and Others v. Mwale*. The case *AIDS Law Project v. Attorney General & 3 Others* as well as *Rosemary Namubiru v. Uganda* show the unjust consequences of criminal law when used as a blunt instrument to criminalise HIV transmission. *LM and Others v. Government of the Republic of Namibia* and *Government of the Republic of Namibia v. L.M. & 2 Others* reveal the discriminatory practice of sterilising women living with HIV without consent, while *Stanley Kingaipe & Another v. The Attorney General*, *Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd.*, *Dwenga and Others v. Surgeon-General of the South African Military Health Services and Other* and *Georgina Ahamefule v. Imperial Medical Centre & Dr. Alex Molokwu* address discrimination in employment. Then there is the case of *Abalaka and another v. The President of Nigeria and others* regarding a doctor's claim that he had discovered a cure for HIV; in this case, it is not the scientific claim, but the government's reaction that is particularly notable.

ACCESS TO TREATMENT

Dr. Jeremiah Ojonemi Alabi Abalaka and Medicrest Specialist Hospital Ltd. v. President of the Federal Republic of Nigeria, Attorney General of the Federation, and National Agency for Food and Drug Administration and Control (NAFDAC)

[2014] Suit No. FHC/MKD/CS/75/2012
Nigeria, Federal High Court at Makurdi

COURT HOLDING

The ban of a vaccine developed by the plaintiff was arbitrary and thus illegal, null, and void. However, since the plaintiffs' vaccine is a drug, patients must give their consent prior to the plaintiff administering the vaccine to them.

Summary of Facts

Dr. Jeremiah O. Abalaka, a registered Medical Practitioner, a surgeon and the Chief Consultant of Medicrest Specialist Hospital Ltd. (the "plaintiff"), started an independent research trial to find an HIV vaccine in 1992. He claimed that following some tests and experiments he conducted on himself and willing HIV-positive subjects, he had discovered a vaccine that prevents HIV infection, and also a cure for HIV that works by inducing a conversion from a seropositive state to a seronegative status.

The plaintiff tried to promote his discovery and get the support of the government and other institutions in order to conduct more research. Even though governmental organizations were willing to work with him, the Ministry of Health did not cooperate with him. The Minister banned the vaccine and stated that the Ministry planned to issue guidelines for any assessment on HIV/AIDS product claiming cure or prevention. After 16 years, however, no such guidelines had been set out. The plaintiff therefore sought a declaration that the ban or suspension of the use of the HIV vaccine discovered by the plaintiff is illegal, null and void and of no effect, as the ban violates the patent granted to plaintiff; and an injunction restraining the federal government from implementing a ban or in any way interfering with the use of the patent or the plaintiff's vaccine.

Issues

Several issues were raised before the Court by the plaintiff and defendants. The Court decided to make its determination on the basis of the issues raised by the plaintiffs, and focused on the following:

1. Whether the plaintiff had discovered a vaccine that prevents HIV infection, and a drug that cures HIV by causing sero-reversion from HIV positive to HIV negative; and

2. Whether the government's response to the discovery of this purported HIV vaccine and cure, including banning the work of the plaintiff, was justifiable.

Court's Analysis

The Court agreed with the plaintiffs that the defendants did not submit any evidence to contradict the plaintiffs' claim about the vaccine and cure. The Court therefore accepted the plaintiff's evidence that he had conducted experiments that appeared to support the argument that he was on the course of developing or had developed a means to prevent HIV infection and cause sero-conversion.

The Court also agreed with the plaintiffs that despite the importance of the discovery, the government did nothing to promote the work of the plaintiff. Instead, it banned the plaintiff's work. The Court took cognisance of the devastating effects of the HIV epidemic in Nigeria and the world at large, and the challenges of addressing it. It noted the efforts of the plaintiff that seemed to provide a breakthrough to the problem of HIV and yet went unappreciated by the government. In fact, the government appeared to want to halt positive progress altogether, without justification.

A central argument raised by the defendants was that the plaintiff could not be allowed to use or promote the vaccine and cure without complying with registration requirements in accordance with the Food, Drugs and Related Products (Registration etc.) Act, CAP C 34 of the Laws of the Federation of Nigeria 2004 (the "Act").

The Court noted however the plaintiff's claim that more research was needed to confirm the vaccine and cure. It therefore held that the plaintiff could not be said to have a safe and effective vaccine or cure, because there was need for further studies to be conducted. However, the Court faulted the government for banning the work-in-progress when it did not even controvert the evidence about positive outcomes of the tests. Further, the Court agreed with the plaintiff that his work had not reached the status of a cure or vaccine and was therefore not required to be registered under the Act. The Court was concerned about the lack of government effort to put in place the necessary facilities and guidelines to support the plaintiff's initiative. It therefore held that the government's response of just banning the work-in-progress was unjustifiable, illegal, null, and void.

Realising the desperation of HIV-positive persons, the promising drug discovered by the plaintiff, and the government's unwillingness to promote research, the Court was of the view that the plaintiff could at his discretion promote the use of the drug, and potential clients could decide for themselves.

Conclusion

The plaintiffs succeeded in their claim.

Significance

One wonders why the government took such a negative attitude in addressing Dr. Abalaka's claim that he was onto some possible cure or vaccine. The claim sounded rather incredible, and raises questions about whether this was scientifically validated. But, as the Dr. Abalaka said, it was work-in-progress.

The Court seems to have been focused mostly on the government's response in the face of the claim. It appeared first of all as though the government did not have any interest, or rather, was interested in burying the claim and proceeding without Dr. Abalaka, and therefore decided to just ban his work. Even when the defendants were drawn to the Court, they never bothered to really engage the evidence

proffered by the plaintiff which showed that the vaccine and drug appeared to be effective. Much as the Court could not be the arbiter of claims better suited to an institution of immunology or science, the Court was impressed by the failure of the government to controvert the plaintiff's evidence. But, this is really as far as the legal issues could go. The case tells us little or nothing about the scientific truth or evidence behind the vaccine or drug, and instead demonstrates how the politics of HIV/AIDS played out among the various actors, including Dr. Abalaka as an innovator and the government as the regulator of vaccines and drugs. Obadare and Okeke ably discuss these politics in their article entitled "Biomedical loopholes, distrusted state, and the politics of HIV/AIDS 'cure' in Nigeria."[97]

Whether or not there was scientific truth to his vaccine or cure, Dr. Abalaka carried the day in Court because the government had banned his scientific research without any legal ground or rational justification.

Dickson Tapela & 2 Others v. Attorney General & 2 Others
[2014] MAHGB-000057-14
Botswana, High Court

COURT HOLDING

The refusal to provide Highly Active Antiretroviral Therapy (HAART) to treat HIV in the applicants violates the applicants' rights under Sections 3, 4, 7, and 15 of the Botswana Constitution.

The refusal to provide HAART is a breach of respondents' duty to provide basic health care services for inmates in the respondents' care under the Prisons Act, Section 57(1).

Summary of Facts

Three applicants brought this action against the Botswana Attorney General, Ministry of Health, and Ministry of Justice, Defence and Security. Two were Zimbabwean nationals seeking review of a prison's denial of non-citizen inmates' entry into HAART. HAART was made available to citizen inmates. The third applicant was a non-governmental organization advocating for the rights of people living with HIV/AIDS and other marginalised groups. The applicants alleged that the exclusion of non-citizens from the HAART program violated constitutional protections, national HIV/AIDS policy and the prison's duty to provide health care services to inmates.

Issue

The issue put before the Court was the following:

> Whether non-citizens' exclusion from the HAART program violated the constitutional protections of the right to life under section 4, the right not to be subjected to inhuman and degrading treatment under section 7, and the right to non-discrimination under section 3 and 15.

