LEGAL GROUNDS

Reproductive and Sexual Rights in Sub-Saharan African Courts

Volume III

CENTER FOR REPRODUCTIVE RIGHTS

Centre for Human Rights
UNIVERSITY OF PRETORIA

UNIVERSITY OF TORONTO
FACULTY OF LAW

LEGAL GROUNDS

Reproductive and Sexual Rights in Sub-Saharan African Courts

Volume III

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FOREWORD

The post-Second World War era has witnessed a steady proliferation of international law instruments dedicated to the protection of human rights. The 1948 Universal Declaration of Human Rights laid the edifice for the universal recognition of the inherent dignity of the equal and inalienable rights of all human beings as the foundation of freedom and justice. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966, significantly advanced the cause of human rights protection by moving beyond a mere declaration of rights to establish clear treaty obligations for states parties.

These covenants have been followed by other United Nations (UN) treaties dedicated to protecting the rights of specific disadvantaged and marginalised groups. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 as a universal instrument for protecting women's rights, is one such example. Regional human rights systems have followed suit. In 2003, the African human rights system emulated as well as amplified CEDAW when it adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) to establish a regional instrument for the protection of women's rights. In terms of ensuring accountability for human rights abuses, the African regional human rights system, which was first established in 1981 with only the African Commission on Human and Peoples' Rights, has since been complemented by a court--the African Court on Human and Peoples' Rights.

But what has been the sum total of these important developments at the UN and African regional levels? How tangible is the promise of human rights in the daily lives of women, men, and children, including those in Africa?

The ultimate objective of human rights treaties is to recognise individuals as repositories of rights that are the subject of enforceable international law. It is all too apparent that the world is no longer short of declarations and treaties that recognise human rights. What the world, and not least the African region, is woefully short of, though, is the realization of human rights. The challenge now is to secure not just the respect and protection, but the fulfilment of human rights guarantees.

Sexual and reproductive health rights remain one of the weakest areas of human rights on the African continent. Africa's unmet contraceptive needs, high levels of unsafe abortion, high incidence of early or coerced marriages, deteriorating access to health-care services (including reproductive health services), prevalence of sexual violence and sexual exploitation, pandemic levels of HIV, and laws and customary practices that discriminate on the grounds of gender and sexual orientation all testify to a failure to effectively realise sexual and reproductive health rights on the continent. Unless rights are fulfiled, they remain rhetoric at best. As Frans Viljoen once wrote about international human rights law in Africa, "The ultimate test of international human rights law is the extent to which it takes root at the national level, and its ability to flourish in the soil of states and to bear fruit in the lives of people."

National courts have a crucial role to play in cultivating this process. With the privilege of dispensing decisions that are unquestionably authoritative in the eyes of national authorities, such courts

can play an august role in contributing towards the fulfilment of human rights if they are able and willing to indigenize human rights. Ultimately, national courts must be able and willing to discharge their constitutional judicial functions as not just impartial arbiters in disputes, but equally, intrepid custodians of the constitutional guarantees of rights enshrined in national constitutions, many of which emulate human rights guarantees in UN and regional instruments.

However, in a democracy, the task of ensuring human rights protections cannot be left to the courts alone. Civil society has a crucial role to play in raising awareness about rights and in giving vitality to the demand for, as well as enforcement of, human rights. The Treatment Action Campaign's successful litigation against intransigent state denial of the rights of persons living with HIV to health care in South Africa, for example, is a testament to civil society's capacity to make human rights come alive. Civil society also represents a necessary component of democracy, for through advocacy and litigation, it can hold governments accountable for their failure to respect, protect, or fulfil human rights.

An important prerequisite for civil society's ability to advocate for and litigate human rights is the accessibility of jurisprudence. Obtaining decisions of national courts and tribunals in many parts of Africa is a challenge, because decisions are not always reported on a regular basis, or they are reported in a manner that is not easily accessible to the public. The *Legal Grounds* series fills a gap in the availability and accessibility of jurisprudence pertaining to reproductive and sexual health and rights.

Like its predecessors, *Legal Grounds III: Reproductive and Sexual Rights in Sub-Saharan African Courts* is a tool for organizations, individuals, and institutions of learning. The scope of this third volume has been widened to include cases from Francophone and other non-Commonwealth countries, while focusing more exclusively on jurisprudence related to reproductive and sexual health. Though the study of reproductive and sexual health as a human rights discipline on the African continent is still at a relatively young stage, a number of countries are developing the discipline in their tertiary institutions. Equally significant, in 2015, the Centre for Human Rights, University of Pretoria, launched a Masters in Sexual and Reproductive Rights in Africa programme. This publication is a compelling resource for students in this field. In addition, it is a contribution towards a knowledge base for jurisprudence that bears directly or indirectly on reproductive and sexual health as human rights, and is conducive towards building and entrenching a human rights culture on the African continent.

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Faculty of Law, University of Pretoria
South Africa
October 2016

I. INTRODUCTION

In line with the objectives and goals of its predecessors, this third volume of the *Legal Grounds* series provides analytical summaries of the main jurisprudence from African courts that have addressed the protection of reproductive and sexual rights from 2010, when the last volume was published, until early 2016.

The first volume of *Legal Grounds* was a preliminary step toward enhancing access to and knowledge about some of these decisions in African Commonwealth countries, with an emphasis on cases that directly and indirectly affect women's reproductive and sexual health and rights. The second volume advanced that goal and also provided a crucial starting point for women's rights advocates to develop and strengthen litigation strategies at the national level, and for researchers who continue to analyze existing gaps in interpretation and adjudication and propose solutions.

Legal Grounds III builds on the previous two publications in many aspects. It includes, for the first time, jurisprudence from civil law jurisdictions, and broadens the discussion from Commonwealth courts to those in Sub-Saharan African countries, and beyond women and children to other vulnerable individuals and groups. This volume is also more focused on health issues. Whereas previous volumes had included cases on women's rights involving marriage or property, *Legal Grounds III* includes only two such cases (on disparate treatment of adultery and polygamy) in its new chapter on Francophone Africa. The remaining 52 cases directly impact reproductive and sexual health.

While the case summaries and analyses show that gender-based discrimination remains a great threat to women's and adolescent girls' health and lives, a notable trend is the increase in the number of decisions that are now protecting and advancing these rights. Another trend is the willingness of courts in some of the countries to distinguish themselves from previous decisions that failed to uphold these rights in the past.[1]

As in 2005 and 2010, when the first two volumes of *Legal Grounds* were published, still relatively few publications examine the interpretation and application of human rights norms by national courts in Africa. Even fewer consider whether and how national courts interpret and apply regional and international human rights laws. Further, the scarcity of accessible information on national courts' jurisprudence, particularly regarding how they analyze and adjudicate legal issues that deal with women's rights, continues to be a challenge in Sub-Saharan Africa. Accordingly, this publication remains a vital tool for human rights advocates and all other stakeholders working to advance sexual and reproductive rights in the region.

This volume addresses many of the health issues that the previous volumes addressed as well as new and emerging issues. The case summaries include those involving child marriage; adoption and surrogacy; criminalization of consensual adolescent sexual conduct; sexual violence, including in schools; maternal mortality, morbidity, and poor quality of care; access to safe and legal abortion; contraceptive provision; wrongful birth or life claims; rights of intersex persons and sexual minorities; and HIV-based discrimination.

Advocates can use the information in this volume of *Legal Grounds* to develop and strengthen litigation strategies; highlight existing gaps in the enactment, reform, interpretation and implementation of laws; and sustain grassroots and other advocacy strategies to compel governments and others to respect, protect and fulfil the sexual and reproductive rights of all.

STRUCTURE OF THIS REPORT

Each chapter begins with a brief introduction explaining the significance of each issue, drawing attention to how certain aspects of the cases advance sexual and reproductive rights, or indicating noticeable trends in jurisprudence. "Highlight" boxes throughout the report also discuss important themes and the cases pertaining to them in order to show how these cases may be used in broader contexts.

The cases are organised by issues or themes. Each case is discussed in the following manner:

Court Holding briefly highlights key aspects of the decision.

Summary of Facts outlines the relevant facts.

Issue(s) identifies the central question(s) addressed by the court. Although some cases address several legal issues, the summaries selectively focus on issues that affect the rights of women, children, and other groups who are vulnerable to violations of their reproductive and sexual rights.

Court's Analysis delineates key portions of the court's reasoning.

Conclusion summarises the outcome of the case.

Significance provides additional context and comments on each case summary from a progressive human rights perspective and draws attention to the broader impact of the decisions.

Links to the full texts of the cases and helpful online legal resources are listed at the end of the report.

As always, we have made an extensive effort to provide the most up-to-date information. However, some of the cases may have been appealed or superseded after going to press. Accordingly, the case summaries should be viewed as a preliminary source of information that can provide much needed support to accountability, advocacy, and research efforts aimed at addressing ongoing violations of sexual and reproductive rights in the African region.

II. CHILDREN AND ADOLESCENTS

Children and adolescents are subjects of sexual and reproductive rights and attendant responsibilities. Put simply, sexual and reproductive rights are those rights that enable everyone, including adolescents, to realise and maintain the highest standard of sexual and reproductive health. As the Programme of Action adopted in Cairo at the International Conference on Population and Development noted in 1994, "reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents."[2] They include the right to make decisions about one's sexual and reproductive health freely and without discrimination or coercion. Sexual and reproductive rights imply, amongst other things, state obligations to protect children and adolescents from sexual abuse, early marriages, and female genital mutilation. They also imply obligations to provide education, information, and services to enable young people to realise sexual and reproductive health.

This chapter discusses court decisions that encourage continued reflection on some of the sexual and reproductive issues affecting young people on the African continent. These include, for example, the challenge that countries face in dealing with forced and child marriages as depicted in the South African case of *Nvumeleni Jezile v. The State and 7 Others*.[3] The Kenyan case of *W.J. & Another v. Astarikoh Henry Amkoah & 9 Others*[4] raises questions about the effectiveness of criminal law in addressing sexual abuse of children. The *Teddy Bear* cases in South Africa[5] invite countries to rethink sex laws that unjustifiably criminalise adolescent sexual conduct and expose children to the harshness of the criminal justice system.

CHILD, FORCED AND EARLY MARRIAGE

Mudzuru & Another v. Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others
Const. Application No. 79/14 [2015] ZWCC 12
Zimbabwe, Constitutional Court

COURT HOLDING

The effect of Sections 78(1) and 81(1) of the Constitution is that the enjoyment of the right to enter into marriage and found a family is guaranteed to a person who has attained the age of 18 years and is legally delayed in respect of a person who has not attained the age of 18 years.

Section 22(1) of the Marriage Act is inconsistent with the provisions of Section 78(1) of the Constitution to the extent that it provides that a girl who has attained the age of 16 can marry, and is therefore invalid.

Summary of Facts

The applicants filed the application before the Constitutional Court of Zimbabwe in terms of Section 85(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (the "Constitution"), and asked the Court to interpret and apply constitutional provisions to the law on marriage to address the problem of early marriages which constituted an infringement of the fundamental rights of the girl child. Their contention was that Section 78(1), as read with Section 81(1) of the Constitution, should be interpreted to mean that a person below the age of 18 years cannot marry under any law.

Issues

1. Whether or not the applicants had sufficient standing interest under Section 85(1)(a) or Section 85(1)(d) of the Constitution to institute the proceedings claiming the relief they sought.
2. Whether Section 78(1) of the Constitution sets the age of 18 years as the minimum age for marriage in Zimbabwe.
3. Whether Sections 78(1) and 81(1) of the Constitution rendered invalid Section 22(1) of the Marriage Act and any other law authorizing a girl who was below the age of 18 to marry.

Court's Analysis

The Court determined that, while the petitioners might not have standing under Section 85(1)(a) of the Constitution to bring this action, they did have the right to bring it under the public interest provisions of Section 85(1)(d), because the interests of children subjected to early marriages were properly identified as a public interest concern.

In order to interpret and apply the meaning of Section 78(1) as read with Section 81(1) of the Constitution, the Court looked to the obligations undertaken by Zimbabwe under various international human rights treaties and conventions. It also took into account the attitude of international law toward the issue of laws regarding marriage and children, and especially through the perspective of the Convention on the Rights of the Child (the "CRC") and the African Charter on the Rights and Welfare of the Child (the "ACRWC"). It noted that a child is defined as a person below the age of 18, and that child marriage is defined as marriage of a person under the age of 18.

The Court found that Section 22(1) of the Marriage Act was enacted in 1965 at a time when states were guided by Article 16 of the Universal Declaration of Human Rights (the "UDHR") and the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962 (the "Marriage Convention"), which did not provide adequate protection for children until the coming into force of the CRC and ACRWC. States such as Zimbabwe therefore set minimum ages of consent based on norms other than the protection of the rights of children, so that the Marriage Act permitted marriage of girls under the age of 18.

The Court also took cognizance of the fact that the Convention on the Elimination of All Forms of

Discrimination against Women ("CEDAW"), which entrenched the principle of equality of men and women, reserved the right to marry and to found a family to men and women of full age (Article 16). Article 16(2) of CEDAW prohibited child marriage, though it did not define "child." However, the full implications of this provision were set when the CRC defined "child" in 1990.

The Court noted that since the coming into force of CEDAW and the CRC, there was progressive recognition of the harm to children of child marriages and the negative implications on the enjoyment of the rights of the child. When the ACRWC came into force in 1999, Article 21(2) clearly and unambiguously prohibited child marriages and specified the minimum age of marriage to be 18 years for any person. The Court noted that the ACRWC specifically targeted child marriage as a "harmful social and cultural practice affecting the welfare, dignity, normal growth and development of the child particularly the girl-child" (page 36 of judgment), which states parties were obligated to eliminate by taking measures, including legislative measures. The Court referenced the concluding comment on Zimbabwe (A/53/40(1998) para. 214) by the Committee on the Convention on Civil and Political Rights (the "ICCPR Committee") which expressed the view that the provisions of Section 22(1) of the Marriage Act allowed early marriage and maintained a difference in the minimum age of marriage for boys and girls.

The Court recognised that Section 78(1) of the Constitution was enacted to comply with the obligations of Zimbabwe under Article 12(2) of the ACRWC to specify the minimum age of marriage and abolish child marriage. It held therefore that Section 78(1) should be interpreted to mean that a person who has not attained the age of 18 has no legal capacity to marry, so that the legal effect of the provision is to set the minimum age of marriage at 18.

According to the Court, in defining a child as a person below the age of 18, Section 81(1) of the Constitution had the effect of supporting the application of Section 78(1). It therefore held that the two provisions, read together, provided that enjoyment of the right to enter into marriage and found a family is guaranteed to a person who has attained the age of 18 years and is legally delayed in respect of a person who has not attained the age of 18 years.

The Court clarified that Section 78(1) had effectively abolished all types of child marriages without any exception for any religious, customary, or cultural practices. Further, it eliminated the practice of having someone else, such as parents or public officials, consent to marriage on the person's behalf. Therefore "no law could validly give a person in Zimbabwe who is aged below eighteen years the right to exercise the right to marry and found a family without contravening Section 78(1) of the Constitution." The Court therefore held that Section 22(1) of the Marriage Act is inconsistent with the provisions of Section 78(1) of the Constitution to the extent that it provides that a girl who has attained the age of 16 can marry, and therefore that it is invalid.

Conclusion

The plaintiffs' application succeeded. The Court issued various declarations including that Section 78(1) of the Constitution set the minimum age of marriage at 18, and that Section 22(1) of the Marriage Act and any law, custom, or practice which authorises child marriage is unconstitutional. The Court also declared that starting January 20, 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or a religious union, before reaching the age of 18.

Significance

The Zimbabwe Constitutional Court recognised and articulated many of the issues that are associated with child marriages. Many countries in Africa have ratified the ACRWC and are obligated under Article 21 of the treaty to abolish child marriages. As the Court recalls, these obligations include legislative measures such as prohibiting persons below 18 from marrying. Some countries in Africa have yet to take such legislative measures. However, the greater challenges are reflected in the recent headline "Legal ages of marriage across Africa: Even when it's 18, they are married off at 12!"[6] Indeed legal ages of marriage can be set, but how should they be enforced by states? Would criminalization be the best way to ensure compliance with domestic law? Such are the sort of questions that states must address.

Nvumeleni Jezile v. The State and 7 Others
[2015] ZAWCHC 31, High Court Case No. A 127/2014
South Africa, High Court, Western Cape Division, Cape Town

COURT HOLDING

The offences for which the Appellant was charged took place after a traditional *ukuthwala*, a practice leading to negotiations for a customary marriage on which the Appellant relied for his defence, would have occurred. Therefore, the Appellant could not rely on the practice of *ukuthwala* to justify his conduct.

Practices associated with the aberrant form of *ukuthwala* do not comply with the requirements of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), and cannot be protected under the law.

Summary of Facts

The Appellant was convicted of human trafficking, rape, common assault, and assault with intent to cause grievous bodily harm, and was serving his sentence. This was an appeal against the conviction and sentence.

In December of 2009 or early January 2010, the Appellant left his residence for his village to find a girl to marry, in accordance with his custom. He identified a 14-year-old girl (the Complainant), who was still in school (Grade 7), as the girl he desired to be his wife. His family and the family of the Complainant initiated and concluded marriage negotiations within one day. The family of the Complainant then forcibly took her to the house where the Appellant resided, where she was informed that he was to become her husband. While there, she was made to undergo traditional ceremonies, even though she protested, at the conclusion of which she allegedly became the Appellant's wife according to customary law. A bride price of 8000 Rand (about 565 USD) was paid to the Complainant's maternal grandmother with whom the Complainant had been living.

The Complainant was forced to accompany the Appellant to his place of residence, where she was unhappy and ran away. She was found by members of her family and returned to the Appellant's

residence a few days later. The Appellant subsequently required the Complainant to travel to Cape Town with him to reside with the Appellant's brother, where the Appellant and the Complainant had sexual intercourse on multiple occasions, all of which instances the Complainant contended were against her will. Shortly after her arrival in Cape Town, the Complainant ran away and reported the matter to police. The Appellant was charged and convicted on one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm and one count of common assault.

Issues

The issues on appeal were:

1. Whether the trial court's determination of the issues should have taken into account the practice of *ukuthwala,* which allows the "bride" to be coerced, and
2. Whether the two convictions for assault should have been treated as one charge, given that both assaults were part of one overall assault.

Court's Analysis

Based on the submission of the Friends of the Court regarding the traditional and aberrant forms of *ukuthwala*, the Court evaluated the Appellant's defence that his actions were justifiable as a customary practice.

The Court took judicial notice of a public debate on the practice of *ukuthwala* that "its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape of not only women but children as young as eleven years by older men."[7]

The Court considered the legal framework regulating customary marriages, including constitutional provisions, legislation, and human rights treaties to which South Africa is a signatory. Section 211(3) of the Constitution of South Africa (Constitution) requires courts to apply customary laws subject to the Constitution and relevant legislation. Section 28 of the Constitution provides that protection of the child from harm and also the best interests of the child are paramount in matters concerning children. Further, Section 28 of the Constitution defines a child as a person under the age of 18 years. The Constitution also provides guidance for interpreting the constitutional rights in the Bill of Rights (Section 39).

The Court reviewed the Children's Act, 2005 (Children's Act), and referred amongst others to Section 1 on the definition of trafficking, Section 12(1) which prohibits subjecting children to cultural practices that are detrimental to their wellbeing, and Section 284(1) which prohibits child trafficking. Section 284(2) provides that it is no defence that the child or the person having control over the child consents to trafficking.

The Court referred to provisions of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (Sexual Offences Act) on rape, and called attention to Section 56(1) which provides that it is not a defence to the charge of rape to rely on a marital or existing relationship. It also referred to Sections 70 to 72 of the Sexual Offences Act, which prohibit trafficking in persons for sexual

purposes. The Court also noted that the Sexual Offences Act defined trafficking in a similar manner to the definition in the Children's Act, and that the Sexual Offences Act makes trafficking of any person without their consent an offence; consent can only be voluntary or uncoerced.

The Court made reference to the Prevention and Combatting of Trafficking in Persons Act, which at the time of the judgment had been passed but had not yet entered into force (it has since been signed into effect). However, the Court stated that the Act's various provisions pointed to the intention of the Legislature to comply with its obligations under international human rights law.

The Court then made reference to the RCMA which provides for recognition of customary marriages under the Constitution and stipulates the requirements for contracting a valid customary marriage. Section 3(1) lists the following requirements: (a) prospective spouses should be over the age of 18 years; (b) both must consent to the customary marriage; and (c) the process must be in accordance with customary law. Sections 3(3)(a) and 3(4)(a) provide for conditions under which a person below the age of 18 can enter into a customary marriage with the consent of parents or guardians.

The Court also referred to Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which prohibits discrimination on the grounds of gender and includes any cultural practice that impairs the dignity of women or undermines the dignity and welfare of female children.

Finally, the Court reviewed several international human rights treaties and South Africa's obligations in relation to them, including the Convention on the Rights of the Child (CRC), which stipulates that member states take measures to abolish traditional practices prejudicial to the wellbeing of children and also protect children from exploitation, and the African Charter on the Rights and Welfare of the Child (ACRWC) which prohibits child marriage and betrothal. The Court determined that there was clear authority that child trafficking and child abuse or exploitation for sexual purposes was "not to be tolerated in [its] constitutional dispensation."[8]

The Court subsequently reviewed information provided by the parties and *amici curiae* regarding the practice of *ukuthwala*. The *amici* indicated that *ukuthwala* is one of a number of alternative ways under customary law to bring about marriage negotiations, and that it generally requires (a) the woman to be of marriageable age, typically child-bearing age; (b) the consent of both parties, though there are instances in which the women's acquiescence in the process occurs after the fact; (c) a mock abduction of the woman at dusk, during which the woman would feign protest but would have agreed beforehand; (d) a smuggling of the woman to the man's homestead; and (e) an invitation sent to the woman's homestead to inform the woman's family that she was with the man's family, which was supposed to signal the desire of the man's family to enter into marriage negotiations. The *amici* argued that, based on the record, *ukuthwala* was not properly performed in the matter due to the Complainant's young age, her lack of consent, and the payment of the bride fee before the *ukuthwala* occurred.

After evaluating the legal framework and the information provided on the practice of *ukuthwala*, the Court then turned to the facts of the case. The Court determined that the offences for which the Appellant was charged had taken place after a traditional *ukuthwala* would ordinarily have happened, as the trafficking and sexual assaults occurred after the customary marriage. Therefore, the Court held that the Appellant could not rely on the traditional practice of *ukuthwala* to justify his criminal conduct.

Further, the Court was persuaded largely by the views of Professor Nhlapo and Inkosi Mahlango on the distinction between the traditional and the aberrant forms of *ukuthwala*. The aberrant form did not have the same requirements of consent and age. The Court found that the Appellant had relied on an aberrant form of *ukuthwala* and held that the Appellant could not rely on the misapplied form of *ukuthwala*, which did not comply with the requirements of the RCMA, to justify commission of the offences of trafficking and rape.

On the second issue, the Court concluded that the Appellant's two convictions of assault both arose out of the same incident. The Court therefore concluded that the two counts should be treated as a single offences in order to prevent a duplication of punishment.

Conclusion

The appeal against the convictions for trafficking and rape was dismissed, and the Appellant's convictions on the counts of assault were set aside.

Significance

The United Nations (UN) General Assembly resolution on child, early and forced marriages (CEFM) recognises that:

> Child, early and forced marriage is a harmful practice that violates, abuses and impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls….[9]

Though CEFM is a global problem, it is most prevalent in Sub-Saharan Africa and South Asia. The African Union (AU) responded to this challenge on 29 May 2014 at its Headquarters in Addis Ababa, Ethiopia,[10] by launching a campaign to end child marriage across Africa. Another important event on the African continent was the First African Girls' Summit on Ending Child Marriage in Africa, held in Lusaka, Zambia between 26 and 27 November, 2015. A statement from this meeting reminded Africa that:

> Article 21(2) of the African Charter on the Rights and Welfare of the Child, which requires that child marriage and the betrothal of girls and boys shall be prohibited, and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and to make registration of all marriages in an official registry compulsory.[11]

As submitted by the *amici curiae*, poor socio-economic conditions and poverty fuel the cycle of CEFM. CEFM is both a manifestation and a cause of poverty which survives the generations because of the complicity of families and the acceptability of the practice to members of the community. Other factors that sustain CEFM include patriarchal socio-cultural norms that subjugate girls and women, especially by suppressing their self-determination in matters relating to their sexuality and sexual relationships. Violence, abduction and rape are tools for maintaining the subjugated position of women in society.

This case has generated debate around an issue the Court did not determine, and that is whether *ukuthwala,* even in its innocuous form as described by Professor Nhlapo and Inkosi Mahlangu, is nevertheless shrouded in patriarchal values that are contrary to gender equality and human rights.[12] Indeed, why should mock-abduction be a feature for the girls and not the boys? Does it not in fact, even if only symbolically, represent the subjugated position of the girl in relation to the man? Another challenge is that *ukuthwala* seems to focus on the consent of families rather than the person's consent. Noteworthy also was the Appellant's appreciation of the ambiguity about consent which the practice of mock-abduction poses. This is an important observation because mock-abduction mystifies the process of consent and obscures whether it does in fact take place, or whether the girl succumbs to pressure or merely acquiesces after being coerced. The whole practice of *ukuthwala* is therefore suspect, as it is based on patriarchal notions about the place of women in society. However, it is no simple matter to dissuade communities from continuing such practices because of the reasons described above, including that they are a source of income, and caused by socio-cultural pressure.

Finally, one is left wondering why family members who participated in the crime were not prosecuted. The evidence showed that the Complainant's uncle and other family members, and also the family members of the Appellant, were accomplices to the abduction. The brother of the Appellant had also allegedly held the Complainant down while the Appellant raped her. The Court, however, agreed with the trial court in the view that:

> … the involvement of the complainant's male family members and grandmother was nothing more than a neutral factor insofar as the Appellant's own blameworthiness was concerned.[13]

The Court agreed with the trial court without explaining its reasoning, even though it was evident that family members played key roles in the commission of the offences. Extending liability to members of the family may have had the implication of prosecuting a whole group of family members or members of a community. Understandably this may not have appealed to the prosecutors or the courts. It may indeed not have been received well by the wider community. However, this raises questions about fairness of the criminal justice system when it fails, without justification, to prosecute those who are involved as accomplices in criminal activity relating to CEFM.

HIGHLIGHT

CHILD MARRIAGE: LEGAL AND SOCIO-CULTURAL ASPECTS

Child marriage is a huge problem in Sub-Saharan Africa, such as in Niger where over 75% of girls are married before age 18 and in Malawi and Mozambique, where over 50% of children are married before the age of 18. Child marriage practices infringe on the rights of the child, and are themselves a consequence of violations of the rights of the child. The causes of the phenomenon of child marriage are complex and interrelated. Social, cultural, religious, and economic factors influence norms, values, and behaviour on individual, community, and society levels. While poverty is an important driver of child marriages in Africa, one of the rationales for child marriage is related to preservation of the traditional value of girls' chastity and virginity. Using Malawi as a case study, one of the reasons some communities have resisted raising the age of marriage to 18 was the argument that it would allow a window period in which sexually mature girls would engage in sexual intercourse before marriage.

Monica J. Grant, a sociologist, found that in rural Malawi, parents worry about the girl-child becoming sexually active when she attains puberty.[14] Parents are anxious that their daughters will not finish school, but will instead get pregnant. Parents construct the girl as easily distracted from their studies by boys who will lure them into sexual relationships. In fact, another study had found that anxious parents preemptively took their girl-children out of school in order to prevent them from getting pregnant.[15]

Therefore, socio-cultural norms about sexuality of the girl-child, the value placed on the girl's virginity, and the construction of the girl-child as sexually weak against the sexual desires of boys, contributes to parents marrying off their girl-child as soon as she reaches puberty. Such constructions of girls' sexuality reveal underlying power dynamics in a patriarchal environment that justifies girl-child marriages.

In 2014, the African Union launched a campaign to eliminate child marriages on the African Continent. In 2016, the Southern African Development Community (SADC) adopted the Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage. In a number of countries, such as Zimbabwe[16] and more recently Tanzania,[17] the courts have supported the application of human rights and legal norms to the eradication of child marriages.

It is important, however, that legal and human rights approaches to end child marriages address social and cultural norms around the sexuality of the girl-child. The anxiety that parents have about sexually mature girls who might be sexually active and get pregnant before marriage is a concern that motivates parents to limit the sexual agency of the girl. Parents may therefore feel justified to either restrict normative consensual sexual conduct, or to marry off the girl-child as soon as she reaches or approaches puberty. Clearly, the root problems of why and how society controls the sexuality of adolescent girls must be explicitly addressed by legal and human rights approaches that aim to end the scourge of child marriages.

FEMALE GENITAL MUTILATION

Law and Advocacy for Women in Uganda v. The Attorney General
[2010] UGCC 4 Constitutional Petition no 8 of 2007
Uganda, Constitutional Court

COURT HOLDING

The custom and practice of Female Genital Mutilation (FGM) violates the rights of women enshrined in Articles 21, 22, 24, 32(2), 33, and 44 of the Constitution. FGM is declared prohibited for being inconsistent with the Constitution.

Summary of Facts

The Petitioner, a non-governmental organisation (NGO) duly registered in Uganda, filed a petition challenging the custom and practice of FGM by several tribes in Uganda, as being inconsistent with the Constitution of the Republic of Uganda 1995 (the Constitution). The Petitioner asked the Constitutional Court of Uganda (the Court) to declare FGM unconstitutional in accordance with Article 2(2) of the Constitution, alleging that it violated the right to life guaranteed under Article 22(1); the right to dignity and protection from inhuman treatment, secured under Article 24; the rights of women recognised under Article 33; and the right to privacy guaranteed under Article 27(2) of the Constitution.

Issues

The Court identified two issues for determination:

1. Whether the petition raised any matter for constitutional interpretation.
2. Whether the custom and practice of FGM was unconstitutional and should be prohibited.

Court's Analysis

The main judgment was written by Justice of Appeal Twinomujuni. The Court determined that the petition did raise matters that required constitutional interpretation.

The Court then considered the issue of whether the custom and practice of FGM is unconstitutional and should be prohibited. The Court considered the evidence put forward by the Petitioner, which included affidavits stating that the practice of FGM is carried out crudely, causes excruciating pain, and results in excessive bleeding and trauma. The potential consequences include permanent disfigurement or death. Apart from this, the practice could result in urinary incontinence, rendering the woman a social outcast because of the urine odor. Some women end up with paralysis and/or some other permanent disability.

The Court also considered the fact that the affidavits stated that the practice of FGM does not appear to have any medical or social benefits to the community or to the women and girls subjected to this practice.

After reviewing the evidence, the Court moved on to discuss the constitutional provisions relevant to the determination of the matter. It started by highlighting Article 37 of the Constitution, which recognises every person's right to enjoy and practice one's culture and tradition. The Court juxtaposed this with Article 44 of the Constitution, which provides that there would be no derogation from certain rights including freedom from torture and from cruel, inhuman, or degrading treatment, recognised under Article 24 of the Constitution.

The Court then pointed out that Article 32(2) of the Constitution prohibits laws, cultures, customs, and traditions which are against the dignity, welfare, or interest of women, and Article 33(1) and (3) provide that women shall be accorded equal dignity with men and the state shall protect women and their rights. At this point, the Court concluded that any person is free to practice their culture, traditions, or customs as long as none of these infringe on the human dignity of any person or subject any person to any form of torture or cruel, inhuman, or degrading treatment.

The Court evaluated the evidence in the light of the law, and found that FGM is indeed practised among some tribes in Uganda. It also found that the practice has harmful consequences on the health and dignity of women and girls. It made reference to the document entitled Eliminating Female Genital Mutilation: An Interagency Statement (Interagency Statement), published in 2000 by the World Health Organization (WHO), which describes potential harmful consequences of FGM, including chronic pain, decreased sexual pleasure, and post-traumatic stress disorder. The publication also gives evidence of increased risk of childbirth complications and highlights the negative consequences of FGM on newborn babies.

The Court therefore held that FGM violates the rights of women enshrined in Articles 21, 24, 32(2), 33, and 44 of the Constitution, and, to the extent that girls and women are known to die as a direct consequence of FGM, also Article 22 of the Constitution. Further, the Court stated that FGM violates the rights of women, referencing a passage of the Interagency Statement that concluded that FGM violates well-established human rights principles, norms, and standards, including equality and non-discrimination on the basis of sex, the right to life, and the right to be free from inhuman treatment. The passage also stated that FGM has been recognised to manifest discrimination on the basis of sex and is rooted in gender inequalities and power imbalances between men and women, and that FGM is a form of violence against women and girls. The Court therefore held that FGM must be prohibited in the jurisdiction, for being inconsistent with the Constitution.

Conclusion

The petition succeeded.

Note

While this decision was being written, the Ugandan Parliament coincidentally passed a bill on December 10, 2009, titled "Prohibition of Female Genital Mutilation," which was welcomed by the Court as consistent with its own ruling based on the Constitution of Uganda.

Significance

The practice and custom of FGM is said to have been prevalent in 29 countries in Africa including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Eritrea, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, and Zambia. The practice has since been banned in several countries including: Benin (2003); Burkina Faso (1996); Central African Republic (1996, 2006); Chad (2003); Cote d'Ivoire (1998); Djibouti (1994, 2009); Egypt (2008); Eritrea (2007); Ethiopia (2004); Ghana (1994, 2007); Guinea (1965, 2000); Guinea Bissau (2011); Kenya (2001, 2011); Mauritania (2005); Niger (2003); Nigeria (1999-2002, multiple states); Senegal (1999); Somalia (2012); South Africa (2000); Sudan (state of South Kordofan 2008, state of Gedaref 2009); Tanzania (1998); Togo (1998); Uganda (2010); and Zambia (2005, 2011). The current application resulted in Uganda joining the group of countries that have prohibited FGM.

FGM has serious implications on the sexual and reproductive health and rights of girls and women who are subjected to it, and has no social or medical benefit to society or to the victims. Some communities continue to practice this custom because it is associated with identity and belonging and it is socially acceptable. Underlying this practice however, is an attitude about women's position in society and their sexuality, and reflects a denial of their self-determination and control over their autonomy in matters relating to their sexuality. However, this practice is accepted and encouraged by socio-cultural norms rooted in traditions and customs that justify holding such views about girls and women. This is contrary to human rights perspectives articulated by human rights treaties to which many countries where FGM is practised have subscribed through accession or ratification.

The 1993 United Nations World Conference on Human Rights (the "Vienna Conference") was an important milestone for advocacy to eliminate FGM because at this meeting FGM became framed as a form of violence against women. The Vienna Conference affirmed FGM as subject to scrutiny under international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), and the Convention on the Rights of the Child (CRC). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) specifically addresses FGM in Article 5, which provides that states shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards, including Female Genital Mutilation.

This decision of the Constitutional Court of Uganda to prohibit FGM is therefore important as it is one of the measures that states are obligated to undertake under Article 5 of the Maputo Protocol. Although the decision was primarily based on the Constitution of Republic of Uganda, the Court acknowledged the place of international human rights when it referred to the Interagency Statement, which articulated international human rights standards and norms that bear upon FGM.

While elimination of FGM is not the exclusive purview of legislative measures, these legislative measures are important to facilitate and support the transformation of socio-cultural norms around women's sexuality and sexual and reproductive rights. It is therefore important for African states to act in unison and solidarity to end the harmful practice of FGM and prohibit such practices, even if the practice may not have been documented in their countries. For instance, and indeed quite coincidentally, anecdotal sources suggest that FGM is being practised among some communities in Malawi even, though Malawi is not among the countries where FGM is deemed prevalent. It is important that Malawi take measures to curb this practice, including legislative measures. Indeed, it is important for all states that have obligations under international and national law to respect, protect, and fulfil women's rights to take such legislative measures and outlaw FGM.

SEXUAL ABUSE, ASSAULT AND VIOLENCE

C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v. Commissioner of Police/Inspector General of The National Police Service & 3 Others
[2013] eKLR, Petition No. 8 of 2012
Kenya, High Court at Meru

COURT HOLDING

The Court held that the police failed to conduct prompt, effective, proper, and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence, and that this amounted to discrimination, contrary to the express and implied provisions of Article 27 and Article 244 of the Constitution of Kenya 2010.

This failure infringed on the petitioners' fundamental rights and freedoms, under Articles 21(1) and (3), 27, 28, 29, 48, 50(1), and 53(1)(d) of the Constitution and the general rules of international law, including any treaty or convention ratified by Kenya which forms part of the law of Kenya as per Articles 2(5) and 2(6) of the Constitution. These include Articles 2, 3, 4, 5, 6, 7, and 18 of the African Charter on Human and Peoples' Rights, Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights, Articles 2, 4, 19, 34, and 39 of the United Nations Convention on the Rights of the Child, and Articles 1, 3, 4, 16, and 27 of the African Charter on the Rights and Welfare of the Child.

Furthermore, the police did not effectively enforce Section 8 of the Sexual Offences Act 2006. This amounted to a breach of Article 27(1) of the Constitution of Kenya 2010 that provides the right to equal protection and benefit of the law.

Summary of Facts

Eleven petitioners, who claimed to be survivors of defilement, child abuse, and other forms of sexual violence, brought this case against Kenyan law enforcement agencies. They alleged that the police had failed to effectively investigate their complaints and take the necessary action, which would have brought the perpetrators to account for their unlawful acts. They based their petition on diverse national and international laws, including the Constitution of Kenya 2010, the Sexual Offences Act 2006, the Police Act of the Laws of Kenya, the Universal Declaration of Human Rights, the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and Peoples' Rights.

Issues

The issues put before the Court were the following:

1. Whether the neglect, omission, refusal, and/or failure of the police to conduct a prompt, proper, and professional investigation into the complaints of petitioners violated the petitioners' fundamental rights and freedoms under Articles 2, 10, 19, 21, 22, 23, 27, 28, 29, 48, 50(1), and 53 of the Constitution of Kenya 2010.

2. Whether the conduct of the police described above violated petitioners' fundamental rights and freedoms under Articles 1, 2, 3, 5, 7, 8, and 10 of the Universal Declaration of Human Rights; Articles 2, 3, 19, 34, and 39 of the United Nations Convention on the Rights of the Child; Articles 1, 2, 3, 4, 16, and 27 of the African Charter on the Rights and Welfare of the Child; and Articles 2, 3, 4, 5, 6, 7 and 18 of the African Charter on Human and Peoples' Rights.

3. Whether failure of the police to act on the petitioners' complaints constituted an abdication of statutory duty, contrary to the express and implied provisions of the Sexual Offences Act, 2006 and the Police Act.

Court's Analysis

The Court found that the petitioners were survivors of sexual violence and child abuse, that they had suffered physical and psychological harm, and that they had reported the crimes to various police stations. The police had failed to conduct prompt, effective, and professional investigations into these complaints. This caused further harm to the petitioners as the perpetrators continued to threaten their physical and psychological well-being. The Court also stated that this created a climate of impunity for defilement, as the perpetrators were not held accountable for their unlawful acts.

The Court found that while the perpetrators were directly responsible for the harm caused, the respondents were culpable for the ongoing failure to ensure that criminals were brought to account through effective investigation and prosecution of these crimes. The Court found that the police not only failed to take action, but also put the victims under onerous cross-examination, and humiliated and blamed them when they reported their ordeals. For these reasons, the Court found the respondents directly responsible for the psychological harm caused to the petitioners as a result of their actions and inaction.

The Court agreed with the principle set out in the South African case of *Van Eader v. Minister of Safety and Security* (2002) ZASCA 123, where a fundamental breach of the petitioners' freedom was found to have occurred when the police failed to pursue the perpetrators of child abuse and sexual violence. The Court cited *Jessica Lenahan (Gonzales) and others v. United States*[18] in support of the proposition that the state had a positive obligation to protect the vulnerable, such as children, and its failure to do so did not need to be intentional in order to constitute a breach of this obligation. The Court further agreed with the principle stated in the Kenyan case of *R. v. Commissioner of Police & 3 others ex-parte Phylis Temwai Kipteyo,*[19] that once a report is made to the police, the police have a duty to take the appropriate steps and actions to investigate and apprehend the perpetrators, and the failure to do so violated constitutional rights of the victims as guaranteed under Article 244 of the Constitution of Kenya 2010.

The Court referred to other supporting case law to demonstrate the central role the police played in facilitating access to the courts by victims of sexual abuse, with the consequence that when the police failed to discharge their obligations, victims are denied access to the courts and therefore access to justice. Furthermore, as the petitioners were children, the Court stated that the failure of the police to act on the complaints of abuse also infringed on the constitutional requirement to protect the best interests of the child.