Court's Analysis

The Court held that HAART is not only a medical necessity but a lifesaving therapy, the withholding of which will take away a constitutionally guaranteed right to life. HAART keeps HIV mutation in check

and drastically reduces the recurrence of opportunistic infections in HIV positive people. Withholding HAART would enable HIV to replicate and relegate the applicants to the terminal stage of AIDS, drastically increasing the likelihood of death.

The Court held that the exclusion of non-citizen inmates from HAART can only be justified under section 15 of the Constitution if it is reasonably justifiable in a democratic society and in the public interest. It referenced *Unity Dow v. The Attorney General 1992 BLR119,* where the Botswana Court of Appeal stated that Botswana must abide by international standards of conduct unless it is impossible. Therefore, the standards required by the articles of the African Charter on Human and People's Rights apply. Article 2 requires the signatories to take the necessary measures to protect the health of their people and to ensure they receive medical attention. These standards do not allow discrimination against non-citizen inmates.

The Prisons Act, Section 57(1) imposes a duty on a medical officer to take measures to restore the health of prisoners and to prevent the spread of disease. Denial of HAART to non-citizen inmates would likely create a cycle of infection of HIV/AIDS-positive non-citizen inmates by opportunistic infections that may in turn infect citizen inmates.

Conclusion

The Court set aside the decision of the authorities not to provide HAART to non-citizen inmates, and ordered that the applicant inmates and all other non-citizen inmates in a similar predicament be enrolled in the HAART program.

Significance

See Court of Appeal case below.

Attorney General and Others v. Tapela and Others; In re: Attorney General and Others v. Mwale
CACGB-096-14, CACGB-076-15 [2015] BWCA 1
Botswana, Court of Appeal

COURT HOLDING

The decision by the authorities to withhold HIV/AIDS treatment from foreign inmates when citizen inmates are receiving free treatment is unlawful and contravenes the Prisons Act and Regulations.

The decision to withhold HIV/AIDS treatment from foreign inmates based on the fear that foreigners may use this as a way to access free antiretroviral treatment is not irrational.

Summary of Facts

The Attorney General had filed an appeal in two cases. In the first case, the applicants brought an action before the High Court of Botswana against the Botswana Attorney General, Ministry of Health, and Ministry of Justice, Defence and Security. They sought review of a prison's denial of non-citizen

inmates' entry into Highly Active Antiretroviral Therapy (HAART) program for treating HIV/AIDS. The program was made available to citizen inmates only. Sechele J had decided in the applicant's favour and issued orders including that non-citizen inmates be enrolled in the prison's HAART program.

In the second case, the applicant, a Zimbabwean national serving a prison term, brought an action to enforce Sechele J's order, after he was denied enrollment in HAART. In his ruling, Dingake J had issued a directive compelling the relevant authorities to provide antiretroviral treatment to the applicant.

These were the two matters against which the Attorney General was appealing.

Issues

The issues that the Court isolated for determination were:

1. Whether the decision of the authorities to withhold free HAART from foreign prisoners, while making it available to citizen prisoners, was unlawful for being *ultra vires* (exceeding the powers granted under) the Prisons Act, Cap. 21:03 (the "Prisons Act"); and

2. Whether the decision of the authorities was irrational.

Court's Analysis

The Court's view was that the matter could be fully determined by interpreting and applying the Prisons Act and the Regulations made under it, so that there was no need to address constitutional questions, as the lower court purported to do.

The Court, in its reading of Sections 2, 56(1), 56(2), 57(1), and 65 of the Prisons Act, found that the Prisons Act did not discriminate amongst prisoners with regard to medical treatment. It further observed that Regulation 13, which described the duties of the prison Medical Officer, used all-encompassing language.

The Court also restated that under Common law, as under the Prisons Act and its Regulations, prisoners are entitled to be provided with basic health care, and this included the free health services being provided to citizen prisoners in Botswana. It confirmed that the Prisons Act and the Regulations did not distinguish between citizen and non-citizen prisoners.

According to the Court, administrative decisions in Botswana could be reviewed on the grounds of illegality, irrationality, and procedure impropriety. The Court was of the view that grounds of illegality or unlawfulness are part of the doctrine of *ultra vires*. The Court then held that the decision to deny foreign prisoners HAART, while it was given free of charge to citizen prisoners, discriminated against foreign prisoners in a manner not permitted by the Prisons Act and its Regulations, and was therefore *ultra vires*.

The Court however held that the decision was not irrational. It considered the fears raised by the respondents that persons might commit crimes in Botswana with the view to gaining access to free antiretroviral treatment in prisons as a genuine fear, and was of the opinion that a decision to give preferential treatment based on such fears would not be irrational.

Conclusion

The appeal was dismissed. The orders of the lower courts were set aside, and replaced with an order setting aside the decision of the authorities to withhold free HIV/AIDS treatment from foreign prisoners, and an order compelling the authorities to comply with the Prisons Act and Regulations to provide the same HIV care to all prisoners.

Significance

This is a celebrated case in prisoners' rights, and indeed it should be. However, the Court was asked to determine on the narrow issue of whether non-citizen prisoners should have access to HIV medicines. In fact, the Court of Appeal was of the view that the lower courts should not have spent a great deal of time examining constitutional provisions, and referencing international and regional treaties, because the matter could be resolved by interpreting pertinent legislation.

Over and beyond inmates' access to HIV/AIDS drugs in prison, conditions found in many prisons contribute toward exacerbation of the burden of HIV/AIDS and related diseases. Such conditions include overcrowding, poor nutrition, stress, and sexual violence. Though these issues were not raised in the court case, these unmentioned issues are critically important in ensuring that the rights of prisoners are respected.

P.A.O. and 2 Others v. The Attorney General & Another
(2012), Petition No. 409 of 2009
Kenya, High Court

COURT HOLDING

Sections 2, 32, and 34 of the Anti-Counterfeit Act, relating to counterfeit medicines, threatened to violate the right to life of the petitioners as protected by Article 26 (1), the right to human dignity guaranteed under Article 28, and the right to the highest attainable standard of health guaranteed under Article 43(1) of the Constitution of Kenya, 2010, and are accordingly unconstitutional.

Summary of Facts

The petitioners were persons living with HIV/AIDS, who benefited from the passing of the Industrial Property Act, 2001 (Industrial Property Act), which allowed importation of generic medicines, and were therefore able to have a regular supply of affordable HIV/AIDS medicines. They filed their petition to challenge the passing of the Anti-Counterfeit Act, 2008 (the Act), especially the implementation of Sections 2, 32, and 34 of the Act, which would, in their view, threaten their access to low-cost and essential HIV/AIDS medicines.

The petitioners argued that Section 2 of the Act defines counterfeit medicines ambiguously and broadly to include legitimately manufactured and distributed generic medicines. Sections 32 and 34 of the Act vest enforcement authorities with powers to seize counterfeit goods, which would mean that they

could also seize legitimately manufactured generic medicines, therefore threatening or restricting the petitioners' access to low-cost generic HIV/AIDS medicines on which their health and life depended. The petitioners submitted that if the Act was enforced, their rights to life, human dignity, and health as guaranteed under Articles 26(1), 28, and 43 of the Constitution were likely to be infringed.

The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR on Health), who joined the petitioners as a Friend of the Court, submitted that the definition of counterfeiting by Section 2 of the Act conflates generic medicines with medicines produced in violation of intellectual property rights. This would affect access to medicines as argued by the petitioners.

The petitioners also argued that pursuant to the HIV and AIDS Prevention and Control Act, 2006, the Kenyan Government is required to take measures necessary, to the maximum of its available resources, to ensure access to healthcare services including access to essential medicines at affordable prices by persons with HIV or AIDS and those exposed to the risk of HIV infection. Enforcement of the Anti-Counterfeit Act would contravene this obligation.

Issues

The Court addressed two issues:

1. Whether by passing and implementing the Anti-Counterfeit Act, the Government was in violation of the duty to ensure conditions necessary for citizens to enjoy a healthy life; and

2. Whether provisions of the Act would deny the petitioners access to essential medicines and thereby violate their rights under Articles 26(1), 28, and 43(1), as well as Article 53 with regard to the rights of children.

Court's Analysis

The Court noted that the Government recognises that HIV/AIDS is a serious threat to the health and life of the petitioners and other members in the society, and constitutes a major challenge to the socio-economic development of the country. The Court also found that the Government also recognises the importance of anti-retroviral therapy in addressing the challenge posed by HIV/AIDS.

The Court noted the importance of low-cost HIV/AIDS medicines which are necessary to mitigate the impact of HIV/AIDS. It also noted the efforts of the Government to ensure access to and supply of low-cost HIV/AIDS medicines by passing the Industrial Property Act that allows the manufacture and distribution of generic medicines.

The Court then expressed the view that any legislative measures that have the effect of restricting access to essential medicines constitute a threat to the life and health of persons who depend on them, and would be in violation of rights guaranteed under the Constitution.

The Court affirmed the constitutionally protected human rights, including the rights to life and health. It also affirmed that the Constitution recognises application of international human rights in Kenya through the operation of Article 2.

The Court then addressed the meaning and application of the right to life under the Constitution and other human rights instruments. The Court cited Article 43(1) of the Constitution which provides for the right to health, which is also recognised in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It highlighted the measures that states parties are obligated to take under Article 12(2) of the ICESCR, which include to prevent, treat, and control epidemic diseases, and create conditions that would assure to everyone care and treatment in the event of sickness. The Court also referenced the right to health recognised under Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and Article 24(1) of the Convention on the Rights of the Child (CRC), to emphasise the importance accorded to the right to health in the international human rights framework.

The Court highlighted how the right to health has been interpreted by the Committee on Economic, Social and Cultural Rights (ESCR Committee), in its General Comment No. 14 on the Right to Health. The ESCR Committee said that the right to health is indispensable for the exercise of other human rights. It also said that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead healthy lives. In the Court's view, this implies that people must have the medication they need in order to remain healthy. Failure to create such conditions would violate their right to health.

The Court also noted that in General Comment No. 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author, the ESCR Committee comments that states parties have a duty to prevent unreasonably high costs for access to essential medicines. Further, the Court referred to the decision of the South African Constitutional Court in *Minister of Health and Others v. Treatment Action Campaign and Others* ((1) 2002 (10) BCLR 1033 (CC)) to affirm the importance of access to medicines in the realisation of the right to health.

The Court expressed the view that the obligations of the state under the right to health encompass both a positive duty to ensure access to health services, and a negative duty not to do anything that would interfere with access to health care services and medicines. Therefore, any legislation that would imply inaccessibility to essential medicines would violate the right to health.

The Court then reviewed the Act and noted that it is intended to prohibit trade in counterfeit goods, and may be intended to protect holders of intellectual property rights to enjoy the benefits of their innovations. Section 2 of the Act defines the term "counterfeit" to mean "taking the … actions without the authority of the owner of intellectual property right subsisting in Kenya or elsewhere in respect of protected goods." It includes the following language in subsection 2(d) which the Court highlighted:

> … in relation to medicine, the deliberate and fraudulent mislabelling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging.

The Court then referred to the World Health Organisation (WHO) definition of a generic drug that it is a pharmaceutical product manufactured without a licence from the innovator company and marketed after patent or other exclusive rights had expired. The Court noted that the definition of

counterfeit includes medicines that have correct ingredients and sufficient active ingredients. It therefore agreed with the petitioners that there is ambiguity in the Act's definition of counterfeit to include generic medicines.

The Court rejected the respondent's argument that the Act exists to protect the rights of citizens from fake drugs. The Court was of the view that the Act was designed to protect intellectual property rights of individuals. It noted that the Act was not concerned about the standard and quality of drugs.

The Court found that the Act's conflation of counterfeit and generic drugs creates a possibility for misinterpretation by officials, who might seize legitimate generic drugs, which would have a disastrous impact on persons who rely upon them, such as the petitioners. It emphasised that such ambiguity is not permissible, especially where any misinterpretation would impact on the constitutionally guaranteed rights of individuals. It further said that the protection of individuals' right to health and access to medicines is more critical than the protection of intellectual property rights, and therefore protection of the petitioners' rights should take precedence. The Court buttressed its reasoning with General Comment No. 17, where the ESCR Committee said that states parties should prevent the use of scientific progress for purposes contrary to human rights, for instance by excluding patentability where commercialisation of innovations would jeopardise enjoyment of human rights.

The Court therefore concluded and held that Sections 2, 32, and 34 of the Anti-Counterfeit Act threatened to violate the right to life of the petitioners as protected by Article 26(1) of the Constitution, the right to human dignity guaranteed under Article 28, and the right to the highest attainable standard of health guaranteed under Article 43 (1).

Conclusion

The petition succeeded and the Court granted the declarations sought. The Court asked the Government to re-consider the impugned provisions of the Act in light of its obligations to ensure that citizens have the right to the highest attainable standard of health.

Significance

In crafting legislation, Governments may intentionally or unintentionally fail to act in the best interests of their citizens. In this case, the provisions of the Anti-Counterfeit Act were retrogressive of the Government's undertaking to advance the rights to life and health of its citizens, especially with regard to ensuring that low-cost HIV/AIDS medicines are available. Its unintended effect had the potential to be disastrous and could have meant loss of health and life in a context where a significant number of the population rely on the medicines that could have ceased to be available.

It is also significant that this case addressed how to resolve competing rights, constitutionally guaranteed fundamental rights on one hand, and rights to intellectual property on the other. By enacting the Anti-Counterfeit Act in the particular manner that it was passed, the Government may have inadvertently tipped the scale in favour of the intellectual property rights-holder. The Court reminded the Government that the fundamental rights of the individuals should always take precedence.

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.

3. The lower court erred in convicting the Appellant on a "duplex charge."
4. The lower court erred in shifting the burden of proof to the Appellant.
5. The lower court erred by not considering inconsistencies in the prosecution's case.
6. The lower court erred by imposing a sentence disproportionate to the facts and circumstances of the case.

Issues

The Court consolidated the issues for determination as follows:

1. Whether the Appellant was prejudiced in her defence because of the duplex charge, i.e., that the act complained of was both unlawful *and* negligent;
2. Whether the trial court failed to properly evaluate the evidence before it; and
3. Whether the sentence was excessive, taking into account the circumstances of the case.

Court's Analysis

The Court dismissed the first ground for appeal because it was the reason for the appeal, rather than grounds for it. It then turned to the third ground for appeal which was the issue regarding a duplex charge. The charge sheet alleged that Appellant acted "unlawfully and negligently," while the applicable penal code read "unlawfully or negligently." The Appellant argued that the penal code set out two different offences: an unlawful act and a negligent act. Adding the two offences together on the charge sheet, the Appellant argued, made the charges duplex and therefore defective, such that the Appellant could not properly prepare her defence. The Court held that there was no prejudice to the Appellant in this case; that the Appellant was charged with committing an unlawful and negligent act, all in one transaction; and that *Uganda v. Guster Nsubuga & 3 Others*, HC Session Case No. 84 of 2012, supported this conclusion.

Next the Court addressed the second, fourth, and fifth grounds together, as they concerned the issue of evaluation of the evidence. The mother's testimony in the lower court was that, after noticing that her son had been stuck with a contaminated needle, she shouted, which caused the second nurse to enter the room. In her first statement to police, however, the mother did not mention having shouted. The Appellant argued that this inconsistency cast doubt on the mother's reliability as a witness. Because the mother was the only witness to the incident, the Appellant argued, if her testimony was not credible, the case should be dismissed. The Appellant further pointed to the fact that the second nurse had not been called as a witness, so the mother's story could not be verified. The Court found these arguments unavailing, stating that the reason the second nurse entered the room was immaterial, and did not detract from the mother's testimony.