Conclusion

The Court found that the actions and inactions of the respondents violated various fundamental rights and freedoms of the petitioners that are guaranteed in the constitution of Kenya and other laws, and ordered the respondents to conduct investigations into the petitioners' complaints.

Significance

This case serves as an example of the challenges that vulnerable victims, and in particular children, have to face when reporting sexual abuse and violence to the authorities. Victims are often discouraged from reporting crimes as a result of the treatment they receive from the authorities. In this case, the police disbelieved and blamed the victims and failed to take action.

This case is significant because the Court found that the police failed in their duty to protect the fundamental and constitutional rights of the petitioners. They were held accountable for their actions and inactions under local police statutes as well as under the constitution of Kenya and international treaties ratified by Kenya that enshrine fundamental rights and freedoms.

In its ruling, the Court was clear that the petitioners, who it noted were a vulnerable group, were owed equal protection and benefit of the law by the law enforcement agencies.

The significance of this case can be understood against the backdrop of the common law principle, restated in *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 (United Kingdom), that the police did not owe a general duty of care to unidentified members of the public. This set the precedent in the common law tradition for refusal by the courts to hold the police accountable for their failure to protect and undertake proper investigations, even in cases where the police were aware of the threat a known perpetrator posed to a particular victim. This precedent is still influential in many jurisdictions that have adopted the common law tradition.

The High Court at Meru, Kenya, however, took a different line of reasoning. Its approach hinged on human rights law rather than common law. It found that the petitioners could be heard on the grounds that a constitutional right or fundamental freedom had been infringed. The Court not only looked at how the police failed in their duties and obligations under the relevant laws, but also how the police mistreated the victims when they reported the crimes. The Court cited expert testimony on Kenyan and international police standards which described the investigations as "inadequate" and "fall[ing] short of international standards." The Court found that the police were directly responsible for the psychological harm the victims suffered as a result of their failures. The Court found further that such failures by the police have contributed to the development of a culture of impunity and tolerance for pervasive sexual violence against girl children.

Since 2010, Kenya has revised its Constitution and enacted legislation, including the Police Act, which has brought the country into line with internationally accepted human rights standards. This enabled the Court to come to a decision that favoured the victims who had suffered at the hands of the police. Other countries, such as South Africa, have also adopted stronger human rights approaches in court decisions based on a strong rights-based Constitution and supporting legislation. As such, this case can be seen as a positive step among efforts being made in Africa to address the problem of sexual abuse and violence against girls and women.

W.J. and Another v. Astarikoh Henry Amkoah and 9 Others
[2015] eKLR, Petition No. 331 of 2011
Kenya, High Court at Nairobi, Constitutional and Human Rights Division

COURT HOLDING

The High Court had jurisdiction to hear the matter because it raised issues of violations of constitutional rights. That there was a criminal matter pending against one of the respondents on the same facts, or that the petitioners could have sought redress in a civil court, did not exclude the jurisdiction of the Court.

The acts of sexual abuse perpetrated by the petitioners' teacher,1st respondent, amounted to violations of constitutional rights of the petitioners, including the right to health, dignity, and education.

By virtue of the oversight responsibilities over the school and the conduct of teachers, the 2nd, 3rd and 4th respondents were liable for the acts of sexual abuse perpetrated by the 1st respondents.

The rights of the 1st respondent were not infringed upon as a result of the petition.

Summary of Facts

The petitioners were two minors who at the time of filing the petition were aged 12 and 13 years, respectively. The 1st respondent was the petitioners' teacher (respondent teacher) at the school the petitioners attended. Their school was the 2nd respondent. The 3rd respondent was the Teachers Service Commission (the "TSC"), a public authority established under Article 327 of the Constitution of Kenya, 2010, whose responsibilities included registering, recruiting, employing, and exercising disciplinary control over teachers. The 4th respondent was the state in the person of the Attorney General.

The petitioners alleged that the respondent teacher had had sexual intercourse with them, and that disciplinary action was then taken against him by the TSC. The matter was reported to police and the respondent teacher was charged with defilement of the children contrary to Section 8(1) as read with Section 3 of the Sexual Offences Act No 3 of 2006.

The petitioners sought damages against the respondent teacher for the alleged sexual abuse. They also claimed damages against the 2nd, 3rd, and 4th respondents jointly for their responsibility for the actions of the respondent teacher, and sued the Government of Kenya for failing to put in place measures to control sexual abuse of students in schools.

Issues

The Court isolated four issues to determine:

1. Whether the Court had jurisdiction to entertain the petition and grant the orders sought.
2. Whether the petitioners had established violations of their constitutional rights by the respondents.

3. Whether the 2nd, 3rd, and 4th respondents were vicariously liable for the violation of the petitioners' rights by the 1st respondent.

4. What remedies (if any) to grant to the petitioners and/or 1st respondent.

Court's Analysis

In its reading of Article 22(1) of the Constitution, which gives persons the right to seek courts' intervention in cases of rights violations, and Article 23(1) read together with Article 165, which provides for the jurisdiction of the High Court in enforcing constitutionally guaranteed rights, the Court agreed with the petitioners that it had jurisdiction over the matter. Its view was that the petition alleged violations of constitutional rights and there was nothing in the law prohibiting the Court from entertaining the matter. The Court therefore held that it had jurisdiction to hear the petition.

The Court went on to determine whether the respondent teacher violated the rights of the petitioners. It took note of two apparently conflicting facts: that the petitioner was acquitted of the criminal charge of sexual abuse, but on the other hand, that the TSC took disciplinary measures against him on the allegations. The Court referenced a decision in *Spadigam (J.) vs. State of Kerala*, (1970) ILLJ 718 Ker, where the Indian High Court observed that an acquittal did not mean a person could not be found culpable in a disciplinary proceeding. The Court therefore found, on a balance of probabilities, that the respondent teacher had committed the alleged acts.

The Court reconciled the fact that the events occurred when the repealed constitution was in force, which did not have provisions on the right to dignity, the right to health, and the right to education, though it contained provisions on non-discrimination and the right to freedom and security of the person. The Court followed the principle that the Constitution did not apply retrospectively so that acts done under the 1963 Constitution would not be determined by the new Constitution unless the nature of the violation was continuing. It found that the violations on the right to dignity, which included emotional and psychological trauma, were of a continuing nature, and therefore fell under the new Constitution.

The Court also observed that the rights guaranteed to children under the 2010 Constitution, specifically the right not to be subjected to any form of sexual or physical violence, and the rights to education, non-discrimination, and dignity, are guaranteed to children under the Children's Act, 2001 (the "Children's Act"). These rights are also guaranteed under the Convention on the Rights of the Child (CRC) which is domesticated by the Children's Act. The Court therefore included Article 19 of the CRC in its discussion because it provided for measures that state representatives ought to take to protect the child from all forms of abuse, including sexual abuse, and also to support the child in cases where violations have occurred.

As a result of its analysis, the Court held that the acts of the respondent teacher amounted to violation of the rights to dignity, education, and health of the petitioners. The Court also held the respondent teacher liable for damages.

The Court then turned to whether the 2nd, 3rd, and 4th respondents had violated the petitioners' rights. It examined this issue from two perspectives: (1) the failure of the respondents to put in place

measures to protect the petitioners from sexual abuse; and (2) the responsibility of the respondents for the acts of the respondent teacher.

The Court inquired into the measures the respondent authorities had taken to protect school children from sexual abuse. It expressed the view that the good intentions of the Government and the TSC were limited, as there was not only insufficient enforcement of ethical standards, but they also were ineffectual. The Court drew attention to the fact that there was insufficient awareness raised among both students and teachers about the ethical standards that stipulated the professional boundaries of the teachers. Furthermore, the Court observed that the Government and respondent authorities appeared to have failed to take any measures to address the consequences that the sexual abuse perpetrated by teachers had on the survivors.

In determining whether the 2nd, 3rd, and 4th respondents were liable, the Court was persuaded by the argument that these respondents owed a duty of care to the students, such that if they failed to safeguard the students from sexual abuse, they not only failed in their duty, but were also responsible for the conduct of teachers who sexually abused the children. The Court therefore held that the 2nd, 3rd, and 4th respondents were responsible and liable for the conduct of the respondent teacher.

The Court observed that the Government had not done enough to hold accountable those who abuse vulnerable constituents under their care, "or to place a duty of care on those who employ them, to diligently exercise their duty of care, first by ensuring that they do not employ persons with a history of abuse, and secondly, to ensure that they avoid instances of abuse in their institutions." The Court expressed the opinion that it was not enough to prosecute sexual offenders. Rather, it was important to commit to ensuring that there is no room at all for abuse in institutions that care for vulnerable groups.

The Court then considered the respondent teacher's argument that his rights were violated because the court proceedings were initiated when a criminal matter was pending, based on the same facts, which had in fact ended with an acquittal. From the evidence before it, the Court held that the rights of the respondent teacher had not been violated.

Conclusion

The Court declared that the respondents' actions and inactions violated the rights to health, education, and dignity of the petitioners. It also declared that all schools and school teachers are at all times under the legal status of a guardian and are under a duty to protect all students from sexual and gender-based violence or harm by teachers. It awarded damages amounting to 2 million Kenyan shillings (equivalent to 20,000 USD) to the first petitioner, and 3 million Kenyan shillings (equivalent to 30,000 USD) to the second petitioner.

Significance

Many governments in Africa, like Kenya, have domesticated, or at least incorporated into their local laws, child rights recognised in international and regional treaties, especially the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC). These instruments create obligations on governments to respect, protect, and fulfil the rights of children, including the right to health, dignity, and freedom from harm, which are among the rights violated when a child is

sexually abused. This case highlights the importance of educational institutions taking measures to prevent and address child abuse.

The Court observed that the measures taken to protect school children and also to promote their sexual and reproductive health rights were woefully inadequate and ineffective. Indeed, intentionally or unintentionally, there appears to be lack of concerted effort to root out the problem. There are no effective preventive measures against threats, addressing potential threats, and taking definitive measures to deal with both the perpetrator teachers and the child survivors.

One of the important challenges about sexual abuse is that the stigma and shame associated with suffering sexual abuse prevents cases of abuse from surfacing. This creates challenges for addressing sexual abuse, and is devastating for survivors, who may have no support from their families, school authorities, or the government to address their predicament.

Perhaps the question here is how governments have understood their obligation to protect children from sexual abuse. Governments have tended to place too much trust in criminalisation-based protection regimes that are built around criminal justice and enforcement of sexual offence laws. Unfortunately, as the Court observed, this does not work very well.

One observation is that child protection approaches have emphasised "protecting" the child, based on the assumption that a child is helpless and totally dependent on adults for protection. While it is true that children are vulnerable and have a right to special measures of protection, to regard them as individuals who lack agency undermines the full realization of their human rights.

One effective preventive measure against child abuse is therefore to create an environment in which the children themselves can recognise threats, and initiate responses that are within their capacity. The role of governments is then to provide support for the child. Effective child protection regimes should comprise both the creation of an enabling environment, wherein there are laws, policies, and codes of conduct to protect children which are effectively enforced, and the empowerment of children, to enable them to recognise, prevent, and avert danger.

The Court's decision makes it clear that it is important for governments to require all schools to have child protection and support policies that are simple and clear to everyone, including teachers, parents, and especially students themselves. In cases of sexual abuse, the policies must be clear on what support is provided to the students, including counselling. Policies must also spell out linkages to other supportive processes including the health and justice systems.

HIGHLIGHT

SEXUAL ABUSE, ASSAULT AND VIOLENCE

Sexual abuse, assault, and other forms of violence against women and children have been internationally condemned, and over the past ten years, landmark decisions from courts across Africa, including Kenya, South Africa and others, have established jurisprudence that advocacy groups across Sub-Saharan Africa and beyond can utilise to advance women's and adolescent girls' rights.

Jurisprudence has established that states and other duty-bearers are liable for the failure to effectively protect, respect, and fulfil women and girls' human rights by protecting them against assault, sexual abuse, and violence. For example, in the Kenyan case *C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v Commissioner of Police/Inspector General of the National Police Service & 3 Others*,[20] the court determined that the state and its organs could not hide behind common law to justify their failure to carry out an effective investigation into reported sexual abuse cases, and that this amounted to discrimination against the group of women and girls who were abused.

Allegations of defilement, according to the Court, should be properly investigated and perpetrators of such crimes should be prosecuted to deter others. Further, the Court held that state organs have a duty "to protect" their citizens from sexual abuse, harassment, defilement, and violence, regardless of their gender. The Court held the police responsible for not adequately protecting the interests of the vulnerable women and girls and therefore failing to ensure their safety.

In *W.J. & Another v Astarikoh Henry Amkoah & 9 Others,* the Kenyan Court affirmed the constitutional and fundamental rights of women and girls against assault and sexual violence. The Court upheld a petition by two minors and their guardians that school J, its regulatory body, and the state did not do enough to protect the petitioners against the first respondent, their teacher, who raped them. According to the Court, the first respondent should not have been entrusted with the petitioners and other children, given his previous history of sexual violence and assault which had led to his transfer to that school.

The Court held that the state is obliged by the Kenyan Constitution and international law to prevent violence against women and girls and to ensure that their fundamental rights to welfare and development; education; health, including reproductive and sexual health; and dignity were protected at all times. The Court also held that the employers of the First Respondent should be held accountable (vicariously) for their omission and that the law should not only focus on punishing the perpetrators of violence, in this case sexual abuse and assault against girls, but should also make provisions for victims and survivors' rehabilitation process and costs.

In conclusion, the decisions discussed herein affirm that the state and its organs can be held accountable in circumstances where they breach their constitutional duties towards their subjects or contravene their regional and international human rights obligations. In the instances discussed above, the police and educational institutions were held accountable for failing in their respective duties to effectively protect women and girls against sexual abuse and violence.

CONSENSUAL SEXUAL CONDUCT

C.K.W. v. Attorney General & Director of Public Prosecution
[2014] eKLR, Petition 6 of 2013
Kenya, High Court

COURT HOLDING

Sections 8(1) and 11(1) of the Sexual Offences Act are not discriminatory against adolescents by criminalising sexual conduct between consenting adolescents, because the intention of this law is to protect adolescents from harmful sexual conduct. Where it is alleged that a law has a discriminatory impact, but the law itself was not manifestly directed at discriminating between persons, the discriminatory impact of the law must be assessed and weighed against the rights that the law seeks to protect. In this instance, the Sexual Offences Act seeks to achieve the important societal goal of protecting children from premature sexual activity, which the court found to outweigh any alleged discriminatory impact.

Section 8 of the Sexual Offences Act does not distinguish between a boy and girl. The choice of the prosecuting authority to prosecute only the boy did not render the law discriminatory.

Summary of Facts

The petitioner, who was 16 years old at the material time, was facing a charge before the magistrate's court for the offence of defilement, for having had penetrative penile-vaginal sex with a girl the age of 16, which was contrary to Sections 8(1) and 8(4) of the Sexual Offences Act, 2006 (Sexual Offences Act). The petitioner lodged this application before the High Court of Kenya, calling on the Court to declare Sections 8(1) and 11 (1) of the Sexual Offences Act invalid to the extent that they are inconsistent with the rights of children as protected under the Constitution of Kenya. The Sexual Offences Act criminalises sex between all individuals under the age of 18, without regard to their capacity to consent.

Issues

The two grounds considered by the court for invalidity were:

> (a) that Sections 8(1) and 11(1) of the Sexual Offences Act indirectly prompted disproportionate prosecution against male children in instances of consensual sexual acts between minors and thus indirectly denied male children equal protection and benefit of the law, contrary to Article 27(5) of the Constitution of Kenya; and
>
> (b) that Sections 8(1) and 11(1) of the Sexual Offences Act were inconsistent with the rights of children under the Constitution of the Republic of Kenya to the extent that they criminalised consensual sexual conduct amongst children and in that they criminalise acts for which adults are not subjected to prosecution. The Children Act, 2001, defines "child" as a person under 18 years of age.

Court's Analysis

The Court affirmed that when a person commits an act of penetration with a child, the offence of defilement is committed, and whether or not there was consent is not an element of the offence.

The Court considered the South African case of *Teddy Bear Clinic for Abused Children & Another v. Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, and highlighted that the South African Court held that the fundamental rights of children may be limited by legitimate reasons, such as to protect them from harm. The Court cited the testimony of two experts in child psychology who testified that when adolescents are left to themselves to sort out their sexuality issues, they tend to engage in risky behaviour due to poor decision-making and power imbalances within the sexual relationship. The Court's ruling was greatly influenced by this expert testimony and did not adopt the reasoning of the South African Court, which said that punishing sexual expression that is developmentally normal is degrading to the adolescent.

The Court opined that if it was the opinion of experts that adolescents should not be left to decide about sexual activity, then it was counter-productive to allow adolescents to carry on sexual activity even if such activity was deemed developmentally normal. It was on this basis that the Court went on to rule that the impugned provisions were not inconsistent with the rights of the child because they were meant to protect children from harmful sexual conduct. The limitation of the right of the adolescent to engage in consensual sex was therefore justified.

On the issue of discriminatory impact on the basis of gender, the Court ruled that Section 8 of the Sexual Offences Act did not distinguish, on its face, between a girl and a boy, and so the onus shifted to the petitioner to show, through evidence showing the broad application of Section 8 of the Sexual Offences Act, that it had a discriminatory impact on the basis of gender. The Court found that no such evidence of discriminatory impact was presented and therefore found that the law was not invalid on the basis of gender discrimination. The Court found that evidence of individual instances of gender discrimination in the application of the law, even if such evidence showed that the prosecution chose to discriminate in this particular instance, would not, in the absence of evidence showing broad discriminatory impact, render the impugned provision discriminatory.

The Court borrowed the reasoning in *The National Coalition for Gay and Lesbian Equality & another vs. The Minister of Justice & 2 others* CCT No. 11 of 1998 [1998] ZACC 15 where the Constitutional Court of South Africa laid down the factors to be considered when determining whether the alleged discriminatory provision had impacted unfairly on the complainants, including the position of the complainants in society (i.e. whether there are past patterns of disadvantage) and the nature of the provision and purpose sought to be achieved by it.

The Court decided that the petitioner had not convinced the Court that the alleged discriminatory impact of the laws exceeded the worthy or important societal goal of protecting children.

Conclusion

The petition was without merit and was dismissed.

Significance

This is an important case on the constitutional protections of children and the sexual development of children and deals with the challenging issue of to what extent the law should interfere with the constitutional rights of children and whether the constitution should protect 'normal' sexual conduct amongst children. The Court was asked to strike that balance between protection of the child from harmful sexual conduct and respect for the fundamental rights of children that should allow them to explore their sexuality as part of their development.

It should be appreciated that the Kenyan Court was influenced by underlying coexisting ideologies about adolescent sexuality. Past laws on defilement were not based on human rights but on prevailing social norms that girls should be 'chaste' when a man approached them for marriage. With the advent of Abrahamic religions in Africa, social norms around adolescent sexuality adopted the idea that sex before marriage is morally wrong because sex is only for procreation and therefore only for married people. The emergence of the human rights era placed principles of dignity, equality, and consent at the center of regulations on sex, with emphasis on protecting children.

These ideologies have influenced development of legislation on adolescent sexuality in Africa in various ways. Some countries such as Malawi have maintained the legislation adopted at colonial times and only tweaked the age of defilement from 13 to 16. Other countries such as South Africa have overhauled their legislation to align it to human rights, for instance to redefine 'defilement' provisions in gender-neutral terms.

Now, the question put before the Court that is of relevance to many countries is whether laws should criminalise sexual intercourse between two consenting adolescents. The Kenyan Court answered in the affirmative. Two issues could be raised with the way it arrived at its conclusion. First, the Court purported to base its argument on protecting the child from harm but a closer reading of the reasoning would reveal that this was underpinned by the prevailing attitudes in Kenyan society that it was wrong for adolescents to have sex. Though it referred to the *Teddy Bear Clinic Case*, it only did so to select lines that would support this ideology. Ultimately, it parted reasoning with the *Teddy Bear Clinic Case* and based its decision on moral grounds, though these were couched in human rights language. The Court was less interested in exploring whether criminalising consensual sex between two 16-year-olds would cause them shame and embarrassment and negatively affect their development.

Second, even if adolescents should not be left to decide matters relating to their sexuality, it could be questioned whether criminal law is the best aid for the adolescent. Would not comprehensive sexuality education be more empowering and have a more positive effect on the development of the child than criminalisation? Indeed, while comprehensive sexuality education has been shown to equip adolescents with the information and skills needed to make meaningful choices about whether and when to engage in sexual activity, many governments in the region have not provided adequate comprehensive education to adolescents, thus perpetuating their disempowerment.

Further, the Court did not really do justice to the issue of whether the defilement provision was gender-biased. Penetration in the Sexual Offences Act is defined as "partial or complete insertion of the genital organs of a person into the genital organs of another person". It is difficult to imagine

that the sexual organs of a girl would penetrate those of a boy, so that she could be charged of this crime. The Court could have explored this definitional dilemma and determined whether it was gender-neutral. Indeed, men have suffered a pattern of disadvantage in jurisdictions where rape and defilement only pertain to women. The disadvantage is the invisibility of rape and defilement of men and boys under the law, leaving many men and boys suffering rights violations that the state does not recognise and address accordingly.

S v. Brian M. [surname editorially abridged]
[2015] ZWHHC 106, CRB No. B467/14
Zimbabwe: High Court

COURT HOLDING

A sentence of 24 months' imprisonment for statutory rape was excessive considering that the perpetrator was a young boy of 17 involved in a romantic relationship with a girl of 15.

Summary of Facts

B.M was convicted under Section 70 of the Criminal Law Codification and Reform Act (Chapter 09:23) of having sexual intercourse with a person under the age of 16. B.M was 17 and the girl was 15 at the time of the alleged statutory rape(s). The two were boyfriend and girlfriend. The girl became pregnant. B.M. was charged, convicted, and sentenced to 24 months in prison, with 8 months set to be suspended if he did not violate any sex laws for 5 years, and with the remaining 16 months suspended if he performed 525 hours of community service within a 16-week period.

Issue

Whether a 24-month sentence for statutory rape is excessive for a 17-year old perpetrator who had consensual sex with a 15-year old, with whom he was in a romantic relationship.

Court's Analysis

The Court listed several reasons for determining that the sentence was excessive. First, it stated that the purpose of the law is to protect children under the age of 16 from sexually transmitted diseases, unintended pregnancies, and predatory adults. However, the prohibitions apply equally to persons aged 17 as to persons much older, even though one of the purposes of the law is to protect children from predatory adults. The Court noted that under Section 81 of the Constitution of Zimbabwe, 17-year-olds are "children." Other jurisdictions exempt youthful violators from prosecution when the violator's age is within two or three years of the victim's age. The Court noted that, according to some reports, 66% of people aged 15 to 19 engage in unprotected sex. It also noted that, in another case, juvenile sex offenders who committed the more serious crime of rape were not sentenced to imprisonment, such as in the case of *S v. M* 2009 (1) ZLR 47.

Conclusion

The Court held that under the circumstances of the case, with B.M. being under the age of 18 and just 2 years older than the girl, with whom he was in a romantic relationship, a suspended 24-month sentence was excessive. The sentence was reduced to 210 hours of community service within a 16-week period.

Significance

The Court was faced with the unfortunate effect of criminalizing consensual sex amongst adolescents. The boy was 17 and the girl 15 and were in a romantic and sexual relationship, which might not have been obvious until the girl's pregnancy exposed their relationship to the criminal justice system. Tsanga J., in his judgment, acknowledged the disharmony in the laws where the Constitution recognises a 17-year-old as a child (defined as below 18), while the Criminal Code (where child is defined as below 16) treats the individual as an adult liable to prosecution under the offence of having sex with a young person.

This is a typical example of the idiosyncratic impact of criminalization of consensual sexual conduct on the adolescent. In the "Teddy Bear" cases also discussed in this volume, the South African High and Constitutional Courts grappled with a similar matter and held sexual offences provisions to be contrary to the best interests of the child, and an infringement on their rights, including the rights to dignity and privacy of the child. It is unfortunate that adolescent boys involved in consensual sexual conduct with their girlfriends are caught in the web of discrepant laws and exposed to the harshness of the criminal justice system.

Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another
[2013] ZAGPPHC 1, Case No. 73300/10
South Africa, High Court

COURT HOLDING

By criminalising various consensual sexual conduct or activity: (i) between children who are between 12 and 15 years of age, and (ii) between two children who are within two years of age of one another, where one child is 16 or 17 years old, and the other is under 16 , Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (the "Act") and the definition of "sexual penetration" in Section 1 of the Act are inconsistent with the Constitution of South Africa (the "Constitution") and are therefore invalid.

Summary of Facts

In the case before the High Court, the Applicants challenged the constitutional validity of Sections 15, 16 and 56(b)(2) of the Act, which criminalised consensual sexual activities between children of certain ages. The Applicants brought their applications (i) in their own interest as organizations dedicated to protecting children's rights pursuant to Section 38(a) of the Constitution; (ii) on behalf of children

at risk of being criminalised to protect their rights pursuant to Section 38(c) of the Constitution and Section 15(2)(c) of the Children's Act 38 of 2005 ("Children's Act"); and (iii) in the public interest pursuant to Section 38(d) of the Constitution and Section 15(2)(d) of the Children's Act.

Issues

The broader issue before the Court was whether by criminalising consensual sexual activity between children of a certain age, Sections 15 and 16 of the Act were unconstitutional for infringing on children's constitutional rights to dignity, privacy, and bodily and psychological integrity, and were contrary to the best interests of the child as protected in Section 28 of the Constitution. The issues can be put more specifically as follows:

1. Whether Sections 15(1) and 56(2)(b), as read with the definition of "sexual penetration" in Section 1 of the Act, were unconstitutional to the extent that they:

    - Criminalise a child aged 12-15 for engaging in an act of consensual sexual penetration with another child who is also 12-15 years old; and,

    - Criminalise a child aged 16 or 17 for consensual acts of sexual penetration with a child under 16, where the age gap between them is two years or less.

2. Whether Sections 16 and 56(2)(b) of the Act and the definition of "sexual violation" in Section 1 of the Act are unconstitutional to the extent that they criminalise a child aged 15-15 years old for engaging in consensual sexual conduct with another child aged 12-15 years old, where there is more than a two-year age difference between the two children.

Further, in the event that the Court upheld the constitutionality of Sections 15 and 16 of the Act, the Applicants asked the Court to determine:

3. Whether Section 54(1)(a) of the Act, which requires a person who has knowledge that the impugned offences have been committed by a child under 18 years of age to report such knowledge to a police official; and

4. Whether Sections 50(1)(a)(i) and 50(2)(a)(i) of the Act, which require children convicted of the impugned offences to be included in the National Register for Sex Offenders were unconstitutional insofar as they apply to children engaging in consensual sexual activities.

Court's Analysis

The Court undertook an analysis of the text of the impugned provisions and noted that the terms "sexual violation" and "sexual penetration" were defined so broadly that they included conduct that virtually every normal adolescent participates in at some stage or another, including conduct that could be positive, normal, and healthy if consensual. Sections 15 and 16 as read with Section 56 of the Act produced anomalous results, including that consensual sexual conduct between adolescents was criminalised.

The Court also examined the purpose of the legislation, and noted that it was primarily to protect children from predatory adults. The Court considered evidence from experts in child psychology and mental health, which described ages 12 to 16 as a period when adolescents are vulnerable, as they "have physiological ability and psychological disposition to engage in various sexual activities, but not yet the fully developed cognitive and emotional apparatus to deal with such experiences in a constructive fashion."[21] As such, adolescents need protection and support.

According to the expert evidence, the impugned provisions went beyond protection of children and criminalised harmless and even beneficial consensual sexual activity. This harmed adolescents in a number of ways, including causing adolescents who were charged with such offences to experience emotional distress such as shame, regret, anger, and embarrassment. It further promoted stigmatisation of adolescent sexuality, and suppressed and drove underground expressions of sexuality, making it difficult for adolescents to access guidance they need from adults. Further, it could also compromise the work of organisations and individuals in support of adolescents, as they might be seen to be promoting illegal activities. The Court noted that sexual health services to adolescents would be compromised due to the requirement that individuals must report sexual behaviour that was otherwise normal and healthy.

The Court also considered the expert opinion that the enforcement of the provisions would subject many adolescents to the criminal justice system. This would have a negative impact on their healthy and normal development, as they may suffer trauma and secondary victimisation.

Despite the differing opinions amongst the Deponents, the Court noted that the majority agreed that ". . . using the weapon of the criminal justice system to deal with adolescent sexuality would further marginalise young people and will have long-term harmful consequences not only in respect of their own sexuality but also in respect of their own personal psychological well-being."[22]

The Court then considered the arguments of the respondents, that the provisions of the Act which gave discretion to the prosecuting authorities on offences relating to children, would be implemented in accordance with relevant provisions of the Constitution, the Children's Act, and the Child Justice Act. As such, prosecutions would not be pursued if they were not in the best interests of the child. The respondents also argued that the diversion mechanism could be used to prevent children from facing the full force of the criminal justice system.

The Court considered the constitutionally guaranteed rights that might be violated by the impugned provisions. It held that the effect of the impugned provisions, including the harm caused by unjustified intrusion into the private and intimate sphere of children's relationships, violated Section 28 of the Constitution, which entrenches protection of the best interests of the child, including protecting children from undue exercise of authority.

The Court also held that children have an inherent right to dignity recognised in Section 10 of the Constitution. It referred to the case of *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) where the Constitutional Court of South Africa held that laws that proscribed certain consensual sexual activity were an unjustifiable limitation of the rights of equality, dignity, and privacy. The Court applied the same reasoning to consensual sexual conduct between adolescents.

The Court further held that the impugned provisions contravened not only the right to bodily and psychological integrity, under Section 10 of the Constitution, but also the right to intimate and personal relationships, under Section 14 of the Constitution.

The Court also referenced the case of *S v. M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) to state that children are entitled to a realm of personal space and freedom in which to live their own lives, and are to be protected even from the conflicting rights of the community.

The Court emphasised that rights of children are not subordinate to adults. It referred to its decision in *Christian Lawyers of South Africa v. Minister of Health and Others* (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509 (T) where it held that rights guaranteed under Sections 10 (right to dignity), 12 (right to bodily and psychological integrity), 14 (right to privacy), and 27 (right to health care services including to reproductive health) of the Constitution also applied to girls under the age of 18.

The Court then gave its opinion on the arguments of the respondents, that prosecutorial discretion and diversion could prevent infringement of children's rights. The Court opined that diversion would still subject the child to processes that would infringe the child's rights. As for the argument that prosecutorial discretion would be exercised in accordance with the Constitution and other laws, the Court dismissed the argument on several grounds including that "prosecutorial discretion can never cure the existence of constitutionally invalid criminal offences."[23] Further, there were no guidelines on exercise of this discretion. The Court referred to other decisions such as *Dawood & Another v. Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), where the Court held that where Parliament conferred discretional powers on an official that limited fundamental rights, Parliament ought to provide guidance on how such constitutional rights would be protected. The Court did not find tangible and concrete guidelines for the discretionary prosecution relating to matters regarding children under the Act.

After finding Sections 15 and 16 in violation of constitutional provisions, the Court inquired whether the limitation of rights was reasonable and justifiable under Section 36 of the Constitution. The Court noted that the purposes of the criminal provisions included protection of children from predatory adults, sexual predators, persons who sexually abuse children, and perpetrators of sexual abuse. However, it held that the criminalisation of consensual sexual conduct between children bore no relationship to the purpose of protecting children from predatory adults and abusers. The impugned provisions could not therefore pass muster under Section 36 of the Constitution.

Conclusion

The Court invalidated the offending provisions and, by way of remedy, suggested amending the provisions by reading words into them. The Court then referred the matter to the Constitutional Court for confirmation.

Significance

If sexuality is a sensitive subject in the human rights discourse, it is even more so when it concerns adolescent sexuality. The subject of adolescent sexuality has normally been within the purview of cultural and religious norms. This case was novel not only in that it brought adolescent sexuality

openly into the realm of human rights, but also in that it positively affirmed adolescents as sexual beings who can engage in consensual sexual conduct, and recognised certain forms of state interference with this as a violation of their rights.

One reason why the subject of adolescent consensual sexual conduct found its way to the Court is because South Africa comprehensively reviewed its sexual offences law to align it with human rights, and dealt more elaborately with the issue of adolescent consensual sexual conduct. Many African countries still maintain, in their sexual offences regimes, the so called "anti-defilement laws" that are designed to protect adolescents (and in many cases only adolescent girls) from engaging in sexual relations. These defilement laws regulate adolescent sexuality by proscribing consensual sexual relationships between adolescents. The following provision taken from the Malawi Penal Code is used here for illustration: "Any person who carnally knows any girl under the age of sixteen shall be guilty of a felony and shall be liable to imprisonment for life."[24] "Any person" could be a boy of 15 or 16. This was the issue that the South African Court addressed, whether consenting adolescents engaging in sexual conduct should be punished.

A report by the Law Reform Commission of Tanzania highlighted a high rate of defilement where most of the victims are teenage girls, and the culprits are mostly within the same age-group.[25] As experts testified before the court, this high rate of defilement may be a result of the fact that many teenagers engage in consensual conduct amongst themselves. However, the criminal laws of countries such as Malawi and others, punish this conduct. In fact, the Tanzania Law Reform Commission recommended that the age of defilement be raised to 18. The side-effect of this indiscriminate law would be to subject more adolescents to unjustifiable scrutiny, condemnation, and punishment. The South African Court protected the children of South Africa from these undesirable effects.

Although criminal laws have an important role to play, they should not be regarded as best suited to ensure child and adolescent sexual health and well-being. Rather, it is by respecting the rights of the child and the adolescent, including the rights to dignity, privacy, and access to sexuality-related health services and education, that children and adolescents will be given the space and opportunity to enjoy sexual health and well-being as they evolve toward becoming adults.

Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another
CCT 12/13, [2013] ZACC 35
South Africa, Constitutional Court

COURT HOLDING

Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Act) have the effect of harming the adolescents they intend to protect in a manner that constitutes a deep encroachment in the rights of dignity and privacy, as well as the best interests of the child principle.

The limitations are not justifiable when subjected to the requirements under Section 36 of the Constitution of South Africa (the Constitution).

Sections 15 and 16 of the Act are declared invalid to the extent they impose criminal liability on children under the age of 16 years old, but their invalidity is suspended for 18 months to allow Parliament to remedy the defects of the statute. Effective from the date of the judgment, there is a moratorium on all criminal proceedings and related activities against children under the age of 16 under Section 15 and 16.

Summary of Facts

This was an application for confirmation of a ruling by the North Gauteng High Court in Pretoria that certain provisions of the Act relating to the criminalisation of consensual sexual conduct with and among children of a certain age are constitutionally invalid. The High Court had held that by criminalising consensual contact between children of a certain age, Sections 15 and 16 of the Act infringed on the rights of the child and were therefore invalid. It went on to suggest a remedy by reading certain words into the provisions. Under the terms of Section 172(2)(a) of the Constitution, the High Court's ruling has no force unless and until confirmed by the Constitutional Court.

Issues

The issue before the Court was whether it is constitutionally permissible for children to be subjected to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith. More specifically, the Court stated that it would determine the following:

1. Whether any rights were limited by the impugned provisions;
2. If so, whether these limitations were reasonable and justifiable in terms of Section 36 of the Constitution; and
3. If these limitations were neither reasonable nor justifiable, the appropriate remedy.

Court's Analysis

The Court started from the premise that children enjoy fundamental rights guaranteed to "everyone" under the Constitution. If any rights should be limited, the limitation ought to be reasonable and justifiable in terms of Section 36 of the Constitution.

The Court then looked at the Applicants' evidence, which included the expert report of a child psychiatrist and a clinical psychologist, which provided information about child development and the impact of the impugned sections. The report stated that South African children reach maturity between the ages of 12 and 16, and during this time their experiences have long lasting impacts on their adult lives. Adolescents engage in sexual exploration including kissing, masturbation, and sexual intercourse which in circumstances where it is consensual is potentially a normal and healthy experience. At this age, they need guidance and support from adults and caregivers to avoid the negative consequences of sexual behaviour.

The report stated that criminalising such behaviour negatively impacted children, as being charged under the impugned provisions would bring shame, embarrassment, anger, and regret. It could further drive adolescent sexuality underground and make it difficult for adolescents to seek help, and equally challenging for adults and caregivers to support children on sexual matters.

The Court then considered the impact of the impugned provisions on the rights of children. It first justified why the matter to be determined should be the rights of children between 12 and 15, which it referred to as "adolescents," as distinguished from individuals of 16 and older. The Court relied on the expert evidence that related only to children between 12 and 16, so that its determination was narrowed to this age group.

The Court agreed with the Applicants in applying the principle in *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) that criminalisation of consensual sexual conduct was a form of stigmatisation that was degrading and invasive. Failure by society to respect consensual sex choices diminish one's innate self-worth. Further, punishing sexual conduct that is otherwise normal disgraces the adolescent. The Court therefore held that the impugned provisions clearly infringed on adolescents' right to dignity.

The Court also referred to the *National Coalition* case, which stated that the right to privacy protected one's "inner sanctum," which included not only one's intimate relationships but also their sexual preference. The Court held that this also applied to adolescents, and the effects of Sections 15 and 16 infringed upon the right to privacy of adolescents by intruding into their intimate lives.

The Court held that the impugned provisions also infringed on the best interests principle by subjecting adolescents to harm and risk, for instance by driving adolescent sexual behaviour underground and undermining the guidance they need from adults and caregivers in matters of sexuality. The Court also considered the respondents' arguments that prosecutorial discretion and diversion would mitigate this harmful and negative impact, but dismissed these arguments as untenable.

Having found that Sections 15 and 16 infringed on the rights of children, the Court determined whether the limitation of rights was reasonable and justifiable under Section 36 of the Constitution. The Court found that the legitimate intention of the Act was to discourage adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and from engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct. However, the respondents did not proffer any evidence to show how the impugned provisions achieve the intended purpose. Rather, the evidence showed that they increased harm and risk to adolescents. The Court therefore held that there was lack of a rational link between the impugned provisions and their stated purpose, so that Sections 15 and 16 of the Act did not pass constitutional muster. Further, the Court opined that there were less restrictive means to achieve the intended purpose than criminalising wide-ranging behaviour, including behavior that would be regarded as normal.

The Court therefore held Sections 15 and 16 unconstitutional to the extent that they criminalise the consensual sexual conduct among adolescents between the ages of 12 and 16, and declared them invalid. However, it departed from the reasoning of the High Court in determining the appropriate remedy. Rather than using a combination of severance and reading-in, it declared the provisions invalid but suspended the invalidity to allow Parliament to remedy the statutory defect. In order to prevent the provisions from remaining operational in the interim, the Court imposed a moratorium on all investigations into, arrests of, and criminal and ancillary proceedings against adolescents for consensual sexual activities with their peers pending the remedial action of Parliament.

Conclusion

The order of the High Court was set aside and replaced by orders that (i) Sections 15 and 16 were invalidated to the extent that they criminalised consensual sexual conduct between adolescents under 16; (ii) the invalidity of these Sections was suspended for 18 months for Parliament to remedy the defect; (iii) a moratorium was placed on implementing Sections 15 and 16 on adolescents below 16 until Parliament took remedial action; and (iv) the Minister of Justice and Constitutional Development were ordered to expunge from the National Register for Sex Offenders details of a child below the age of 16 convicted under the invalidated provisions and of a child who was issued a diversion order following a charge under the invalidated provisions.

Significance

From the perspective of adolescent sexuality and criminal law, children in Africa are frequently treated as one homogenous and asexual group that should be protected from all forms of sexual behaviour, whether positive or negative, until they are adults or married. Intertwined with this are cultural and religious norms that affect adolescents disparately, depending on which norms take precedence in their social setting. In traditional Africa, puberty is regarded as that milestone where the child becomes an adult. In some cultures, the girl and boy child undergo initiation rituals where they are taught how to behave as adults, including initiation into sexual practices. In settings where Abrahamic religious norms take precedence, the expectation is that persons should not engage in consensual sex until they are married.

The combined effect of social and religious norms and criminal law may impact adolescents' development, especially when the principle of evolving capacities in regards to their sexual development is not adequately taken into account. Children may be introduced to sexual matters too early at initiation rituals; for example, in the Chewa culture (Malawi), girls may be forced to have sexual intercourse with an adult as part of initiation rituals. In circumstances where Abrahamic religious norms are followed, adolescents are prevented from accessing information, education, and health services relating to sexuality because society fears that they will engage in sexual conduct prohibited by religious norms. Anti-defilement laws further impact adolescents when they indiscriminately criminalise consensual sexual behaviour.