The Appellant next argued that because the needle was not brought as an exhibit, the Appellee had failed to prove it was contaminated. The Court noted that the mother testified that the Appellant used a contaminated needle, and that the Appellant herself testified she did not remember whether she had used a new needle or a contaminated needle. The Court found the testimony of the mother

sufficient to prove the toddler was injected with a contaminated needle, noting testimony from expert witnesses that a needle is considered contaminated once it pierces the skin. The Court further noted that the Appellant knew her HIV status and had been receiving treatment for the same.

The next matter considered was whether the Appellant acted negligently. The Appellant noted that in criminal matters, a higher level of proof is necessary to show negligence than is necessary in civil matters, citing several cases. The Court also noted that the Appellant was a fully and properly qualified nurse with over 30 years of experience, and that the mother was a regular client at the clinic. The Court recited expert testimony outlining the procedure to be followed when a medical professional is pricked and there is a flow of blood, which is to discard the contaminated needle, wash and bandage the pricked area, and begin again with a new needle. The experts testified that this was standard procedure and well-known to all healthcare professionals. There was further evidence from the clinic that they always had a surplus of needles, so finding a clean needle would not have been an issue. There was also evidence that the Appellant did in fact know that she had pricked her finger. In light of all the evidence, the Court concluded that the nurse had acted negligently. The Court further concluded that the lower court had not improperly shifted the burden of proof to the Appellant and that it had properly considered all evidence on record. The Court therefore dismissed the second, fourth, and fifth grounds of appeal.

The sixth and last ground of appeal was the sentence. The Court noted that, contrary to the Appellee's argument that the Appellant was convicted on two counts, she was actually convicted on only one count. The Court noted that the Appellant was "an elderly person aged 64 years," that she was a mother and grandmother, and that she was "sickly" and "HIV positive." The Court further noted that the toddler remained HIV-free, and that the Appellant had no intention of harming the toddler. The Court acknowledged that an appellate court should only reduce sentences if the sentence is illegal, inadequate, or "manifestly excessive." There were no arguments that the sentence was inadequate, and the Court stated that it was not illegal. By way of explaining that the sentence was "manifestly excessive," the Court stated that "medical practitioners need some degree of protection." Without saying much more, the Court held that three years was an excessive sentence and reduced the sentence to time served, which had been 5 months.

Conclusion

The Court upheld the lower court on all counts, but nonetheless reduced Appellant's sentence from 3 years to time served (five months).

Significance

Transmission of HIV is a public health concern, and this case revolves around exposure to HIV due to an act of professional negligence. Countries have used the law to protect the public from HIV transmission and the risk of transmission or exposure to HIV by criminalising acts and behaviour that expose others to HIV. Sometimes the criminal provisions are overbroad and result in penal sanctions that are disproportionate to the aim of preventing transmission. The Joint United Nations Program on HIV/AIDS (UNAIDS) suggests that criminal law as a tool for prevention of transmission of HIV be used with circumspection. It recommends that generally, criminalisation only be limited to intentional

acts of transmission, i.e., that the person knows he is living with HIV, and acts with the intention to transmit it, and he or she in fact transmits it.[100] This is to avoid situations in which punishment is excessive and disproportionate to the act or behaviour.

The significance of this case was whether the punishment was excessive for the reason that it was about HIV transmission even though the actual transmission did not happen. The fact that the child was not infected probably influenced the Court to reduce the sentence though this was not stated explicitly in the judgment. Another reason might have been the fact that the nurse had been on remand for some 5 months. This was certainly harsh if the only reason she had to be on remand for that long was to do with the supposed "seriousness" of the negligent act. Criminal laws should not merely reflect anxiety to curb the spread of HIV transmission, as this may have unjust consequences, as was probably the case against the Appellant.

HIGHLIGHT

CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE, AND TRANSMISSION

The overly broad application of criminal law to HIV non–disclosure, exposure, and transmission raises serious human rights and public health concerns. Many countries have adopted HIV-specific legislation with the aim of protecting the rights of people living with HIV (PLWH), yet most of these laws have punitive and coercive provisions that are contrary to globally recognised best practices.

Proponents of criminalization claim that they are promoting public health and morality and safeguarding the rights and health of women. However, the scope, generality, and vagueness of the laws permit the criminalisation of women for non-disclosure, exposure, or transmission to not only their sexual partners, but also to their children.

The decision in *AIDS Law Project v. Attorney General & 3 others* declared Section 24 of the HIV and AIDS Prevention and Control Act, 2006, unconstitutional as the provision was vague, overbroad, and lacking in legal certainty particularly in respect to the term "sexual contact." Further, the section violated the rights to privacy and confidentiality and discriminated against PLWH, especially pregnant women. As a result, it instilled fear and stigma and violated the right to privacy. It also undermined public health initiatives that have been successful in encouraging disclosure and exposed individuals to stigma, discrimination, and rejection.

Broad criminalisation of HIV exposure and transmission particularly raises questions in the context of vertical transmission, yet it is well known that most women lack the information

HIGHLIGHT continued...

and services to prevent HIV exposure during pregnancy, delivery, or breastfeeding. Further, non-voluntary partner disclosure exposes women to violence and discrimination by their partners, families, and communities.

Whereas the *AIDS Law Project* judgment is remarkable in finding the criminalisation of HIV transmission as unconstitutional and a violation of Kenyans' fundamental human rights, it is crucial to follow through with the amendments of Section 24 and review this law, as proposed in the judgment.

Namubiru's case, on the other hand, brings to light the dangers of media sensationalism and violations that health care providers go through with regard to HIV criminalization. *Namubiru's* case attracted sensationalised media coverage, confirming the treatment and human rights violations that PLWH's face. She was found guilty of professional negligence and sentenced to 3 years in jail despite the fact that the incident was accidental, contrary to widely-held suspicion that she had intentionally exposed the baby to HIV. Although Namibiru was set free on appeal, the case creates a dangerous precedent on HIV criminalisation.

These two cases highlight the impact of HIV criminalisation. There is need to amend, repeal or withdraw laws that criminalise HIV transmission. It is clear that what has made a difference in reducing the number of new infections is mainly awareness raising and provision of services, as well as establishing a conducive legal environment that is free of stigma and discrimination. The criminal justice system should advance a more just and rational response to HIV that integrates public health and human rights.

FORCED STERILIZATION

LM and Others v. Government of the Republic of Namibia
[2012] NAHC 211
Namibia, High Court

COURT HOLDING

The defendant government failed to discharge its onus to prove that all three plaintiffs had given informed consent to their respective sterilisation procedures, thus all three procedures were unlawful.

As there was no evidence that the sterilisation procedures had been performed on the plaintiffs due to the fact that they are HIV positive, the plaintiffs failed to discharge their onus to prove that the sterilization procedures were performed on a discriminatory basis.

Summary of Facts

The case was brought against the Namibian Government in 2010 by three patients of various public hospitals who claimed that they had been sterilised by means of bilateral tubal ligations without their having given informed consent. They further claimed that the sterilisation procedure was done on them without their consent, and was thus unlawful, because they were HIV-positive. They claimed that the following rights guaranteed in the Namibian Constitution (Constitution) had been violated:

- The right to life in terms of Article 6 of the Constitution;
- The right to liberty in terms of Article 7 of the Constitution;
- The right to human dignity in terms of Article 8 of the Constitution;
- The right to equality and freedom from discrimination in terms of Article 10 of the Constitution; and
- The right to found a family guaranteed in terms of Article 14 of the Constitution.

Issues

The parties agreed that a sterilisation procedure is unlawful unless informed consent is obtained. The issues before the Court, thus, can be broken down as follows:

Informed consent:

1. Whether the Namibian government state hospital medical practitioners performed sterilisation procedures without obtaining informed consent from the plaintiffs.
2. Whether the medical practitioners' failure to obtain informed consent from the plaintiffs infringed the following constitutional rights:

i) The right to life

ii) The right to liberty

iii) The right to human dignity, and

iv) The right to found a family

Discrimination on the basis of HIV-positive status

1. Whether the forced sterilisation was in fact due to the HIV positive status of the women and therefore constituted discriminatory practice

2. Whether the following constitutional rights were infringed :

   i) The rights to life, liberty, human dignity and to found a family, and

   ii) The right to equality and freedom from discrimination.