In this regard, this South African case is revolutionary because it affirmed adolescents as sexual beings who may engage in consensual sexual conduct among themselves, if they choose. South Africa arrived at this decision using its Constitution and domestic laws. Some African countries still have laws that criminalise consensual sex between adolescents. Yet, girls and boys still engage in some form of sexual conduct. The effect is that since the norms and laws prevent them from getting the necessary support, such as sexual and reproductive health information and services, they are susceptible to unwanted pregnancy, sexually transmitted infections, and unsafe abortions.

The South African case perhaps raises questions about the extent to which African countries are implementing various rights for adolescents. For instance, the African Commission's General Comment on Article 14(1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa discussed wide-ranging human rights principles that impact women's sexual and reproductive rights, including the right to non-discrimination, the right to

health, and the right to sexuality education. These rights should fully apply to adolescents. To ensure realisation of these rights, states are obligated to take steps including transformation of legal and policy frameworks, such as by eliminating laws that indiscriminately criminalise consensual sexual conduct between adolescents.

HIGHLIGHT

ADOLESCENT CONSENSUAL SEXUAL CONDUCT

Social norms, religious norms, and criminal law regulate sexual conduct. In many traditional settings in African countries, a girl matures at puberty, and is prepared for sexual activity thereafter. In settings where certain religious norms take precedence, the person is allowed to engage in sexual activity only after celebration of marriage. States also regulate sexual conduct through criminal laws by setting age of consent to sex.

The two *Teddy Bear* decisions of the South African Courts addressed the criminalization of consensual adolescent sexual conduct. Both courts found that indiscriminate criminalization of consensual sexual conduct infringed upon the rights of children and adolescents. These decisions are revolutionary in positing the idea that adolescent consensual sex should not always be viewed as problematic. In the second *Teddy Bear* case, Justice Sisi Kampepe affirmed that consensual sexual conduct between adolescents may not only be innocuous, but is critical for normal and healthy development.

Treating adolescent sexuality as problematic negatively influences how society addresses adolescent sexuality, especially in health care and educational institutions. Adolescents have been denied sexual health information, education, and services for fear that it would encourage them to engage in sexual conduct. They have been subjected to violations of their rights: for getting pregnant outside wedlock, for instance, girls have been denied the opportunity to continue with education, as in the student pregnancy case in the Constitutional Court of South Africa.[26]

Further, sex laws are not necessarily benevolent for the adolescent who it is designed to protect from harm. As Justice Kampepe noted in the second *Teddy Bear* case, criminalization drives adolescent sexual behaviour underground. It puts the adolescent through the harsh criminal justice system, when it is really not necessary. The two South African cases invite a reflection on how Africa has used criminal law to disempower adolescents and infringe on their rights, including, the rights to privacy and dignity. It is noteworthy that these criminal regimes reflect problematic conceptions about sexuality of children and adolescents. Instead of using criminalization to protect adolescents from harm arising from consensual sexual conduct, governments can enhance sexuality education programs, counselling, and comprehensive sexual and reproductive health services for adolescents to achieve the same objective but in ways that conform to the rights of the child.[27]

STUDENT PREGNANCY

Head of Department, Department of Education, Free State Province v. Welkom High School & Another; Head of Department, Department of Education, Free State Province v. Harmony High School & Another
CCT 103/12 [2013] ZACC 25
South Africa, Constitutional Court

COURT HOLDING

The Head of Department ("HOD" or "applicant") did not have the power to formulate policies for a particular school and, consequently, could not instruct school principals not to follow school policies, even if the HOD was of the view that the policies were unconstitutional.

The pregnancy policies *prima facie* violated constitutional principles. However, the Court would not make a declaration on the constitutionality of the pregnancy policies since it was not properly brought before the Court, and also because the Court respected the scheme of powers under the School Act.

Summary of Facts

This was an application before the Constitutional Court of South Africa by the Head of Department of the Department of Education of the Free State Province for leave to appeal against a judgment of the Supreme Court of Appeal. The matter concerned two high schools, Welkom High School and Harmony High School in the Free State (collectively, "respondents"), and their respective school governing bodies ("SGBs"). Both schools had adopted policies that provided for automatic exclusion of any student from school if it is found that she is pregnant. When in two separate instances the schools applied the policies to pregnant students, the applicant intervened in the decisions of the SGBs and ordered the schools and their governing bodies to ignore the pregnancy policy and reinstate the students. The respondents took the matter to the High Court which ruled that the HOD had no authority to tell the principals to go against an adopted policy of the SGBs, nor could the HOD interfere in the decisions of the schools implementing these policies. The Supreme Court upheld this decision.

Issues:

1. Whether the HOD had the power to instruct principals of public schools to ignore policies adopted by the SGBs.

2. Whether and to what extent the Court could determine the constitutionality of the policies on student pregnancy.

Court's Analysis

The majority judgment, written by Justice Sisi Khampepe, reviewed the School Act (the " Act"), which is the primary legislation governing the relationships between the Minister of Education,

Members of Provincial Executive Councils responsible for education ("MECs"), HODs, principals and SGBs. According to Justice Khampepe, the Act gave the SGB powers akin to a legislative authority within the school to formulate policies, while the principal was responsible for implementation of these policies through the supervisory authority of the HOD. The Act does not grant the HOD any powers of policy making, so the HOD was not empowered to formulate binding pregnancy policies for a particular school.

Justice Khampepe held that an SGB may not adopt and enforce a policy that undermines the fundamental rights of pregnant learners, including the rights to education and freedom from unfair discrimination. However, the rule of law obliges an organ of state to use the correct legal process, which in turn requires the HOD to use clear internal remedies where available, rather than resort to self-help. Therefore, the HOD was obligated to ensure that constitutional rights were upheld, but the HOD could not interfere in an arbitrary manner and had to follow the mechanisms provided for by the Act.

Additionally, Justice Khampepe discussed whether the Court should delve into the issue of constitutionality of the pregnancy policies even if this was not properly before the Court. The Court was of the opinion that the pregnancy policies *prima facie* violated constitutional rights. Under section 172(1)(b) of the Constitution, the Court has the power to order any just and equitable remedy "that would place substance above mere form by identifying the actual underlying dispute between the parties" even if the claims were not raised by the parties. The Court invoked these discretionary powers in order to make a just and equitable determination of the matter. The Court therefore elaborated on its opinion about the constitutionality of the pregnancy policies.

The Court held that, first, the policies unjustifiably discriminated on the basis of pregnancy and sex. Second, the policies limited the right to education by requiring that the student repeat an entire year. Third, the policies *prima facie* violated students' rights to human dignity, privacy, and bodily and psychological integrity by requiring them to report their own pregnancy or that of others. Finally, the policies violated the best interests of the child because they failed to take into account the health and other needs of the pregnant student.

The majority judgment concluded that the Court would not make a declaration on the constitutional validity of the pregnancy policies since this was not put properly before the Court, and also because the Court respected the scheme of powers in the School Act. Instead, the Court ordered the SGBs to review their pregnancy policies.

The minority and dissenting judgment written by Justice Raymond Zondo opined that if the pregnancy policies were *prima facie* inconsistent with the Constitution, "then it logically follows that the principal was obliged not to implement that policy and the HOD was not only entitled but obliged to give the instruction that he did to ensure that the principal did not act unlawfully and unconstitutionally."[28] According to the minority judgment, the principle of legality obliged the HOD to ensure that the principal was not implementing policies that were unconstitutional. Further, the Court ought not to have avoided determining the matter of constitutional validity of the pregnancy principles, since this matter had been raised in both lower courts by the HOD.

Conclusion

Leave to appeal was granted. The appeal against the order of the Supreme Court of Appeal was dismissed. The SGBs were ordered to review their pregnancy policies in the light of the judgment, and to do so in collaboration with the HOD.

Significance

This decision follows several others such as *Student Representative Council of Molepolole College of Education v. Attorney General* [1995] (3) LRC 447), where the Botswana Court of Appeal held that a regulation that required a student to report pregnancy to the authorities, and would be obliged to leave the College or be expelled if this was a second occurrence, was unconstitutional as it was discriminatory on the basis of sex. Similarly, in *Mfolo and Others v. Minister of Education, Bophuthatswana* (South Africa, Supreme Court, Bophuthatswana and General Division), [1992] (3) LRC 181, and in *Lloyd Chaduka and Morgenster College v. Enita Mandizvidza* (Zimbabwe, Supreme Court), Judgment No. SC 114/2001; Civil Appeal No. 298/2000, the two Courts held that regulations that required pregnant students to withdraw from college were unconstitutional.

Pregnancy in colleges and schools has been perceived as the problem of the pregnant student, that she has mistimed it, or in the case of unmarried girls and women, that it was morally wrong to be pregnant before marriage. As a result, policies on student pregnancy have been designed to "discourage" others from becoming pregnant and have been rather punitive on pregnant students and young mothers. This also perpetuates the stigma against pregnant and young mothers. This case and the ones referred to above encourage states to change the attitude of duty-bearers and align policies with fundamental rights and freedoms.

An important consideration that the Court brought up is that the pregnancy policies failed to take into account the best interests of the child (the pregnant student or young mother below the age of 18), including her health, arrangements she has made to take care of the newborn, and her wishes generally. This line of thought has far reaching implications. For instance, what would it mean to have policies that would support arrangements about taking care of a learner's new born or baby, including breastfeeding? What wishes of the pregnant student or young mother should be taken into account? This may involve measures that require allocation or reallocation of resources beyond simply allowing pregnant students and young mothers to remain in the school system, and addressing the pattern of bias and discrimination that has operated against pregnant students and young mothers in schools.

III. MATERNAL HEALTH CARE AND SERVICES

The facts of the cases in this chapter point to failures of governments to ensure every aspect of the definition of reproductive health and rights under the 1994 Programme of Action (PoA) of the International Conference on Population and Development.[29] The PoA states that reproductive health includes the right of women to access appropriate health care services so that they are able to go safely through pregnancy and childbirth and have the best chance of having a healthy infant.[30] Additionally, the Convention on the Elimination of All Forms of Discrimination Against Women (1979) requires states to ensure that women have appropriate services in connection with pregnancy, confinement and the postnatal period, and that they are granted free services where necessary.[31] The cases also remind us that the target to reduce the global maternal mortality ratio to less than 70 per 100,000 live births by 2030 under Sustainable Development Goal (SDG) 3 (Good Health and Well-Being)[32] cannot be met without fully protecting, promoting, respecting and fulfiling the right of all women to access reproductive, maternal health care and services. States further have an obligation to meet SDG 5 (Gender Equality), which pursues the agenda to ensure universal access to sexual and reproductive health and reproductive rights.[33]

The cases in this chapter reveal different facets of violations of women's maternal health rights. *The Center for Health, Human Rights and Development (CEHURD) and others v. Attorney General*[34] confirms that maternal health is compromised by the government's failure to provide basic health services for pregnant women, resulting in maternal deaths. The fact that the plaintiffs lost the case in a Constitutional Court, only to get a favourable ruling from an appellate court in *The Center for Health, Human Rights and Development and Three Others v. Attorney General*[35] is a good illustration of how courts can influence the fulfilment of maternal health rights. On the other hand, *The Center for Health, Human Rights and Development and Four Others v. Nakaseke District Local Administration*[36] suggests that maternal deaths can not only be prevented by the availability of appropriate health care and services, but also by ensuring that the available services are actually accessible when pregnant women need them. *Ntsele v. MEC for Health, Gauteng Provincial Government*[37] is a vivid example of how the failure to provide adequate maternal health care transcends the problem of maternal deaths. Rather, such failures can also have an actual and adverse lifelong impact on neonatal or child health. *Millicent Awuor Omuya alias Maimuna Awuor and Another v. The Attorney General and Four Others*[38] exposes the dangers and violations that low-income women can encounter in health care facilities when there free or affordable maternal health care and services are not available.

Center for Health, Human Rights and Development and 3 Others v. Attorney General
[2012] UGCC 4, Constitutional Petition No. 16 of 2011
Uganda: Constitutional Court

COURT HOLDING

The petition raised acts and omissions that fell under the doctrine of a "political question," and the Court could not find any competent question requiring constitutional interpretation.

Summary of Facts

The petitioners filed this case against the government, claiming that it had failed to provide basic healthcare, maternal commodities, and maternal healthcare to expectant mothers. They cited specific cases of maternal deaths that were the direct result of this failure. The petitioners asserted that the ultimate consequences included high maternal mortality and high infant mortality. The petitioners argued that the government's failure to provide basic maternal healthcare infringed on constitutionally guaranteed rights under Articles 22, 24, 33, 34, and 44 of the Constitution of the Republic of Uganda, and also the right of access to health services under Objectives XX, XIV (b), XV, and Article 8A. Further, the petitioners impugned the government for failing to uphold its international obligations, which included respect of the right to the highest attainable standard of health by virtue of Article 45 of the Constitution.

To this, the respondent raised the preliminary objection that the Court could not adjudicate on the issues raised by the petitioners because they involved political questions. The respondent contended that the Court would be interfering with political discretion, which by law was the preserve of the Executive and the Legislature.

Issues

The Court was therefore asked to determine the following issues:

1. Whether the right to the highest attainable standard of health is a constitutional right by virtue of Article 45 of the Constitution.
2. Whether the inadequate human resources for maternal health, lack of essential drugs, and lack of emergency obstetric care services at health centres are infringements of the right to health.
3. Whether non-provision of basic maternal healthcare services in health facilities contravenes Article 8A or Objectives XIV and XX of the Constitution.
4. Whether non-provision of basic maternal healthcare packages in government hospitals, resulting in the deaths of pregnant women and their children, is a violation of the right to life as guaranteed under Article 22 of the Constitution.
5. Whether health workers' failure to attend to pregnant women subjects women to degrading and inhuman treatment, in contravention of Articles 24 and 44(a) of the Constitution.

6. Whether the high rates of maternal mortality in Uganda contravene Articles 33(1), (2), and (3) of the Constitution.

7. Whether the families of Sylvia Nalubowa and Jennifer Anguko, who died in hospital due to non-availability of basic maternal commodities, are entitled to compensation.

Court's Analysis

Pursuant to Article 137 of the Constitution, courts have jurisdiction on matters where the petition, on the face of it, shows that an interpretation of a provision of the constitution is required. However, if the issues fall under the doctrine of a "political question," as was argued by the respondent, the Court would not assume adjudication. The Court therefore inquired whether indeed the issues it was asked to determine were covered by this doctrine.

The Court said the "political question" doctrine emanated from the concept of the separation of powers articulated in *Marbury v. Madison*, 5 US. 137, and concerns the appropriateness of courts interfering in decisions of other branches of government. The doctrine therefore prevents courts from encroaching on decisions which are the purview of other branches of government, even if it could assume jurisdiction.

Following the precedent in *Coleman v. Miller*, 307 U.S 433, the Court said that it would consider the appropriateness under the system of government of attributing finality to the actions of the political departments, and also look at the lack of satisfactory criteria for judicial determination when determining whether the issue before it was a political question. The Court went on to cite case law where the court had suggested that even in cases where courts felt obliged to intervene when executive decisions are challenged on the grounds that the rights of the individual are clearly infringed or threatened, the courts do so sparingly.

Thereupon, the Court reviewed provisions of the Constitution that describe the role of each organ of government, and then applied these roles to the facts before it. The Court opined that much as it may have been true that government had not allocated enough resources to maternal healthcare services, the Court would be reluctant to determine the issues raised before it. It ruled that the issues concern policy matters that are the preserve of the Executive, and the courts would not interfere. While the Court acknowledged the importance of the issues raised by the petitioners, it refused to interfere in what it had determined involved the prerogative of the Executive. It further justified its stance by suggesting that the petitioners still had remedies available to them other than the route of constitutional interpretation.

Conclusion

The Court struck down the petition and did not consider the merits of the case.

Significance

Uganda, like many African countries, adopted a constitution that recognises social and economic rights including the right to health. For instance, Objective XIV (b) of the Ugandan Constitution says

that "The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice … and shall … ensure that all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits." Further, the provisions of these constitutions are rarely read individually and in isolation. For instance, the provision stated above, read with Article 33 (3)—which says that "The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society"—creates legal obligations on the state to ensure that all expectant mothers receive basic maternal healthcare.

The petition brought before the Constitutional Court of Uganda depicts a scenario that is perhaps all too common in Sub-Saharan Africa. Government-run health facilities are frequently if not chronically underfunded, understaffed, lacking the basic commodities, and failing to provide the requisite standard of care. The petitioners' case arose out of a legitimate expectation that the state be held accountable for meeting the obligations stipulated in the Constitution. Their case was based upon evidence of two maternal deaths that they argued could have been avoided if only the government had fulfiled its duty to provide basic maternal healthcare and services. However, while acknowledging the fact that there was government failure, the Court chose to rely on the political question doctrine and declined to rule on the merits of the case.

Indeed this has been the trend in some jurisdictions in Africa, where courts have not enforced social and economic rights, preferring to rely on the doctrine of the separation of powers. Other courts have refused to adjudicate such rights because they are principles of policy and therefore not justiciable nor enforceable; see, for example, *Kingaipe and Chookole v. Attorney General,* 2009/HL/86 (High Court of Zambia).

Other jurisdictions, however, have approached social and economic rights differently. In *Sandesh Bansal v. Union of India and others* (Writ Petition No. 9061/2008), the petitioner alleged that the government had failed to implement a program to reduce high maternal mortality. The High Court of Madhya Pradesh held that the shortage of infrastructure and personnel had resulted in the ineffective implementation of the program, resulting in unnecessary deaths of mothers, and that this was a violation of the right to life as guaranteed in the Constitution of India.

In another case, the Delhi High Court (Writ Petition (C) 5913/2010) on its own motion took on a case about a destitute woman who died on the street while giving birth to a baby girl. The Court noted that the government provided inadequate medical services to destitute pregnant and lactating mothers, and ordered the government to review its funding of shelters for the destitute. This judicial reasoning contrasts with the Ugandan decision.

The Ugandan decision is an example of how courts have not enforced human rights guarantees for many vulnerable persons in African countries, on the basis that these responsibilities lie with the other branches of government. Since the Court determined the issue before it was a political question, the Court did not raise questions for the Executive to address on why the two women died in circumstances that were avoidable, or inquire about what steps the government was taking to realise its obligations to provide adequate healthcare. The significance of this decision therefore lies in the Court's inability to hold the government accountable due to its determination that the

failure to provide healthcare of expectant mothers was a political question, and therefore outside the Court's jurisdiction, even though the right to healthcare is guaranteed to the women of Uganda in the Constitution.

Center for Health, Human Rights and Development and 3 Others v. Attorney General (2015), Constitutional Appeal No. 01 of 2013 Uganda, Supreme Court

COURT HOLDING

The petition raised competent questions for the Constitutional Court to determine under Article 137(4) of the Constitution. Therefore, the Constitutional Court should have heard, interpreted, and determined the issues raised by the petitioners as they implicated constitutional rights.

The Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution on the pretext that this encroached on the discretionary powers of another organ of the state.

The doctrine of political question is of limited application in Uganda. The Constitutional Court had erred in dismissing the petitioners' claim without hearing the merits, on the ground that it raised a political question.

Summary of Facts

This was an appeal of the preceding case summary which was a ruling from the Constitutional Court rendered in Constitutional Petition No. 16 of 2011 in which the Appellants had challenged the Government of Uganda for failing to provide basic maternal health services. The petitioners claimed that the failure to provide basic maternal healthcare infringed on constitutionally guaranteed rights under Articles 22, 24, 33, 34, and 44, as well as the right of access to health services under Objectives XIV(b), XV, XX, and Article 8A of the Constitution of the Republic of Uganda 1995 (the Constitution).

The Constitutional Court dismissed the application without hearing its merits on the ground that the petition did not disclose competent questions that needed interpretation, and that the petition concerned a political question that it could not adjudicate upon.

The Appellants therefore filed the appeal on three grounds. The first was that the Constitutional Court did not correctly apply the doctrine of political question. Second, the Constitutional Court erred in law in holding that the petition did not raise competent questions requiring constitutional interpretation. Third, the Constitutional Court erred in law when it decided that the petition called it to review and implement health policies.

The Appellants argued that Article 137(1) of the Constitution vests the Constitutional Court with powers to interpret the Constitution, so that it had powers to review any Executive act that violated or threatened any rights guaranteed by the Constitution. The Appellants cited *Ismail Serugo v. Kampala City Council & Another*, (Constitutional Appeal No. 2 of 1998) to support the argument

that the Constitutional Court was obliged to entertain the petition. They further argued that no article of the Constitution was immune from interpretation. They cited *Uganda Association of Women Lawyers & Five others v. Attorney General, (Constitutional Petition No. 2 of 2003)* to advance the position that the Constitutional Court should always remain accessible to any person seeking interpretation of the Constitution.

In response, the respondent argued that the Constitutional Court could not hear the petition because it involved a political question, and would be contrary to the principle of separation of powers. The respondent cited Article 90(1) of the Constitution as read with Rules 133 and 161 of Parliamentary Rules of Procedure, to argue that these mandate the Parliament of Uganda to have oversight over the implementation of government policies and programs, such as health programs. The respondent also argued that courts cannot adjudicate on matters that implicate allocation of resources, as this would be contrary to Article 112 of the Constitution and Section 7(2) of the Budget Act, 2001.

The Appellants argued that the doctrine of political question, first articulated by the Supreme Court of the United States (US Supreme Court) in *Marbury v. Madison*, (5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)) was not the proper authority to guide interpretation and application of the Uganda Constitution. Rather, the Court should be guided by Article 132(4) of the Constitution. Further, the Appellants contended that the Constitution requires all government agencies and organs to respect, uphold, and promote the rights enshrined in the Constitution, so that no act or omission of Government was immune from constitutional scrutiny.

The Appellants argued that even if the doctrine of political question had application in Uganda, it could not apply in cases where constitutional rights of an individual or the constitutionality of the law were at stake. They cited the decisions of the US Supreme Court in *Zivotosfsky v. Clinton Sec of State* 32 S. Ct 1421 (2012) and the decision of the Supreme Court of Canada in *Bertrand v. AG of Quebec* [1992] 2 LRC 408, where Executive decisions were reviewed because they involved constitutional rights. The Appellants also referenced other court decisions that rejected arguments for immunity of Executive decision concerning health matters, such as *Minister of Health and Others v. Treatment Action Campaign,* 2002 (5) SA 721 (Constitutional Court of South Africa) and *Paschim Banga Khet Mazdoor Sanity v. State of West Bengal,* (1996) 4 S.C.C 37 (Supreme Court of India).

Issues

According to the Court, the application raised three issues for determination:

1. Whether the petition raised competent grounds requiring interpretation under Article 137 of the Constitution;

2. Whether the Constitutional Court properly interpreted and applied the political question doctrine; and

3. Whether the Constitutional Court properly exercised its jurisdiction in refusing to determine the matter on the grounds that it would interfere with the discretionary mandate of another arm of government.

Court's Analysis

The Court disagreed with the reasoning and conclusion of the Constitutional Court that the petition had not raised specific issues under the Constitution for its determination. The Court agreed with the Appellants that their petition had specified the acts and omissions and the particular provisions of the Constitution that were implicated. The Court found that the petition had raised competent questions for the Constitutional Court to have determined in accordance with Article 137(4) of the Constitution. The Court therefore held that the Constitutional Court had erred in holding that the petition did not raise competent questions for it to determine.

The Court then considered the first and third grounds of appeal together. The Constitutional Court had held that the issue it was called upon to determine concerned the discretion of the Executive to formulate and determine policy, and that it was therefore a political question which the Constitutional Court could not adjudicate. The Court reviewed the *Marbury* case and observed that the doctrine was an interpretive tool fashioned by courts, rather than provided for by the Constitution or legislation. The Court further observed that this tool was created to address particular political challenges in the American system of government and was in any case not applied consistently by the American courts.

The Court said that Article 137(1) of the Constitution was interpreted by a Ugandan Court in *Paul Semogerere and Two Others v. the Attorney General* (Constitutional Appeal No. 1 of 2002) to mean that the Constitutional Court is mandated to decide on any claim involving constitutional rights violations. The Court therefore held that the Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution on the grounds that it infringed on the discretionary powers of another organ of the state.

The Court then turned to the argument that the Constitutional Court was barred from adjudicating matters that involved allocation of resources and therefore falling within the ambit of Article 111(2) of the Constitution. The Court found that Article 111(2) vests the power to determine, formulate and implement government policies in the Cabinet, while Article 137(3)(b) grants any citizen who alleges contravention of a provision of the Constitution the right to petition the Constitutional Court for redress. It therefore did not agree with the Constitutional Court's conclusion that it could not entertain the petition because it involved a political question, nor with the respondent's assertion that by virtue of being enacted lawfully by the Legislature, laws were therefore immune from constitutional scrutiny.

The Court also reasoned that if the Constitutional Court were to allow the argument that the political question ousted its jurisdiction, then all acts and omissions of the Executive would be beyond its scrutiny. This would be contrary to the spirit of the Constitution which demands that state actors respect, uphold, and promote the Constitution. The Court therefore held that the Constitutional Court had erred when it abdicated its constitutional duty to hear and decide on the allegations of violations of constitutional provisions by the Executive, because Executive acts and omissions are not protected from constitutional challenge. The Court also held that the political question doctrine was of limited application in Uganda, and that the Constitutional Court had erred in dismissing the petitioners' claim on the ground that it raised a political question without hearing the merits of the case.

In a separate concurring judgment, Kutereebe CJ, expressed the view that under a democratic dispensation, there is no such thing as absolute separation of powers among arms of the government. Rather, the Constitution provided a system of checks and balances, where the courts had the power to review constitutionality of Executive decisions. Kutereebe CJ was of the view that the petition had created an important opportunity for the Constitutional Court to decide on the content and application of the right to life and the right to health in Uganda. He also disagreed with the reasoning that the Constitutional Court could not intervene in policy issues that involve resource allocation. He cited several examples of cases where courts intervened in Executive decisions that involved resource allocation, including in *Minister of Health and others v. Treatment Action Campaign*, (*supra*) and the Indian court decision in *Pashim Banga Khet Mazdoor Samity and Others v. State of West Bengal and Another*, (1996) AIR SC 2426 (Supreme Court of India).

Conclusion

The appeal succeeded and the matter was remitted to the Constitutional Court for determination of the merits.

Significance

The African region has some of the highest rates of maternal mortality globally. Uganda's maternal mortality ratio is estimated at 343 deaths per 100,000 live births.[39] The causal factors may be complex, but governments have the mandate to ensure availability and accessibility of basic services so that women have appropriate care during pregnancy and childbirth. Many countries have adopted constitutions that recognise rights relating to access to maternal health services. Some constitutions, such as the Ugandan Constitution, do not explicitly provide for the right to access maternal health care in the Bill of Rights, but recognise policy objectives relating to health care services including maternal health. However, maternal deaths implicate other rights provisions of the constitution, for instance Article 22 on the right to life. This case sets important jurisprudential precedent in signalling that preventable maternal death is a human rights issue. Maternal mortality and other women's health issues have been regarded by other courts as "natural" phenomena that families or communities should privately deal with, and should not surface into the public domain of politics and economics. Too many women in Africa continue to lose their lives due to pregnancy and childbirth. The African Union adopted a resolution in 2008 on maternal mortality in Africa at the African Commission on Human and Peoples' Rights Meeting.[40] The recommendations that were made at this meeting are still pertinent. These included that African states:

- Ensure participation of women and civil society in the formulation, implementation, monitoring, and evaluation of policies and frameworks aimed at addressing maternal mortality;
- Take all appropriate measures including positive discrimination in providing funds for specific programs and projects to secure maternal health;
- Provide well-staffed and equipped maternity centres in rural areas;

- Employ and retain skilled health personnel and birth attendants in rural and semi-urban areas;
- Train and retain health workers in emergency obstetric care;
- Develop community-led emergency transport systems to cushion the effect of delays in getting medical attention;
- Develop adaptive training curriculum for the education of women and girls on rights to reproductive health.

It is therefore important for advocates to continue to agitate for implementation of measures which will lead toward improved maternal health care, and toward elimination of preventable maternal deaths and ill-health in Africa.

Center for Health, Human Rights and Development and 4 Others v. Nakaseke District Local Administration
(2015), Civil Suit No. 111 of 2012
Uganda, High Court

COURT HOLDING

The deceased died as a result of complications during labour, due to neglect of duty of the doctor who was supposed to attend to her, so that she failed to receive the necessary management and care for the emergency condition she had developed. This was a violation of the constitutional rights of the deceased as well as the constitutional rights of the surviving children.

The defendant, which was the local authority and was responsible for management and operations of Nakaseke Hospital including provision of medical services, was vicariously responsible for the death of the deceased, and the violation of the human rights of the deceased and her surviving children.

Summary of Facts

The plaintiffs in the matter were the Center for Health, Human Rights and Development (CEHURD), the husband, and three daughters of Nanteza Irene (the deceased). They were suing the sole defendant, Nakaseke District Local Administration (Local Authority), the Local Government with oversight over Nakaseke District Hospital (Hospital). The deceased was brought to the Hospital to deliver a child when labour had started. The plaintiffs alleged that during labour, the deceased was diagnosed with a condition known as obstructed labour, making herunable to deliver her baby without the intervention of trained medical personnel. The only trained medical staff member who could manage the condition was a doctor who was supposed to be on duty during this time, but was absent. After some eight hours, the deceased developed complications and died as a result. The plaintiffs therefore claimed damages against the defendant, which had administrative responsibility over the Hospital. The basis of the plaintiffs' claim was that the health rights of the deceased were violated by the defendant, as well as the rights of the children she had left behind.

Issues

The issues before the Court were:

1. Whether the defendant violated the human and health rights of the deceased;
2. Whether the rights of the children she left behind were also violated by the defendant; and
3. Whether the defendant was liable, and if so whether damages should be awarded.

Court's Analysis

The Court examined the timeline of the alleged events from the time the deceased was said to have arrived at the hospital until the time of her demise. The Court found that the deceased was in labour for some eight hours before she succumbed to a ruptured uterus resulting in blood loss. During this time, the doctor on duty who could have provided the appropriate care that the deceased required did not attend to her.

The Court inquired into the particulars of the care that the deceased received. The Court found that the deceased was admitted to the hospital at 1:35pm on the day of her demise, and according to the state of her labour, she was expected to deliver by 5pm. However, a review of her condition before then by the nurse tending to her detected a condition of obstructed labour, an emergency condition which required intervention that only a trained doctor could provide. At 4:30 pm, the staff started to look for the doctor who was on duty, as the person trained to manage the condition of obstructed labour. Unfortunately, the doctor was nowhere to be found before the deceased suffered a ruptured uterus and died.

The Court did not accept the doctor's argument that he had been around the precincts of the hospital. It also rejected the doctor's attempt to justify his absence on other grounds. In fact, the Court referred to paragraph 4.3 of the Code of Conduct and Ethics for the Uganda Public Service which required that public officers seek and obtain permission from a supervisor to be absent from duty, and report any absence from duty to the supervisor or relevant staff. The Court found that the doctor absented himself without communicating his absence to the relevant staff. The Court therefore found that due to the flagrant neglect of duty by the doctor, the deceased did not receive the care and protection she was entitled to under the Constitution of the Republic of Uganda, 1995 (Constitution), especially provided under Article 33(3) which says that "The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society."

The Court also referenced Article 34(1) of the Constitution, which protects the right of children to know and be cared for by their parents or other care-givers. The Court found that the surviving children were denied their mother's care and companionship which was an infringement of their rights. The Court therefore held that the constitutional rights of the deceased had been violated, as well as the constitutional rights of the surviving children and spouse.

The Court then turned to the issue of liability of the defendant. It referred to Section 30 of the Local Government Act, Cap 24 of the Laws of Uganda (LGA), which provides for the functions, powers, and services of a Local Government Council (Council.) It found that the functions of a Council included

provision of health and medical services. It also referred to Article 176(2)(g) of the Constitution which provides that:

> The local government shall oversee the performance of persons employed by the Government to provide services in their areas and to monitor the provision of Government services or the implementation of projects in their areas.

The Court also found from testimony of the Local Authority that the defendant was responsible for the operations and management of the Hospital, including the provision of medical services. In fact, the Local Authority had been informed of the predicament of the deceased but failed to take action. The Court cited the principle that a defendant is vicariously liable for the negligent acts and omissions of its servants committed within the scope of the employee's employment. It referred to a decision of the High Court of Uganda in *Christopher Yiki Agatre v. Yumbe District Local Government* (HCCS No.22 of 2004) which applied this principle. The Court therefore held that the defendant was vicariously liable for the death of the deceased and her child, and the violation of the human rights of the deceased and her surviving children.

The Court went on to consider the issue of damages. The Court did not award punitive damages to the defendant because it considered the scarce resources of the Local Authority which are used to run its operations and are frequently in short supply. It however awarded general damages amounting to 35 million Uganda Shillings (equivalent to 10,000 USD).

Conclusion

The plaintiffs' claim succeeded.

Significance

This relatively short judgment appears to be a hybrid between a cause of action in negligence and an action based on violation of constitutionally guaranteed rights. In an action on negligence, the plaintiff is supposed to prove that he or she suffered injury which is attributed to the negligence of the defendant who owed a duty of care to the plaintiff. Actually, the Court could have probably disposed of the matter on this cause of action alone. Indeed, its most important finding was that the doctor on duty caused the death when he neglected the duty of care owed to the deceased. The Court however added that the neglect causing death was a violation of the human rights of the deceased as well as of her children. It referred to constitutional rights only minimally.

The Court's opinion was more focused on the issue of neglect than human rights. The Court said that "the human and maternal rights of the deceased and the rights of the children and surviving spouse, arising under the constitution were violated." It is not clear which provision related to the rights of the surviving spouse. Further, elsewhere in the judgment it uses the language "human and health rights" and "the right to basic medical care," but does not really elaborate on the content of the health rights or right to basic medical care. Overall, the Court was clearer on the neglect of duty causing death than on human rights. It may have been useful if the Court, or indeed counsel, had referred to the international and regional human rights framework and jurisprudence, which may have resulted in a clearer human rights discourse.

Uganda is a party to the Covention on the Elimination of All Forms of Discrimination against Women (CEDAW), which issued the first decision from an international body on an individual maternal death, in the case of *Alyne da Silva Pimentel Teixeira v. Brazil* (Communication No. 17/2008 CEDAW/C/49/D/17/2008). In this case, the Committee on Elimination of Discrimination Against Women (CEDAW Committee) considered the case of a woman who had died of complications of pregnancy as a result of delays in being provided with appropriate care by the health system. The CEDAW Committee found that the state violated Article 12 on the right to health, and under Article 2(c) in relation to access to justice, amongst others. It made several recommendations to address the systemic factors leading to her death and discrimination in the health system, which would apply to the Ugandan context, including that the state:

> (a) Ensure women's right to safe motherhood and affordable access for all women to adequate emergency obstetric care, in accordance with General Recommendation No. 24 (1999) on women and health;
>
> (b) Provide adequate professional training for health workers, especially on women's reproductive health rights, including quality medical treatment during pregnancy and delivery, as well as timely emergency obstetric care;
>
> (c) Ensure access to effective remedies in cases where women's reproductive health rights have been violated and provide training for the judiciary and for law enforcement personnel;
>
> (d) Ensure that private health-care facilities comply with relevant national and international standards on reproductive health care; and
>
> (e) Ensure that adequate sanctions are imposed on health professionals who violate women's reproductive health rights.

This judgment is an important signal that preventable death of women during pregnancy, labour, and childbirth is a human rights issue. Unfortunately, the tragic demise of Nanteza Irene is not uncommon in Africa. Sub-Saharan Africa has some of the highest maternal death rates in the world. Institutional factors such as neglect of duty and delay of care can be contributing factors in these maternal deaths. Public interest court advocacy is therefore one means of bringing attention to such protracted issues concerning the public health system and to hold duty-bearers to account. Future court advocacy on this prevalent problem in Uganda and elsewhere should make use of existing regional and international jurisprudence to assist the courts in crafting useful judgments and effective remedies to advance the reproductive health and rights of women throughout Africa.

Millicent Awuor Omuya alias Maimuna Awuor & Another v. The Attorney General & 4 Others (2015), Petition No. 562 of 2012
Kenya, High Court, Constitutional and Human Rights Division

COURT HOLDING

The detention of the petitioners by Pumwani Maternity Hospital (Pumwani Hospital) because of their inability to pay their medical bills was arbitrary, unlawful, and unconstitutional. Nothing in the law mandated or authorised health institutions to detain patients or clients for non-payment of medical bills.

Detaining the petitioners under poor conditions including making them sleep on the floor, and with poor sanitary conditions amounted to cruel, inhuman, and degrading treatment.

By refusing to treat the petitioners and/or subjecting them to ill-treatment on account of their inability to pay for maternal health services, the state had failed to implement its obligation to provide maternal health services to women in a manner that was non-discriminatory and respectful of their dignity.

Summary of Facts

The two petitioners were women who at various times were admitted and treated at Pumwani Maternity Hospital, a respondent in the matter. Pumwani was previously run by the City Council of Nairobi (City Council), another respondent, but was now managed by the county government of Nairobi. The petitioners alleged that they had been detained at Pumwani Hospital for several days, and treated in a cruel, inhuman and degrading manner by staff, for failing to pay the medical bills incurred for receiving maternal health services. This detention included restricted movement, being made to sleep on the floor, deliberate lack of attention including failure to provide medical treatment, and verbal abuse. They claimed violation of various rights guaranteed under the Constitution of Kenya, 2010 (Constitution). They also referred to rights recognised in international human rights treaties to which Kenya is party, including the International Covenant on Civil and Political Rights (ICCPR).

Issues

The Court isolated three issues for its determination:

1. Whether the petition failed to state with a reasonable degree of precision, the manner in which the petitioner's rights were violated;
2. Whether the respondents violated the petitioners' rights to liberty and security of the person; freedom of movement; freedom from torture, cruel and degrading treatment; dignity; health; and non-discrimination; and
3. Whether the petitioners were entitled to the remedies they sought.

Court's Analysis

The Court agreed with the petitioners that the Constitution guarantees the right to health, including reproductive health care, under Article 43, and the right to non-discrimination and equality before the

law under Article 27. The Court added that Article 21(2) of the Constitution imposes on the state the obligation to take appropriate measures to achieve progressive realization of the rights, as guaranteed under Article 43.

The Court found the respondents in violation of Article 29 of the Constitution, which protects the right to freedom and security of the person, for detaining and preventing the petitioners from leaving the Pumwani Hospital for failing to pay hospital bills. It also referenced Article 9(1) of the ICCPR which provides that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The Court referred to General Comment No. 35 of the UN Human Rights Committee (HRC) which indicates that states are obligated under the ICCPR to protect persons against violations of the right to liberty by third parties including lawful organizations, such as employers, schools, and hospitals.

Following a review of several decisions including *Isaac Ngugi v. Nairobi Hospital and Three Others* (Petition No 407 of 2012, High Court, Kenya), *Sonia Kwamboka Rasugu v. Sandalwood Hotel and Resort and Another* ([2013] eKLR (Petition No. 156 of 2011, High Court, Kenya), and *Malachi v. Cape Dance Academy International and Others* ((2010) CCT 05/10 ZACC 13 (South Africa Constitutional Court)), the Court found that there was nothing in the law that mandated or authorised health institutions to detain patients or clients for non-payment of bills. It therefore held that the detention of the petitioners by Pumwani Hospital because of their inability to pay their medical bill was arbitrary, unlawful, and unconstitutional.

The Court also held that the petitioners were treated in a manner that was cruel and degrading. It referenced the decision of the Inter-American Court of Human Rights in *Miguel Castro-Castro Prison v. Peru*, ((2006) ser. C, No. 160) and also *RR v. Poland*, ((2011) No. 27617/04), in which the European Court of Human Rights held that the denial of essential reproductive health services to a woman caused mental suffering amounting to ill-treatment.

The Court also referred to the case of *Institute for Human Rights and Development in Africa v. Angola* ((2008) AHRLR 43 (ACHPR 2008)), wherein the African Commission on Human and Peoples' Rights (African Commission) stated that conditions of detention where food was not regularly provided and detainees had no access to medical treatment was tantamount to cruel, inhuman, and degrading treatment and was a violation of Article 5 of the African Charter on Human and Peoples' Rights (Banjul Charter).

The Court reiterated that the right to health and the right to dignity are inextricably linked, and that health care institutions ought to provide services and care that respect human dignity. The Court also said that even where detention would be lawful, the right to dignity would still have to be respected (Article 10(1) of the ICCPR). The Court therefore found that the petitioners had been treated in a manner that violated their right to dignity.