Court's Analysis

The Court stated that the defendant government could rely on the defence of *volenti non fit injuria* if able to prove that the plaintiffs signed consent forms that signified consent to the sterilisation procedures. The Court explained what constituted this consent. It referred to the South African case of *Castel v. De Greef* 1994 (4) SA 408 (C), where Justice Ackerman expounded on the doctrine of informed consent, which could be broken down into key components.

> (a) First, the doctor had a duty to provide adequate and sufficient information to enable the patient make an informed decision. The information should enable the patient to appreciate the nature and extent of the harm or risk involved.
>
> (b) Second the consent must be clear and unequivocal, given freely and voluntarily, and should not be induced by fear, fraud or force.
>
> (c) Third, the consent must be comprehensive, and must extend to the entire transaction inclusive of its consequence.

The Court noted that the onus was on the defendant government to prove that the plaintiffs had given informed consent. Further, whether the defendant's agents obtained informed consent was a question of fact rather than law. The Court reviewed the evidence to determine whether the defendant's agents had obtained informed consent from the plaintiffs when they administered the sterilisation procedures.

The Court's evaluation of the evidence was as follows : In respect of the first plaintiff, there was no indication that she had requested sterilisation. The plaintiff did not sign any form specifically relating to sterilisation. There were no medical records indicating that the plaintiff requested or expressed any intention to be sterilised. Further, the consent was obtained during labour, and in circumstances in which there was no proper counselling given, including information regarding alternative methods of

contraception to the procedure of sterilisation.

In respect of the second plaintiff, the Court found that there was no medical record indicating that either the procedure or alternative methods of contraception had been explained to the plaintiff. Though the second plaintiff did sign a consent form for the sterilization procedure, the consent was obtained from the plaintiff while she was in labour.

The Court found that there were unjustifiably no medical records indicating that consent was obtained from the third plaintiff. Again, while the plaintiff signed a consent form, the defendant admitted that the consent was obtained during labour.

In all three cases, the Court found that although the plaintiffs had signed consent forms, there was no evidence that the health providers had given adequate and sufficient information to the plaintiffs under circumstances in which they fully appreciated the consequences of sterilisation. There were no records to capture that informed consent was properly obtained. The Court therefore held that the defendant had not proved that its agents had properly obtained informed consent from all three plaintiffs before undertaking the sterilisation procedure.

On the second claim, of discrimination due to the plaintiffs' HIV-positive status, the Court held that the plaintiffs failed to substantiate their claim based on the evidence laid before it.

Conclusion

The plaintiffs succeeded on the first claim that they were sterilised without informed consent, and thus that such sterilisation was unlawful. The plaintiffs had a fall-back (alternative) claim which was that that the conduct of the defendants infringed on the plaintiff's constitutional rights. However, since the Court decided that the plaintiffs had succeeded in their main claim, it decided not to make a determination on the alternative claim. The plaintiffs failed on the second claim that the sterilisation was based on discrimination on the basis of their HIV positive status.

Significance

Though this was technically a sound judgment which impugned the paternalistic practice of denying individuals' reproductive decision-making, the Court focused on the doctrine of informed consent within the confines of the law of delict (equivalent to law of torts in common law), and missed the opportunity to develop human rights jurisprudence. This case is a reminder of the point that advocates made at the International Conference on Population and Development (ICPD) in Cairo in 1994, that population control should not be pursued through control of women's bodies, but through respect for human rights. Advocates at the ICPD agitated for what have come to be known as (sexual and) reproductive rights. Reproductive rights were defined in the ICPD Program of Action as "… human rights that are already recognised in national laws, international human rights documents and other relevant United Nations consensus documents."[101] These include the rights of all to make decisions concerning their reproduction, free of discrimination, coercion and violence. These rights are recognised in national laws, including the Constitution of Namibia. The Court could have used this opportunity to advance human rights norms relating to the relationship between health providers and their clients or patients.

The Court dismissed the claim that the plaintiffs were discriminated against on the basis of their HIV status. A question that may be asked is whether it was coincidence that all the women who were forced to be sterilised were also HIV positive. Though the plaintiffs did mention in their testimonies that health providers indicated their HIV status was one of the reasons for the sterilisation, this alone was appreciably unconvincing to the Court as demonstration that the hospital had a deliberate policy, written or unwritten. Yet courts need not require plaintiffs to prove that hospitals have a written or unwritten policy around sterilization of women living with HIV. The pattern presented in the Namibia case should have been adequate to demonstrate discriminatory intent.

The Court's decision to dismiss the claim of discrimination was unfortunate since in 2009, the International Community of Women Living with HIV/AIDS reported evidence that health providers in Namibia pressured and forced HIV positive women to undergo sterilisation.[102] It is perhaps unfair to expect the Court to have been more active to pursue the question of discrimination when it was given little reason to do so. Counsel could have tried to be more persuasive, but perhaps this was understandably difficult since there was no written policy, nor was it likely that the health providers would volunteer the information if such discriminatory practices existed. It is therefore plausible that discriminatory sterilisation, based on HIV status, was present in this case. Nevertheless, this case is important, because it sent the message that informed consent is a high threshold and a woman's autonomy in making reproductive choices should be taken seriously.

Government of the Republic of Namibia v. L.M. & 2 Others
[2014] Case No. SA 49/2012, NASC 19
Namibia, Supreme Court

COURT HOLDING

The Appellant's agents had performed the sterilisation without having properly obtained informed consent from the respondents.

Summary of Facts

This was an appeal against a decision of the High Court, discussed immediately above,[103] that found the Appellant government liable for the sterilisation of the respondents without their informed consent.

Issues

The Supreme Court isolated one issue: Whether the agents for whose conduct the Appellant was responsible had performed sterilisation procedures without obtaining informed consent from the respondents.

Court's Analysis

One thing that was notably different from the decision of the High Court was that the Supreme Court related informed consent to the rights recognised in the Namibian Constitution, especially the rights to dignity, to physical integrity and to found a family. Further the Court recognised that it was the woman's choice to decide to bear children or not, and that the decision must be made freely and voluntarily.

The analysis of the evidence was very similar to that conducted by the High Court. The Supreme Court assessed whether it could be said that the respondents had the intellectual and emotional capacity to give informed consent. It held that the circumstances under which the Appellant's agents purported to have obtained informed consent from the respondents - that is, during labour - would not support the claim that the respondents had the requisite intellectual and emotional capacity to give independent and free consent. Further, the Court relied on the absence of any clinical record that indicated that the health providers had discussed the nature and risks of the sterilisation procedure with the respondents, to find that on the balance of probabilities, the health providers had not properly obtained informed consent.

Conclusion

The appeal was dismissed.

Significance

In contrast to the High Court decision, the Supreme Court acknowledged the human rights aspect of the case. However, it could have expounded more on how human rights governed the relationship between health providers and women in matters of reproductive health care, and especially in this case since it was then well-known that women living with HIV were vulnerable to pressure from health providers to undergo sterilisation. The Supreme Court determined it would not address the discrimination question because of a lack of evidentiary support for the respondents' claim that the forced sterilization occurred due to their HIV status. This decision has been celebrated as being important, however, in affirming the reproductive rights of women. Despite the Court's failure to engage with the discrimination aspect, there is no reason to doubt that its judgment does affirm all women's reproductive rights, including for those women living with HIV.