The Court then delved into the right to health specifically as guaranteed under Article 43 of the Constitution, but also recognised in Article 16 of the Banjul Charter and Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It referred to its previous decision in *PAO and Two Others v. Attorney General* (High Court Petition No 409 of 2009) where the

Court affirmed that the right to health is indispensable to the enjoyment of other rights, and that it encompassed the positive obligation to ensure that services are provided, and the negative duty not to do anything that would affect access to health care services.

The Court noted that in the same General Comment No. 14, the Committee on Economic, Social and Cultural Rights (CESCR) said that in order to realise rights under Article 12(2)(d), which requires states to take the necessary steps to achieve the full realization of the right to health, states must ensure that health providers are trained to recognise and respond to the specific needs of vulnerable or marginalised groups. The Court further noted that the CESCR said that the state has a duty to fulfil a specific right when it was beyond the means of persons to realise the right. The Court said that this was the case with the petitioners, who could not afford the health services. The Court stated that the state had the obligation to provide affordable reproductive health services.

The Court observed that despite Kenya's obligation, stemming from national and international law, to provide reproductive health services, this is not realised for a large number of women in Kenya. Having taken into account the arguments that the right to health could only be realised progressively, and that there were minimum core obligations that needed instantaneous implementation, the Court noted that although the government had taken measures toward making reproductive health care accessible and affordable, it had also taken retrogressive steps by requiring user-fees for health services. The Court had regard to a publication by Alfred Anagwe where the author showed that user-fees disproportionately impeded women's access to reproductive health care.[41]

The Court also considered whether the petitioners' right not be discriminated against, protected under Article 27(4) and (5) of the Constitution, was infringed. It also had regard to Article 2 of the Banjul Charter protecting the right to non-discrimination, and Article 18 requiring states to ensure the realisation of women's right to non-discrimination. It referenced Article 1 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the Maputo Protocol, which defines discrimination against women and Article 2, which requires states to combat all forms of discrimination against women through appropriate legislative, institutional, and other measures. The Court affirmed that these provisions obligate states to take corrective and positive action including reform of existing discriminatory laws and practices. The Court referred to the definition of discrimination in Article 1 of CEDAW, and Article 2's obligation that States take steps without delay to eliminate discrimination against women and ensure that the state and public authorities and institutions shall not engage in any practice or act that discriminates against women. It cited the African Commission's *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* where the African Commission said that:

> States should recognise and take steps to combat intersectional discrimination based on a combination of (but not limited to) the following grounds: sex/gender, race, ethnicity, language, religion, political and other opinion, sexuality, national or social origin, property, birth, age, disability, marital, refugee, migrant and/or other status.[42]

In conclusion, the Court found that the health system practised systemic discrimination against women by denying services to those who could not afford them. It therefore held that the state had

failed to implement its obligation to provide maternal health services to women in a manner that was non-discriminatory and respected their dignity, and the ultimate consequence was failure of poor women to realise the right to the highest attainable standard of health.

Conclusion

The petition succeeded. The petitioners were awarded global damages taking in account the conditions in which each petitioner was detained. The first petitioner was awarded Kshs 1,500,000 (equivalent to 15,000 USD) and the second petitioner Kshs 500,000 (equivalent to 5,000 USD)

Significance

This very important and revealing judgment is quite comprehensive in addressing the rights that are violated when health systems deny maternal health services to women or treat them badly because they do not have the means or resources to pay for services. Indeed, while maternity is generally thought to be a celebrated status for women in Africa, women who are indigent have a great deal more to worry about when they encounter the modern health system. One of the greatest barriers to sexual and reproductive health care may be the attitudes of health care workers, coupled with health care systems that are inaccessible to those who cannot afford their services.

In this case, the state raised the argument that resources are a challenge. But the way in which the women were treated was not just about resources. Actually, the hospital utilised its resources to keep the women detained there. Secondly, the ill-treatment and the verbal abuse were not about resources. They were indicative of a bias against women of a lower socio-economic status or class. The Court in its judgement emphasised that it was not all about lack of resources. It was also in a very significant way about discrimination. It did not require allocation of resources to address this discrimination. It required the staff to treat every person in a manner worthy of their dignity, and human dignity, one of the core values of human rights, does not depend on one's social location or economic status.

Ntsele v. MEC for Health, Gauteng Provincial Government [2012] ZAGPJHC 208 South Africa, High Court

COURT HOLDING

The defendant health clinic and hospital was liable for the brain damage suffered by the plaintiff during birth and while in their care, and therefore for infringement of the plaintiff's right to the highest attainable standard of health protected under Section 27 of South Africa's Constitution.

Summary of Facts

The mother sued, on behalf of her minor child plaintiff, for brain damage suffered by the child allegedly arising from negligent medical treatment provided by the defendant's employees. The mother alleged that when she was giving birth to the child at a clinic and hospital run by the

defendant, the nursing staff at the clinic, and the doctor and nursing staff at the hospital, respectively, were in breach of their duty of care for having failed to provide the requisite medical attention and care the mother required during the delivery of her child.

The mother maintained that the defendant's employees failed to execute their statutory duty pursuant to Section 27 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the "Constitution"), which mandated them to provide reproductive health care to her and her child with reasonable skill and diligence, as a result of which her child sustained brain damage due to deprivation of oxygen during the process of birth.

The plaintiff's evidence revealed that the mother had endured prolonged labour due to the failure of the clinic and hospital staff to take the necessary measures to assist her in the delivery. The plaintiff submitted that the brain damage was a consequence of the defendant's employees' breach of the duty of care, because they failed to monitor the progress of the pregnancy, as well as the health of the foetus in the process of birth.

The defendants responded that negligence had not been proven and asked the Court to dismiss the matter. The defendant submitted that the plaintiff had not shown that the defendant's employees had failed to take reasonable steps to prevent the injury. The defendant further argued that the plaintiff had not shown that the plaintiff's brain damage was foreseeable and due to the defendant's employees' negligence.

Issue

The issue before the Court was whether the defendant ought to be held liable in negligence for the damage to the brain sustained by the plaintiff child during birth, when under the care of the employees of the defendant.

Court's Analysis

The Court reminded the defendant that once the plaintiff had established a *prima facie* case of negligence, it was up to the defendant to disprove that the brain damage of the child was due to the negligence of the defendant's employees.

The Court agreed with the plaintiff that the circumstantial evidence regarding the nature of the brain damage justified drawing an inference that it was caused by the negligence of the defendant's employees. It further said that in the absence of evidence disproving the probability of negligence, the Court would conclude that the defendant's employees had failed to accord the plaintiff the treatment to which she was lawfully entitled.

The Court also considered whether the doctrine of *res ipsa loquitur* could apply. The Court could draw an inference of negligence if the defendant had within its grasp the means of knowing the crucial facts of how the clinic and hospital staff administered treatment to the plaintiff, but failed to explain why they should not be held liable.

Following the review of the evidence before it, the Court was of the view that the brain damage suffered by the plaintiff justified inference on the balance of probabilities that it was due to the

defendant's employees' negligence. In the absence of evidence to rebut this, the Court would draw the conclusion that the defendant was negligent. The Court found that the defendant was not able to explain how the damage to the child's brain could have occurred if not for the employees' negligence.

The Court also noted that the clinic and hospital records regarding the treatment procedures accorded to the mother and her child were missing, despite a legal duty for the Clinic and Hospital staff to ensure that hospital records were kept safe pursuant to Sections 13 and 17 of the National Health Act No. 61 of 2003. Further, there was no explanation from the defendant about the missing records. The Court's view was that the defendant's failure to explain the missing records would justify an adverse inference of negligence. In the absence of any evidence to explain how the child suffered brain damage, which could only result from oxygen deprivation during the process of birth, the Court held that the maxim of *res ipsa loquitur* could apply. The defendant would be presumed negligent because its employees were in control of and were completely knowledgeable of the circumstances under which the child sustained the brain damage. In the absence of any evidence disproving negligence, the only plausible explanation of the injury that occurred to the child would be that the defendant's employees caused it.

The Court agreed with the plaintiff that the obligations of the defendant also had a basis in the constitutional right to the highest attainable standard of health, recognised in Section 27 of the Constitution. The plaintiff had the right to receive adequate reproductive health care, and the defendants had the reciprocal duty to provide reproductive health care with the skill and diligence expected of the medical profession. The Court reiterated that the maxim of *res ipsa loquitur* was applicable where the plaintiff established a *prima facie* case of negligence and the defendant, under whose care the child had been placed, failed to explain why they should not be held liable. The Court therefore held that the defendant had failed to discharge the evidential burden to disprove the causal connection between the negligence of its employees and the brain damage suffered by the plaintiff.

Conclusion

The Court ordered the defendant to compensate 100% of the damages that the plaintiff proved.

Significance

The unfortunate event of women not receiving adequate reproductive health care, with adverse consequences to neonatal health is, sadly, a common occurrence on the African continent. In some countries, the issue is systemic. Poor and indigent women and their babies face a high risk of sustaining injury because of the inability of governments to ensure equitable access to quality reproductive health care. Poor quality reproductive health care, especially for women, is not an inevitability of nature. It is rather a result of socio-economic choices governments have made. Over time, these choices have deepened a sense of disentitlement especially amongst poor women.

In its judgment the South African Court perfunctorily paid attention to the issue of reproductive rights. However, the case was essentially decided on the private law of tort or delict. In order to address the challenges that women face in Africa, there is need to build strong jurisprudence to hold governments accountable for respect, protection and fulfilment of the reproductive rights of women in Africa.

HIGHLIGHT

MATERNAL HEALTH CARE AND SERVICES

Challenges related to inadequate resources, lack of gender responsive budgeting in the health sector, and lack of a rights-based approach to reproductive health service provision and to maternal health litigation are clearly discernible from the five cases in this chapter. More importantly, the cases have brought to the fore the power of impact litigation in holding governments accountable for the implementation of the right to maternal health, including women's right to go through pregnancy and childbirth safely and free from rights violations.[43]

The case of *Millicent Awuor Omuya alias Maimuna Awuor and Another v. The Attorney General and Four Others* validates long-standing arguments about the need for all sectors, including health, to pursue gender responsive budgeting (GRB) and address mistreatment of women during childbirth. The absence of GRB in the health sector is reflected in policy decisions such as those regarding user fees. When policy makers fail to consider and/or mitigate the impact of user fees on poor women (especially since women are the ones who constantly use health services as primary care givers and as child bearers), development cannot be inclusive.

As governments grapple with prioritising spending in the context of scarce resources and competing needs, the worst thing that can happen to efforts to achieve the full realization of maternal health rights is for courts to resist holding the executive branch accountable for the violation of relevant constitutional rights. This has been done under the guise of claims that the judiciary cannot scrutinise political or policy questions. Therefore, by reversing an earlier decision from a Constitutional Court, the Supreme Court of Uganda in *The Center for Health, Human Rights and Development and Three Others v. Attorney General* [2015] took an important step to clarify that the doctrine of separation of powers does not put any state organ above the duty to respect, protect, and fulfil constitutionally guaranteed rights. As Kutereele CJ opined, *"*there is no such thing as absolute separation of powers amongst arms of government since the Constitution provided for a system of checks and balances where the court had power to review the constitutionality of executive decisions.*"*

The Chief Justice's perspective that the Ugandan case was an important opportunity for the Constitutional Court to determine on the content of law and application of the right to life and right to health does not only hold true for Uganda, but also for any country on the continent that desires to move solidly towards improving maternal health. However, the activism of organizations such as The Center for Health, Human Rights and Development (CEHURD) in Uganda (as demonstrated by their litigation of three of the five cases in this

HIGHLIGHT continued...

Chapter) is evidence that impact litigation is an indispensable advocacy tool for influencing substantive changes regarding maternal health care and services. Sadly, the African continent seems to lack a critical mass of non-profit organization that are working on this agenda in their respective countries.

The Human Rights Council has recognised that applying a rights-based approach to the reduction of maternal mortality and morbidity is key to achieving desired milestones.[44] Thus the continent should guard against maternal health rights violations that are reinforced by blindness to a human rights-based approach in health facilities, goods, and services. Both lawyers and courts have to be savvy about basing arguments and rulings on human rights standards in reproductive health jurisprudence. Though the cases had positive outcomes, some of the judgments, such as *CEHURD v Nakaseke*, and *Ntsele v. MEC for Health,* missed the opportunity to apply a more robust human rights analysis.

IV. ABORTION AND FETAL INTERESTS

In 2010, when *Legal Grounds* Volume II was published, the chapter on abortion and fetal interests noted that while restrictive abortion laws continued to prevail in African countries, there was also a growing trend towards expanding access to legal abortion in recognition of a wide range of women's rights including the rights to life, health, non-discrimination, and freedom from torture, cruel, inhuman and degrading treatment.

That trend has since taken hold, with over fifty percent of African countries now providing for legal exceptions to the criminalization of abortion which extend beyond saving the life of a woman to preserving her mental and physical health. Two examples of countries where recent law reforms have occurred are Rwanda and Kenya, with Rwanda also allowing for exceptions on the grounds of rape, incest and forced marriage, and reducing the harsh criminal penalties that previously applied. The immediate outcomes of those reforms are reflected in *Case no. RPA 0787/15/HC/KIG,* in which a Rwandan court decided that a minor who became pregnant due to sexual violence had a legal right to abortion. However, there are ongoing challenges with implementation to ensure that legal reform translates to actual change for women seeking abortion care and health practitioners providing this essential service. Aspects of these challenges arose in the Kenyan case of *Republic v. Jackson Tali* where a nurse was sentenced to death for allegedly providing an abortion that resulted in the death of a woman despite contradictory evidence, and in the Zimbabwean case, *Mildred Mapingure v. Minister Of Home Affairs and 2 Others*, where burdensome procedural barriers prevented a woman who was raped by armed robbers from accessing a legal abortion.[45]

Legal Grounds Volume II also featured the 2008 South African case *Stewart v. Botha*, in which the judiciary showed its reluctance to take on the complexities of a wrongful life claim. This current volume includes a recent South African decision*, H v. Fetal Assessment Centre,* where the court distinguished itself from that earlier decision and delved into the legal questions that arise from a wrongful birth or life claim. Two other decisions from Kenya, *AAA v. Registered Trustees (Aga Khan University Hospital, Nairobi)* and *E.R.O. v. Board of Trustees, Family Planning Association of Kenya*, also support the perception that courts are increasingly more willing to recognise reproductive rights standards regarding contraceptive provision and wrongful life claims.

ABORTION

Case no. RPA 0787/15/HC/KIG
(2015), Unreported
Rwanda, High Court

COURT HOLDING

IC had the right to access abortion in accordance with Article 165 of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code of Rwanda, as well as under Article 14(2) of the Protocol to

the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which is part of the law of Rwanda.

For purposes of the law on access to abortion, being defiled is the same as having been raped, so that every girl under age 18 who is pregnant as a result of sexual intercourse ought to be considered as having been raped.

Summary of Facts

This was an appeal to the High Court by NJ on behalf of her daughter IC, who was 13 years old, against the ruling of the Intermediate Court of Nyarugenge (RP 0561/15/TGI/NYGE) denying IC access to abortion on the ground of rape. IC claimed that she was raped by NB after he gave her an alcoholic drink, and she got pregnant as a result. NJ initiated proceedings in the Intermediate Court requesting permission for IC to get an abortion on the ground that her life was in danger. The Court denied the request, basing its decision on the ground that there was no criminal charge convicting NB of the offence of rape, and that it was possible that IC had become pregnant without rape.

Arguments of Parties

The Appellant argued that sexual intercourse with a 13-year-old could only be interpreted as rape. The medical report confirmed pregnancy and indicated that she was under 18 years old. Further, although the judge of the lower court expressed the view that a girl under 18 could become pregnant through ways other than defilement, he did not offer an alternative explanation as to how IC had become pregnant.

The Appellant also argued that the Court should not wait for conviction of the offender before it gave permission to access abortion on the ground of rape.

The prosecution, on the other hand, argued that Article 165[46] of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code of Rwanda (Penal Code), should be interpreted that only a "woman" who contracts pregnancy as a result of rape is allowed legal abortion on the ground of rape. According to the prosecution, legal abortion was not available to a "child" who contracts pregnancy as a result of defilement (sexual violation of a minor). The offence of defilement of a child is defined in Article 190[47] of the Penal Code. Article 217 of the Penal Code defines "a child" as a person under the age of 18.

Issues

The issues before the Court were:

1. Whether Article 165 of the Penal Code includes a child;
2. Whether it was proven that IC was raped; and
3. Whether IC had the right to access legal abortion.

Court's Analysis

The Court considered the prosecution's argument that the Penal Code only allowed abortion for "women" rape survivors but not for "child" survivors of sexual violence. The Court's opinion however was that despite rape and defilement being couched in different language and under two separate provisions, they both involve non-consensual sex. The Court expressed the view that girls under the age of 18 do not have capacity to make decisions regarding involvement in sexual relationships, and that every occasion of sexual intercourse with girls under age 18 ought to be regarded as "rape" under the Penal Code. To support its view, the Court referenced the Rwanda National Protocol for Operationalisation of Exemptions for Abortion under the Penal Code, issued by the Ministry of Health, which provides the guidance that for purposes of access to abortion on the ground of rape, the pregnancy of a girl under age 18 should be treated as arising out of rape.

The Court agreed with the Appellant that, in the absence of evidence to the contrary, the only way that IC could get pregnant at 13 years old was because she was sexually violated. It therefore found that the lower court had erred in rejecting the claim that IC was pregnant as a result of a sexual offence committed against her.

The Court reiterated that a woman who has been raped, which includes a child who has been sexually violated, and became pregnant as a result, could access abortion legally pursuant to Article 165 of the Penal Code. The Court also recognised Rwanda's obligation under Article 14(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the "Maputo Protocol"), which is part of the law of Rwanda by virtue of Presidential Order 05/01 of 03/05/2015, to take the necessary measures to protect the reproductive rights of women by providing access to safe abortion in cases of sexual assault and rape.

The Court therefore found that the Appellant had the right to request access to legal abortion for IC on the ground of rape, in accordance with the law of Rwanda under the Penal Code, but also under the Maputo Protocol. This was based on the unrebutted evidence of the pregnancy, which implied that an offence of defilement, which entailed rape, had been committed against her.

In addition to the reasons explained above, the Court also took into account the views of IC and her reasons for seeking abortion. These included that she was embarrassed amongst her peers, and that she wanted to go back to school. The Court also took note of the fact that she was too young to become a parent.

The Court held that IC had the right to access abortion in accordance with the laws of Rwanda on the ground that she had been defiled, which for all purposes of the law on access to abortion, was the same as having been raped.

Conclusion

The Court authorised IC to undergo abortion at a designated facility.

Significance

Rwanda is one of the countries that has taken steps to implement the Maputo Protocol, which were undertaken by an executive act of domestication, and is therefore under a legal obligation to ensure the realisation of women's sexual and reproductive rights, including access to safe abortion on grounds including sexual assault and rape. It also has aligned its abortion provisions in the Penal Code with Article 14(2) of the Maputo Protocol. Further, Rwanda has taken measures to ensure that the law is clarified and made transparent to service providers as well as users through enabling policies such as the National Protocol for Operationalization of Exemptions for Abortion in the Penal Code of 2012 (Rwanda Ministry of Health, 2014).

Even where abortion is accessible on certain grounds, adolescents can still face challenges to accessing safe abortion, especially when access is tied to administrative procedures, such as the requirement to prove rape to a third party. It was also evident in this case, where an admission was made before the Court, that the child had attempted to procure an illegal abortion. Even in a country like Rwanda, where the law on abortion is quite progressive, the law was not so clear on access for minors until perhaps this decision. The significance of this decision therefore is that it clarified the law on access to safe abortion for minors. It demystified the apparent interpretive or administrative hurdles. The evidence that the girl is below age 18 and pregnant as a result of sexual intercourse is sufficient for her to obtain permission of the courts to access abortion in accordance with the law.

It was also significant that the Court heard the views of the child herself. This accords with the children's rights principle that the views of the child be taken into account. Further, it was a demonstration of the importance of consent and adolescent decision-making in that, even if in principle the parent consented on the child's behalf, this was buttressed by the child's own statement showing consent. This emphasises that abortion for a minor should be of the girls' own decision-making and should never be non-consensual. The child's views, and perhaps even her own "consent," in accordance with the evolving capacity of a child aged under 18, should be taken into account.

Further to this, however, the views of the child included socio-economic factors which are not specified in the abortion law, such as embarrassment amongst peers and disrupted education. This shows that the abortion law of Rwanda still falls short of addressing the full range of issues behind why women and girls need abortion services. Many girls and even women seek abortion on grounds such as these. To exclude them from allowable grounds for accessing abortion is not only out of touch with the prevailing reality, but also infringes on their reproductive rights.

Apart from the issue of abortion, this decision also raises an important question regarding the autonomy of adolescent girls in relation to sexual conduct. The Court stated the position of the law, which is that girls of below age 18 do not have capacity to decide on sexual relationships. This fails to take into account variations in age from very young adolescents, who may not be able to consent to sex, and older adolescents, such as 17-year-olds. Legal capacity as provided by the law may be at odds with the true capacity of a girl to self-determine matters of a sexual relationship. Development of autonomy in matters relating to sexuality is an important aspect of adolescent sexual development, and a law that simplistically removes the capacity of every girl below age 18 to decide about her sexual relationship might do more harm than good. Evolving capacities of girls and adolescents to determine matters relating to their sexuality should not be extinguished by law, or indeed any other instrument.

Mildred Mapingure v. Minister Of Home Affairs and 2 Others
(2014), Judgment No. SC 22/14, Civil Appeal No. SC 406/12
Zimbabwe, Supreme Court

COURT HOLDING

The police (first respondent) failed in their duty to assist the Appellant in accessing timely services in order to prevent pregnancy. The doctor (second respondent) also failed to carry out his professional duty to avert the pregnancy when it could have been reasonably prevented. These unlawful omissions took place within the course and scope of their employment, and therefore the first and second respondents were vicariously liable to compensate the Appellant for the harm resulting from the failure to enable her to prevent pregnancy.

The duty of the prosecutors and magistrate to act reasonably in the performance of their functions did not extend to the provision of legal advice, whether accurate or otherwise, to the Appellant. Therefore, the prosecutors and magistrate cannot be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate for the termination of pregnancy.

Summary of Facts

On 4 April 2006, Mildred Mapingure, the Appellant in the case, was attacked and raped by robbers at her home. She immediately reported the matter to police and requested that she be taken to a medical practitioner to be given medication to prevent pregnancy (emergency contraception) and any sexually transmitted infection. Later that day, she was taken to hospital and was attended to by a medical practitioner. The medical practitioner said that he could only attend to her request for emergency contraception in the presence of a police officer. The medical practitioner further indicated that the medication had to be administered within 72 hours of the sexual intercourse having occurred. Mapingure duly went to the police station the following day but was advised that the officer who had dealt with her case was not available. She then returned to the hospital, but the medical practitioner insisted that he could only treat her if a police report was made available. On 7 April 2006, she went to the hospital with another police officer. At that stage, the medical practitioner informed her that he could not treat her because the prescribed 72 hours had already elapsed. Eventually, on 5 May 2006, Mapingure was confirmed pregnant.

Thereafter, Mapingure went to see the investigating police officer who referred her to a public prosecutor. She indicated that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. In July 2006, acting on the direction of the police, she returned to the prosecution office and was advised that she required a pregnancy termination order. The prosecutor in question then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate on 30 September 2006. When she then sought the termination, the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure, and declined to do so.

Eventually, after the full term of her pregnancy, Mapingure gave birth to her child on 24 December 2006.

Mapingure brought an action against the Ministers of Health, Justice and Home Affairs for pain and suffering endured as well as maintenance of the child. The basis of her claim was that the employees of the respondents had been negligent in their failure to prevent the pregnancy, and subsequently to facilitate its termination.

In this earlier case, *Mapingure* v. the *Minister of Home Affairs & Ors,* HH-452-12, 2012 (2) ZLR, decided 12 December 2012, the High Court dismissed her claim and held that her misfortune was due to her ignorance as to the correct procedure to follow, and that it was not the duty of the relevant officials to give guidance to her on this, so that the respondents were neither directly nor vicariously liable. She appealed the decision to the Supreme Court.

Issues

The following were the issues for determination before the Supreme Court:

1. Whether the respondents' employees were negligent in the manner in which they dealt with the Appellant's predicament;

2. Whether, assuming an affirmative answer to the statement above, the Appellant suffered any actionable harm as a result of such negligence; and

3. If so, whether the respondents are liable to the Appellant in damages for pain and suffering and for the maintenance of her child.

Court's Analysis

The Court determined the Appellant's claim by applying the test for negligence. It followed the decision of the South African case of *Mukheiber* v. *Raath & Anor* 1999 (3) SA 1065 (SCA) in which medical negligence was in issue. According to the *Mukheiber* case, the test for medical negligence was whether

> (a) a reasonable person in the position of a defendant: (i) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal consequence by which that harm occurred; and (iii) would have taken steps to guard against it; and (b) the defendant failed to take those steps. It also held that liabilities in relation to maintenance of a child in medical negligence cases cannot be unlimited, but can be "no greater than that which rests on the parents to maintain the child according to their means and station in life, and lapses when the child is reasonably able to support itself."

Applying this test to the facts before the court, it held that the doctor failed to terminate the pregnancy when it could have been reasonably prevented and that "a reasonable person in the position of the doctor would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the Appellant on the alternative means of accessing that drug, would probably result in her falling pregnant." It therefore found the doctor negligent for having failed to take reasonable steps to prevent the pregnancy.

The Court also found the police to have been negligent for failing to act timeously in taking the Appellant to the doctor for her pregnancy to be prevented and their inaction amounted to unlawful conduct by reason of the omission to act positively.

It held that the role for the police cannot be confined to their statutory duties, so that, "In the specific circumstances of any given case, it may be legally incumbent upon them to act outside and beyond their ordinary mandate, so as to aid and assist citizens in need, in matters unrelated to the detection or prevention of crime." This was such a case where the omission to assist the Appellant was held to be unlawful.

Furthermore, the Court also determined that it was the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy in terms of Section 5(4) of the Termination of Pregnancy Act. It held that the authorities could not be liable for not assisting her to terminate the pregnancy, because they do not have any legal duty to initiate and institute court proceedings on behalf of Mapingure.

In making the determination, the Court had judicial notice of international human rights instruments and made reference to various provisions relating to the reproductive rights of women, such as paragraph (e) of Article 16.1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which guarantees women's rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights; and Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which obliges states to recognise "reproductive rights of women by authorising medical abortion in cases of sexual assault, rape…" and also provide education and information on these rights.

However, although the Court recognised the normative role of international instruments in addressing women's rights, it said that pursuant to constitutional terms, these cannot operate to override or modify domestic laws until they are internalised and transformed into rules of domestic law. Nevertheless, after going through various provisions of the international human rights instruments, the Court noted that these were already recognised in the laws and administrative practices of Zimbabwe, and that the norms in these international instruments were therefore of great persuasive value in the application and interpretation of the statutes and common laws.

Conclusion

The Court partially allowed the appeal and granted Mapingure general damages for pain and suffering arising from failure to prevent her pregnancy. The Court dismissed her claim for damages for pain and suffering beyond the time her pregnancy was confirmed, and for the maintenance of her minor child, since the maintenance of the pregnancy was held to be her own fault.

Significance

It must be noted at the outset that the Court made its determination on the basis of the law of medical negligence rather than human rights norms. The significance of this case therefore relates

to the opportunity missed to interpret and apply human rights norms to national laws and policies relating to reproductive rights of women in Zimbabwe.

Indeed, the Court admitted that the rights stipulated in these international instruments were already recognised in the laws of Zimbabwe. Both the former and new Constitutions of Zimbabwe recognise the right to liberty. The new Constitution also recognises the right to personal security. Self-determination or the principle of autonomy is of central importance to reproductive rights, and is reflected in the provisions that the Court mentioned such as article 16(1) of CEDAW and article 14(1) of the Maputo Protocol.

The medical practitioner who treated Mapingure told her that she needed to be accompanied by a police officer or at least a police report, if available. It is not very clear whether this practice was supported by law or policy. Apparently, the Court took its legality for granted when it addressed the question of negligence of the police and doctor. This first barrier prevented Mapingure from accessing treatment to prevent pregnancy. While the Court found that the police and doctor were negligent, it did not question whether the practice of requiring a police officer to accompany the rape survivor or a police report for the survivor to access emergency contraception was in itself lawful.

Mapingure encountered the second barrier when she wanted to access abortion on the grounds of rape, as authorised under the Termination of Pregnancy Act. However, section 5(4) of the Termination of Pregnancy Act provided that permission could only be granted by the superintendent of the institution after a certificate was issued by a magistrate, and the medical practitioner to perform the termination was satisfied that a complaint of the alleged rape was lodged with the authorities. Further, that on a balance of probabilities, the unlawful intercourse which resulted in the pregnancy had taken place. On inquiring from the public prosecutor how she could get the certificate from the magistrate, she was misled to believe that the rape trial had to be completed first. Consequently, when she finally got the certificate, the hospital refused to perform the termination, stating the pregnancy was at an advanced stage.

Though Zimbabwe has relatively progressive policies and laws on reproductive health, including access to termination of pregnancy, the services were simply not available or were inaccessible for Mapingure. In the Court's analysis and finding, Mapingure was to blame for not knowing what to do, and trusting what the authorities told her about getting the certificate from the magistrate in order to terminate her pregnancy.

This decision could be contrasted with the Argentine case of *F. A. L. s/ Medida Autosatisfactiva* (2012) that came before the National Supreme Court. The facts in the lower court were similar to the *Mapingure case* in that it was about a girl who had become pregnant following rape and was previously denied access to an abortion by lower courts, but was allowed by the Superior Court. Following the abortion, the public defender appealed to the National Supreme Court, which said that forcing a woman who had suffered a sexual abuse to carry a pregnancy to full term infringed the woman's right to dignity and amounted to institutional violence. Perhaps of greater interest is what the Court said about the obligations of the state. It held that the state had a duty to provide the conditions necessary to enable such women to access abortion quickly and safely. Further,

the authorities should provide the necessary protocols for the performance of lawful abortion and remove any administrative barriers, including the need for third party authorisation. Furthermore, the state should put in place guidelines guaranteeing information and confidentiality to the woman. This resonates with the guidelines issued by the World Health Organisation (WHO) which recommends that states remove administrative barriers that make lawful access to abortion services difficult for women. It exhorts states to do away with such uncertainties and ambiguities about the law so that not only women, but also the health providers and other stakeholders in the chain of service-provision are clear about the policies and laws and are able to implement them effectively and efficiently.

The underlying challenge with the *Mapingure case* was that the Court did not really pay sufficient heed to human rights instruments and jurisprudence in determining the issues before it. Had the Court given more emphasis to the international human rights considerations, it may have been guided by the jurisprudence of treaty monitoring bodies such as *L.C. v. Peru*.In this case, a girl who became pregnant from sexual abuse attempted to commit suicide, seriously injuring herself. While she was eligible for lawful abortion on grounds of health, the authorities delayed responding to her requests for abortion and eventually denied her access. The CEDAW Committee found a violation of Article 12 of CEDAW and, amongst other issues, lamented the lack of effective procedures to operationalise the law that allowed access to abortion, resulting in authorities arbitrarily denying access to abortion services.

The CEDAW Committee reminded Peru that CEDAW imposed obligations to respect, protect and fulfil women's right to health care and that these included that states must provide education and information to health providers and women to ensure availability and accessibility of health care services, including abortion services.

Similarly, in *L.M.R. v. Argentina*, the Human Rights Committee found violations of several rights when a girl who became pregnant as a result of rape was denied access to abortion services, to which she was legally entitled. The Human Rights Committee noted how the complainant had to endure many administrative hurdles, going from court to court, just to exercise her legal right to abortion services. Again, apart from infringement of the substantive human rights norms, this was very much tied to the procedural injustice where the state and its agents frustrated the realisation of rights.

In its analysis of the Termination of Pregnancy Act, the Zimbabwean Court did point out that the absence of a procedural guide was a challenge, as subjects of rights could not easily discern what the law required. The Court acknowledged that further clarification is required. Even so, surprisingly, the Supreme Court held that the responsibility to terminate pregnancy fell squarely on the shoulders of Mapingure.

Republic v. Jackson Namunya Tali
[2014] eKLR, High Court Criminal Case No. 75 of 2009
Kenya, High Court

COURT HOLDING

The Accused, with malice aforethought, caused the death of the Deceased while assisting her to procure abortion.

Summary of Facts

Jackson Namunya Tali, the Accused, was charged with murder under Section 203 and Section 204 of the Penal Code of Kenya. The Accused, a nurse by profession, operated a medical clinic named M.P. Medical Clinic & Laboratory Services, at Gachie Trading Centre in Kiambu County, Kenya. In July 2009, he received a client by the name of Christine Atieno, and allegedly assisted her to procure an abortion which resulted in complications that led to her death.

Issue

Whether the Accused had committed the offence of murder.

Court's Analysis

In the opinion of the Court, the Accused claimed that the Deceased came to his clinic "while bleeding in pregnancy," and sought medical help. He admitted administering some form of treatment which, in the Court's opinion, led to complications and her death.

His defence was that she had sought medical attention at his clinic following a botched abortion elsewhere, and he was not responsible. He did not, however, produce a patient record to substantiate his claim that she was already bleeding and anemic upon arrival.

Though a medical expert testified that he was unable to determine the cause of the death, the Court found that there was direct and circumstantial evidence that the immediate cause of death was the bleeding that resulted in anemia due to interference with the pregnancy. The question was whether the Accused or someone else had interfered with the pregnancy.

The Court's opinion was that the Deceased had gone to the Accused's clinic while not bleeding and came out bleeding, though the Court did not explain how the evidence supported this conclusion. Nevertheless, the Court held that unless the Accused offered a plausible explanation, it could only be inferred that the Accused was responsible. His explanation of what transpired did not convince the Court that he had not interfered with the pregnancy in a way that led to complications and the death of the Deceased. Although there was no direct evidence that the Accused interfered with the pregnancy and caused death, the Court held that all the direct and circumstantial evidence, taken together, established that the Deceased had sought procurement of abortion from the Accused, and in assisting her, he caused her to develop complications and she died as a result.

Conclusion

The Accused was convicted of the offence as charged, and sentenced to death.

Significance

While it is not clear from the facts of this case whether the Deceased died as a result of complications associated with an attempted abortion, the Court's holding highlights the risks associated with unsafe abortions prevalent in most countries in Africa that have restrictive laws and policies on access to safe abortions. Kenya has maintained provisions on abortion in its code of criminal law adopted from colonial times. Sections 158, 159, and 160 of the Kenya Penal Code criminalise procuring an abortion, assisting a woman to procure an abortion, and supplying the means to procure an abortion. Further, Article 26(4) of the Constitution of Kenya prohibits abortion except "when in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law." While the Constitution offers some hope that the word "health" can be interpreted liberally, the challenge is that without clear guidance, qualified health providers are likely to interpret the law conservatively to avoid the possibility of being caught on the wrong side of the law. One recent scholarly article found that although many countries allow abortion in certain circumstances, they have failed to guarantee transparency in implementing these laws:

> One of the major flaws with African abortion laws is that, though abortion is not absolutely prohibited and, furthermore, though there has been a discernible regional trend toward substantive liberalization of the grounds for abortion, in the overwhelming majority of countries, abortion laws have not been effectively implemented. The pervading public understanding … is that abortion law is most prohibitive and abortion is something that is rarely, if ever, lawful.[48]

It is notable that, in this case, the Court appears not to have undertaken any review concerning whether the alleged abortion would have been legal under Kenyan law. In fact, the Court concluded that performing an abortion was tantamount to "malice aforethought," supporting a murder charge.

Therefore, although the law of Kenya does in fact allow access to abortion in terms of Article 26(4) of the Constitution, without deliberate measures by the government to develop clear guidelines on how the law should be interpreted and applied, the public and even qualified health providers remain confused about the extent to which abortion is legally permissible. This failure of transparency in implementation of laws on abortion undermines access to safe abortion for girls and women who are entitled to such services under the law.

In the case at hand, the deceased had no way of knowing whether she would have qualified for a legal abortion to preserve her "health." Moreover, unscrupulous law enforcers also take advantage of this confusion to extort bribes from legitimate abortion providers and patients, driving access to legal abortion further underground.[49]

In practical terms therefore, the law in Kenya severely restricts access to safe abortion services. It creates an environment where girls and women would rather seek abortion services outside the

public health system, as the deceased did. This case is therefore an example of such failure of transparency of which the ultimate consequences are preventable maternal ill-health and deaths from abortion complications.

At the micro-level, health providers bear the responsibility for abortion complications. At the macro-level, however, overwhelming evidence suggests that the unsafe abortion epidemic is linked not to malicious intentions of abortion providers, but to lack of access to safe abortion due to restrictive laws and policies that are not implemented in a transparent manner. This is the trend in countries like Kenya, Malawi, and others that have laws and policies restricting access to safe abortion. When public policy turns women away from safe abortion services, they will inevitably use unsafe methods, or seek alternative services, including services from unskilled practitioners.

The significance of this case therefore lies in its overshadowing of the macro-level picture. The Accused and others like him may be held responsible for the deaths of girls and women from unsafe abortions, perhaps logically so from a narrow criminal justice perspective. However, it is the governments that should ultimately be held responsible for the deaths due to preventable abortion complications from two different perspectives: First, because the persistent criminalization of abortion continues to deny women access to safe abortion services. Second, governments should be held accountable where they have failed to transparently implement laws that actually enable women and girls to access safe abortions, resulting in denial of services to which they are legally entitled. The South African experience is evidence of how states' choices regarding access to safe abortions can improve women's health. After 1996, when South Africa enacted the Termination of Pregnancy Act, which liberalised access to safe abortion, abortion-related deaths fell by 91%.[50]

It is undeniable that abortion is a deeply contentious subject. However, improving women's health is a global concern that is high on many governments' agendas. This case should be a reminder that there is still room for states to make the choice to prevent avoidable deaths by providing access to safe abortion services to the fullest extent of their laws, and eventually decriminalise access to abortion.

HIGHLIGHT

ABORTION AND FETAL INTERESTS

Several countries in Africa have reformed or are reforming their national laws on access to legal abortion to expand the grounds under which a legal abortion should be provided. Examples include Kenya, Rwanda, Malawi, Sierra Leone, Ethiopia and Swaziland.[51] This trend is due in part to the global, regional and national recognition of the connection between restrictive abortion laws and high levels of unsafe abortion which contribute to avoidable maternal deaths particularly in the African region.

The recognition at the global level has led to an increased number of recommendations by UN treaty monitoring bodies to African countries urging them to decriminalise abortion. Accordingly, in January 2016, the UN Committee on the Rights of the Child stated that it was concerned at the high level of maternal mortality due to unsafe abortion and recommended that Kenya decriminalise abortion in all circumstances and review its laws to ensure better access to safe abortion.[52] Regional human rights mechanisms have also made concrete contributions to efforts to address restrictive abortion laws. In May 2014, the African Commission on Human and Peoples' Rights (the Commission) adopted a general comment on Article 14(2)(c) of the Maputo Protocol in which it urged governments to ensure that they authorise access to legal abortions as guaranteed by the Protocol.[53]

However, alongside the ongoing shift to expand access to legal abortion is a growing effort to limit its application. Some African states have invoked a right to life prior to birth to justify their failure to reform restrictive laws or their adoption of laws and policies that directly contradict regional and international human rights standards. Yet, this claim is not supported by any international human rights instrument or treaty. Documentary evidence shows that the drafters of the African Charter on Human and Peoples' Rights explicitly rejected language extending the right to life prior to birth. Equally, the Maputo Protocol implicitly reinforces the understanding that the right to life accrues at birth.[54]

A case in point is Kenya, whose 2010 Constitutional law reform provided for access to legal abortion on specific grounds, including where there is a need for emergency treatment, where the life of health of the woman is at risk, and as otherwise authorised by law. However, its health ministry subsequently withdrew the standards and guidelines it developed to guide healthcare providers on provision of safe abortion. It also issued a directive to all healthcare workers prohibiting them from obtaining any training on safe abortion. Likewise, Sierra Leone's reformed abortion law, which provided for expanded access to legal abortion, received a unanimous vote from its parliament to pass it into law, but the President was pressured into declining to sign it into law. Similar efforts to limit the application of current policies that provided for specific grounds for legal abortion are currently unfolding in Uganda.

In order to comply with their human rights obligations and address the rate of maternal mortality due to unsafe abortion in the region, African governments have a duty to eliminate all legal and procedural barriers that impede access to safe abortion.

WRONGFUL BIRTH OR LIFE

AAA v. Registered Trustees (Aga Khan University Hospital, Nairobi)
[2015] eKLR, Civil Case No. 3 of 2013
Kenya, High Court

COURT HOLDING

Medical practitioners providing family planning services owe a duty of care to their clients to provide services in accordance with the professional standards expected of them.

Damages were awarded for pain, suffering, and loss of amenities, and for the cost of raising and educating the child until she turned 18. Damages for the costs of antenatal care and delivery services were rejected as the claim was not particularised and proven by the Plaintiff.

Summary of Facts

The Plaintiff consulted the family planning clinic of Aga Khan University Hospital (the "Defendant") for an appropriate contraceptive to prevent her from having any more children. She was advised to choose the method of *implanon*, an implant that would prevent conception for three years from the date of insertion. She decided to choose this method and the procedure was done the same day. About a year later, her menses failed and she was confirmed pregnant. Further tests at the Defendant's clinic revealed that there was no *implanon* implanted in her arm. The Plaintiff claimed that it was the failure to implant the *implanon* that led to her subsequent pregnancy and the birth of her baby. The Plaintiff further claimed that both of these events were the result of the Defendant's negligence. She therefore sought damages for having suffered emotional pain, distress, psychological damage, physical incapacity, and financial hardship, including the cost of bringing up the child from the date of her birth until the child turned 18 years old. No defence was entered and an interlocutory judgment was entered on 14 May, 2014.

Issue

Since an interlocutory judgment had already been entered as unopposed by the Defendant, the issue before the Court was what damages should be awarded to the Plaintiff.

Court's Analysis

The Court noted that this was a unique case in the jurisdiction, and that there was little precedent to rely upon. The Court distinguished the Kenyan case of *ERO v. Board of Trustees Family Planning Association of Kenya, Nairobi HCC No 788 of 2000* on its facts, as the evidence in that case showed that conception had occurred prior to the sterilization. The Court therefore relied upon comparable court decisions from other jurisdictions to make its determination. The Court reviewed the decisions of English Courts in *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* (1985) *2 WLR 215; (1984) 2 ALL ER 513* (*Emeh case*) and *Thake & Another v. Maurice* (1986) *1 ALL ER 497 (CA)* in recognition of the history of such litigation in England. The Court noted that the approach

previously taken by courts in such cases had been that the claimant would be compensated only for pain, suffering, loss of amenities, and loss of consortium. Courts historically would award damages for the upbringing of the child only if the child was born with congenital abnormalities. For a healthy baby, public policy dictated that the joy derived by parents in bringing up a child cancelled out the compensation that could otherwise be awarded.

The Court noted, however, that courts had since moved away from this policy and started awarding compensation for the cost of raising an unexpected child until the age of majority. The Court referred to the *Emeh case* cited above, which held that "the compensatable loss suffered by the Plaintiff as a result of the negligence in performing that operation extended to any reasonably foreseeable financial loss directly caused by her pregnancy" [55] and that there was no rule of public policy preventing the plaintiff from recovering in full the financial damage sustained; therefore, the plaintiff in *Emeh* was entitled to damages for "loss of future earnings, maintenance of the child up to trial, maintenance of the child in the future, Plaintiff's pain and suffering up to the time of trial, and future loss of amenity and pain and suffering, including the extra care that the child would require. . . ."[56] Mitigating factors which could reduce an award would include "the value of the child's aid, comfort and society to the parents."[57]

The Court also referred to a decision of an American court in *Sherlock v. Stillwater Clinic* ((1977) 260 NW 2D 169), where the Supreme Court of Minnesota addressed the "troublesome" issue of allowing recovery of damages for rearing a normal, healthy child. That Court had said that the costs of raising a child resulting from wrongful conception and birth are a direct financial injury to parents and that it would be short-sighted in today's society to say that the long term and enduring benefits of parenthood exceeded these costs. Further, leaving aside moral and ethical considerations, public policy should not deny the parents' recovery of damages. It also said that family planning is an integral part of modern marital relationships and that public policy had changed in line with statutes promoting family planning.

The High Court of Kenya held that medical practitioners owed a duty of care to clients to provide family planning services according to the professional standards expected of them. The Defendant was vicariously liable for the negligence of its medical staff. The Court held that damages were awardable (where appropriate) for each of the following claims:

1. pain and suffering, including psychological damage, mental distress and anguish;
2. costs of antenatal care and delivery services; and
3. expenses/costs related to care and upbringing of the child (medical, shelter, food, education, clothing, entertainment, etc.) from birth until the age of 18 years.

In assessing damages, the Court did not award any damages for the costs related to antenatal care and delivery, because the Plaintiff had failed to particularise and prove these "special damages" which had to be specifically raised by the Plaintiff. The Court therefore awarded general damages under the first and third claims above. However, in determining the amount of damages for pain, suffering, and loss of amenities, the Court distinguished awards made in England by taking into account the comparable standard and costs of living in the Republic of Kenya. The Court also noted

that the Plaintiff had not testified to having experienced any "particular undue pain or difficulty, pre-natal, natal, or ante-natal."[58]

In determining the amount of damages under the third claim the Court balanced the claimed damages with the joy and society that the parents will have in bringing up their child. The Court also noted that the new child was a girl, while the two previous children were boys. It also took account of the fact that the parents had failed to provide evidence substantiating the quantum of the damages claimed. It accordingly reduced the damages awarded under that claim, against the Plaintiff's claim.

Conclusion

The Court awarded general damages, but special damages were denied.

Significance

The cause of action in this case was negligence. However, access to contraceptives can also be discussed in terms of human rights. The right to contraceptive information and services is grounded in internationally recognised human rights, and this was especially brought to the fore at the 1994 International Conference on Population and Development (ICPD). The ICPD Programme of Action, which was a consensus document adopted by 179 countries at this conference, articulated the relationship between population and development in terms of human rights, and especially through the concept of sexual and reproductive health rights. The ICPD Programme of Action defined reproductive rights as rights already recognised in various national laws and policies, international human rights documents, and other consensus documents. Reproductive rights rested on the "recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."[59] In the African context, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is an important human rights document as it specifically recognises reproductive rights and the right to sexual health. Article 14 of the Maputo Protocol states that:

> *1. Parties shall ensure that women's right to health, including sexual and reproductive health, is respected and promoted, including:*
>
> *(a) the right to control fertility;*
>
> *(b) the right to decide whether to have children, the number of children and the spacing of children; [and]*
>
> *(c) the right to choose any method of contraception.*

Article 14 (2) of the Maputo Protocol stipulates the measures which states are required to undertake to realise these rights, including to: "provide adequate, affordable, and accessible health services, including information, education, and communication programs to women, especially those in rural areas…."[60]

The African Commission on Human and Peoples' Rights (African Commission) issued an interpretive document, General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Maputo Protocol, to interpret Article 14's provisions and guide implementation by states. In the General Comment, the African Commission reminded states parties to "ensure availability, accessibility and acceptability of procedures, technologies and comprehensive and good quality services, using technologies based on clinical findings."[61] This includes contraceptive services.

Indeed, the Constitution of Kenya, 2010, contains various provisions that are aimed at promoting sexual and reproductive health, including Article 43(1)(a) that specifically articulates the right to health, including reproductive health care. Family planning and access to contraceptives is a key priority area, according to the National Reproductive Health Policy of 2007.

Although a great deal more could be said about the human right to access contraceptives, in the current case the apparent scenario is that the health providers did provide the information and education that enabled the Plaintiff to exercise the right to choose her contraceptive method. When she made her choice, the health providers negligently failed to implant the chosen contraceptive, resulting in the Plaintiff conceiving and eventually delivering a child.

There are two reports that have been published which examine the human rights implications of the barriers to accessing family planning in Kenya. The first is a report published in 2007 by the Center for Reproductive Rights and Federation of Women-Lawyers - Kenya, entitled, *Failure to Deliver: Violations of Women's Human Rights in Kenyan Health Facilities*.[62] This report indicated, amongst other things, that there were numerous barriers to accessing contraception and family planning, including the cost, supply shortages, and abusive treatment that prevented women from seeking services at public facilities.

The other report was published in 2012 by the Kenya National Commission on Human Rights, entitled, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?*[63] This report also indicated there were barriers to accessing family planning related to socio-cultural barriers, commodity insecurity and prohibitive costs. Neither of these reports address the quality of the family planning services that are available.

E.R.O. v. Board of Trustees, Family Planning Association of Kenya
[2013] eKLR, Civil Case 788 of 2000
Kenya, High Court

COURT HOLDING

The Family Planning Association of Kenya ("FPAK") was not liable for breach of duty of care to the Plaintiff, who gave birth to a child 9-10 months after having a permanent family planning procedure performed at a FPAK clinic. The Plaintiff was already pregnant at the time of the procedure, and the pregnancy was not therefore a result of the Defendant's negligence.

Summary of Facts

The Plaintiff brought suit against the Defendant, the Board of Trustees for FPAK, seeking damages for negligence arising from a tubal ligation procedure performed on her by the Defendant's agents. Prior to the tubal ligation procedure, the Plaintiff was subjected to a pregnancy test using a urine sample to exclude pregnancy. The results were negative. The FPAK staff proceeded with the procedure.

Approximately 9.5 to 10 months following the procedure, the Plaintiff gave birth to a child. This was the basis of the Plaintiff's allegation that the pregnancy resulted from negligence by the FPAK staff in performing the tubal ligation procedure, and her claim for damages. The Defendant denied her claim.

Issues

The issues before the Court were the following:

1. Whether the Defendant owed a duty of care to the Plaintiff;
2. Whether the Defendant, through its servants or agents, was negligent in carrying out the procedure on the Plaintiff; and
3. Whether the Plaintiff has suffered injury as a result of the negligence of the Defendant and its staff.

Court's Analysis

The Court held that the Defendant owed the same duty of care to the Plaintiff as would a doctor to his patient, as set out in *M (a Minor) v. Amulega & Another* [2001] KLR 420. This duty of care is carried out on behalf of the Defendant by its staff and, as such, if the staff is negligent in giving treatment, the Defendant is liable. The Court acknowledged that such negligent acts by staff members would constitute a breach of the Defendant's duty.

The Court held that the Defendant did not breach its duty of care. According to the Court, the evidence weighed in favor of a finding that the Plaintiff was already pregnant at the time of the procedure. While a blood test would have more accurately detected the pregnancy, such testing was prohibitively expensive and essentially unavailable to the Plaintiff. Accordingly, the Court found that it was reasonable for FPAK staff to rely on the negative urine test results in moving forward with the procedure. The subsequent examination of the Plaintiff's fallopian tubes, which were completely blocked, indicated a successful procedure and further supported the Court's holding.

Having held that there was no breach of duty of care, the Court did not examine the third issue.

Conclusion

The Plaintiff failed to prove her case, and therefore her claim was dismissed.

Significance

This case was instituted in 2000, 10 years before Section 43(1)(a) of the Constitution of Kenya, 2010 which recognises the right to health care services, including reproductive health care, came into effect. However, a ruling was made 13 years in the future, in 2013. No information was provided in the judgment for this lengthy delay.

Although this case was decided entirely on the private law of negligence, further scrutiny of the case reveals that the duty to provide information might have been taken for granted by the providers. It is not indicated in the case that the health providers warned the Plaintiff that the urine-based pregnancy test might not detect a very early pregnancy. It was likey taken for granted that her chance of getting pregnant was remote since she had indicated that she had been using an injectable contraceptive method.

The Court focused on the fact that the health providers did everything according to proper protocol regarding the procedure. However, further scrutiny of the judgment reveals that one thing was overlooked in the pre-operative procedures. The providers should have warned the Plaintiff that the urine-based pregnancy test was not failure-proof. The lack of this important piece of information had serious consequences for the Plaintiff.

This case is significant in terms of human rights, in relation to the right to receive information. The right to health care services, including reproductive health care, includes the right to receive the necessary information about procedures in order for clients to make informed choices.

H v. Fetal Assessment Centre
[2014] ZACC 34
South Africa, Constitutional Court

COURT HOLDING

The issue of whether a child could claim damages against a medical expert for pre-natal misdiagnosis that could have enabled the mother to exercise her informed choice to terminate the pregnancy, and resulting in the birth of the child with a disability, presented a complex factual situation and an uncertain legal position. It could therefore not be determined using the exception procedure, which allows a claim to be dismissed as having no merit without a court hearing any evidence.

A child's claim against a medical expert whose misdiagnosis resulted in the birth of the child with a disability could potentially exist.

Summary of Facts

The applicant was a boy born with Down syndrome. His mother instituted a claim for damages in the High Court on his behalf, against the Fetal Assessment Centre (Centre), for wrongful and negligent failure of the Centre to warn the mother of the high risk of the child being born with Down syndrome. It was alleged that, had she been warned, she would have chosen to undergo an abortion. The

applicant claimed damages for past and future medical expenses and general damages for disability and loss of amenities of life. The respondent defended the claim as being bad in law, and not disclosing a cause of action recognised in law. The High Court had upheld the defence of exception and dismissed the claim as having no merit without hearing the evidence. The applicant sought leave to appeal to the Constitutional Court.

Issues

The Constitutional Court isolated the following issues for determination:

1. Whether a child's claim for damages against a medical expert for pre-natal misdiagnosis of a condition that deprived the child's mother of the informed choice to terminate the pregnancy potentially existed; and

2. Whether the exception procedure was appropriate in determining the matter.

Court's Analysis

The Constitutional Court (the "Court") recognised the importance of the exception procedure as a useful mechanism "to weed out cases without legal merit". The Court indicated that it had previously ruled that questions regarding development of common law would better be served after hearing all the evidence. It referenced *Carmichele v. Minister of Safety and Security* ([2001] ZACC 22) in which the Court held that it would be better not to determine an issue involving developing the Common law using the exception procedure, especially in cases where the issue presented a complex factual situation and an uncertain legal position.

The Court then addressed the issue of whether the child's claim could be recognised in law, a question which in its view was complex and had important normative implications. It rejected the use of the term "wrongful life", because it suggested that courts would be involved in determining the paradox of whether non-existence was preferable to existence. It therefore distinguished its approach from *Stewart and Another v. Botha and Another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA), wherein the South African Supreme Court of Appeal held that a child could not advance a similar claim, precisely because the Supreme Court thought allowing the child to make a claim involved making value judgments regarding existence or non-existence of a child.

In the opinion of the Court, the paradox had to be acknowledged because avoiding it masked value judgments that have to be brought under the scrutiny of constitutional values and rights. The Court was aware that in the final analysis, a court determining the matter might still rule that a child could not claim. However, the point was that the matter raised issues that could not be addressed by way of the exception procedure. It held therefore that the proper procedure was for the High Court to hear the substantive matter and not to dispose of it prematurely without hearing the merits.

The Court proceeded to address the possibility that the child's claim could in fact be allowed if the matter was to be considered, taking into account all the relevant facts. It reviewed comparable foreign jurisprudence and noted that while some countries allowed parents to claim damages due to negligently-caused unwanted pregnancies, most countries did not address the issue of the child as a claimant. It also noted that the variability in treatment of claims on "wrongful birth" was due to the

diverse constitutional, political and social contexts within which the law of the country was created, or in other words, the legal culture. From this analysis, the Court concluded that the South African legal culture required that the issue be determined with respect to constitutional values. The Court therefore affirmed that the law, including common law, must conform to the values of the Constitution of the Republic of South Africa, 1996, and the development of the law ought to promote the spirit, intent and objectives of the Constitution. The Court observed that the values and rights that were particularly important included equality, dignity and the right of children to have their best interests considered of paramount importance in every matter concerning them.

The Court then considered whether common law could be developed to recognise the child's claim, taking into account the principle of the best interests of the child, as well as other constitutional values. It examined this in relation to the elements that ought to be proven to sustain the claim, including: harm or loss, wrongfulness, negligence, and causation.

The Court recognised the difficulty of proving harm or loss in the absence of physical injury or harm to his person or property. Referencing the law as explained in *Natal v. Edouard (*[1990] ZASCA 60; 1990 (3) SA 581 (A)) and endorsed in *Mukheiber v. Raath and Another* ([1999] ZASCA 39; 1999 (3) SA 1065 (SCA)), the Court affirmed that legal harm was not only physical injury to the person or property, but included the added financial burden to the parents as a result of the birth of the child. In the context of constitutional rights, the Court said that the harm to the parents might be addressed as an infringement on the right of the parent to exercise free and informed choice regarding reproduction. However, the added financial burden remained a legal loss that had implications if the child was to be considered a potential claimant. This harm or loss to the child would become apparent only if parents were unable to pursue their claim. The Court highlighted that even if in this circumstance the child suffered no loss of constitutionally protected choice, the best interests of the child principle required that the issue of loss for the child also be considered.

The question that the Court addressed then was what would happen if for some reason the parents failed to make a claim against a negligent medical practitioner, as was the issue in this case. The Court postulated that a court could find the medical expert liable for the child's claim, for the same loss for which he would have been liable to the parents.

With regard to the claim of wrongfulness, the Court was of the opinion that the principle that the best interests of children be given paramount importance in every matter concerning them implicated the medical expert's misdiagnosis that results in birth of a child with a disability. In the event that the parents failed to claim, the best interests of the child principle would not allow the loss to lie with the child. The Court's view was that allowing loss to lie with the child might breach a duty not to cause such loss and invoked the rights of the child under Section 28(2) of the Constitution. However, in order for liability not to be indeterminate, either parents or the child may claim, but not both cumulatively. The Court concluded that it would not be inconceivable to impose liability with respect to the child where the parents failed to claim.

On the element of causation, the Court was of the view that pre-natal misdiagnosis would not be the cause of the disability itself, but of the birth of the child with a disability. It therefore considered the misdiagnosis as part of the chain of events that led to the birth that resulted in the loss.

As for negligence, the Court said that this would have to be proven in accordance with established principles. The Court also said that the damages were already those recognised in law that the parents could claim.

In conclusion, the Court held that a child's claim against a medical expert whose misdiagnosis resulted in the birth of the child with disability might potentially be found to exist. The Constitutional Court was therefore of the view that the High Court ought to hear the substantive matter and make a determination in light of constitutional values and rights.

Conclusion

Leave to appeal was granted, and the order of the High Court was set aside and replaced with an order of leave for the plaintiff to amend the particulars of the claim.

Significance

The decision of the Court hinged on its cognisance of the fact that the decision to terminate pregnancy involves making value judgments. When a woman makes a choice to terminate pregnancy, she is effectively choosing whether the potential developing life in her should continue to exist or not. South African law allows a girl or woman to choose to terminate pregnancy on request up to 12 weeks of gestation. The reasons a woman may want to terminate pregnancy are varied, and include avoiding financial burden. The fact that the law allows people to terminate pregnancy on such grounds therefore implies that the law accepts certain value judgments that form the basis of the decision to terminate pregnancy. This cannot be avoided.

If a woman can claim damages for "wrongful birth", should it now become a metaphysical issue just because it is the child claiming damages for his or her own wrongful birth? Take for instance the case of *Registered Trustees of Aga Khan University Hospital, Nairobi*, (Civil Cause no. 3 of 2013, High Court of Kenya) (*Aga Khan*)**,** in which the applicant successfully claimed damages for maintenance of a child who could not have been born if not for the negligence of the health provider in providing contraceptive services.

The *Aga Khan* case might be the case that properly raises the paradox of existence or non-existence, because in this instance the choice to use contraceptives or not determines the coming into existence or not of a child and even when couples use contraception, unintended pregnancy can still result. In the present case however, the choice is rather about the continued existence or non-existence of the foetus. This is what raises the paradox because the termination of pregnancy is based on the perceived risk of having a child with a disability, which as the Court suggested, involves a value judgment. The Court seemed to have addressed this difficult issue by first basing its decision on the premise that the law implicitly accepts the value judgment that persons make when they choose to terminate pregnancy on various grounds. Secondly, the Court said that it was dealing with a situation when the child was already born, because prior to being born, the issues do not arise.

The Court's analysis in developing the common law to allow the child to claim is important as it builds on the jurisprudence on application of human rights principles and values in determining issues impacting on the rights of the child. This was also particularly significant because in the process, the Court had to address the ethical-legal dilemma otherwise couched in the term "wrongful birth." It should be noted, however, that the Constitutional Court did not make the final decision on the matter, but only gave its opinion on how the High Court could approach the issue in the appeal.

V. ADOPTION AND SURROGACY

This chapter focuses on issues of parental responsibilities and rights and the protection of children's best interests through the recognition of the non-traditional forms of family. Firstly, the recognition of the parental rights and responsibilities of unmarried fathers of children born out of wedlock remains a contested issue in some African countries, due to the customary law approach and legislative provisions that generally exclude these fathers from the lives of their children. For example, In the Kenyan case of *RM & another v. Attorney General* ([2006] eKLR) the Court refused to declare provisions of the Children's Act of 2001, which did not give an unmarried father parental responsibility in relation his child, as being discriminatory.

The African Charter on the Rights and Welfare of the Child enjoins countries to move from this discriminatory approach and to focus on the right that a child has to know and have a relationship with both his/her parents regardless of their marital status. Some courts have embraced this need to move towards a child-centred approach to parental responsibilities and rights, including the recognition of unmarried fathers' right to consent to adoption and, separately, their obligation to paym maintenance for their children. For example, in the South African case of *Fraser v. Children's Court, Pretoria North (*1997 (2) SA 264 (CC)*),* an unmarried father successfully challenged the constitutionality of Section 18(4)(d)4 of the Child Care Act 74 of 1983, which did not recognise unmarried fathers' rights and only required the mother of a child of unmarried parents to consent to an adoption. The maintenance requirement is illustrated in *JGM v. CNW [2008] eKLR,* wherein the Kenyan High Court recognised parental responsibilities of an unmarried father who denied parental responsibility based on the non-existence of a marriage between himself and the mother of the children and ordered him to pay child support. The case of *GK v. BOK, CGLK, MT and the Attorney General* [2015] BWHC, MAHGB-000291 from Botswana recognising an unmarried father's right to consent to the adoption of his child is a further welcome development.

This chapter will also discuss cases that pertain to surrogate motherhood agreements. In the South African judgment *AB and Surrogacy Advisory Group v. Minister of Social Development* [2015], Section 294 of the Children's Act, which requires that the child to be born from the surrogacy agreement be genetically related to at least one of the commissioning parents was declared unconstitutional. Although the judgment may be hailed for protecting reproductive autonomy of adults, the same cannot necessarily be said from a child-centred approach, as it potentially allows for the conception of children who will never know the identity of their genetic/biological parents. Nonetheless, it still remains to be seen whether the Constitutional Court will confirm the High Court judgment.

In the case of *Ex Parte MS and Others* [2014], the South African High Court confirmed a surrogate motherhood agreement where artificial insemination had already taken place. Section 292 of the Children's Act (38 of 2005) requires that a surrogate motherhood agreement be confirmed by the High Court prior to artificial insemination, making artificial insemination prior to court confirmation an offence. Despite this, the High Court found that it was in the best interests of the child who was about to be born to confirm the surrogate motherhood agreement and avoid uncertainty about the parentage of the child. In Kenya, where surrogate motherhood agreements are not regulated by law,

the Court found in *JLN and 2 Others v. Director of Children's Services and 4 Others* [2014] that the commissioning parents should be recognised as the parents of the children as this was in the best interests of the children and protected the right to dignity of the commissioning parents.

This chapter will also discuss the case of *MIA v. State Information Technology* (Pty) Ltd [2015] from the South African Labour Court in which the Court recognised "maternity" leave for a commissioning parent of a child born through a surrogate motherhood agreement. The Labour Court found that the applicant had been unfairly discriminated against, and was entitled to paid leave.

ADOPTION

GK v. BOK, CGLK, MT and the Attorney General
[2015] BWHC 1, MAHGB-000291-14
Botswana, High Court

COURT HOLDING

The Court held that Section 4(2)(d)(i) of the Adoption of Children Act Cap 28:01 is unconstitutional to the extent that it does not require the consent of the father in the adoption of his child born out of wedlock in all cases, on the grounds that such differentiation on the basis of gender and marital status cannot be shown to serve any legitimate purpose or interest.

Summary of Facts

The applicant and first respondent conceived a child who was born out of wedlock. The applicant and first respondent were never married, although the applicant provided financial and other support for the child from her birth. The child had lived with the applicant for some 12 months, during which time the first respondent became involved in a relationship with the third respondent. At the conclusion of this 12-month period, the third respondent attempted to adopt the child, which adoption was consented to by the first respondent, the child's mother. Because the child was born out of wedlock, the applicant's consent to this adoption was not required pursuant to the relevant provision of the Adoption of Children Act (the "Act") (Section 4(2)(d)(i)). The applicant sought relief from the Court that the Act discriminates on the basis of marital status and gender, and as such should be declared unconstitutional as inconsistent with the constitutional protection against discrimination on the basis of certain protected classes secured under Section 15 of the Constitution of Botswana 1966 (the "Constitution").

Issues

The issues put before the Court were the following:

1. Whether gender and marital status were vulnerable categories that are protected from discrimination under Section 15 of the Constitution of Botswana; and

2. Whether there were exclusions of certain legislative areas from the protections of Section 15

of the Constitution (whether the exclusions appearing in Section 15(4) permit discrimination on the basis of protected classes within these legislative areas (including adoption and personal law)).

Court's Analysis

The Court reviewed the concepts of formal and informal equality in the context of the Constitution, finding that informal equality before the law is the core principle of Section 3 of the Constitution. The Court also found that Section 3 of the Constitution should be read as an umbrella provision that informs related sections of the Constitution, including Section 15 (protection from discrimination). The Court reviewed the state of constitutional interpretation in Botswana and strongly favoured a dynamic approach that views the constitution as a living document, embodying values to be interpreted in the context of contemporary norms (citing *Attorney General v. Dow 1992 BLR 119 (CA)*.

On the basis of this approach to constitutional interpretation, the Court found that the Constitution requires that a law that promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and that legitimate purpose.

The Court undertook a thorough review of the jurisprudence regarding adoption and the rights of children in Europe, North America, and South Africa, finding that the preponderance of the jurisprudence indicates that the rights of fathers to consent to or veto the adoption of their children is based on the degree to which the father has established a familial relationship with the child, and should not be entirely informed by the marital status of the father at the time when the child was born. Accordingly, biological fathers accrue parent-like rights to direct important decisions relating to the child as they demonstrate the responsibilities of parenthood. The Court cited the South African case of *Fraser v. Children's Court Pretoria North and Others* ([1997] ZACC 1), as well as the United States case of *Caban v. Mohammed,* (441 US 380-Supreme Court 1979). The Court noted the paramount importance of the rights of the child in the consideration of all matters relating to children. The Court found that the applicant had established, on evidence, his strong familial relationship with his daughter (the second respondent).

The Court noted that gender, health status and disability are not amongst the grounds listed in the Constitution upon which discrimination is constitutionally protected. The Court cited Amissah JP in *Attorney General v. Dow, supra*, extensively, for the proposition that the protected grounds listed in the Constitution are not exhaustive, but rather examples of the classes that are protected from discrimination under the constitution. The Court also cited *Diau v. Botswana Building Society 2003*((2) BLR 409 (IC)) for the proposition that the Constitution "outlaw[s] discrimination on grounds that are offensive to human dignity."

The Court found that the customary laws which dictate that a child born out of wedlock belongs to the mother's family "offends any notion of fairness, equality and good conscience when measured against contemporary norms," citing *Dow*, *supra*, for the proposition that the Constitution trumps customary laws to the extent of any inconsistency.

Finally, the Court addressed the exclusions of certain legislative areas in Section 15 of the Constitution, including laws relating to adoption and other matters of personal law. The Court found that the protective provisions of Section 15 (including the exclusion referenced in the preceding sentence) should be read in light of the overarching "umbrella" concepts of equality embodied in Section 3 of the Constitution. Citing *Dow, supra*, and *Ramantele v. Mmusi and Others* (CACGB-104-12) [2013] BWCA 1, the Court found that the exclusions in Section 15(4) should be interpreted narrowly where their impact would be to cause discrimination that is not rational or justifiable in the public interest. In other words, the exclusions in 15(4) of the Constitution should not be read as permitting discrimination based on protected grounds in the context of certain legislative areas, including adoption and personal matters. Rather, courts should consider the public interest (including the preservation of customary law if not antithetical to the objects of the Constitution) if discrimination based on a protected ground is established in the context of one of these excluded legislative areas.

Conclusion

The Court found that it is unfair gender discrimination to require consent of a mother, but not of a father, for adoption of a child born out of wedlock. This distinction has the potential to impair the fundamental dignity of fathers, and hence is impermissible under Sections 3 and 15 of the Constitution. The Court therefore held that the Adoption of Children Act Section 4(2)(d)(i) was unconstitutional because it has the effect of discriminating on the basis of marital status and that the discrimination did not serve any legitimate purpose or interest permissible under the Constitution.

Significance

According to Botswana customary law, which is similar to customs and traditions of many other African societies, a child born out of wedlock is considered illegitimate. As such, the father had no rights over the child. This had several implications, including that the burden of taking care of the child was shifted to the woman, who in most cases was blamed for bearing the child "illegitimately." Importantly, it also cut the child off from the care and support of the father. Unfortunately, colonial laws also regarded a child born out of wedlock as illegitimate, so that colonial and customary law acting in synergy created a chasm between biological fathers and their children born out of wedlock. This has produced negative social consequences because such children were denied their biological father's care. It also encouraged fathers not to take responsibility for their biological children.

Therefore, apart from the rights of the biological father being infringed upon, the best interests of the child are at stake when fathers are discouraged from taking responsibility to care for their children. Promoting the father-child relationship contributes toward the realisation of the rights of the child guaranteed by human rights treaties especially the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and is reinforced by the Court's decision in this case.

HIGHLIGHT

ADOPTION AND SURROGACY

The traditional forms of families have been altered by the recognition of adoption and now, very recently on the African continent, surrogacy, to account for the rights of individuals who want to become parents and are dependent on adoption or surrogacy..

Although adoption has been recognised and regulated for some time now in most African countries, the same cannot be said for surrogacy, which is still considered a novelty. Surrogacy has actually been traced to Biblical times, albeit that it was not by means of artificial insemination.[64]

The crucial distinction that needs to be drawn between adoption and surrogacy is that the aim of adoption is to provide a home for a child who maybe orphaned or abandoned or whose parents are incapable of caring for him or her, whereas in the case of surrogacy, the law is making it possible for commissioning parent(s) who are not able to conceive and carry a child to term, to have donor gametes implanted into a third person ("surrogate") in order to enable them to have a child. This distinction is very important as in the case of surrogacy, one of the questions from the *AB and Another v. Minister of Social Development* judgment concerned the difference between adoption and a surrogacy arrangement where the child has no genetic link to the commissioning parent(s).

The right of adopted children to know the identity of their biological parents is recognised by most adoption laws and this enables adopted children, upon reaching majority, to trace their biological parents. Furthermore, *GK v. BOK, CGLK, MT and the Attorney General* highlights the fact that the law cannot exclude a biological parent, particularly fathers of children born out of wedlock, from consenting to an adoption, where such an adoption is not the best interests of the child.

In some instances of surrogacy, anonymous donors contribute gametes in the South African context, and the law does not allow for identifying details, beyond basic health information, of such donors to be revealed. Therefore, if the Constitutional Court confirms the judgment in *AB and Another v Minister of Social Development*, this could open the door to the conception and birth of children who will never know the identities of their genetic/biological parents.

In the case of *J.L.N & 2 Others v. Director of Children's Services and 4 Others,* the recognition of the commissioning parents also provided certainty in relation to the identity and origin of the children, despite the lack of legislation, by recognising the genetically related commissioning parents as the legal parents of the children.

HIGHLIGHT continued...

Although the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child do not explicitly provide for the right of children to know the identity of their genetic/biological parents, some commentators have suggested that such a right is implicit in several provisions of these instruments,[65] and that the recognition and regulation of alternative forms of procreation, such as surrogacy, should be done with due regard to the rights of children to be born from such arrangements to find out the identity of their genetic/biological parents. Although treaty monitoring bodies have not begun to explore this in detail, in 2002, The UN Committee on the Rights of the Child expressed this interpretation in its "Concluding observations" on a report submitted by the United Kingdom:

> The Committee is concerned that children . . . born in the context of a medically assisted fertilisation do not have the right to know the identity of their biological parents.
>
> **In light of articles 3 and 7 of the Convention, the Committee recommends that the State party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible**. [Emphasis in original][66]

Judicial opinions on this issue vary. In 2012, the Canadian Court of Appeals of British Columbia disfavoured this interpretation when it reviewed Articles 3, 7 and 8 of the CRC and this Committee's observations, and declined to recognise a right for children conceived by medically assisted reproduction to know their "biological origin."[67] More recently, The US Supreme Court decision in *Adoptive Couple v. Baby Girl*[68] highlighted the wide range of judicial opinion about whether children have a right to know their biological origins.

SURROGACY

AB and Surrogacy Advisory Group v. Minister of Social Development
[2015] ZAGPPHC 580
South Africa, High Court

COURT HOLDING

Section 294 of the Children's Act 38 of 2005, which requires that a genetic link exist between the commissioning parents and prospective child in a surrogacy agreement, is inconsistent with the Constitution for violating the rights to equality, privacy, dignity, bodily and psychological integrity, and to health care for parents who are unable to contribute a gamete or gametes in the surrogacy arrangement.

Summary of Facts

Chapter 19, Sections 292-303, of the Children's Act 38 of 2005 (the "Act") regulate surrogacy in South Africa. The application was to challenge the constitutional validity of Section 294 of the Act that provides as follows:

> Genetic origin of child. —No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

The effect of Section 294 is to invalidate a surrogacy agreement when a commissioning parent does not have a genetic link with the contemplated child. In other words, a surrogacy agreement requires that the commissioning parent or parents, as the case may be, provide the gametes or gamete, meaning either of the two generative cells necessary for reproduction.

This requirement affected the first applicant because, due to a pre-existing medical condition, she could neither biologically give birth to a child, nor donate a viable gamete. Further, she was single, and could not rely upon a second prospective parent to comply with the genetic link requirement. The only avenue open to her was to get gametes from two donors, but this was barred by the impugned Section 294 of the Act.

The applicants challenged Section 294 on the grounds that the genetic link requirement violated the first applicant's right to equality, dignity, reproductive health care, autonomy and privacy.

The second applicant brought the matter by reference to Section 36(c) and 36(d) of the Constitution, and represented the class of persons whose rights are infringed by the operation of Section 294 of the Act.

The applicants challenged the genetic link requirement for a surrogacy arrangement because it was not required for an In Vitro Fertilisation (IVF) procedure. In fact, the first applicant had previously

tried the IVF procedure using gametes from two donors (double donor gametes), and only when this failed, did she opt for surrogacy, only to realise that the law did not allow double donor gametes for surrogacy. The applicants therefore argued that persons who opt for surrogacy should be accorded the same choice that persons who are using IVF have.

The applicants argued that the regulatory regime on surrogate motherhood must be aligned with constitutional rights and must not be arbitrary, discriminatory, or contrary to human dignity.

The applicants also submitted that genetic lineage should not be a relevant factor in conceptualising families. They argued that families without genetic lineage are just as valuable as families with genetic lineage.

The respondent argued to retain the genetic link requirement because it had rational purposes, including the best interests of the child, prevention of commodification and trafficking of children, prevention of commercial surrogacy, prevention of exploitation of surrogate mothers, and prevention of circumvention of the adoption law.

Issue

The issue for the Court's determination was whether Section 294 of the Act was inconsistent with the Constitution for requiring that there be a genetic link between the commissioning parent or parents and the contemplated child in a surrogacy agreement.

Court's Analysis

The Court first identified the class and subclass of persons affected by Section 294 of the Act. It described the "class" as comprising parents who were medically or biologically unable to carry a child (i.e. *pregnancy-infertile*). Parents of this class could still contribute their gametes or gamete to conception. However, there existed a subclass that was *pregnancy-infertile* but could not contribute their gametes or gamete because they were biologically unable to do so. These were *conception-infertile*. This subclass was affected by the genetic link requirement.

The Court also recognised that some persons who were *pregnancy-infertile* but could provide gametes or a gamete for conception might not want to do so for reasons such as to avoid passing on a genetic trait. These too would be barred by the genetic requirement link if they opted for surrogacy through double donor gametes.

The Court appreciated that the applicants and respondents differed on their point of view regarding surrogacy. The applicants understood surrogacy to mean that persons had an opportunity to have children even if they could not give birth themselves regardless of whether they were genetically linked to the child or not. On the other hand, the respondents regarded surrogacy as an opportunity for persons who could not themselves give birth to have genetically linked children.

The Court reviewed the historical background to the development of the law, and found that the rationale for requiring a genetic link, as stated in the 1992 report of the South African Law Commission (the "SALC"), was to promote the bond between parent and child, and it was therefore envisaged to be in the best interests of the child. Further, it would prevent shopping around with the view to creating children with particular characteristics.

A further inquiry revealed that a report of a Parliamentary Ad Hoc Committee of 1999 had recommended that the genetic requirement be retained; otherwise the situation would be similar to adoption.

The Court observed that the Parliamentary Ad Hoc Committee allowed same-sex parents, and to the Court this was a demonstration that legislation takes cognisance of and integrates constantly evolving social norms and practices. It also observed that the SALC recognised the right of persons to make certain decisions about reproduction and that it considered a limitation on these rights as a violation of the person's dignity and privacy.

The Court examined the legislative intent of Chapter 19 of the Act. It referenced the decision in *Ex Parte MS and Others* (2014 (3) SA 415 (High Court of South Africa) to confirm that the overriding legislative intent was to regulate surrogacy and to ensure sufficient protection of the rights and interests of the parties to surrogacy arrangements, and to enable commissioning parents to acquire parental rights without going through an adoption process. The Court then raised the question whether the genetic link requirement infringed on the rights of prospective parents who were *conception-infertile* or could not meet this requirement. Related to this, it also examined the applicants' question on the relevance of genetic lineage to the legal concept of the family.

The Court was persuaded by the applicants' argument that family should not be defined with reference to whether there is a genetic link between the parents and children of families. It took into account the decision in *Satchwell v. President of the Republic of South Africa and Another* (2002 (6) SA 1 CC), in which the South African Constitutional Court questioned the traditional view of family and expressed the opinion that although family meant different things to different people, all of the meanings were equally valid.

The Court examined comparative legislation in other jurisdictions and appreciated various perspectives in regulating surrogacy before turning to the South African constitutional framework. It highlighted that the Constitution promotes open and democratic values, which includes amongst other things, the rule of law. It referenced the South Africa Constitutional Court decision in *New National Party v. Government of the Republic of South Africa and Others* (1999 (3) SA 191 (CC) to restate the principle that there ought to be a rational connection between measures that the government takes, including legislative measures, and a legitimate governmental purpose. If the rational connection did not exist, the measures would be found unconstitutional. It therefore put the requirement of the genetic link to this test. It took into account the purported purposes of the genetic link that the respondents identified, and also the rejection by the applicants that there was any rational connection.

The Court accepted the applicants' argument that autonomy is a value that ought to be taken into account in determining the matter. It examined the applicants' arguments that the genetic link requirement caused a class or sub-class to be treated differentially and excluded them from enjoying equal protection and benefit of the law. The Court pointed out that Section 9(1) of the Constitution provides that everyone is equal before the law and should enjoy equal protection and benefit of the law.

The Court expressed the opinion that the right to equality was important in the determination of the matter, and that equality was a foundational right as confirmed in *S v. Makwanyane and Another* (1995 (3) SA 391 (Constitutional Court of South Africa)). The applicants alleged discrimination on

the ground of infertility because the genetic link excluded infertile persons from parenthood through surrogacy arrangements. The Court had recourse to the decision in *Harksen v. Lane* (1991 (1) SA 300 (Constitutional Court of South Africa)), which laid out a test for determining whether a ground that is not a listed distinction under Section 9(3) of the Constitution could nevertheless be a ground for discrimination. The Court found that infertility objectively has the potential to impair human dignity, and that differential treatment based on infertility would therefore constitute discrimination. The Court held that excluding members of a subclass from surrogacy infringed on their right to dignity as it prohibits them from exercising their autonomy. Further, the differential treatment imposed by the genetic link reinforces the negative effects that infertility has on persons, so that this constituted discrimination prohibited under Section 9 of the Constitution.