HIGHLIGHT

SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN LIVING WITH HIV

Women living with HIV encounter challenges relating to their sexual and reproductive health and rights. Due to ignorance or misconceptions, women living with HIV are often deprived of their rights to exercise control over their sexuality. The right to sexual and reproductive health is recognised as a component of the right to the highest attainable standard of health.[104] Moreover, at Cairo during the International Conference on Population and Development in 1994, the international community agreed that individuals shall have the right to determine freely and responsibly the timing and number of their children. This has been echoed in international human rights instruments including the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on the Rights of Women (Maputo Protocol). The right to sexual and reproductive health is broadly classified into two components: the right to sexual and reproductive health services and the right to sexual and reproductive health autonomy. Thus, states are obligated to ensure available, affordable, accessible, and quality sexual and reproductive health services to all on a non-discriminatory basis. Furthermore, states must ensure that the right of individuals to make decisions about their own bodies is well-respected.

Discriminatory practices against women living with HIV when seeking health care services, including sexual and reproductive health services, undermine the rights to autonomy, dignity, and health, among others. Experience has shown that in many African countries women living with HIV are either compelled to undergo HIV testing or subjected to forced sterilisation. While sterilisation can be a useful means of birth control for women who choose this method, when it is coercive it becomes a threat to the enjoyment of human rights. Forced sterilisation raises both ethical and human rights issues. Health care providers are ethically required to seek informed consent from patients before embarking on any treatment. This implies that the patient must have a full understanding of the treatment sought and be able to decide whether or not to continue with it. It also means that the patient must have been informed in a language that he/she understands. Where it cannot be ascertained that the patient appreciates the nature of treatment being conducted or the consequences that might follow, it cannot be said that the patient has consented to such a treatment. Forced sterilisation undermines the rights to autonomy and to found a family of women living with HIV. The Namibian Supreme Court in *Government of Namibia v. LM and others*[105] held that forcible sterilisation constitutes a gross violation of human rights. It further notes that the essential elements of informed consent include knowledge, appreciation, and consent. These elements are cumulative and the onus is on the person claiming consent was obtained to prove them.

DISCRIMINATION IN EMPLOYMENT

Dwenga and Others v. Surgeon-General of the South African Military Health Services and Others
[2014] ZAGPPHC 727, Case No. 40844/2013
South Africa, High Court

COURT HOLDING

It was vexatious, frivolous, and an abuse of process for the South African National Defence Force ("SANDF") to attempt to litigate the same issues that it had already determined in the *South African Security Forces Union* ("*SASFU"*) case six years previous – namely, whether or not the SANDF's practice of prohibiting the recruitment of individuals infected with HIV was constitutional.

Summary of Facts

Six years earlier, in the decision reached in the case of *South African Security Forces Union (and three individuals) v Surgeon General, Minister of Defence, Chief of the SANDF, President of the RSA and Minister of Health* (case no. 18683/2007), the High Court of South Africa held the SANDF's blanket ban on recruitment of persons infected with HIV to be unconstitutional. Following the order made in SASFU, the SANDF introduced new recruitment policies to comply with the Court's orders. However, SANDF's implementation of the new policies continued to automatically exclude new recruits who were living with HIV from entering into certain contracts.

The applicants in this matter were automatically excluded from entering into contracts because they were living with HIV. SANDF initially raised the argument that its policy was justifiable pursuant to Section 36 of the Constitution of the Republic of South Africa, 1996 (the "Constitution"). It abandoned this line of argument and argued instead that its recruitment practice was justifiable under Section 9 of the Constitution.

Issue

Whether the SANDF may be permitted to bring before the courts a dispute which has already been decided against it.

Court's Analysis

The Court cited *Cook and others v. Muller* 1973 (2) SA 240 (N), at 245H-246B for the proposition that a Court may prohibit a person from relitigating a dispute that was already decided against him, under the guise of an action against another party. Under a long line of cases cited by the Court (*Burnham v. Fakheer*, 1939 N.P.D. 63; *Reichel v. Magrath*; *Niksch v. Van Niekerk*), the Court noted that it had previously prevented litigants and defendants from relitigating issues that had already been decided against them. It made no difference that the issue had been raised against a new party.

Here too, the Court noted that the SANDF's practice of prohibiting the recruitment of applicants with HIV had already been decided in *SASFU*. Although this case was decided on the grounds that the

SANDF's arguments were "vexatious and frivolous and an abuse of process," the Court stated that the SANDF had been unable to provide any evidence to suggest that the requisite health required for the positions sought by the Applicants could not be achieved by a person infected with HIV.

Conclusion

The applicants were successful. The Court made various orders including reinstatement, but also granted punitive costs because of the respondents' non-compliance with the earlier court orders and its attempt to relitigate an issue that was already settled.

Significance

Discriminatory attitudes and practices against persons with HIV are still prevalent in our societies, despite the progress that many countries have made in terms of putting in place public policies to curb these forms of discrimination. Having legislation in place or even a court decision is sometimes not enough incentive, even for public institutions, to end discriminatory practices. The Court commented that public institutions should be exemplary in complying with constitutional norms and standards, such as respect and protection of the rights of persons living with HIV.

Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd.
[2011] ZALCJHB 7, Case No. JS178/09
South Africa, Labour Court

COURT HOLDING

The applicant's dismissal from employment for HIV-positivity was automatically unfair in terms of Section 187(1)(f) of the Labour Relations Act, 66 of 1995, because the reason for dismissal was his HIV status, and was not justifiable on any other ground.

Summary of Facts

The applicant sought relief for dismissal from employment on the grounds of his HIV status, which was unfair according to Section 187(1)(f) of the Labour Relations Act, 66 of 1995 (the "LRA"). In the alternative, the applicant pleaded that his dismissal was substantively and procedurally unfair according to Section 188 of the LRA. He also sought relief arising from unfair discrimination on the grounds of his HIV status, as proscribed by Section 6(1) read with Section 50(2)(b) of the Employment Equity Act, 55 of 1998 (the "EEA").

The applicant was employed by the respondent as a manager of a stable and a horse riding instructor at the Mooikloof Equestrian Centre (the "Centre"), owned by the respondent. In the pre-employment interviews, the applicant was asked about his health, and he stated that he was in good health.

The applicant had been living with HIV for 18 years and was on a treatment regime. Otherwise, according to his medical expert, he was in excellent health.

A week later, he and other colleagues were asked to complete a Personal Particulars Form ("PPF"), and amongst others, it required information about allergies and medication taken for these allergies as well as medication for chronic conditions. The applicant listed chronic conditions including HIV, and indicated the anti-retroviral medication he was taking.

A few days after he had submitted the PPF, a confrontation ensued between the applicant and his employer, which resulted in his being dismissed. He was ordered to vacate the premises. The dismissal note referred to the pre-employment interview and the fact that the applicant had said he was in good health. The note said that he had been dishonest in the interview for not stating the truth about his health. The final notice of his dismissal indicated "fraudulent misrepresentations" as the reason for his dismissal.

The applicant argued two claims. In the first claim, he submitted that the circumstances of his dismissal constituted automatic unfair dismissal under Section 187(1)(f) of the LRA. He claimed that the dismissal was discrimination against him due to his HIV status, and therefore violated his constitutional rights to dignity and privacy. The applicant submitted in the alternative that, should the Court not find unfair dismissal, then it should find that the dismissal was invalid, and the procedure of dismissal was not in accordance with Section 188 of the LRA.

In the second claim, the applicant submitted that the conduct of the respondent amounted to unfair dismissal in terms of the EEA. He claimed that he was dismissed without notice, and removed from the employer's property in a manner calculated to humiliate him because of his HIV status.

The respondent replied to the first claim with the argument that the reason for dismissal was dishonesty of the applicant, as during pre-employment interviews he stated that he was in good health. The respondent said he only realised the dishonesty when the applicant volunteered information about his medical conditions after completing the PPF. The respondent claimed that this had created a breakdown of trust. The respondent argued that if the Court did not accept this explanation, then it should accept the argument that the respondent was dismissed because he was not suitable for the requirements of the job.