The Court was not persuaded by the respondent's argument that there was a rational connection between the differentiation and a legitimate governmental purpose. The Court was of the opinion that the purpose of regulating surrogacy is for commissioning parents to have a child, which is also the purpose of legislation for IVF. Requiring that a genetic link should exist between a commissioning parent and the child in the context of surrogacy but not for IVF defeated the purpose. In the absence of governmental purpose, the Court was of the view that the offending legislation should be struck down.

The Court agreed with the applicants that the decision to have a child through a surrogacy arrangement fell under the constitutional right to bodily and psychological integrity recognised under Section 12(2) of the Constitution. The Court held that the genetic link requirement infringed on the right of individuals to make decisions about reproduction.

The Court also agreed with the applicants that the genetic link requirement infringed on the right to privacy as it interfered with the commissioning parent's or parents' decision to use gametes for conception of their prospective child.

The Court also found that the genetic link requirement infringed the right to health care protected under Section 27 of the Constitution. It affirmed that surrogacy is recognised as a form of reproductive health care in South Africa.

The Court therefore held that Section 294 was inconsistent with the Constitution because it violates the constitutional rights to non-discrimination, dignity, privacy, health care, and bodily and psychological integrity.

Conclusion

The Court concluded that the only way to align Chapter 19 of the Act with the Constitution was to strike down the genetic link requirement. It therefore declared Section 294 invalid to the extent of its inconsistency with the Constitution.

Significance

South Africa is one of the few countries in Africa that regulates surrogacy. Other countries do not have a clear regulatory framework on surrogacy. Indeed, when the Court explored comparable regulatory frameworks in other jurisdictions, no African country featured. In *J.L.N. and Two Others v. Director of Children's Services and Four Others* [2014] eKLR, Petition No. 78 of 2014, the High Court of Kenya

recognised that surrogacy was not regulated by any specific provisions in Kenyan law, and therefore surrogacy-related issues had to be decided on a case-by-case basis.

The South African case's views on the concept of the family is potentially notable for other jurisdictions. Genetic lineage is one of the important defining features of the family for many in Africa, and it is no wonder the SALC and the Parliamentary Committee that reviewed the law also considered it necessary to retain the genetic link. However, when the Court tested this requirement against constitutional rights, it found that this could not hold. Families should not be valued because of genetic links, though for some, it would be an important consideration. Rather, family should be based on intention of the parties and not physical attributes of the individuals as envisaged by the genetic link.

Despite most of Africa not having regulatory frameworks on surrogacy, the South African decision is still a beacon on how to think through issues of surrogacy in relation to human rights.

Ex Parte: MS and Others
[2014] ZAGPPHC 457
South Africa, High Court

COURT HOLDING

The Court could confirm a surrogacy agreement after the surrogate mother was already fertilised, because such an interpretation of the provisions of chapter 19 of the Children's Act, 38 of 2005 accorded with the Constitution of the Republic of South Africa, 1996, and promoted constitutional rights of the parties to the agreement.

Summary of Facts

The applicants were parties to a surrogacy agreement, namely the commissioning parents and the surrogate mother. They made the application to confirm a surrogacy agreement as required under Section 292 as read with Section 295 of the Children's Act, 38 of 2005 (the Act). According to Section 292, in order for a surrogacy agreement to be valid, it must be written and signed by all parties and confirmed by the High Court. The Act therefore envisages entering into a valid agreement before implementing its requirements. Section 296(1)(a) of the Act provides that no artificial insemination may take place before the surrogate agreement in confirmed by the Court. Section 303(1) renders it an offence to fertilise or assist in fertilising a woman before a surrogacy agreement is confirmed by the Court.

In this case, however, the parties entered into a verbal surrogacy agreement and proceeded to implement artificial fertilisation before the agreement was confirmed by the High Court. At the time of the application, the surrogate mother was 33 weeks into the pregnancy.

This case therefore raised a novel issue, as the Court had never addressed a situation where parties applied to confirm a surrogacy agreement when it had already been implemented.

Issues

The Court isolated two questions it would address:

1. Whether it is competent for a court to confirm a surrogacy agreement when artificial fertilisation of the surrogate mother has resulted in the conception of a child in the absence of a pre-existing valid surrogacy agreement; and

2. What approach a court should take to confirm a surrogacy agreement after conception.

Court's Analysis

The Court noted that the Act does not provide a clear direction on whether courts could confirm a surrogacy agreement after conception. While the Act envisaged confirmation of a surrogacy agreement before conception, it did not provide any guidance on the consequences of non-compliance for the validity of a written agreement subsequently entered into between the parties. It also was silent on whether courts could still validate such an agreement.

The Court reminded itself of the common law principle that an agreement to commit an unlawful act would not be enforceable. In this case, it was unlawful to fertilise the surrogate mother before validating the surrogacy agreement. The Court said that, normally, courts should not interpret a statute to condone unlawfulness.

The Court, however, was of the view that a surrogacy contract was a special kind of contract that should not be determined by common law principles, but rather the Court would be mindful of the human rights implication for the parties, and especially that it involved the rights of children who would be born out of the agreement. The Court observed that the surrogacy agreement aimed at advancing constitutional rights including the right to dignity, the right to make decisions concerning reproduction, and the surrogate mother's right to security in and control over her body.

The Court was cognisant of Section 39(2) of the Constitution, which mandated courts to interpret legislation in a manner that would promote the spirit, purport, and objects of the Bill of Rights. It said that courts would even interpret legislation to grant the court discretionary power where there was lack of express grant of such power if it was necessary to comply with Section 39(2) of the Constitution.

The Court examined the reason behind requiring confirmation of a surrogacy agreement and found that it was to protect the interests of the parties, including the child to be born. The Court therefore envisaged an interpretation of the provisions of the Act to include the discretion of the court to confirm a surrogacy agreement after the child has been conceived, if it was to promote the rights of the child.

The Court noted that there was an ambiguity with the provisions of the law, in that Section 295(b)(ii) referred to the interests of a child that is yet to be conceived, while Sections 295(d) and (e) referred to interests of a child that was to be born, which would include a child that had been conceived but was not yet born. The Court was of the opinion that Section 295 therefore covered both the situation where a child had not yet been conceived at the time that confirmation of a surrogacy agreement was sought, and the situation where a child had already been conceived, but was not yet born.

The Court further noted that neither Section 292 nor Section 295 required the court to be satisfied that the surrogate mother had not yet undergone the process of artificial fertilisation and that she was not already pregnant as a result. It therefore was of the opinion that the provisions conferring the power on a court to confirm a surrogacy agreement in and of themselves would not preclude the court from confirming such an agreement when the surrogate mother had already undergone fertilisation.

The Court then inquired whether it was the intention of the legislation to render post-fertilisation surrogacy agreements invalid and incapable of being validated. It observed that Section 296 made it unlawful to fertilise a surrogate mother before a valid surrogacy agreement, but nowhere did a provision expressly state that a court is precluded from confirming a post-fertilisation surrogacy agreement. The Court went on to say that a provision which would preclude a court's power to confirm a surrogacy agreement post-fertilisation might actually infringe on the constitutional rights of the parties. It would impact on parental rights, the right to exercise reproductive choice, and the right to dignity of the commissioning parents. It would impose parental rights on the surrogate mother, and would infringe the right to family or parental care of the child to be born. This would not be in the best interests of the child.

After considering all the facts of the case, the Court was of the opinion that it would be patently contrary to Section 28(2) of the Constitution to hold that a court had no discretion to confirm a surrogacy agreement in circumstances when confirmation is sought post-fertilisation. The Court therefore held that the Act does not preclude a court from confirming a surrogacy agreement subsequent to the artificial fertilisation of the surrogate mother, and in circumstances where she is already pregnant with the child to be born under the agreement.

On how to approach post-fertilisation confirmations, the Court said that these applications must be considered within the framework of the Act, though each case would depend on facts peculiar to it. However, confirming a surrogacy agreement after fertilisation should be considered as an exception to the general rule. Therefore, parties should place sufficient facts before the court explaining why the application was made late. Further, the parties would also have to satisfy the court that the application was not aimed at, or would not have the effect of, permitting the parties to circumvent the objectives of the regulatory scheme. Parties would therefore have to, from the outset, satisfy the court that the arrangement between them fell within the permissible scope of a lawful surrogacy agreement.

The Court expressed the view that evidence of a pre-existing verbal or written agreement between the parties, which would have been a valid surrogacy agreement but for the absence of confirmation of the court, would be a good indicator that the parties are bona fide in their application.

The Court expressed the further view that an application for the validation of an agreement that is post-fertilisation should take place before the child is born. The provisions of the Act on surrogacy were aimed at a child that is not yet born, so that they would not apply where a child is already born.

The Court regarded the most important consideration in confirming surrogacy agreements post-fertilisation to be in the best interests of the child to be born. It noted that this requirement is stated in Section 295(e) of the Act.

Conclusion

After finding that it can validate a surrogacy agreement post-fertilisation, and that the application satisfied the various elements set out by the Court, the Court granted the application and validated the verbal surrogacy agreement which the parties had entered prior to fertilisation.

Significance

This case provides guidance on interpreting legislation to promote constitutional rights and advance the best interests of a child where such legislation does not offer clear directions on how to address situations where parties fail to comply with the proper processes surrounding surrogacy. It took the Court some creativity to save the agreement from collapsing, and it had to reason around the common law principle that prohibits legislation to be interpreted in a manner that condones unlawfulness. It would be prudent for a legislature to address the gap that the case exposed to avoid leaving it to the courts to determine the issue of validating surrogacy agreements post-fertilisation on case-by-case basis.

J.L.N. & 2 Others v. Director of Children's Services & 4 Others
[2014] eKLR, Petition No. 78 of 2014
Kenya, High Court (Constitutional and Human Rights Division)

COURT HOLDING

The Hospital did not violate the petitioners' right to privacy when it divulged information about the surrogacy agreement while seeking the advice of the Director on what to do about the circumstances involving the petitioners and the Hospital.

The Director violated the rights and fundamental freedoms of the petitioners, including their right to dignity, when seizing the children and placing them in a children's home.

Summary of Facts

The 1st petitioner entered into a surrogacy agreement with the 2nd and 3rd petitioners, and gave birth to twins at MP Shah Hospital (the "Hospital"), the 3rd respondent. The 1st petitioner was the surrogate mother of the twins, while the 2nd and 3rd petitioners were the genetic parents. Following delivery, the question arose as to whose name, the surrogate's or the genetic mother's, should be entered in the Acknowledgement of Birth Notification (the "Notification"), as required under the Births and Deaths Registration Act, Cap 149 of the Laws of Kenya (BDRA). The Hospital sought the advice of the Director of Child Services (Director) who decided that the children were in need of care and protection. The children were therefore placed under the care of a children's home. The children were later released to the 1st petitioner, and the Hospital issued the Notification in her name.

The petitioners filed a suit against the Director and others in the Children's Court to prevent the children from being put up for adoption. Pending the hearing and determination of the main suit, the Children's Court ordered that the children be released into the custody of the genetic parents, and

that the surrogate mother be allowed unlimited access for purposes of breastfeeding the children. The Children's Court also ordered that the names of the genetic parents be entered into the birth notifications as well as the birth certificates.

The petitioners sought orders to compel the respondents to release the children into their custody and not interfere with the surrogacy agreement, and an order for damages. They also sought declarations that the Hospital's disclosure of the petitioners' medical information to the Director contravened the petitioners' constitutional rights to privacy, and that the Director's decision to seize the children from the surrogate mother contravened both her rights and the constitutional rights of the children.

Issues

The Court adjudicated on the following issues:

1. Whether the Hospital violated the petitioners' right of privacy under Article 31 of the Constitution; and
2. Whether the Director violated the petitioners' rights in taking away the children.

Court's Analysis

The Court affirmed that the BDRA requires that upon birth, a notification of birth be given. It also requires that the persons giving the notification give the particulars of the child including: name of the child, date of birth, sex, type of birth (single or twins), nature of birth (alive or dead), place of birth, name of father, name of mother, and the person to whom the notification is issued.

On the issue of privacy, the Court examined Article 31 of the Constitution, and highlighted proviso (c) which protects the right to privacy of every person not to have information about their family or private affairs "unnecessarily required or revealed." The Court was persuaded by the petitioner's arguments that under certain conditions, the right to privacy may be limited, as was stated by Lord Justice Bingham in the English Court of Appeal decision of *W v. Edgell*. Indeed, it was the Hospital's argument that the disclosure was necessary under the circumstances.

The Court found that the Hospital had a statutory duty to record the details of the children in the Notification under Section 10 of the BDRA. However, the challenge was whose details should be included: the surrogate mother's or the genetic parents. The Court held that the mother referred to in the BDRA was the birth mother, and by virtue of Section 2 of the Children's Act, the surrogate mother had the immediate responsibility to maintain the children and was entitled to their custody. The Court therefore found that the Hospital had made the right decision to give the particulars of the mother. However, since there was no law on surrogacy, nothing prevented the Hospital from registering the names of the genetic parents in the notification.

In its final determination, the Court was ultimately persuaded by the Hospital, which argued that in the absence of a law on surrogacy, and in the face of uncertainty about what to do, it was justified in seeking the guidance of the Director. It said that this was a justifiable limitation on the right to privacy of the petitioners. Further, the Court cited Section 38(1) of the Children's Act which mandated the Director to safeguard the welfare of children.

On the second issue, the Court considered whether the Director had acted in the best interests of the children. The Court found that the children were not in need of care and protection. The Court pointed out that the Director was called upon to guide the Hospital on what to do about the registration and to decide on to whom the children would be released. The Court noted that there was no issue about the mother rejecting them, nor was there any dispute between the surrogate mother and the genetic parents. The Court therefore found that the decision of the Director to seize the children and place them in a children's home was not in the best interests of the children in respect of Article 53(2) of the Constitution and Section 4(2) of the Children's Act. It held that the actions of the Director to seize the children contravened the right to dignity of the petitioners, and caused them embarrassment and distress.

The Court observed that the issues it was asked to adjudicate arose because there was no legislative regime on surrogacy in Kenya. The Court was of the opinion that it was the duty of the state to enact legislation to regulate surrogacy. This duty stemmed from the right to health and health care services, including reproductive health guaranteed under Article 43(1)(a) of the Constitution, but also the right to recognition and protection of the family under Article 45(1). It followed the decision of the High Court of Kenya in *Organisation for National Empowerment v. Principal Registrar of Persons and Other* (Petition No. 289 of 2012 [2013] eKLR), and decided that the details of the genetic parents be registered rather than those of the surrogate mother because the child is entitled to the identity of its genetic parents.

Conclusion

The Court awarded damages to the petitioners as compensation for violation of their right to dignity.

Significance

The head note of an article by Aamera Jiwaji says: "In the absence of clear regulation, the practice of surrogacy in Kenya is growing as an unsupervised industry with no law to fall back on if anything goes wrong during the treatment."[69] A cursory review of countries that have some legislation on surrogacy on the African continent only brings up South Africa as having a law on surrogacy. Umeora *et al.,* writing about the practice of surrogacy in Nigeria could only speculate that surrogacy probably takes place in Nigeria. Surrogacy is not very visible on the African continent,[70] but some may be happening clandestinely.

Surrogacy raises complex ethical, moral, and legal questions. There are a number of interrelated perspectives from which to discuss surrogacy. There is the reproductive rights perspective involving the parties in the surrogacy arrangement. There is the children's rights perspective, which concerns a child or children born out of a surrogacy arrangement. Parental rights are another perspective. Finally, the rights of women, as the ones who must carry the pregnancy and who often predominately shoulder responsibility for childrearing, constitute a fourth perspective of note.

The Court primarily focused on the issue of parental rights and the rights of the child. The Court reasoned that parental rights be accorded to the genetic parents. It held that taking away the child from the surrogate and genetic parents was an infringement of their rights as parents. Of course, the issue would be more complex in a case where there is no genetic link between the commissioning parents and the child.

With regard to the rights of the child, the Court emphasised that the rights of a child born out of a surrogacy arrangement were no different from the rights of any child recognised under national and international law. Other scenarios could be imagined that could complicate the case; for instance, in the case of Baby Gammy, an Australian couple had twins out of a surrogacy arrangement with a woman in Thailand, but decided to leave behind one of the twins because he had Down's Syndrome.[71] This case sparked debate but also revealed that failure to regulate surrogacy may allow loopholes and expose children to human rights violations.

From a reproductive rights point of view, the starting point could be the concept of the right to sexual and reproductive health, and reproductive rights as articulated at the 1994 International Conference on Population and Development (ICPD) that took place in Cairo. Reproductive rights were defined in the Program of Action (PoA) as "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health."[72]

However, surrogacy was not on the agenda at the ICPD. Barbara Stark argues that to the extent that surrogacy enables persons to exercise their reproductive goals and to have children, the ICPD PoA supports surrogacy, or in the least would weigh against an outright ban of the practice.[73] Stark's view can be buttressed by the argument that surrogacy arrangements are a realisation of the right to enjoy the benefits of scientific progress[74] for persons who would otherwise not have had the chance to reproduce, and in some instances, have progeny that share their genetic identity.

Commercialisation of surrogacy is an important challenge because of the risk of coercion or undue influence on the surrogate. Global or transnational surrogacy agreements have therefore been criticised because they have usually involved rich prospective parents and poor potential surrogates. Vida Panitch is one thinker who believes that such transnational commercial surrogacy agreements should be criminalised as they involve exploitation of women by violating their reproductive rights to be free from violence and coercion.[75] She emphasises that the exercise of the right to reproductive choice (by the prospective parent or parents) should not result in the infringement of another person's reproductive right to be free from coercion (the surrogate). Yet, this approach could also be critiqued as assuming that individuals who are poor or otherwise marginalised are in all instances unable to exercise agency in deciding whether to become surrogates.

MIA v. State Information Technology Agency (Pty) Ltd.
[2015] ZALCD 20
South Africa, Durban Labour Court

COURT HOLDING

In applying maternity leave policy, an employer must recognise the status of parties to a civil union and recognise the rights of commissioning parents in a surrogacy agreement, including male parents in same-sex unions. The respondent's refusal to grant the Applicant paid maternity leave on the grounds that he was not the biological mother of his child therefore constituted unfair discrimination.

The right to maternity leave as created in the Basic Conditions of Employment Act is an entitlement not linked solely to the welfare and health of the child's mother, but which must also be interpreted to take into account the best interests of the child.

Summary of Facts

The Applicant, a male employee in a same-sex civil union, entered into a surrogacy agreement with a surrogate mother. The applicant asked his employer, the respondent, for paid maternity leave. However, the respondent refused to grant him paid maternity leave as per its policy because it understood "maternity" to apply to females only, and also did not recognise this as applying to commissioning surrogate parents.

The respondent's maternity leave policy mirrors the provisions of Section 25 of the Basic Conditions of Employment Act 1997; an employee is entitled to "paid maternity leave of a maximum of four months," such leave to be taken "four weeks prior to the expected date of birth or at an earlier date". The Applicant was initially offered unpaid "family responsibility leave," and subsequently two months' paid adoption leave and two months' unpaid leave. The Applicant sought an order directing the respondent to (1) refrain from unfair discrimination; (2) recognise the rights of those in the Applicant's position as natural maternal parents; (3) recognise the rights of those in the Applicant's position to receive paid maternity leave; (4) pay the Applicant two months of remuneration; (5) pay damages in the sum of R400,000; and (6) pay costs.

Issue

The issue before the Court was whether the application of the respondent's policy on maternity leave discriminates unfairly against employees who are in civil unions and are commissioning surrogate parents.

Court's Analysis

The Court expressed the view that the right to maternity leave as created in the Basic Conditions of Employment Act must consider the best interests of the child in addition to the welfare and health of the child's mother. This is consistent with the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act 2005, which specifies that "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied."[76]

Surrogacy agreements are regulated by the Children's Act. Pursuant to the terms of the surrogacy agreement entered into by the Applicant, the child was taken straight from the surrogate. Only one commissioning parent is permitted to be present at the birth; it was decided between the Applicant and his spouse that the Applicant would be present and would take immediate responsibility for the child. The Court was of the opinion that there is no reason why an employee in the Applicant's position should not be entitled to maternity leave for the same period and on the same terms as a "natural mother."

The Court therefore held that any policy adopted by an employer should recognise the rights that flow from the Civil Union Act and the Children's Act, so that same-sex parents and surrogate mothers should not be discriminated against.

Conclusion

The Court ordered the respondent to pay an amount equivalent to two months' salary to the Applicant and the Applicant's costs, but damages were denied.

Significance

This case is peculiar to South Africa because it is the only country in Africa that has legislation recognising same-sex marriages (civil unions) and surrogate parents. However, it is jurisprudentially noteworthy for more than these reasons.

The predominant construction of family is that it is a heterosexual institution. Women have thus been socially constructed as "mothers" so that anything to do with maternity is associated with the female species. Over the years, human rights norms have been extended to cover non-traditional family constructs, such as same-sex marriage. There is much resistance to this but, as illustrated in this case, certain boundaries are being extended nevertheless. In this case, the Court interpreted "maternity" to include male "mothers" and therefore that males may also be entitled to maternity benefits. The Court explained that the principle is those who take care of the infant as their "mother" are eligible to maternity benefits, their gender notwithstanding. Further, the Court recognised the principle that the best interests of the child are paramount also applies to the situation, so that concern is not just about who receives maternity coverage, but who also benefits from it.

VI. GENDER, SEXUALITY, WOMEN AND DISCRIMINATION

This chapter contains a mix of interrelated issues under the umbrella of sexual rights. Sexual rights are human rights norms that apply to sexuality, and necessarily implicate gender relations. However, sexual rights are still a contested concept, and have usually been interpreted to advance heteronormative notions about sexuality.[77] The implications include that only heterosexuality is legitimate, sexual intercourse should only be within the marriage setting, and women are accorded the responsibility for preserving sexual morality. However, this ideological bias has continually been challenged, and this chapter reflects court advocacy to expand the application of human rights norms to diverse circumstances beyond the heteronormative imaginary.

Women have been discriminated against in various ways, such as when courts give out lenient sentences to perpetrators of sexual violence, as noted in Zimbabwean *Chirembwe* case. In the Ugandan case of *CEHURD & Iga Daniel*, the court found the derogatory statutory language in the Penal Code, which referred to a woman with mental disability as an "imbecile," to contravene the Constitution of Uganda.

Women constitute the majority of sex workers in Africa, and where sex work is criminalised, the rights of sex workers, and of women suspected of being sex workers, are often violated. They are stigmatised and discriminated against and labelled as those who infect others with HIV, as seen in the *Nyambura* case. In this case the Kenyan court failed to find that the By-laws that are primarily enforced on female sex workers for "loitering" are discriminatory on the basis of gender and therefore unconstitutional.

Kenyan courts were also approached to deal with the novel issue of intersex persons. In the *RM* case, the Court refused to accept the contention that persons with intersexuality are not recognised under the law. However, in the *Baby A* decision, the Court signalled a change in conceptualising human rights and the condition of intersexuality and agreed with the petitioner that there was a need to protect the constitutional rights of intersex persons.

This chapter also includes court decisions that reveal the resistance of governments and government agents to recognise diversity in sexual orientation, and gender identities. In *Thuto Rammoge* (Botswana) and *Eric Gitari* (Kenya) the courts found the refusal to register associations of LGBTI persons to be discriminatory as it infringes on the right to freedom of association and was therefore unconstitutional. In the *Kasonkomona* decision, the Zambian Court found that publicly advocating for homosexual rights was not a criminal offence, and was within the right to freedom of expression.

It remains clear that countries in Africa need to do much more to align their national laws with progressive constitutional provisions and to meet their commitments to the international and regional human rights instruments, including the duty to advance sexual rights beyond heteronormative constraints.

RAPE

S v. Chirembwe
[2015] ZWHHC 162, CRB No. R 1006/12
Zimbabwe, High Court

COURT HOLDING

It was appropriate to split rape charges from unlawful entry charges. However, the lower court erred in sentencing each count of unlawful entry separately from rape, because they arose out of the same transaction. The counts that arose out of the same transaction (i.e., unlawful entry leading to rape) then could be sentenced individually but made to run concurrently with those transactions that were similar in nature and closely linked in time (the aggravated unlawful entry counts).

Summary of Facts

The accused was a burglar who broke into houses and also committed acts of rape. He was charged with a combined thirty counts of contravening s 131 (1) & 2 (unlawful entry) and s 65 (rape) of the Criminal law (Codification and Reform) Act [Chapter 9:23]. Of the total 30 counts, 13 were counts of rape whereby, after entering 10 domestic premises, the accused committed the rapes. He was convicted of 21 of the 30 counts. For those 21 counts, he received a total sentence of 290 years. Of these, the final 60 years were suspended for five years on condition he did not commit a crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature.

The magistrate had meted out the sentences cumulatively, with 10 years for each count of unlawful entry, plus 20 years for each count of rape, totalling 290 years.

The regional magistrate who handled the case referred the case to the High Court for review.

Issue

Whether the splitting of the charges and the consequent sentence were appropriate.

Court's Analysis

In the Court's opinion, the convictions were proper but the cumulative sentencing arrived at a ridiculous result, which did not serve any purpose except to shock people. The Court pointed to the probable influence of public sentiment, especially women's groups who perceived that courts were meting out lenient sentences to rapists. The Court acknowledged that magistrates usually gave sentences of between 15 to 20 years for rape cases, but they are later reduced on review.

The Court considered the views of Kamocha J in *S v. Ndlovu* 2012 (1) ZLR 393 that though life imprisonment is the maximum sentence permissible for rape under the criminal code, this should be reserved for the worst examples of the crime. According to Kamocha J, rape sentences should be between 5 and 10 years, and beyond 10 years for exceptional cases. He also discouraged giving out cumulative sentences when dealing with multiple counts.

Though the Court agreed with the views of Kamocha J in *S v. Ndlovu*, it expressed the view that this reasoning ignores the implications of sexual violence on the enjoyment of rights by women and girls. In the Court's opinion, sentencing must utilise an engendered approach and a constitutional and human rights perspective.

Sexual violence infringes the rights to bodily and psychological integrity, freedom from violence, and inherent dignity, and rape is "a particularly serious form of gender based violence against women and girls" which has an impact on the enjoyment of their human rights. These are rights guaranteed in the Constitution of Zimbabwe Amendment Act (No.20) Act 2013 (Constitution) and international human rights treaties. The Court recognised the pervasive nature of sexual violence and the reality that women and girls live in constant fear of sexual violence throughout their lives, and this impacts gender equality between women and men. The Court reasoned that it was the state's responsibility "not just to protect women against any such violations which encroach on their fundamental rights, but to also prosecute and punish appropriately as part of its exercise of due diligence."

Reviewing the sentence by the magistrate, the Court's opinion was that the lower court was generally right to sentence the rape charges separately from the unlawful entry charges. It however erred in sentencing each count excessively. Further, the lower court should have for the purposes of sentencing, treated each entry leading to rape as one transaction, sentenced individually but running concurrently.

Conclusion

The Court resentenced the accused as follows:

For most of the counts involving unlawful entry under aggravated circumstances and rape on the same premises, the accused received ten years' imprisonment for each count, to run concurrently. For example, 10 years for Count 1 (unlawful entry) would run concurrently with 10 years with Count 2 (rape). For one of the charges of unlawful entry with rape, the Court did not explain the reduced sentence of 8 years. Finally, the accused was sentenced to 15 years for one unlawful entry with 3 rapes of the same complainant. By contrast, the five counts of unlawful entry and theft were sentenced to 3 years each, running concurrently with all previous sentences.

These totalled 73 years' imprisonment, of which the final 18 years was suspended for five years, on condition that the accused did not commit another crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature. This yielded an effective sentence of 55 years.

Significance

This case was more than just about sentencing for rape but also provides some insight on the evolution in Southern Africa's judicial system's response to the prevalence of rape and the appropriate punishment for perpetrators. The Court took cognizance of public sentiments accusing courts of being lenient with rapists and its decision signaled some movement towards taking the impact of rape on girls and women seriously.

One particularly egregious court decision that devalued the impact of rape on the victim was *WB v. the State* (Case No. CA 352/2006, South Africa), where the Appellant had raped his six-year-old

daughter and the trial court had sentenced him to life imprisonment. On appeal however, the High Court reasoned that the trial court failed to take into account the mitigating factors that the Appellant was a "caring, and loving husband and father" and reduced the sentence to 15 years in prison. The Court had decided to ignore the impact of rape on the girl-child on the basis that the Appellant was a good father and husband.

While the courts alone may not solve the problem of sexual violence against women, they should not condone a culture of leniency in cases of sexual violence against women. By acknowledging the human (women's) rights dimension of sentencing, the Court signals a welcome change in judicial thinking about sexual violence, taking into account the life-altering impact of rape, not only on the victim, but on the group (girls and women) that disproportionally experiences pain and suffering.

DISABILITY, SEXUALITY AND CRIMINAL LAW

Center for Health, Human Rights and Development and Iga Daniel v. Attorney General
(2015), Constitutional Petition No. 64 of 2011
Uganda, Constitutional Court

COURT HOLDING

The language of Section 45(5) of the Trial on Indictments Act is unconstitutional because it labels defendants with mental disabilities as "criminal lunatics" and therefore violates their dignity. It also treats persons with such disabilities differentially, which contravenes the principle of presumption of innocence, and infringes on their rights to liberty.

Section 82(6) of the Trial on Indictments Act required modification to ensure conformity with the Constitution, so that persons are not detained indefinitely for reasons of insanity.

The use of the words "idiot" and "imbecile" in Section 130 of the Penal Code Act, criminalizing attempts at sexual relations with mentally disabled females, is derogatory, dehumanizing, and degrading and therefore unconstitutional.

Summary of Facts

The applicant, Center for Health, Human Rights and Development ("CEHURD"), filed a petition challenging the constitutionality of Sections 45(5) and 82(6) of the Trial on Indictments Act and Section 130 of the Penal Code Act. CEHURD alleged that the impugned provisions contained language that was derogatory and prejudicial to persons with mental disabilities, and therefore infringed on various constitutionally guaranteed rights including the rights to dignity, non-discrimination, liberty, and presumption of innocence.

Issues

The issues before the Court were as follows:

1. Whether Sections 45(5) and 82(6) of the Trial on Indictments Act contravene the right to liberty and freedom from discrimination of the persons with mental disabilities guaranteed under articles 23 and 21 of the Constitution;

2. Whether Section 130 of the Penal Code Act contravenes the right to dignity of persons with mental disabilities guaranteed under Article 24 of the Constitution; and

3. Whether Section 130 of the Penal Code Act contravenes the right to freedom from discrimination guaranteed under Article 21 of the Constitution.

Court's Analysis

The Court referenced a number of international and regional human rights treaties ratified by Uganda, including the International Covenant on Civil and Political Rights ("ICCPR"), the African Charter on Human and Peoples' Rights ("ACHPR"), and the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"), to highlight the fundamental rights to non-discrimination and equality before the law, liberty and security of the person, equality and dignity. It took cognizance of Article 35 of the Constitution of the Republic of Uganda, 1995 (the "Constitution"), which specifically entrenches the right to human dignity of persons with disabilities, and obligates the government to take appropriate measures to realise their full mental and physical potential. Further, Section 32 of the Persons with Disabilities Act, 2006, obliges all government departments and organs to respect, uphold, and protect constitutionally guaranteed rights of persons with disabilities.

The Court found that Section 45(5) of the Trial on Indictments Act empowers the Minister to order an accused person to be confined as a "criminal lunatic". It held that such language violates the principle of presumption of innocence and infringes on the dignity of persons with mental disabilities secured under Article 35 of the Constitution. It also infringes on their right to freedom from all forms of torture or cruel, inhuman or degrading treatment or punishment, as secured under Article 24 of the Constitution. The Court was persuaded by *Purohit and Moore v. The Gambia*, (Communication No. 241/2001 (2003)) in which the African Commission decided on a similar issue, and held the statute's use of derogatory language such as "criminal lunatic," and automatic confinement of persons with mental disabilities "for insanity" were contrary to their rights, including the rights to dignity and non-discrimination.

The Court found that the terms "idiot" and "imbecile" referring to women with disabilities in Section 130 of the Penal Code Act were derogatory and dehumanizing. Further, these derogatory terms detract from the dignity that should be accorded to all disabled persons under Article 24 of the Constitution. Section 130 of the Penal Code Act reads as follows:

> Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, commits a felony and is liable to imprisonment for fourteen years.

The Court was of the view that the remedy should not be to strike out the section as this would leave girls and women with mental disabilities unprotected from sexual abuse. Therefore, the Court

recommended that the section be modified so that it is aligned with Article 24 of the Constitution. It proposed that the words "idiot" and "imbecile" be struck off and replaced with the words "mentally ill or impaired", so that the modified Section 130 of the Penal Code would read as follows:

> Any person who, knowing a woman or girl to be mentally ill or impaired, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was mentally ill or impaired, commits a felony and is liable to imprisonment for fourteen years.

Conclusion

The application succeeded, and the Court made the following orders:

- Section 45(5) of Trial on Indictments Act was declared unconstitutional.
- Section 82(6) of the Trial and Indictments Act was modified to include periodic review of detention.
- The words "idiot" and "imbecile" were struck out from Section 130 of the Penal Code Act, and the Court recommended alternative words to be used.
- Conditions of detention for all persons detained for reason of insanity must be reviewed in the light of the judgment, so that they are taken for appropriate care.
- The relevant provisions of the Trial on Indictment Act and the Penal Code Act must be reviewed and amended to clarify how persons with disabilities ought to be treated in compliance with the Constitution.

Significance

Countries that were under British colonial rule adopted colonial legislation that uses such derogatory language against persons with disabilities. This is based on earlier conceptualizations of persons with disabilities as objects of charity and bio-medically defective. Further the sexual offences laws conceptualised women with mental disabilities as sexual objects to be protected from males, rather than as rights-holders able to exercise the full range of human rights, including their sexual rights.

The law, such as Section 130 of Uganda's Penal Code, plays an important constitutive role in shaping norms and behaviour in society. It indirectly influences the framework for norms, attitudes and expectations of members of the society.[78] These include professionals working with women with mental disabilities in the justice system and also health institutions. The existence of laws that maintain derogatory language for women with disabilities and conceptualise them as sexual objects devoid of any agency unwittingly creates an environment that perpetuates sexual abuse and violence against them.

It is notable that despite reconceptualization of disabilities from a human rights perspective, some countries such as Uganda and Malawi have retained provisions in legislation that are anachronistic in relation to constitutional developments and progressive legislation. This decision is significant because countries that maintain similar legislation—which is prejudicial, derogatory and contrary to

the dignity of women with mental disabilities and treats them as sexual objects, but also discriminates against persons with disabilities in general— do not need to reinvent the wheel. The Ugandan case exposes an issue that needs some transformative action. It is therefore important for the Court's pronouncements and directives in the case to be taken seriously, not only by the government of Uganda but also by other governments.

WOMEN AND CRIMINAL LAW

Lucy Nyambura & Another v. Town Clerk, Municipal Council of Mombasa & 2 Others
[2011] eKLR, Petition No. 286 of 2009
Kenya, High Court

COURT HOLDING

The petitioners had not demonstrated that Section 258(m) of the Mombasa Municipal Bye-laws violated their rights.

There was no basis for declaring that the said provision actually or potentially violated the rights and dignity of women.

The Court declined to make an order that the arrest, arraignment, and trial of the petitioner was an abuse of her constitutional rights. There was no basis for declaring the said provision to be unconstitutional.

The petitioners did not address the Court on how the international human rights instruments they relied upon in the application should be applied under the domestic law of Kenya. As such, the Court could not make any determination on whether the said provision contravened Kenya's obligations under the international human rights instruments.

Summary of Facts

The petitioners were arrested and charged for the offence of "loitering in a public place for immoral purposes" (prostitution), under Section 258(m) of the Mombasa Municipal Bye-laws ("Bye-laws"). They brought this petition before the High Court challenging the interpretation and application of the Bye-laws as allegedly contravening their fundamental rights and freedoms guaranteed under the Constitution of Kenya 1969 (the "1969 Constitution") and other international instruments that Kenya has ratified, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW). They claimed that (i) the Bye-laws were therefore unconstitutional and (ii) their arrest and detention in custody was discriminatory, oppressive, and unconstitutional.

Issues

The issues the Court was asked to determine can be summarised as follows:

1. Whether Section 258(m) of the Mombasa Municipal Bye-laws violated the rights of women as guaranteed under the Kenyan Constitution, including the right to dignity;
2. Whether the said Section 258(m) contravened Kenya's obligations under CEDAW, the African Charter on Human and Peoples' Rights, and the Maputo Protocol;
3. Whether the said Section 258(m) is discriminatory against women in its effect and purpose; and
4. Whether there should be an order declaring that Section 258(m) is unconstitutional.

Court's Analysis

While the petition was based on the 1969 Constitution, the Court agreed to use both the 1969 and 2010 Constitutions to determine the matter after noting that the latter intended to build upon and not to detract from the rights and freedoms guaranteed in the former.

The Court then evaluated the evidence and arguments of the two sides. The petitioners relied upon a research study by the Federation of Women Lawyers (FIDA) in Kenya, reported in the publication *Documenting Human Rights Violations of Sex Workers in Kenya: A Report based on the Findings of a Study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi Towns in Kenya*, as evidence for the discriminatory application and impact of the Bye-laws. The report alleges that police officers would, in the evenings or nighttime, arrest women based on how they were dressed, talked, or walked, and charge them under the impugned provision if they could not account properly for being out at that time or place.

The petitioners argued further that the law in effect only targeted women and therefore its effect was discriminatory on the basis of sex and gender, contrary to Article 27(4) of the 2010 Constitution of Kenya. They further argued that the women were not arrested for the act of prostitution and that at the time of their arrest, there was no evidence they were "engaging in" prostitution, but rather, their arrest was a violation of their freedom of movement.

The respondents rebutted the discrimination argument by referring to the text of the Bye-laws which, they claimed, was not discriminatory but applicable to all. They further relied on public interest and limitation of rights arguments to justify the constitutionality of the Bye-laws. They claimed that the law was aimed at discouraging immoral conduct and, as a matter of public interest, protecting public decency, and that prostitution is a vice that contributes to the spread of AIDS and is a medium for sexual exploitation. They also claimed that the Bye-laws protect young women from being lured into prostitution. They raised the limitation of rights, relying upon the limitation clause in Article 70 of the 1969 Constitution and Article 24 of the 2010 Constitution, which provide for a "right or fundamental freedom in the Bill of Rights" not being limited by law except to the extent that it is reasonable and justifiable in an open democratic society and is based on a number of listed factors.

The Court agreed with the respondent's arguments that the Bye-laws were enacted in the observance of a balance between the guaranteed rights of individuals and the wider public interests. It also agreed with the argument that the Bye-Law was constitutional in light of Article 24 of the 2010 Constitution of Kenya, which envisages limitation of certain rights as lawful. The Court held that public interest justified the limitation of the rights of the petitioners.

Conclusion

The petition failed in its entirety.

Significance

The underlying debate in this particular case was about the legality of prostitution (street prostitution). However, the significance of this case can be analysed both in relation to the legality of prostitution and vagrancy, loitering, rogue, and vagabond laws ("Vagrancy Laws").

Vagrancy laws have been allegedly used by law enforcers when the law enforcers fail to find enough evidence to prosecute for bigger crimes. Arguably, vagrancy laws tend to catch the poor, the vulnerable, and the marginalised. Indeed, in the Malawi case of Mwanza & 12 others v. R (Confirmation Criminal Case no 1049 of 2007) where 13 women were picked up at 3 a.m. and brought to court under rogue and vagabond charges, the judge set aside the women's convictions and remarked that the law could not have been intended to criminalise mere poverty and homelessness. Yet, that was its effect in the cited case.

Vagrancy laws tend to be drafted in vague and overbroad language such as "being found loitering…." Law enforcers thus find themselves vested with wide discretionary powers to determine who is caught by the law. Demeanor is frequently cited as the means for identifying suspect groups that are then arrested for further investigation. This was the case with the petitioners who were arrested for being found in a street, looking, dressed or talking like they were selling sex.

Vagrancy or loitering laws have been struck down precisely because their vagueness makes them prone to abuse, in principle and in fact, by law enforcers. For instance, in the United States case of *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Supreme Court overturned the decision of a lower court and held a vagrancy ordinance void for vagueness on the ground that the ordinance failed to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden by the statute, and also because it encouraged arbitrary and erratic arrests and convictions.

The petitioners in the case under discussion were arrested based on their demeanor. They had dressed, appeared, and talked suspiciously, regardless of their actual intention for being on the street after dark.

In any case, the defendants argued that the limitation on the rights of these women was proportionate to public interest. They argued that at stake was the public need to be protected from AIDS. This limitation would also discourage those young girls who might otherwise be lured into sex work. This case could be compared with the Canadian case of *Canada (Attorney General) v. Bedford*, 2012 ONCA 186. That Court described three ways that a law can violate a principle of fundamental justice:

1) If the impact it has on people is "grossly disproportionate" to the purpose of the law;

2) If it is "overbroad" and catches too many unrelated activities or actions; or

3) If the law is "arbitrary", that is having no connection with the purpose of the law.

Given the broad application of the Mombasa Bye-laws, it is arguable that they are disproportionate and overbroad. Anybody could be arrested on the street, kept in a cell, and asked the following morning what they had been doing on the street the previous evening. This, according to the Court, was justified in order to protect public morals or spread of disease. The Court did not however require any evidence that there is a relationship between prostitution and the spread of AIDS or the luring of girls into prostitution.

It must be appreciated that the whole issue of the Bye-laws was linked to another politically charged subject: sex work. This is a contentious issue, not only on the African continent. As one scholar has said: "Prostitution continues to be endlessly political and tied to the most fundamental social processes that underpin structural power: gender hierarchies, heteronormativity, and the structural and ideological regulation of women's behaviour."[79]

The Court faulted the petitioners' evidence and arguments. However, allowing the petition to succeed could not only have affected vagrancy laws, but could have signaled women's empowerment with regard to transactional sex, something that Kenyan society had already decided against through its anti-prostitution laws.

As Dianne Grant has said about regulation of prostitution:

> Prostitution regulations are always political and their enforcement is equally contradictory. That is because sex work is paradoxical as police must find a balance between enforcing what is a relatively minor offence in criminal terms, to that of appeasing/catering to powerful interest groups, residency associations, municipal and provincial governments, in a given city.[80]

This captures precisely what was going on in the Kenyan Court. The Court sided with the Mombasa Municipal authorities and the police, perhaps in order to appease powerful interest groups, united by the ideologies that ensure that women who sell sex are kept disempowered. Therefore, despite the petitioners raising the argument that the application of the law had a discriminatory effect on women, and proffering research evidence to demonstrate this, the Court was dismissive.

The above analysis points to the predicament of the petitioners in the case. They may however have been pitted against socio-political interests that had far more influence over the Court than the arguments and evidence they were able to present. Perhaps ultimately, the significance of this case is that it makes us realise the difficulty of challenging vagrancy laws.

A successful challenge would require much more than invoking constitutional rights; it would likely require well thought-out legal and political advocacy strategies.

LEGAL RECOGNITION OF INTERSEXUALITY

Baby "A" (suing through her mother, E.A.) and The Cradle the Children Foundation v. Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths
[2014] eKLR, Petition No. 266 of 2013
Kenya, High Court (Constitutional and Human Rights Division)

COURT HOLDING

The petitioners in the case before the Court and in the *RM case* are different, and the facts also differ, so that matter is not *res judicata.*

Baby A has an intersex condition, but there is no evidence that the rights of Baby A or other people with intersex conditions were violated in any way because of Sections 2(a) and 7 of the Registration of Births and Deaths Act.

It is an anomaly that the current legal framework does not recognise people with intersex conditions. It is the duty of the government to protect the rights of babies and people with intersex conditions by providing a legal framework to address issues relating to them, including registration under the RBDA, medical examination and tests, and corrective surgeries.

Summary of Facts

The petitioner, Baby A, was born with both female and male genitalia. Kenyatta National Hospital, the second respondent in the case, conducted medical tests on the petitioner. In one of the documents which captured the personal details of the petitioner, a question mark "?" was inserted in the column for indicating the sex of the person. Baby A had never been issued a birth certificate. The petitioner claimed that the entry of a question mark indicating the sex of the petitioner was a violation of the rights of the child to legal recognition, dignity, and freedom from inhuman and degrading treatment. These rights were guaranteed in Section 4 of the Children Act, 2001 (Children Act), and Articles 27, 28, and 29 of the Constitution of Kenya, 2010 (Constitution).

The petitioner also claimed that the failure of legislation such as the Registration of Births and Deaths Act (RBDA), Cap 149 of the Laws of Kenya, to recognise children with intersex conditions infringed on various rights of children guaranteed under the Constitution, and also under various international human rights treaties, including the Convention of the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR), and the International Covenant on Economic and Social and Cultural Rights (ICESCR).

Issues

The Court identified the following issues for its determination:

1. Whether the matter raises facts already raised and determined (*res judicata*) in the earlier case of *RM v. Attorney General and Another*, Petition 705 of 2007 (*RM case*);

2. Whether Baby A is an intersex person and if so, whether the baby suffers lack of legal recognition because of Sections 2(a) and 7 of the Births and Deaths Registration Act and whether therefore these provisions are inconsistent with Article 27 of the Constitution;

3. Whether there is need for guidelines, rules and regulations for surgery on persons with intersex conditions; and

4. Whether there is a need to collect data on persons with intersex conditions in Kenya and if so, who is mandated to do so.

Court's Analysis

The Court considered the *RM case* and the matter at hand to determine whether the issues raised had indeed been raised before and already settled by the Court in terms of Section 7 of the Civil Procedure Act. After reviewing precedent and instructive case law from other jurisdictions, the Court concluded that for *res judicata* to apply, "the issues in the matter before the Court must be directly and substantially in issue in the two suits and the parties must be the same or the parties under whom any of them claim or is litigating under, are the same."[81] First, the Court found that the parties in the two suits were not the same. Second, it determined that the facts in the two suits were different. The Court therefore held that the matter was not barred by *res judicata*.

The Court then dealt with the central claim of the petition, that Baby A suffered from lack of legal recognition due to having an intersex condition. First, the Court sought to determine whether Baby A was an intersex person. Using the definition of intersex from the *RM case*, the Court determined that Baby A was an intersex person based on the fact that a laboratory report/form indicated a question mark in the category of the sex of the child, showing that there was ambiguity about the sex of the child. Although the Notification of Birth form indicated that Baby A was male, the Court determined that that outcome was due to the societal expectation that babies be categorised as male or female.

After determining that Baby A was an intersex person, the Court evaluated the petitioner's argument with respect to lack of legal recognition as an intersex person. The petitioner claimed that failure of the RBDA to recognise persons with intersex conditions constituted an infringement of constitutional rights guaranteed under Article 27(4) of the Constitution, which prohibited discrimination against the person on any ground including sex. The Court followed the reasoning in the *RM case* where the Court had said that sex is fixed at the time of birth.

The Court went on to address the petitioner's argument that the term "sex" in various legislation, including the Constitution, be interpreted to include intersex. The Court relied upon the *RM case*, which was of the view that it was not the mandate of the Court to expand the meaning of sex in the Constitution to include intersex, and that this was for the Legislature.

Further, the Court found that no one, neither the petitioner nor anyone on her behalf, had in fact tried to register the birth on behalf of the underage petitioner. In addition, there were no facts alleged or evidence produced of violations of the petitioner's rights. It was on this basis that the Court refused to find infringement of rights.

The Court next considered the argument that it should issue guidelines on corrective surgeries for babies with intersex conditions. The Court was of the view that it was not within its mandate. However, the Court went on to say that it would nevertheless grant appropriate relief in accordance with Article 23(3) of the Constitution because the matter raised issues of a constitutional nature. The Court proposed that people with intersex conditions be recognised as such under the law, and that the failure of the RBDA or the Constitution to recognise them should not be interpreted to mean that their rights could be infringed. It made reference to two decisions of the Colombian Constitutional Court, Sentencia No.54-337/99 (the *Ramos* case) and Sentencia T 551/99 (the *Cruz* case), and concluded that the state had a duty to protect the rights of babies and persons with intersex conditions by putting in place a legal framework which would govern issues such as their registration, medical examinations, and corrective surgeries. The Court urged Parliament to enact the necessary legislative framework. In addition, the Court determined that data collection on intersex persons should be undertaken and that the Court would make an appropriate order to determine whose function it was to collect such data.

Conclusion

The petitioner's rights were not violated, so the petition failed in that regard.

The Court ordered the Attorney General to bring before it, within 90 days of the judgment, the information related to the organ, agency, or institution responsible for collecting and keeping data related to persons with intersex conditions.

The Court also ordered the Attorney General to file a report before it within 90 days of the judgment, identifying the status of a statute regulating intersex as a sex category, and guidelines and regulations for any corrective surgery for persons with intersex conditions.

Finally, the Court ordered that the Petitioner move to make an application for registration of Baby A by the Registrar of Births and Deaths, and that a report of this be filed with the Court within 90 days of the judgment.

Significance

This is the second case to be decided in the Kenyan courts concerning the rights of persons with intersex conditions. The first case was *RM v. The Hon. Attorney General and Four Others (RM case)*, Petition no 705 of 2007. The *Baby A case* further develops the jurisprudence in the *RM case*, and its significance is better appreciated when it is analysed in contrast to the *RM case*.

In the *RM case*, Justice Sitati, who authored the main judgment, had written that "The Kenyan society is predominantly a traditional African society in terms of social, moral and religious values. We have not reached the stage where such values involving matters of sexuality can be rationalised or compromised through science."[82] In contrast, Justice Lenaola in the present decision uses language such as: "… time is now ripe for the development of rules and guidelines on corrective surgeries for intersex children especially minors such as Baby A."[83] Elsewhere in the judgment, Justice Lenaola states that "The fact that the Births and Deaths Registration Act and the Constitution do not define

the term 'sex' does not mean that we should hide behind the traditional definition as we know it." These statements show progressive thinking about intersex conditions, as compared to the reasoning in the *RM Case.*

The most important way in which this Court differed in perspective from the *RM case* is that while the reasoning in the *RM case* was tantamount to erasing persons with intersex conditions by rigidly affirming the male/female binary, the Court in the *Baby A case* departed from this traditional understanding of the meaning of sex as only encompassing the male/female binary. It was therefore not surprising that the Court went on to recognise the existence of children and people with intersex conditions as a class. Although the issue of *locus standi* was not raised in this case, the Court on its own motion allowed Baby A to represent other persons with intersex conditions when it said that "The issues raised in the present Petition must be looked at in the wider context of the place of intersexuals in our society as opposed to the narrower and specific interests of Baby A who is only one such person in our Society."[84] In fact, this case turned upon the Court's recognition of persons with intersex conditions as a class whose rights needed protection. Therefore, though the conclusion of the case did appear to be unfavourable for Baby A as an individual, the petition was successful in raising awareness about the rights of persons with intersex conditions generally. Despite its apparent reliance on the reasoning in the *RM case*, which it quoted substantially, the Court arrived at a bolder and more just conclusion because the decision was in the end premised on Baby A's capacity to bring a representative suit on behalf of the interests of persons with intersex conditions. Further, while it agreed with the court in the *RM case* that it is the role of the Legislature to come up with laws that would recognise persons with intersex conditions, the Court assumed the duty to ask the Legislature to come up with a legal framework for them, and it proceeded to issue orders that would, if respected, facilitate realisation of their constitutional rights.

This case is therefore important because it broke fetters with cultural norms about sex and sexuality in relation to intersexuality. It forged new ground toward ensuring recognition and respect of the rights of persons with intersex conditions.

It would have been more enriching for Africa's jurisprudence if the Kenyan courts had addressed the issue of discrimination and lack of legal recognition of persons with intersex conditions, apart from addressing the issue of corrective surgery. In both cases, the Courts found that the petitioners had not brought evidence of discrimination, as neither petitioner had applied for a birth certificate or other identity documentation, and therefore they could not conclude that the petitioners had been discriminated against. This however does leave room for further public interest litigation if a petitioner could bring concrete evidence of how lack of legal recognition violates rights including the right to non-discrimination. Further, the Court in the *Baby A* case did issue orders relating to gathering data about persons with intersex conditions and the status of the law in relation to them, which, if respected by the Attorney General, would contribute towards development of a positive discourse on their rights, not only in Kenya but in the African region.

R.M. v. Attorney General & 4 Others
[2010] eKLR, Petition No. 705 of 2007
Kenya, High Court

COURT HOLDING

The petitioner did not present any data or facts to show that there was a definite number of intersex persons in Kenya as to form a class or body of persons in respect of whose interest the petitioner could bring a representative suit. Consequently, the petitioner had no *locus standi* to bring a representative suit on behalf of other intersex persons.

The petitioner as an intersex person was adequately covered by the law and, consequently, his constitutionally guaranteed rights and other rights were not infringed upon and he suffered no discrimination under the law on that basis.

The petitioner's right to protection against inhuman and degrading treatment as provided under Section 74 of the Constitution was violated by prison officials, and he was entitled to general damages of Kshs. 500,000 and 20% of his costs against the Attorney General and Commissioner of Prisons.

Summary of Facts

The petitioner was born with both male and female genitalia, a condition known as intersex. His parents had raised him as male. He claimed that due to his condition, he could not obtain a birth certificate, a prerequisite to obtaining a national identity card. As a result of not having a birth certificate or national identity card, he could not enjoy citizenship rights, including the ability to register as a voter, obtain travel documents, acquire property and get employment. He dropped out of school at Class 3, and when he attempted to marry, the law did not recognise his marriage. He became secluded and later was charged with an offence of robbery with violence in 2005. While the petitioner was in prison remand, awaiting the determination of his case, the statutory prison search revealed that he had both male and female genital organs. The petitioner was taken to the hospital for verification of his gender, and the doctor's report confirmed that he had ambiguous genitalia. As a result, a court order was made to remand the petitioner to the police station during the pendency of his trial. The petitioner was tried, convicted and sentenced to death for robbery with violence. He was committed to a prison for male death row convicts, where he shared cells and facilities with male inmates. He claimed that he was exposed to abuse, mockery, ridicule, and inhuman treatment, as well as sexual molestation by other male inmates.

The petitioner claimed that due to the failure of the legal framework to recognise intersex persons, his fundamental rights were infringed, including dignity, freedom from inhuman treatment, freedom from discrimination on the basis of sex, freedom of movement, freedom of association, the right to a fair hearing and the right to protection under the law. He therefore relied on the Constitution of Kenya, 2010 (Constitution), and also the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

Issues

The Court in its judgment enumerated a rather long list of issues for determination. However, the issues could be condensed into the following:

1. Whether the petition was a representative suit, and if so, whether the Court had jurisdiction under Section 84 of the Constitution to consider generally the rights and violations of rights of intersex persons;

2. Whether the petitioner was an intersex person, and if so, whether the petitioner, as an intersex person, suffered from a lack of legal recognition and protection under the Constitution and other applicable laws, resulting in violations of the petitioner's human rights, including, among others, the right of everyone to be recognised as a person before the law, the right to equality and non-discrimination as guaranteed under Section 82 of the Constitution, and the constitutionally guaranteed rights to life, liberty and security of the person; and

3. Whether the petitioner suffered violation of his fundamental right to be free from torture, cruel, inhuman, or degrading treatment provided under Section 74 of the Constitution.

Court's Analysis

The Court addressed the issue of whether the petitioner could sue on behalf of the body of intersex persons in Kenya. The Court discussed the definition of "intersex" and concluded that it describes "an abnormal condition of varying degrees with regard to the sex constitution of a person."[85] Based on that definition, the Court determined from the facts provided that the petitioner was an intersex person. On inquiring into whether there was a body of intersex persons who had an interest in the outcome of the petition because it would have an impact on their welfare, the Court held that the petitioner, along with the interested parties and *amici curiae* who were joined in the matter to support the arguments of the petitioner with respect to other intersex persons, had failed to provide any evidence that there was a definite number of intersex people in Kenya to form a body of people whose interests he represented. The petitioner's *locus standi* with respect to a representative suit was therefore denied and all reference to other intersex persons was struck out of the petition.

The Court then delved into the issue of lack of legal recognition of and discrimination against the petitioner as an intersex person. The petitioner had submitted that the Birth and Deaths Registration Act only recognised male or female sexes but not intersex. He argued that the law therefore did not provide legal recognition of him as an intersex person and did not afford him the rights protected by the Constitution. To address the issue, the Court first of all inquired into the meaning of the term "sex". The Court sought a definition of the term in the 11th Edition of the *Concise Oxford English Dictionary* and also the *Black's Law Dictionary* (8th Edition), and found that "sex simply refers to the categorization of persons into male and female on the basis of their biological differences as evidenced by their reproductive organs."[86] It was also persuaded by the English decision in *Corbett v. Corbett* ([1970]2 WLR 1306), as well as decisions from other jurisdictions, that a person's sex is fixed at birth. The Court therefore concluded that the Births and Deaths Registration Act did not in fact exclude the petitioner as an intersex person, since he was either male or female at birth, despite the

difficulty posed by the ambiguous genitalia, and thus his birth could have been registered under the Births and Deaths Registration Act if an application had been made. The Court rejected the argument that the term sex in Sections 70 and 82 of the Constitution should be interpreted to include intersex as a third category of gender because the Court read the term sex in those sections to encompass the two categories of male and female only, and also because the legislature in Kenya had not taken action to expand the meaning of the term sex. Similarly, the Court disagreed with the argument that intersex persons should be brought within the category of "other status" included in Article 2 of the UDHR and Article 26 of the ICCPR. It concluded that intersex persons "are adequately provided for within the Kenyan Constitution as per the ordinary and natural meaning of the term sex,"[87] it would be contrary to the intention of the legislature, and society might not have been ready for a third category of gender at that time.

The Court also considered the argument that the petitioner had been discriminated against and disadvantaged socially as a consequence of the alleged failure of his legal recognition as an intersex person. The Court indicated that the petitioner's failure to obtain legal documents including a birth certificate, identity card and voter's registration card was his own fault, as neither the petitioner nor his mother had made any efforts to obtain such documentation. The Court also determined that the petitioner had abandoned school because he could not see anything written on the blackboard, not because he was disadvantaged due to his intersex status, and that the petitioner's later inability to obtain employment was due to not having an educational background that would make him a stronger candidate for employment. Further, the social problems which he claimed were a result of lack of legal recognition, including inability to marry, were not due to the effect of discriminatory laws. Rather, based on the Court's determination that each person falls into one of the two categories of gender at birth, the Court determined that the petitioner was not prevented from marrying due to his intersex status, and instead, his biological make-up is what prevented him from being able to marry, as his physiology would not permit him to consummate the marriage as a male.

On whether the law should be reformed to allow the petitioner as an intersex person to determine his gender or define his sexual identity, the Court was of the opinion that the petitioner as an adult could do so, including through corrective surgery, but that the government was not at fault for failing to provide the necessary facilities, as there was no justification for giving corrective surgery economic priority over other government-funded initiatives. The Court also determined that the issues raised with respect to the ability of intersex persons to adopt children or parental responsibility for assigning gender to children were not properly brought in the case, as the petitioner had not sought to adopt a child and was beyond the age of maturity. Further, the Court determined that the issue that the petitioner raised regarding social stigma was not a legal issue, but rather a social issue to be addressed through openness and dissemination of appropriate information. Due to the traditional nature of Kenyan society, the Court believed that Kenyan society had not reached a stage where matters of sexuality could be rationalised through science, and that in any case, it was the Legislature's mandate to take up such issues.

The Court also rejected the petitioner's claims that his rights were violated during his criminal trial or that the provisions of The Prisons Act or The Prisons Rules were discriminatory against the petitioner. With respect to the petitioner's criminal trial, the petitioner's detention in the police station was legal because the Court validly ordered his detention in that location taking into account his intersex status

and that there was no other appropriate location to remand him during his trial, and there were no other defects in the trial identified by the petitioner. In addition, the Court determined that holding the petitioner in a male prison was not a violation of his rights because The Prisons Act allows people of separate genders to be housed in different parts of the same prison, and it was not practical for the petitioner to expect a prison facility for himself alone with prison officers who are intersex or have training in that area, given that no such prison officers were known to exist.

Further, the Court found that the petitioner had not been denied the freedom of movement and association because his freedom of movement was lawfully limited after his arrest due to his alleged criminal activity and was limited prior to his arrest due to his own failure to obtain the necessary documentation. Similarly, the Court stated that the petitioner's right to privacy had not been violated because the limitations on petitioner's privacy were legally imposed due to the petitioner's conviction for a criminal offence.

The Court however found that the petitioner was treated in an inhuman and degrading manner by prison authorities who conducted strip searches of the petitioner in front of other inmates with the intention of humiliating him for his intersex condition. The Court therefore found that such actions were a violation of Section 74 of the Constitution. The Court awarded damages of Kshs. 500,000 (about 5,000 USD) to the petitioner as redress for violation of his right to dignity and 20% of his costs against the Attorney General and the Commissioner of Prisons.

Conclusion

The petitioner failed on the main claim that the legal framework did not recognise and discriminated against intersex persons.

The petitioner also failed on the claim that he could bring the petition on behalf of other intersex persons.

The petitioner succeeded in the claim that prison officials treated him in a manner that was cruel and degrading, and he was awarded damages for violation of the right to dignity.

Significance

This case presented novel issues for the Kenyan Court. While intersexuality is lumped together with gay, lesbian, transgender/transsexual and bisexual identities in the collective term LGBTI, intersexuality presents unique legal and human rights challenges quite distinct from the other identities.

The Court defined intersex in a negative manner by characterising it as an abnormality. This was unfortunate because such language fuels stigma and shame about individuals' body. Rather, it should be recognised that some people are born with physical traits that do not fit neatly into the biological categories of male or female. Article 3 (d) of the Convention on the Rights of Persons with Disabilities (CRPD), on the general principle of respect for differences and acceptance of persons with disabilities, is instructive in this regard. Intersex conditions should be taken as part of human diversity and humanity, and differences should not be justification for discrimination.

Many people with intersex conditions have been subjected to "corrective surgery" or genital mutilation. The rationale behind these surgeries and related therapies is to manipulate the person's physical traits in order to make them fit into the male/female binary. This type of intervention is usually done at birth, when the person is not capable of consenting. In this petition, the Court did not address the question in depth because it was not in issue. Indeed, surgery may not be a huge concern in Africa because of the cost and unavailability of the technology and skilled personnel on the African continent. The discourse on intersex conditions and corrective surgeries has gained ground in the developed world, however. For instance, in its concluding observations on Germany, the United Nations Committee on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture) expressed concerns about "cases where gonads have been removed and cosmetic surgeries on reproductive organs have been performed that entail lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians."[88]

In his report of 2013, Juan E. Méndez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, called upon states to "repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned."[89]

While corrective surgery was not the gist of the petition, it is noteworthy that the reasoning of the Court was akin to the ideology behind corrective surgery which is to "normalise" the person and make them fit into the male/female binary. The Court suggested that every person is either male or female and therefore every person should be made to fit into either the male or female category. Because of this ideological construct, the Court did not find it a problem that laws did not recognise persons with intersex conditions. Everyone would be made to fit, even if uncomfortably, into a male or female category. Failure to recognise intersex persons is to erase, ignore, and make them invisible. The consequences however are not only physical; they are social and psychological, and include stigmatisation. By denying difference, society signals rejection of persons who do not conform to socially acceptable traits. One is either male, female, or nothing.

Making persons with intersex conditions disappear through ideological construction opens up space for violations of various human rights. For instance, if in sexuality education, students are not made aware of the existence of peers with intersex conditions, and socialised to accept differences, those peers become marked as "other" and objects of ridicule. To curb the risk of exposing persons with intersex conditions to human rights violations, it is necessary for public policy to recognise and accept them. By making them visible, it makes it necessary to protect their rights.

The Court expressed the opinion that "The Kenyan society is predominantly a traditional African society in terms of social, moral and religious values. We have not reached the stage where such values involving matters of sexuality can be rationalised or compromised through science."[90] This text of the judgment feels rather misplaced given that persons with intersex conditions are born with the condition. One explanation might be that the Court's sentiments were directed toward transgender persons rather than persons with intersex conditions. However, it raises suspicion that this had set the tone of the whole judgment, in which the Court did not accept them as worthy of recognition under the law.

The Court grappled with the issue of intersexual conditions and human rights, but by denying recognition of intersex as a category distinct from male or female, the Court failed to protect the rights of intersex persons. The Court could have shed human rights light into the spaces where intersex persons continue to search for affirmation of their humanity and of their rights. That could be a stepping stone for better jurisprudence regarding intersexuality and human rights on the African continent.

GENDER IDENTITY

Republic v. Kenya National Examinations Council & Another
[2014] eKLR, JR Case No. 147 of 2013
Kenya, High Court

COURT HOLDING

According to Rule 9(3) of the Kenya National Examinations Council Rules 2009 (Kenya Certificate of Secondary Education Examinations), the Kenya National Examinations Council (KNEC) may withdraw a certificate for amendment or for any other reason where it considers it necessary. If on being requested to perform its duty, the KNEC fails to do so, the High Court has the jurisdiction to issue orders compelling it to perform its duty.

The KNEC is not required by law to indicate a gender demarcation on all Certificates of Secondary Education, noting that although it is traditional to indicate such demarcation to assist in proper identification of a candidate, such tradition is not backed by law.

Summary of Facts

This was an application before the High Court of Kenya for review of a decision of the Kenya National Examinations Council (KNEC) denying the applicant change of particulars of name on the applicant's Kenya Certificate of Secondary Education (KCSE), and removal of a gender mark on the same document.

The applicant was born with the physical characteristics of a male child, but has always inclined toward female gender. The applicant completed secondary school as a male, but following such time was diagnosed with Gender Identity Disorder (GID) and commenced treatment for gender reassignment to female.

The applicant applied to the KNEC to have his/her secondary school certificate re-issued to remove the gender demarcation and change the name. This request was denied, so the applicant sought a court order compelling the KNEC to re-issue the certificate.

Issues

The issues put before the Court were the following:

1. Whether the change in name on a KCSE is allowed by law; and

2. Whether the law requires the KNEC to indicate a gender mark on the KCSE.

Court's Analysis

The Court's determination hinged on the proper interpretation and application of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009 (Rules), especially Rule 9 which addresses the mandate of the KNEC with regard to what appears on the certificate. In the Court's opinion, the Rules do not require a gender mark to be indicated on the certificate. Further, the Rules allowed KNEC the discretion to withdraw the certificate for amendment or for any other reasons that it considered necessary.

The Court addressed the reason for which the applicant wanted the certificate to be re-issued with a change in the particulars of name, which included Gender Identity Disorder (GID). The Court found that the applicant demonstrated why the applicant should be treated differently to remove the gender demarcation. In so finding, the Court reviewed, in *obiter dicta*, several decisions from the UK, Kenya, India, and Nepal that consider the legal status of transgender and intersex gender categories (*Belinger v. Bellinger* [2003], UKHL 21, *Richard Muasya v. the Attorney General & Others*, Nairobi High Court, Petition No. 705 of 2007, *National Legal Services Authority v. Union of India and Others*, Civil Original Jurisdiction Writ Petition (Civil) No. 400 of 2012; Writ Petition (Civil) No. 604 of 2012 and *Sunil Babu Pant & Others v. Nepal Government*, Writ Petition No. 917 of 2007). The Court recognised the pain, trauma, and agony that persons with GID undergo, and quoted the opinion of the Supreme Court of India (*National Legal Services Authority* case) that "the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."

The Court also recognised that this was an issue about human dignity, and that it ought to apply Article 28 of the Constitution of the Republic of Kenya, 2010, which recognises this right, to the applicant's circumstances. It was its view that "Human dignity can be violated through humiliation, degradation or dehumanization," as was the case with the applicant.

Taking into account the Rules and the reasons for the applicant's requests, the Court held that by refusing the name-change and removal of the gender mark, KNEC had failed to discharge its obligations in accordance with the law. The Court therefore compelled KNEC to comply by re-issuing the applicant a certificate with the name-change and without a gender mark.

Conclusion

The applicant was successful and the Court ordered KNEC to replace the applicant's certificate.

Significance

The Court's review of the legal interpretation of the term "sex," although *obiter dicta*, is instructive. The Court referred to Article 10 of the Constitution of Kenya in identifying human dignity as a guiding principle to be applied in interpreting any law, and to Article 28 of the Constitution of Kenya which provides that such human dignity should be protected. The Court's emphasis on the value of human dignity was ultimately the reason that it used to overcome the respondents'

arguments, based on grounds of bureaucratic complexity, for not recognizing the applicant's special circumstances.

SEXUAL ORIENTATION

Oloka-Onyango and 9 Others v. Attorney General
[2014] UGCC 14, Constitutional Petition No. 8 of 2014
Uganda, Constitutional Court

COURT HOLDING

The Court held that the Anti-Homosexuality Act 2014 (hereinafter "the Act") was invalid because the Parliament lacked a quorum as required by the Uganda Constitution when it voted to pass the Act.

Summary of Facts

When the Act was put to a vote by the Parliament in December 2013, members of Parliament, most notably the Prime Minister, twice asserted that there was not a quorum present, as required under the Uganda Constitution. The Speaker of Parliament, who is responsible for determining whether a quorum exists, did not follow the required procedures for determining whether a quorum was present and put the Act to a vote, whereby the Act was passed by the members of Parliament present.

The Petitioners sued the government, claiming that a quorum did not exist at the time the Act was voted on, and that the enactment of the Act without quorum was in contravention of Articles 2(1) and (2), 88 and 94(1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedure. Further, the substantive provisions of the Act were impugned for violating legal principles and constitutionally guaranteed rights, including as follows:

- By criminalising consensual same-sex/gender sexual activity among adults in private, it contravened the right to equality before the law, freedom from discrimination and the right to privacy;
- By criminalising consensual touching by persons of the same-sex, it created an offence that was overly broad;
- By imposing a maximum life imprisonment sentence, it created disproportionate punishment in contravention of the right to equality, and freedom from cruel, inhuman and degrading punishment;
- By criminalising consensual same-sex/gender activity among adults in which one is living with HIV or has a disability, it contravened the right to freedom from discrimination and the right to dignity; and,

- In classifying houses and rooms as brothels merely on the basis of occupation by homosexuals, it created an offence which was overbroad and contravened the principle of legality, and rights to property and privacy.

Further, the Petitioners claimed that the criminalisation of consensual same-sex/gender sexual activity among adults contravened Uganda's obligations with regard to the rights guaranteed under international human rights instruments, including the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the UN Covenant on Civil and Political Rights, and the UN Covenant on Economic, Social and Cultural Rights.

Issues

When the issues were laid out before the Court, the Court refrained from determining whether the Act violated constitutionally guaranteed fundamental rights or contravened Uganda's obligations with regard to the rights guaranteed under international human rights instruments. Instead, the Court opted to determine the procedural issue regarding any irregularity of the enactment process. Therefore, the issue the Court determined was whether the Act was passed without a quorum, in contravention of Articles 2(1) and (2), 88 and 94(1) of the Constitution of the Republic of Uganda, and Rule 23 of the Parliamentary Rules of Procedure.

Court's Analysis

The Court affirmed the provisions of the Constitution regarding the procedure of enacting laws in the legislative assembly, including Article 79 of the Constitution, which empowered Parliament to make laws, and Article 88, which deals with quorum prescribed by the rules of procedure under Article 94 of the Constitution.

According to Rule 23 of the Parliamentary Rules of Procedure, the Speaker of Parliament is supposed to ascertain whether the members of Parliament form a quorum before calling for a Bill to be voted upon. The petitioners argued that when some members of Parliament raised the issue of quorum, the Speaker had not followed procedure to ascertain the quorum. The respondents did not rebut this, but asked the Petitioners to prove the absence of quorum.

The Court's opinion was that the Petitioners had alleged a fact which the respondents did not deny and it was therefore presumed that they accepted the fact. Therefore, when the Petitioners alleged that when some members of Parliament had raised the issue of quorum, the Speaker failed to follow procedure to ascertain quorum, and this was not denied by the respondents, then the Petitioners had proved their case.

The Court held that therefore the Speaker had acted illegally. Failure to obey the law rendered the whole process a nullity, so the Act was invalid.

Conclusion

The Anti-Homosexually Act, 2014 was enacted when there was no quorum. This was unconstitutional and it rendered the Act null and void.

Significance

Many countries in Africa have maintained laws that criminalise same-sex sexual conduct that date back to colonial times and originated from the colonial masters. In *Banana v. State*, (2000) 4 LRC 621, by a majority of 3 to 2, the Supreme Court of Zimbabwe ruled to maintain anti-sodomy provisions. In *Kanane v. the State* 2003 (2) BLR 67, the Botswana Court of Appeal upheld anti-sodomy provisions. Both the Zimbabwe and Botswana Courts based their decisions on morality and opined that the society was not ready for same-sex sexual conduct to be decriminalised. The Botswana Court, for instance, went on to say that homosexual practices should not be decriminalised because gays and lesbians were not groups protected by the Constitution.

Such decisions, which affirm stigmatisation of non-heterosexual sexuality, can have the effect of exacerbating homophobia, perpetuating discrimination and violence against persons of homosexual orientation. Lesbian, gay, and transgender people are significantly more likely than the general population to be targeted for violence and harassment, to contract HIV, and to be at risk for mental health concerns such as depression and suicide. Further, they may be deterred from seeking health services out of fear of being arrested and prosecuted.[91]

This case was therefore important for advocacy as it brought or would have brought the impugned laws under the scrutiny of human rights. An opportunity was therefore missed when the Court avoided determining the substantive human rights issues. Its decision on this would have created further opportunities to bring the matter before regional or international tribunals or courts, depending on the outcome in the national court. Nevertheless, the judgment obtained before the Uganda Court was a legal victory and is of symbolic importance for the Lesbian, Gay, Bisexual, Transsexual, Intersex (LGBTI) community, especially since the legislation was annulled.

C.O.L. & G.M.N. v. Resident Magistrate Kwale Court & Others
Petition No. 51 of 2015
Kenya, High Court (Constitutional and Judicial Review Division)

COURT HOLDING

The requirement for the accused to provide samples for purposes of proving an offence, as provided under the Sexual Offences Act, did not infringe on the petitioner's rights.

The right not to self-incriminate secured under the right to a fair trial recognised in Article 50 of the Constitution of Kenya does not envisage excluding an accused from providing medical samples for purposes of proving an offence. Rather, it pertains to oral and documentary evidence against oneself.

Summary of Facts

The petitioners were arrested on suspicion of being homosexuals. While under investigation, the petitioners refused to undergo medical examination. Following their being charged before the 1st respondent, the petitioners were, by court order, compelled to undergo medical examinations

including anal examination. The petitioners claimed that forcible medical examination to ascertain their sexual behaviour violated various rights under the Constitution of Kenya including the right not to be treated in a cruel, inhuman or degrading manner (Article 29); the right to privacy (Article 31); the right to non-discrimination (Article 27); and the right to dignity (Article 28). The petitioners also contended that this means of getting evidence, i.e., non-consensual medical examination, contradicted their rights to a fair trial guaranteed under Article 50 of the Constitution.

Issues

The Court isolated the following issues for determination:

1. Whether the medical examination was a violation of the petitioners' rights to privacy; non-discrimination; torture and cruel, inhuman or degrading treatment or punishment; and human dignity and security of the person; and

2. Whether the medical examination violated the right not to be compelled to make any confessions or admissions that would be used in evidence against the accused.

Court's Analysis

The Court considered the implications of Section 26 of the Sexual Offences Act (Cap. 62 A of the Laws of Kenya) which criminalises deliberate transmission of HIV, and Section 36 which provides that a court may direct collection of evidence of a medical, forensic, or scientific nature for the purpose of ascertaining whether an accused committed an offence under the Sexual Offences Act. It also referred to Section 42 of the Sexual Offences Act which stipulates consent requirements on providing samples for evidence, and also the Sexual Offences (Medical Treatment) Regulations 2012 (Regulations), and in particular, Regulation 5 which provides that a court may order collection of a sample from an accused on conditions which the court may specify. When a person declines to provide a sample, the prosecution can apply for a court order under Section 36(1) of the Sexual Offences Act to compel the person to provide a sample.

The Court noted that, on record, the petitioners appeared to have consented to the medical examination, and did not appeal against the decision or order to undergo medical examination. The Court therefore found and held that the petitioners consented to the medical examination.

In the view of the Court, the right to fair trial secured under Article 50 did not mean that an accused should be excluded from medical examination. It referenced *R v. Kithyulu* (2013), in which a Kenyan Court held that the right not to self-incriminate pertains to oral or documentary evidence against oneself but does not extend to taking of medical samples to prove some fact. Therefore, according to the Court, the petitioners could not rely on constitutional rights to exclude themselves from undertaking the medical examinations in accordance with the law. The Court therefore held that the rights of the accused to a fair trial were not infringed by the requirements of the law to provide samples for purposes of evidence.

Conclusion

The petition failed. The medical examination was done in accordance with the law.

Significance

On one hand, the Court's decision was within the confines of the law in that the applicable law provides for compelling homosexuals to anal examination for purposes of proving the offence of sodomy. This is apparent in the reasoning of the court, which in a nutshell is that the law requires subjection to anal examination to prove the offence of sodomy, and therefore there was nothing illegal in compelling the petitioners to endure such a test.

The Court's reasoning is however not entirely sound. Though the Court seemed very certain about its analysis of the rationale for undertaking anal examinations, especially in paragraph 51 of the judgment, it is not at all certain whether indeed anal examination can prove the offence of sodomy. Further, the unanswered question remains as to whether in order to prove the offence, it is necessary to subject persons to humiliating anal examinations.

The main issue however is not the legality or illegality of conducting anal examinations to ascertain sexual behaviour, which might fall one way or the other depending on the national legal framework. A more fundamental question is whether the body of laws that allows such examinations is ethical in accordance with the rights to human dignity and equality, which many constitutions, including Kenya's, extol.

In this Kenyan case, the Court did not attempt to subject the state's action to human rights scrutiny, especially to question whether the state's practice of forcible anal examinations was in accordance with human rights norms. Instead, it took for granted that the state's practice of anal examinations would definitely prove some specific sexual behaviour. At least, the Court could not have been so certain about evidentiary veracity of such anal examinations.

RECOGNITION OF LGBTIQ ADVOCACY AND GROUPS

Eric Gitari v. Non-Governmental Organizations Co-Ordination Board & 4 Others
[2015] eKLR, Petition No. 440 of 2013
Kenya, High Court

COURT HOLDING

The words "every person" in Article 36 of the Constitution include all persons living within the republic of Kenya, regardless of their sexual orientation.

The respondents contravened the provisions of Articles 36 of the constitution in failing to allow gay and lesbian persons living in Kenya to register an association of their choice.

The petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.

Summary of Facts

The petitioner sought to register a nongovernmental organisation ("NGO") with the 1st respondent, the Non-Governmental Organisations Coordination Board ("NGO Board"), a body corporate established under the provisions of the Non-Governmental Organisations Co-Ordination Act, Cap 19 of the Laws of Kenya ("NGO Act"). The NGO aimed to further the equality of lesbian, gay, bisexual, transgender, intersex, and queer ("LGBTIQ") persons in Kenya. The NGO Board refused to accept the names proposed by the petitioner because they all contained the terms "gay" and "lesbian." The NGO Board cited Sections 162, 163, and 165 of the Penal Code which criminalise gay and lesbian liaisons, and Regulation 8(3)(b) of the NGO Regulations of 1992 (the "Regulations") as the basis for rejecting the request. The referenced Regulation provides that the Director of the NGO Board can reject an application if "such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable."

In a letter stating its reasons for refusal, the NGO Board also expressed the opinion that sexual orientation was not listed as a prohibited ground of discrimination in Article 27(4) of the Constitution of Kenya, 2010 (the "Constitution"); nor was same-sex marriage permitted in the Constitution whilst heterosexual relationships are expressly protected in Article 45(2).

Issues

The central issue in this case is whether persons who belong to LGBTIQ groups have the right to freedom of association, non-discrimination, and equality before the law. In particular:

1. Whether such persons have a right to form associations in accordance with the law; and
2. If the answer is in the affirmative, whether the decision of the Board not to allow the registration of the proposed NGO because of the choice of name was a violation of the rights of the petitioner under Articles 36 and 27 of the Constitution.

Court's Analysis

The Court affirmed that Article 36 of the Constitution grants "every person" the right to freedom of association, and that any limitation to the right ought to be reasonable and justifiable under the law. "Person" is defined under Article 260 of the Constitution to include a company, association, or other body of persons whether incorporated or unincorporated. The Court therefore found that Article 36 does not exclude homosexuals.

The Court also referenced Article 20 of the Universal Declaration of Human Rights (UDHR), Article 22 of the International Covenant on Civil and Political Rights (ICCPR), and Article 10 of the African Charter on Human and Peoples' Rights (ACHPR), which recognise the right to freedom of association and noted that they were inclusive of all natural persons and did not exclude any person.