On the applicant's second claim, the respondent denied the claim, and referred to its reasoning in the argument against the first claim.

Issues

The issues before the Court were:

> (a) Whether the automatic dismissal of the applicant was unfair, or alternatively procedurally and/or substantively unfair, and if so, the appropriate measure of compensation to which the applicant was entitled.
>
> (b) Whether the applicant was unfairly discriminated against on the basis of his HIV status and if so, the appropriate relief to which he was entitled.

Court's Analysis

The Court reviewed the relevant employment law in relation to unfair dismissal. The Court said that the basis for protection against unfair discrimination in employment is the right to equality under Section 9 of the Constitution of the Republic of South Africa, 1996. It then referred to the LRA, which provides that dismissal for a discriminatory reason is automatically unfair unless it can be justified on the grounds of inherent job requirements. Section 187(1) says that dismissal is automatically unfair if:

> … the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

The Court referenced *Bootes v. Eagle Inc System KZ Natal (Pty) Ltd* (2008) 29 ILJ 139 (Labour Court) in which Pillay J. had held that HIV status was an arbitrary ground as envisaged in Section 187(1) of the LRA.

The Court considered the EEA, which prohibits unfair discrimination on grounds including HIV status (Section 6(1)). The Court reminded itself that Section 50 of the EEA empowers it to grant appropriate relief for unfair dismissal, and this includes payment of compensation, payment of damages, and other orders. The EEA also enjoins the courts to take into account relevant codes of practice and international conventions. The Court therefore referenced the Code of Good Practice on the Key Aspects of HIV and AIDS in Employment (Code) issued under the EEA. Amongst others, the Code has guidelines relating to confidentiality, privacy, and disclosure of one's HIV status in the workplace. The Code states that an employee has the right to privacy and is not required to disclose HIV status to an employer or other employees.

The Court noted that South Africa's anti-discrimination laws are based on the International Labour Organisation Conventions, including C111 Discrimination (Employment and Occupation) Convention of 1958. It also referenced the ILO Recommendation concerning HIV and AIDS and the World of Work 200 of 2010 that recognised the impact of discrimination based on HIV status in the workplace.

The Court also took into account the decision in *Hoffmann v. South African Airways* (2000) 21 ILJ 2357 (Constitutional Court) in which it was held that denial of employment to the Appellant because he was living with HIV impaired his dignity and constituted unfair discrimination, and that this was unconstitutional.

In evaluating the evidence before it, the Court found that the main reason for the respondent's action to dismiss the applicant from employment was because of the applicant's disclosure of his HIV status. The Court therefore was persuaded that the applicant had proven, in accordance with Section 187, that he was dismissed unfairly because of his HIV status. The Court went on to determine whether the respondent had a valid defence. The Court referred to the decision in *Leonard Dingler Employee Representative Council and Others v. Leonard Dingler (Pty) Ltd and Others* (1997) 11 BLLR 1438 (Labour Court) at 148H, which held that an inherent job requirement would constitute an absolute defence against unfairness. In the Court's opinion, the respondent's defence that non-allergy to penicillin was an inherent job requirement was just a thin veil to mask the real reason for the dismissal. It therefore dismissed the respondent's defence to the claim of unfair dismissal.

The Court also reviewed the respondent's reasoning that failure by the applicant to disclose his HIV status had led to the breakdown of trust. The Court however reminded the respondent that an employee is not required to disclose HIV status to the employer. The expectation that he should have disclosed his status violated his right to privacy and dignity.

The Court dismissed the applicant's second claim. The Court was of the view that this concerned a claim for damages for humiliating treatment after the fact of the dismissal, and this was not within the competence of the Court to address.

The Court therefore held that the applicant's dismissal was automatically unfair under Section 187(1)(f) of the LRA, because it was discriminatory as it was based on his HIV status.

Conclusion

The respondent was ordered to pay damages in the sum of twelve months' remuneration.

Significance

Discrimination against persons living with HIV is still a challenge in many countries and there is need for vigilance for states to promote a culture of respect for human rights to address discrimination in the workplace. Many countries are parties to international treaties that recognise various human rights that are infringed when a person is discriminated against on the basis of HIV. These include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights recognised and protected in these treaties include the rights to equality and non-discrimination, dignity and health.

In Africa, the important human rights treaties include the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Apart from these treaties, there are various authoritative documents issued by human rights monitoring bodies or other bodies that explain, interpret, or apply provisions on human rights to employment in relation to HIV. Further, various bodies have developed codes or policy documents to address discrimination against persons living with HIV in the workplace. The Southern African Litigation Centre has brought all these resources together in the publication entitled *Equal rights for all: Litigating cases of HIV-related discrimination*.[106]

Many countries in Africa recognise human rights in their constitutional and legal frameworks and integrate human rights protections. An important aspect of promoting respect for human rights is enforcement of rights in the national justice system, such as the courts, as was the circumstance in this decision. Unless rights can be enforced, they remain unrealisable for many people who experience discrimination due to their HIV status in the workplace but cannot access justice in the courts or other tribunals.

Georgina Ahamefule v. Imperial Medical Centre & Dr. Alex Molokwu
[2012] Suit No. ID/1627/2000
Nigeria, High Court

COURT HOLDING

The dismissal of the Applicant from her job was unlawful and constituted a wrongful termination because the 2nd Defendant acted out of malice and extreme bad faith. The Court further held that the 2nd Defendant's performance of a HIV test on the Claimant without obtaining informed consent amounted to battery; the failure to provide pre-and post-test counseling constituted negligence of a professional duty that was owed to the Applicant; and denying medical care to the Applicant based on her status was a violation of her right to health.

Summary of Facts

The Applicant, Georgina Ahamefule, started working as an auxiliary nurse at Imperial Medical Centre, the 1st Defendant, in 1989, when it was established by the 2nd Defendant, Dr. Alex Molokwu. In 1995, while pregnant, the Applicant developed some boils and sought treatment from the 2nd Defendant who conducted diagnostic tests without informing her about the nature of the tests, their outcome, or providing any counseling before and after the tests were conducted. Thereafter, the 2nd Defendant required that the Applicant take a two-week medical leave and also referred her to a physician at Lagos State University Teaching Hospital with a sealed note which she hand-delivered. The physician requested that she return with her husband and took blood samples from both without providing any information about what tests the samples would be used for or any counseling. Subsequently, the physician informed the Applicant and her husband that the HIV test he had conducted on them showed that the Applicant's HIV status was positive while her husband's was negative. No post-testing counselling was provided following these results. The Applicant returned to the 1st Defendant hospital to meet with the 2nd Defendant who directed her to collect a letter of termination of employment. The Applicant, soon after, had a miscarriage and, at the 1st Defendant hospital where she sought medical care, she was denied a medically-necessary surgical procedure due to her HIV status. She filed this case against the Defendants in 2000.

Issues

1. Whether conducting a HIV test on the Applicant without obtaining informed consent and providing pre-and post-testing counseling constituted battery and professional negligence.

2. Whether terminating the Applicant's employment based on her HIV-positive status violated her right to non-discrimination under Articles 2, 18(3) and 28 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and the Laws of the Federation of Nigeria (African Charter) and were thereby unlawful.

3. Whether refusing to provide the required medical care following a miscarriage to the Applicant due to her HIV-positive status violated her right to health under Article 6 of the African Charter and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

Court's Analysis

The Court first considered whether it had jurisdiction over this matter in response to the Defendants' assertion that Section 254c (1) (third alteration) Act 2010 of the Constitution had conferred exclusive jurisdiction over employment-related cases to the National Industrial Court. The Court determined that jurisdiction is governed by the law in effect at the time a suit is filed and trial begins and that the laws that were in effect in 2000, when the case was filed, provided it with jurisdiction over this matter. It then considered whether the Applicant's employment was wrongfully terminated and determined that the applicable law in this instance was the Common law, which provides that an employer can hire and fire an employee at will and without giving a reason, but where one is given it must be justified. The Court determined that the Applicant, who worked as an auxiliary nurse, ran errands for healthcare providers and did not participate in the provision of medical services, nor did she handle blood or any sharp objects. Consequently, it decided that the reason the Defendants gave for terminating the Applicant's employment, which was that the Applicant posed a risk to patients and other staff, was not justifiable.

Conclusion

The Court found that the termination of the Applicant's employment was based on malice and extreme bad faith and was unlawful. It further determined that the performance of an HIV test without the Applicant's informed consent constituted battery while the failure to provide pre- and post-test counselling amounted to professional negligence. It issued a declaration that the Defendant's refusal to provide required medical care to the Applicant following her miscarriage amounted to a violation of the right to health. The Applicant was awarded 5 million Naira (approximately 25,000 USD) as general damages for the termination of her employment and two million Naira (approximately 10,000 USD) for the testing which was done without consent and for the resulting professional negligence.

Significance

In 2000, when this case was filed, it was the first to address rights violations against a person living with HIV in Nigeria and one of the earliest cases in the region. The issues it raised exposed the continuum of human rights violations experienced by people living with HIV and AIDS and its consequences. These violations include lack of pre- and post-HIV test counselling at healthcare facilities; HIV testing and disclosure of results without informed consent; termination of employment due to an employee's HIV status; and denial of access to healthcare services, including emergency obstetric care, due to an individual's HIV status. The Applicant combined human rights and tort claims to increase the likelihood of obtaining a remedy because of the absence of precedents on the human rights claims at the time of filing. However, during the twelve-year period that the case was litigated, robust human rights standards were established on these issues by international and regional human rights instruments and the treaty monitoring bodies charged with their interpretation

Yet, some challenges remain at the national level. HIV testing without informed consent continues to occur in Nigeria and other countries and is typically a pre-condition for employment. The emergence of HIV laws that contain provisions which place those living with HIV at increased risk of human rights violations remains a concern in some countries, such as Kenya and Uganda. These laws contain

provisions that provide for testing and disclosure of results without consent, with potentially negative consequences for women, who are more likely to experience violence and stigma once their status is made known. Its negative implications are increased for certain groups such as pregnant women who are typically subjected to routine HIV tests while receiving maternity care. The provisions in these HIV laws, which criminalise HIV exposure and transmission in language that is so broad it could be interpreted to apply to transmission in-utero, during delivery, or while breastfeeding, also hold serious implications for people living with HIV. African courts have a seminal role to play in addressing such violations and this decision can be persuasive in many other jurisdictions.

Stanley Kingaipe & Another v. The Attorney General
[2010] 2009/HL/86
Zambia, High Court

COURT HOLDING

The petitioners were subjected to mandatory HIV testing without their consent and put on antiretroviral (ARV) drugs unknowingly. This was a violation of their right to protection from inhuman and degrading treatment under Article 15 of the Constitution of Zambia, 1991 (the "Constitution") and their right to privacy under Article 17.

The Court held that petitioners' rights to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels under Article 112(d) was not violated.

The Court found that petitioners were not discharged from the Zambia Air Force (the "ZAF") because they were HIV positive, and therefore held that the petitioners' discharge did not violate Articles 11, 21, 23, or 112(c) of the Constitution, the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, or the Government Policy and Guidelines on HIV/AIDS.

Summary of Facts

The two petitioners had formerly served in the ZAF. While in service, they were asked to appear before a Medical Board of Inquiry to assess their illnesses and determine their fitness to serve. They were later required to undergo compulsory medical checkups where blood samples were taken. Neither petitioner was informed that an HIV test would be conducted. They were later prescribed drugs, but were not informed that they were being treated for HIV. Each petitioner was subsequently discharged from the ZAF as unfit for service but was never informed that they had HIV. They only discovered that they had HIV after receiving counseling and blood tests from other health centers following their discharge.

The petitioners alleged that they were subjected to mandatory and compulsory HIV tests without their express or informed consent and that they were discharged as a result of these tests. They therefore claimed violations of Articles 11, 13, 15, 17, 21, 23, and 112(c)-(e) of the Constitution and of the Government Policy and Guidelines on HIV/AIDS.

Issues

1. Whether the petitioners were subjected to mandatory and compulsory HIV tests, and if so whether it violated their right to personal liberty under Article 13 of the Constitution, their right to protection from inhuman and degrading treatment under Article 15, their right to privacy under Article 17, or their right to adequate medical and health facilities and to equal and adequate educational opportunities in all fields at all levels under Article 112(d) and (e).

2. Whether the petitioners were discharged on account of their HIV status and, if so, whether it violated their fundamental rights and freedom under Article 11, rights to freely associate under Article 21, rights to protection from discrimination under Article 23, or rights to secure an adequate means of livelihood and opportunity to obtain employment under Article 112(c).

Court's Analysis

The Court found that the petitioners were subjected to mandatory and compulsory HIV tests. The Court noted that if any testing is done without someone's consent then the testing is by definition mandatory. To support this, the Court cited *Lewanika v. Frederick Chiluba* (1998) Z.R. 79, where the Supreme Court of Zambia held that extracting a blood sample from any person without his or her consent infringed individual rights. Citing *Airedale NHS Trust v. Bland* (1993) 1 All E R 821, the Court further noted that the petitioners did not lack the capacity to give consent, and that they were in the best position to make their own decision whether or not to have an HIV test.

In the Court's opinion, the absence of informed consent by the petitioners was an affront to their fundamental rights and freedoms and the preservation of their dignity and integrity, which are rights contemplated in both the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. Therefore, the Court held that the compulsory HIV tests similarly violated Articles 15 and 17 of the Constitution, which state, respectively, that "a person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment" and that "except with his own consent, a person shall not be subjected to the search of his person of his property or the entry by others on his premises."

The Court was not persuaded by the evidence before it that the petitioners were discharged on account of their HIV. The Court noted extensive evidence in the record of the petitioners' deteriorating health prior to their Medical Board Inquiries and HIV tests. Based on this history, which included severe infections that restricted mobility, doctors recommended to the Medical Board that both petitioners be found unfit for all forms of military duty. The Court found that the HIV tests were performed *after* the Medical Board had already accepted the doctors' recommendations, and that their decision was therefore based only on the petitioners' prior medical history and not their HIV diagnoses. The Court explained that under Regulation 9 of the Defence Force Regulations of the Defence Act, a soldier may be discharged if he is medically unfit for any form of service and is likely to remain so permanently. The Court accepted the defendant's argument that the doctors reasonably believed that the petitioners' health problems were likely to remain permanent based on their medical history.

The Court found that the petitioners were not discharged on account of their HIV, and therefore held that the petitioners' discharges were not in violation of their rights.

Conclusion

The petition succeeded in part, and the Court awarded the petitioners K10,000,000 each as compensation for having been subjected to mandatory HIV testing without their consent.

Significance

Doctors in the army realised that army personnel were becoming ill and some were becoming unfit for duties. They suspected HIV. They took the initiative to get sick personnel tested for HIV and put those who tested positive on a treatment. For some, this was life-transforming. They got better, and were able to maintain good health following this intervention. It was a good initiative by the doctors because they saved lives; however, the manner in which they intervened was paternalistic and misaligned with human rights principles.

Human rights demand that persons make decisions for themselves on all health interventions. The doctor only facilitates the process of identifying the medical issue and enables the client to make their decisions based on the available options for addressing the issue.

One of the special challenges with sexual and reproductive health services in Africa is this paternalistic attitude of health providers. Paternalism may be subtly manifested by the health provider's failure to provide all the information that is necessary for the client to understand their situation. Paternalism in health services is sometimes so entrenched that clients have come to believe, mistakenly, that their fate rests in the hands of the health provider. Yet, in human rights terms, no one should decide for another person. Every competent person has the "right" to decide for themselves.