The Court recognised the right to freedom of association as an important and powerful right, and is also critical to the enjoyment of other rights. The importance of this right has been recognised by other tribunals which the Court referenced including the African Court of Human and Peoples' Rights in *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000), the African Commission on Human

and Peoples' Rights in *Civil Liberties Organisation v. Nigeria*, Communication No 101/93, and the Ugandan Court of Appeal in *Kivumbi v. Attorney-General* [2008] 1 EA 174.

The Court found that the basis of the decision by the NGO Board, which was that the group held unpopular views which were unacceptable to others outside the group, contradicted the rights advanced by the Constitution. The Court rejected the NGO Board's judgmental attitude, and referenced the Privy Council's decision in *Patrick Reyes v. The Queen,* Privy Council Appeal No. 64 of 2001, which held that a tribunal or decision-making body should not read its "own predilections and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue ..." The Court also cited the South African case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 to agree with its holding that even if the Constitution allowed persons to hold and articulate their views and beliefs against homosexual conduct, it did not allow the state to then turn these beliefs into dogma imposed on the whole of the society.

In the Court's opinion, the aims and objectives of the proposed NGO, which were to advance human rights issues relevant to the gay and lesbian communities living in Kenya, were not illegal. The Court therefore held that the decision of the Board not to accept the name of the NGO infringed on the right to freedom of association secured under Article 36 of the Constitution.

The Court noted that the NGO Board justified the limitation of the right under Article 36 of the Constitution based on the Penal Code's criminalisation of sexual conduct "against the order of nature," and also acts of "gross indecency between males." However, the Court rejected this view. In the Court's view, the Penal Code does not criminalise the state of being a homosexual or homosexuality. Further, the Penal Code does not criminalise the right of association of people based on their sexual orientation.

The Court rejected the NGO Board's argument that sexual orientation was not a listed ground for prohibition of discrimination under Article 27(4) of the Constitution. The Court found this argument flawed because the absence of sexual orientation did not then mean that the state was free to discriminate on this basis. Second, the burden was on the NGO Board to prove by citing relevant law that the limitation was allowed under that law. The Court found that the NGO Board had failed to discharge this burden. The Court therefore found that the acts of the Board in rejecting the petitioner's name for the proposed NGO, and by implication its refusal to register the proposed NGO, was a limitation of the petitioner's right to freedom of association under Article 36 of the Constitution. Further, the Board failed to justify the limitation in accordance with the requirements under Article 24 of Constitution.

The Court then inquired whether the NGO Board's decision infringed on Article 27 of the Constitution which prohibited discrimination. In the Court's opinion, while Article 27(4) does not explicitly state that sexual orientation is a prohibited ground of discrimination, it prohibits discrimination both directly and indirectly against any person on any ground. Further, the listed grounds are not exhaustive; the language used when stipulating the grounds is "including" which according to 259(4)(b) of the Constitution means "includes, but is not limited to." Furthermore, when the Court considered the Constitution holistically, it concluded that the Constitution was committed to promoting the values of human dignity, equality, and freedom. In the Court's view, to allow discrimination on the basis of sexual orientation was to contradict these constitutional values. The Court therefore held that the NGO Board's decision also contravened Article 27 of the Constitution.

Conclusion

The petition succeeded. The Court issued orders including an order of *mandamus* directing the Board to strictly comply with its constitutional duty under Articles 27 and 36 of the Constitution and the relevant provisions of the Non-Governmental Organizations Co-ordination Act.

Significance

This is one of the cases of "recognition of LGBTIQ organisations" that have appeared in Kenya and Botswana, and may reflect naming compromises being made by LGBT advocacy organizations in other African countries. Perhaps the significance of this case could be discerned from this dictum of the Court:

> There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation [under a very different name] but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups. (para. 149)

Political recognition as citizens of a particular identity is the heart of the issue for both the NGO and the NGO Board. It is interesting that in both the Kenya and the Botswana cases, the contention of the government representatives was that LGBTIQ persons are somehow not citizens and that their Constitutions should not recognise LGBTIQ people as persons. In some countries, LGBTIQ organisations have been registered under non-controversial names, and governments have tolerated their carrying out of their objectives to advance rights of LGBTIQ persons. Indeed, "what's in a name?" Perhaps the petitioners in this case and the Botswana LEGABIBO cases would respond, "Everything." This could be an area of reflection for advocacy organisations: the significance of seeking such recognition rather than accepting a compromise.

Thuto Rammoge & 19 Others v. The Attorney General of Botswana
[2014] MAHGB-000175-13
Botswana, High Court

COURT HOLDING

The refusal of the government to recognise and register an organization founded to lobby for equal rights and decriminalisation of same-sex relationships violated constitutional rights to equal protection before the law, and freedom of expression, association and assembly, guaranteed under Sections 3, 12, and 13 of the Constitution, and was therefore unjustifiable under the Constitution.

Summary of Facts

The Applicants, belonging to an organisation called Lesbians, Gays and Bi-sexuals of Botswana ("LEGABIBO"), filed this application to challenge the decision of the Minister of Labour and Home Affairs ("Minister") who rejected the Applicants' registration of their organisation, LEGABIBO. The

Applicants first brought the application for registration before the Director of the Department of Civic and National Registration ("Director"), who rejected the application on two grounds: first, that Botswana's Constitution ("Constitution") did not recognise homosexuals, and second that it would violate Section 7(2)(a) of the Societies Act ("Act"). Section 7(2)(a) of the Act says that:

> The Registrar shall refuse to register and shall not exempt from registration a local society where . . . it appears to him that any of the objects of the Society is, or is likely to be used for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare or good order in Botswana.

The Applicants appealed the decision to the Minister, who upheld the decision of the Director. The Applicants based their application to the High Court on several grounds including that it infringed on their constitutional rights to equal protection before the law, freedom of expression, and freedom of assembly and association.

Issues

The issues for the Court to determine were as follows:

1. Whether in light of the objectives of LEGABIBO, the decision of the Minister rejecting registration of LEGABIBO on the grounds that its objectives were unlawful or its purposes incompatible with peace, welfare, and good order was justifiable under section 7(2)(a) of the Act; and

2. Whether the other ground for refusal for registration, which was stated as the assertion that the Constitution does not recognise homosexuals, could be sustained.

Court's Analysis

The Court first dealt with the procedural issue of whether this was a judicial review or an application under Section 18 of the Constitution. Judicial review is a common law remedy which gives the courts the power to review the lawfulness of a decision or action of a public authority. Section 18 of the Constitution allows any person who alleges that constitutional rights have been infringed to make an application before the High Court without prejudice to any other action with respect to the same matter which is lawfully available. The Court decided to determine the matter under both mechanisms, i.e. judicial review and enforcement of constitutional rights.

The Court considered laws under which the Minister based his decision. First, the Director purported to base his refusal to register LEGABIBO, pursuant to Section 7(2)(a) of the Act, on the grounds that it appeared to him that the objectives of LEGABIBO were likely to be for an unlawful purpose, or any purpose prejudicial to, or incompatible with, peace, welfare, or good order in Botswana. Second, the Director based his decision on the assertion that the Constitution does not recognise homosexuals.

The Court examined the objectives of LEGABIBO to determine whether they were indeed designed to achieve an unlawful purpose. The Court held that none of the objectives appeared to have such a design. For avoidance of doubt, the Court highlighted the objective which, it opined, influenced most the decision of the Director and this was: to carry out political lobbying for equal rights and

decriminalisation of same-sex relationships. The Court ruled that there was nothing inherently unlawful in lobbying or advocating for legislative reform to decriminalise same-sex sexual conduct, and neither was this incompatible with peace, welfare, and good order.

The Court then examined the second ground for refusal to register LEGABIBO, which was that homosexuals were not recognised under the Constitution. First, it noted that nowhere in the Constitution was it expressly stated that homosexuals or heterosexuals were not recognised. It further noted that homosexuality is to do with being sexually attracted toward same-sex persons and that this had nothing to do with the Constitution. The Court then stated that one's sexual orientation does not in itself constitute a crime, so that no one is a criminal for being gay. The Court faulted the decision of the Minister as it was made on the assumption that the objectives of LEGABIBO were to engage in homosexual relationships which was not what any of the objectives stated. The Court therefore held that the decision of the Minister to deny registration of LEGABIBO was unreasonable in law and would be reviewed.

The Court proceeded to review the issue under Section 18 of the Constitution. It first examined if the decision was contrary to Section 3 of the Constitution, which guarantees every person in Botswana fundamental rights without discrimination regarding race, place of origin, political opinion, colour, creed, or sex. The Court reminded itself that the Constitution is the supreme law of the land and that any administrative decision ought to be subject to the Constitution. Further, it referred to the case of *Att. Gen. v. Moagi* 1982 (2) BLR 124 and *Att. Gen. v. Dow* 1997 BLR 119 to emphasise that the language of the Constitution should be construed broadly and not be unduly restricted. Since Section 3 applies to every person, the Court stated that this applied to all persons equally, including homosexual and bi-sexual persons.

The Court also said that lobbying and advocacy are protected by the right to freedom of expression and freedom of association. Denying homosexual or bi-sexual persons the right to register to carry out advocacy and lobbying, the purposes of which are not intrinsically unlawful, was contrary to Section 3, which guarantees everyone the right to freedom of expression, assembly and association, and also infringed Sections 12 and 13 of the Constitution.

The Court then considered the argument of the respondents. The first was that the judicial review proceedings were instituted irregularly and ought to have been struck out. The Court agreed with the respondents about the irregularity. However, the Court ruled that it would proceed to hear the merits of the case despite the irregularity because this concerned allegations of infringement of constitutional rights, which the Court felt obligated to attend to in spite of the procedural irregularity. Further, the Court had recourse to Order 5 Rule 2(1) of the Rules of the High Court, which allowed it to continue to hear the merits of the case notwithstanding irregularity of procedure.

The second argument of the respondents was that homosexual persons were inclined to commit unnatural offences and indecent practices between persons, contrary to Sections 164 and 167 of the Penal Code respectively. The Court ruled that this argument could not be sustained as it presupposed that people should be punished for what they were capable of doing and not what they have actually done. Further, this was contrary to the principle that one is innocent unless proven guilty.

In their final argument, the respondents relied on *Kanane v. The State*, 2003 2 BLR 67, where the Court of Appeal was asked to declare Sections 164 and 167 of the Penal Code, which criminalise consensual homosexual sexual conduct, unconstitutional for contravening rights guaranteed under Section 3 of the Constitution. The Court of Appeal had rejected the petition. In the instant case, the respondents argued by analogy that the Director's decision to reject LEGABIBO's application for registration was therefore lawful. The Court rejected this reasoning and noted that the issues were dissimilar. It noted that the respondents' argument was based on conflating homosexual orientation and homosexual sexual conduct. It reiterated what it had stated earlier in its ruling, that being homosexual and engaging in advocacy and lobbying to make homosexual conduct legal was not in itself unlawful. It therefore upheld its ruling that the Director's decision was unconstitutional for infringing on the constitutional rights of the Applicants.

Conclusion

The decision of the Minister was set aside, and the Court declared that the Applicants were entitled to register LEGABIBO as a Society.

Significance

Gays and lesbians in Africa continue to face discrimination and violence for their non-heterosexual sexual orientation. For instance, students have been suspended from schools merely on the suspicion that they are homosexual. The respondents' arguments in this case reflect how societies tend to conflate homosexual orientation with homosexual sexual conduct. Erasing this distinction has the effect that was clearly illustrated in the instant case; persons are condemned for being who they are, for being homosexual. This is an important distinction because persons who identify as homosexual have been discriminated against for this reason, including being denied employment when sexual orientation has nothing to do with their capacity to undertake that particular employment. Registration of a society was rejected not because there was anything wrong with the objectives, but merely because the persons who wanted to form the society were of homosexual orientation.

This case also shows the powerful influence of the so-called "anti-sodomy" provisions that proscribe consensual same-sex sexual conduct. In referring to the *Kanane* decision to argue that registration of the society should fail because the Court of Appeal in *Kanane* upheld the constitutionality of anti-sodomy provisions, the respondents actually demonstrated the logical conclusion of maintaining such laws in criminal codes. The respondents were implying that if homosexual conduct was lawfully proscribed, then it logically followed that every homosexual be treated with suspicion, lawfully. Much as the Court had faulted the reasoning that homosexuals were condemned before proven guilty, the continued presence of such legislation operates to sustain prejudice against persons of homosexual orientation. The Court appeared intent on dealing with the substance of the case, sidestepping a procedural irregularity that could have been a barrier to addressing the substantive issues in the judicial review. For instance, in *Oloka-Onyango and Nine others v. Attorney General*, Petition no. 08 of 2014, the Constitutional Court of Uganda had avoided delving into the allegations of human rights violations and preferred to constrain itself to the procedural question. In contrast, the Botswana Court was not dissuaded by claims of procedural irregularity when the matter raised allegations of human rights violations.

This was also an important decision for Botswana, considering that a previous decision of the Court of Appeal, in *Kanane*, had failed to apply human rights principles to the question of consensual same-sex conduct. Rather, the Court of Appeal had decided to side with popular anti-homosexuality sentiments. The *Rammoge* decision is progressive because it subjected discriminatory administrative action to human rights scrutiny, and in the process addressed the prejudicial thinking against homosexual persons. It went a long way toward affirming persons with same-sex orientation as subjects of law and human rights, on equal terms to everyone else.

Furthermore, apart from just allowing that LEGABIBO to be registered, the Court affirmed the lawfulness of advocating and lobbying to decriminalise sodomy laws. Arguably, the *Kanane* decision must have had a chilling effect on advocacy when it pronounced that society was not ready to reform anti-sodomy laws. In contrast, the *Rammoge* decision is a positive development in the struggle to reform laws that criminalise same-sex relationships and discriminate against persons with a same-sex orientation.

Finally, it is noteworthy that the Court confined itself to national laws and did not refer to any international human rights instrument or comparative jurisprudence. In a way, it is rare that the Court could rely only on its national laws to arrive at the decision it did.

Attorney General of Botswana v. Thuto Rammoge & 19 Others
[2016] CACGB-128-14
Botswana, Court of Appeal

COURT HOLDING

The refusal of the Minister to allow the registration of LGBTI organisation LEGABIBO was unconstitutional as it infringed on the respondents' right to freedom of assembly and association.

The refusal of the Minister to register LEGABIBO was illegal as it had no basis in law.

Summary of Facts

The 20 respondents had initiated proceedings in the High Court of Botswana (*Thuto Rammoge & 19 Others v. The Attorney General of Botswana* [2014] MAHGB-000175-13) against the Minister of Labour and Home Affairs (the "Minister") who upheld the decision of the Director of the Department of Civil and National Registration (the "Director") to refuse the registration, as a society, of the Lesbians, Gays, and Bisexuals of Botswana ("LEGABIBO") under the Societies Act, Cap 18: 01 (the "Act"). The High Court overturned the decision of the Minister and ordered that LEGABIBO be registered. The decision, *Thuto Rammoge & 19 Others v. The Attorney General of Botswana*, is summarised above. The Attorney General of Botswana raised several grounds of appeal including procedural and substantive grounds. Only the substantive grounds are recounted here. These were:

- The lower court erred in failing to have found that the objectives of LEGABIBO were unlawful in terms of Section 7(2)(a) of the Act as being contrary to good order, and also

under Section 7(2)(e) of the Act as potentially promoting acts criminalised by Sections 164 and 167 of the Penal Code of Botswana (the "Penal Code");

- The lower court erred in holding that homosexual persons were included in the definition of the word "person" in section 3 of the fundamental rights in the Constitution of the Republic of Botswana (the "Constitution"), and were thus entitled to enjoy such fundamental rights;
- Even if the lower court had found that the respondents were entitled to such fundamental rights, the lower court had erred in finding that the Minister's decision was not a justifiable limitation on those rights; and
- The lower court erred when it distinguished the decision in *Kanane v. The State* 2003 (2) BLR 67 (CA) (*Kanane*) when it should have been bound by it.

Issue

Whether the decision to refuse registration of LEGABIBO was unconstitutional, as it unjustifiably infringed on the right to freedom of association and assembly protected under Section 13 of the Constitution.

Court's Analysis

The Court restated the law on review of administrative action and affirmed that administrative action may be reviewed on the grounds of illegality, irrationality, and procedural impropriety. It further stated that the ground of illegality encompassed the doctrine of *ultra vires* (exceeding powers granted by the law) and the principle of unconstitutionality. If an administrative decision was shown to be unconstitutional, it would also be unlawful against the legislation that granted the administrative powers to the decision-making authority.

The Court reviewed the relevant sections of the Act, and amongst others referenced Section 6(2)(a), which obligates the registering authority (the "Registrar") to register a local society applying for registration unless there were valid reasons not to do so. The Act places the onus on the Registrar (or the Minister) to justify reasons for refusal. According to Section 7(2)(a) of the Act, the Registrar could refuse registration of a local society where the objects of the society were or were likely to be used for any unlawful purpose. Section 7(2)(e) empowers the Registrar to refuse registration if the constitution, rules or regulations, or bye-laws of the society were repugnant to or inconsistent with any written law.

The Court observed that the Minister refused registration in terms of Section 7(2)(a) but did not state the reasons. The Court however noted that the letter of rejection contained the following statement:

> Heterosexual activity between consenting adults is not an offence in this country but subjects of your appeal will commit an offence even if their sexual act involves consenting adults.

Apart from noting that this reasoning was flawed, the Court addressed the Registrar's anxiety by reminding him that the Act provided for cancellation of registration of a society if it were found to be pursuing unlawful objectives subsequent to its registration.

Turning to the respondent's claim that constitutional rights were infringed, the Court preferred to focus on Section 13 which recognises and secures freedom of assembly and association, which the respondents claimed was infringed upon by the administrative action of the Minister when he refused registration of LEGABIBO. Section 13(2) provides for lawful limitation to the right to assembly and association which should be provided under relevant law. The Court noted that Section 7 of the Act did not include public morality as a ground for refusing registration, and was of the opinion that public morality alone would not be a valid exercise of discretion.

While the Court recognised that failure of registration infringed upon other interrelated rights, such as freedom of expression, the right to non-discrimination and equality, it decided to base its decision on whether the Minister's decision was reviewable on the grounds of irrationality or illegality contrary to Section 13 of the Constitution.

The Court then addressed the Attorney General's contention that the lower court should have been bound by the decision in *Kanane*. After reviewing the *Kanane* case, the Court observed that attitudes toward gay and lesbian rights were softening. It noted that Parliament itself had amended the Employment Act, Cap 47:07, to prohibit termination of an employee's contract on the grounds of sexual orientation; national policies acknowledged and addressed issues amongst the gay and lesbian population; and organisations have been registered in Botswana that openly campaign for gay and lesbian rights. The Court further noted that despite strong dissenting views about gay and lesbian rights, prominent politicians had begun speaking out in support of gay and lesbian rights.

The Court found the Appellant's reliance on *Kanane* to support its position that the Constitution did not recognise homosexuals to be ill-conceived because there was no mention of homosexuals or heterosexuals in the Constitution. The Court did not find any legislation in Botswana that prohibited anyone from being lesbian, gay, or bisexual. The Court referenced the definition of sexual orientation in the Preamble to the Yogyakarta Principles[92] and accepted the position that sexual orientation could not be learnt or imposed, and that it was a natural attribute of every human being.

The Court refused to accept the reasoning that the *Kanane* case had purported to exclude homosexuals from Section 3 of the Constitution, so the wording "every person in Botswana" in the constitutional provision included everyone and excluded no one.

The Court also noted that fundamental rights and freedoms are accorded specifically to individuals and not groups or classes. The Court therefore found that the Minister was irrational in holding that the Constitution did not recognise homosexuals, and in using that argument as the basis to refuse registration of LEGABIBO.

The Court also found the argument that a homosexual person does not enjoy fundamental rights to be totally unacceptable and irrational. It affirmed the position that fundamental rights are enjoyed by all persons, and that to deny any person their fundamental rights emasculated their dignity, the protection of which is the core objective of Chapter 3 of the Constitution.

The Court affirmed that members of the gay, lesbian, and transgender community form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.

The Court then addressed the second reason the Minister gave for refusing registration which was that the objects of LEGABIBO run counter to the provisions of Section 7(2)(a) of the Act. The Court noted that the Minister gave no reason for this conclusion save the reference to criminalisation of same-sex sexual conduct under Sections 164 and 167 of the Penal Code. The Court further noted that the Minister was under the belief that the objectives of LEGABIBO included to promote unlawful acts. The Court, like the lower court, found nothing unlawful about the objectives of LEGABIBO. It found that the Minister's suspicion that offences may be committed lacked evidence and were unfounded.

The Court then addressed the question of whether the High Court erred in finding that the Minister's decision was illegal or unlawful and contrary to Section 13 of the Constitution. The Court affirmed that Section 13 of the Constitution protects the right of every person to freely assemble and associate. The Court also referenced Article 10 of the African Charter on Human and Peoples' Rights, Article 20 of the Universal Declaration of Human Rights, and Articles 21 and 22 of the International Covenant on Civil and Political Rights to buttress the rights under Section 13 of the Constitution. The Court found that the Minister's decision interfered in the most fundamental way with the respondents' right to form an association and to protect and promote their interests. His decision would therefore be unlawful in terms of Section 7 of the Act unless it was justifiable as a limitation under Section 13 of the Constitution. The Court also reminded the Minister that the onus was on him to justify the limitation of the rights of the respondents under Section 13 of the Constitution.

The Court reiterated its finding that the Minister refused registration based on suspicion that LEGABIBO would promote unlawful objectives. There was no evidence for this conclusion. As far as the Court was concerned, the Minister did not proffer any legitimate grounds in law for the limitation of the rights under Section 13 to refuse registration of LEGABIBO. It therefore held that the refusal of the Minister to allow the registration of LEGABIBO was unconstitutional, and would therefore be reviewed and set aside on that ground as well as the ground of illegality.

The Court however differed from the lower court in that it did not think it proper to make constitutional declarations. It therefore restricted itself to orders setting aside the Minister's decision and facilitating the registration of LEGABIBO.

Conclusion

The appeal was denied and dismissed. The order of the High Court was replaced by an order setting aside the decision of the Minister. The Court also ordered the Registrar to take the necessary steps to register LEGABIBO in terms of the Act.

Significance

In the Court's words:

> Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.

This is a very progressive statement coming from a tribunal in a region where homophobic attitudes are very prevalent. Gays and lesbians are discriminated against because of their sexual orientation. Indeed, the outrageous reasoning by counsel for the Appellants that homosexuals are not human beings worthy of respect of their fundamental rights and dignity is unfortunately common amongst societies in the African region. People are condemned for being homosexual when, as the Court recognised, homosexuality is not learned or imposed, but a natural attribute of being human.

This decision builds on the growing jurisprudence around LGBTI persons in the region. The Court referenced Kenyan decisions in similar circumstances when organisations were refused registration due to discrimination on the grounds of sexual orientation or gender. The Kenyan courts had also affirmed the human rights of LGBTI persons. It is indeed important for tribunals to protect and promote human rights especially of victimised groups such as LGBTI persons. This decision is to be savoured because it forcefully rejects irrational homophobic attitudes and affirms that everyone, including LGBTI persons, is worthy of human dignity, and their fundamental rights ought to be respected.

The People v. Paul Kasonkomona
[2015] HPA/53/2014
Zambia, High Court

COURT HOLDING

The respondent's actions of publicly advocating for homosexual rights did not infringe Section 178(g) (*Nuisances and Offences Against Health and Convenience - Idle and disorderly persons)* of the Penal Code Act. Rather, the accused's actions fell within his right to exercise his freedom of expression.

Summary of Facts

This case concerns an appeal to the Zambian High Court by the Appellant against the acquittal of the respondent by the Magistrate's Court. The respondent, a human rights activist, was invited to engage in a discussion on homosexual rights in Zambia in a television programme, "The Assignment," aired by Muvi Television Studios. The respondent was accused of "soliciting for immoral purposes," arrested, and subsequently charged with the offence of idle and disorderly conduct under Section 178(g) of the Penal Code, Cap. 87 of the Laws of Zambia.

The Magistrate's Court considered the three legal elements for an offence under Section 178(g) of the Penal Code and the evidence submitted by the Prosecution. The three elements were (1) definitions in regards to "soliciting," (2) "public space," and (3) "immoral purposes." The Magistrate's Court acquitted the respondent on the grounds that the Prosecution had failed to prove the offence.

The government appealed the Magistrate Court's decision on the following two grounds: (1) the trial magistrate erred in law and fact by limiting the term "soliciting" to a conduct that is persistence only, and (2) the trial magistrate erred in law by acquitting the accused when there was sufficient evidence to put him on defence, in accordance with Section 206 of the Criminal Procedure Code.

Issue

The issue before the High Court was whether the respondent's action of publicly discussing homosexual rights in Zambia, constituted "soliciting in a public place for immoral purposes," an offence under Section 178(g) of the Penal Code.

Court's Analysis

The Court dismissed the Appellant's two main grounds of appeal. The Court agreed with the trial magistrate that the respondent's conduct of participating in a debate advocating gay rights did not amount to soliciting for immoral purposes.

The Appellant argued that "immoral purposes" refers to some kind of sexual activity; hence the respondent's claims were immoral to the extent that sexual intercourse with a person of the same sex is prohibited under the Penal Code. This argument had been rejected by the Magistrate's Court on the basis that discussion of homosexuality and the safeguarding of the rights of those who practice it, are different issues.

In rejecting the appeal, the Court accepted the reasoning of the trial magistrate. The Court ruled that acts covered under Section 178(g) must be in a public place and involve solicitation i.e., to proposition, ask, entreat or entice someone to commit an immoral act or engage in immoral conduct. The Court accepted that the respondent did not entice or entreat anyone to engage in immoral conduct. The Court also agreed that the respondent's right to freedom of expression could not be limited in this instance.

Conclusion

The Court found no merit in the appeal brought against the respondent and dismissed it accordingly. The Court agreed that the respondent was exercising his right to freedom of expression.

Significance

Since the concept of sexual rights was popularised at the International Conference on Population and Development (ICPD), there has been increased advocacy to apply human rights norms to sexual orientation which has, in turn, attracted a great deal of resistance. Vague and overbroad vagrancy laws have frequently been used to discipline persons who are considered undesirable, such as sex workers and sexual minorities. In this instance, the government of Zambia had deployed criminal law to discipline an activist discussing homosexual rights because the government and its agents did not like the subject of homosexuality being openly discussed in public. However, before the Magistrate's Court, the case for the government had collapsed on the technical grounds that the alleged offence could not be proved.

During the trial, the respondent applied for constitutional review of the provisions under which he was charged (Section 178(g) of the Penal Code), for being vague and overbroad, and for potentially infringing on the right to freedom of expression secured under Article 20 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia (Zambian Constitution). The High Court ruled that it did not recognise any link between the Penal Code provision complained of and freedom of expression

recognised in Article 20 of the Zambian Constitution. This reflects the persistent tension between vagrancy laws and human rights norms that courts, in a number of cases, have been tasked to address (e.g., the *Nyambura* case in Kenya).

The High Court did agree with the Magistrate's Court that the government's case could not hold. The High Court, which had previously ruled that there was no connection between Article 20 of the Zambian Constitution and Section 178(g) of the Penal Code, did not discuss the issue of human rights much further than just agreeing with the Magistrate's Court that the respondent had the right to freedom of expression, which the state had not proved should be limited.

Republic v. Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 Others
[2014] eKLR, JR Miscellaneous Application No. 308a of 2013
Kenya, High Court

COURT HOLDING

The reasons advanced by the Non-Governmental Organisations Coordination Board for not registering the applicants' NGO, which focused on transgender issues, had no basis in law and were unreasonable.

Summary of Facts

In this application, the applicants belonging to an association known as Transgender Education and Advocacy sought a court order compelling the Non-Governmental Organisations Coordination Board (NGO-CB) to register it as a non-governmental organisation (NGO), in accordance with the Non-Governmental Coordination Act, Cap 134, Laws of Kenya (the NGC Act).

The applicants believed they had satisfied all the requirements for the application to register as an NGO, in accordance with the NGC Act, and that the NGO-CB failed to register it. The applicants argued that the NGO-CB failed to discharge its statutory obligations in accordance with the NGC Act. They claimed that this was unfair to the applicants and contravened the rules of natural justice.

The gist of first respondent's argument was that it postponed registration of the applicants' NGO because there was a court matter pending regarding change of name and gender of one of the applicants. Its view was therefore to wait until the issue was resolved.

The NGO-CB also denied it had refused to register the organisation, because according to the NGC Act and the regulations under it, refusal to register must be clearly stated, including reasons for the refusal. It this case, the NGO-CB claimed that it had not refused to register the applicants' NGO.

The applicants submitted that the reasons advanced by the respondents for failing to register the organisation had no basis in the NGC Act and were therefore not valid grounds in law. They contended that the Court should therefore issue an order compelling the NGO-CB to register their NGO.

Issues

The issue before the Court was whether the NGO-CB had exercised its discretion in accordance with the law when it failed to register the applicants' NGO.

Court's Analysis

Making reference to a decision of the Kenyan Court of Appeal in *Kenya National Examinations Council v. Republic Ex parte Geoffrey Gathenji Njoroge* (Civil Appeal No. 266 of 1996), the Court reminded itself of the remedy of *mandamus* that the applicants sought. The Court affirmed that an order of *mandamus* is issued against a public body to compel it to perform a duty imposed on it by statute, where the person or body on whom the duty is imposed fails or refuses to perform the duty.

It also referenced Article 47(1) of the Constitution of Kenya, 2010, which provides for the right of every person to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, and Article 47(2) which provides for the right of any person to be given reasons in writing where a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action.

The Court reminded the NGO-CB that it could exercise its discretion only in accordance with the law that set out its mandate. The Court referred to Section 10(3) of the NGC Act which sets the application requirements for registration of an NGO. The Court made reference to a decision of the Kenyan High Court in *Keroche Industries Limited v. Kenya Revenue Authority and Five Others* (HCMA No. 743 of 2006) that expressed the view that the discretion of a public body in exercise of its duty is not unfettered. Rather, a public body ought to act reasonably, in good faith, and upon lawful and relevant grounds of public interest.

The Court affirmed its duty to intervene, even when a public body has exercised its discretion, including; (1) when there is an abuse of discretion; (2) when the decision-maker exercises discretion for an improper purpose; (3) when the decision-maker is in breach of the duty to act fairly; (4) when the decision-maker has failed to exercise statutory discretion reasonably; (5) when the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) when the decision-maker fetters the discretion given; (7) when the decision-maker fails to exercise discretion; or (8) when the decision-maker is irrational and unreasonable.

The Court agreed with the applicants that the grounds on which the respondent NGO-CB purported to have exercised its discretion were not provided for in the law. Further, the Court expressed the view that the reasons for failing to register Transgender Education and Advocacy amounted to discrimination against the applicants because it denied them freedom of association on the basis of gender or sex, and was therefore clearly unconstitutional as it contravened Article 27(4) of the Constitution.

The Court therefore held that the reasons advanced by NGO-CB for not registering Transgender Education and Advocacy had no legal basis and were unreasonable.

Conclusion

The Court granted the order compelling NGO-CB to act in accordance with the NGC Act and register the applicants' NGO.

Significance

One way in which public authorities have been trying to limit advancement of LGBTI rights is by frustrating registration of organisations that aim at promoting rights of LGBTI persons. This case is similar to *Thuto Rammoge and Others v. The Attorney General of Botswana*, MAHGB-000175-13 (High Court of Botswana), wherein the public authority in Botswana refused to register an association that aimed to work toward the decriminalisation of same-sex relationships. This attitude of public authorities not only infringes on the freedom of assembly of individuals, but reflects a culture that opposes LGBTI rights.

It is encouraging, however, that the decision of the Kenyan Court, just like the Botswana Court, upheld and defended the rights of people to form associations for advancing LGBTI rights. The Kenyan Court recognised that when the public authority said it could not proceed because of the gender identity of one of the applicants, it demonstrated that its decision or lack of decision was motivated by a discriminatory attitude against persons on the basis of gender and sex. This was an important aspect of the decision because it affirmed the rights of transgender persons. The Court held that this was unconstitutional discrimination, therefore indicating that the rights of transgender persons are protected under the Constitution.

HIGHLIGHT

TOWARDS RESPECT FOR HUMAN DIVERSITY

Human rights are built on two fundamental values: human dignity and equality of all human beings. The worth of human beings is not determined by any other person, but by the very fact of being human. Human beings are also diverse in nature: in sexual orientation, gender identity, and expression. Human rights should therefore apply to all humans, irrespective of their sexual orientation, gender identity, or expression. However, this is a claim that has yet to be realised for many people who continue to be discriminated against because they do not conform to rigid categorizations of sexuality and gender.

Governments are supposed to protect human rights. Many governments have adopted constitutions that recognise human dignity and equality. Yet in *The Attorney General of Botswana v. Thuto Rammoge and 19 Others*, the Attorney General of Botswana tried to argue that the Constitution of Botswana did not apply to persons of non-heterosexual orientation. This reflects a pervasive attitude in governments driven by politicians who do not believe in the human dignity and equality stipulated by their own constitutions.

Persons of non-heterosexual orientation, or whose gender identity and expression does not conform to some traditional gender notions, continue to face government-sponsored hate and victimization. Sometimes this has been indirect, for instance through a refusal to recognise the rights to association and expression such as in the *Rammoge* cases in Botswana, the *Gitari* case and *Ex-parte Transgender Education and Advocacy* case in Kenya, and the *Kasonkomona* case in Zambia. Apart from criminalizing sexual conduct, governments deploy other laws to prevent LGBTI persons from enjoying their right to association and expression. In the *Kasonkomona* case, the government used vagrancy laws to try and deny persons the right to talk freely about LGBTI rights.

In all the above mentioned cases, the courts applied human rights norms to the issues raised before them and vindicated the claims that LGBTI persons are deserving of human rights because they are in the first place, human beings. However, the case of *C.O.L. & G.M.N.,* where the Kenyan Court upheld the constitutionality of the law compelling anal examinations in order to prove homosexual behaviour, indicates that there is a great deal that has to be done to secure enjoyment of rights of all persons including decriminalization of sexual conduct involving non-heterosexual intimacy, and also recognition of gender diversity.[93] The victories in these cases are significant as they are beacons of light in the midst of pervasive discrimination against LGBTI persons. The positive judgments refresh the obligations of governments to be faithful to their own constitutions to respect the fundamental values of human dignity and equality of all persons, regardless of sexual orientation, gender identity and expression. This negative judgement, though, calls for vigilance to realise human rights for everyone.

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.

VIII. FRANCOPHONE AFRICA

For the first time, with this edition, the *Legal Grounds* series of publications includes some Francophone court decisions dealing with sexual and reproductive rights. This addition reflects the legal pluralism that characterises the African continent.

Indeed, because of its colonial heritage, Africa knows different legal systems that can be schematically classified into two broad categories of legal traditions. The English-speaking countries generally follow the Common law tradition, while the French-speaking countries, and, by extension, the Portuguese-speaking countries, follow the Romano-Germanic tradition, also known as the civil law tradition. The main difference between the two systems is that in the common law tradition, precedents – published court decisions – are the primary sources of law that guide judges in decision-making, while in the civil law tradition, judges rely primarily on codified statutes.

The inclusion of Francophone decisions greatly enriches this publication, although it does generate some challenges. Indeed, one of these challenges resulted from the difficulty in accessing copies of the judgments to abstract. One explanation might be the relatively low importance placed on judicial precedents by the judges in the civil law system. Another reason, however, is the broader and well-known context of the lack of availability of judicial documents, whether electronically or even on paper, in Africa. Extensive research thus does not guarantee a successful harvest. Nevertheless, the few cases that have been obtained for this publication provide some insight into how the civil law tradition has addressed sexual and reproductive rights in its courts.

The first two cases, delivered by the Constitutional Court of Benin, concern the constitutionality of legislative provisions that were challenged as discriminatory on the basis of sex. In the first case, the law provided a gendered definition of adultery. In the second case, the Court had to decide whether allowing polygyny, but not polyandry, rendered the law unconstitutional. The third case, delivered by the Court of Appeals in Niamey, Niger, concerned a case of alleged infanticide where the Court had to distinguish the offence from that of abortion.

Some other court decisions from other Francophone countries are worth mentioning, even though their content could only be known through secondary sources. Indeed, they help to paint a picture of the sexual and reproductive rights issues raised before Francophone courts. The scope that is explored seems rather large. It covers issues such as the deliberate transmission of HIV to a partner,[107] sexual violence such as rape, the recognition of a person's sexual identity, and the criminal repression of homosexuality.

Among these secondary sources, for example, we find a report[108] by Lawyers without Borders, published in 2010, which analyses three decisions[109] from high courts of the Democratic Republic of the Congo, about sexual violence. From an information bulletin of the Tunisian Health Law Society, we learn of a Tunisian court that authorised change of name and gender on a birth certificate to reflect someone's sexual identity:

> Born with the appearance and anatomical features of a female child, Fatma, the applicant, noticed at puberty relatively visible differences that distinguished her from her sisters and her fellow female students. Suffering from the ambiguity of the situation, Fatma finally underwent genetic testing to determine actual sex. An expert medical report described the case of Fatma Mlaieh as 'male pseudo-hermaphroditism.' On this basis, [Fatma] entered the Court of First Instance of Tunis to obtain leave to amend the birth certificate to change the name to Mohamed Ali. The judge deferred to the medical report and issued a laconic judgment authorizing the applicant to change the name and gender on the birth certificate.[110]

Finally, articles published online show the criminal repression of homosexuality in Cameroon, illustrated in the cases of "Jonas and Franky" and "Roger Mbede." Both cases are currently pending before the Supreme Court of Cameroon. The "Jonas and Franky" case is about two young people, considered men by the Court, convicted of homosexuality after having been found wearing women's clothes and make-up, and drinking Bailey's liqueur (which the judge considered a woman's drink). They were sentenced to five years' imprisonment, but acquitted on appeal after one year in prison.[111] The Government has appealed to the Supreme Court. Roger Jean-Claude Mbede was found guilty of homosexual conduct after he sent a text to a man saying "I am very much in love with you." The Court of Appeal upheld his conviction. Mbede has since died, but an appeal to Supreme Court has been made by his lawyer. [112]

Many African countries have recently adopted progressive constitutions that include a Bill of Rights. We can observe a move to leave behind obscurantist traditional rules and customs in order to recognise the universal human rights norms codified in various international instruments. This can point towards the progressive realisation of every person's human rights on the African continent. For example, while the penal codes of Burundi and Tunisia criminalise homosexuality,[113] the constitutions of both states recognise the rights to physical integrity and human dignity,[114] as well as strict conditions as to the limitation of rights and freedoms.[115] The gap between the constitutional recognition of rights and their realisation opens a space for opportunities in which constitutional advocacy can play the role of a catalyst for change. The three decisions summarised below therefore offer hope that Francophone courts, as well as the rest of Africa, will continue to advance towards the full realisation of sexual and reproductive rights.

ADULTERY

Decision DCC 09-081 of July 30, 2009
Benin, Constitutional Court

COURT HOLDING

The Constitutional Court of the Republic of Benin declares that sections 336 to 339 of the Penal Code of Benin, which criminalise adultery, are unconstitutional because they discriminate on the basis of sex.

Summary of Facts

This is the case of a constitutional trial of provisions of the Penal Code in the context of an ordinary trial. Specifically, the unconstitutional exception raised before the Cotonou Court of First Instance arises from the following context: In February 2007, Ms. Nelly HOUSSOU come before Porto-Novo's Trial Court in order to obtain a divorce on the grounds of serious abuse and mistreatment. The husband responds by bringing his wife before a criminal judge of the Cotonou Court of First Instance – more than a year after her application for divorce – accusing her of committing adultery. "While the procedure initiated by the wife had recorded no useful hearing because of the empty-chair policy adopted by the defendant [i.e. the husband's refusal to attend court hearings], the procedure instituted by the husband was conducted full speed ahead. The goal was simple: to get a criminal judgment noting the wife's adultery, and to have it added to the Porto-Novo file in order to obtain a divorce blaming solely the wife."[116] Therefore, on May 15, 2009, Ms. HOUSSOU and her alleged accomplice, Mr. Akanbi Kamarou AKALA, file, through their lawyers, a request to the Constitutional Court. The applicants claim that the provisions mentioned above are unconstitutional in that they constitute a different legal regime according to whether a man or a woman commits adultery.

Applicants' argument

Through the objection raised before the Cotonou Court of First Instance, the applicants submit that sections 336 to 339 of the Penal Code are contrary to the principle of equality guaranteed by section 26 of the Constitution of Benin and sections 2 and 3 of the African Charter on Human and Peoples' Rights. The alleged incompatibility between the provisions would result from the more favourable conditions for the man than for the woman, which are demonstrated in three different aspects: first, the elements of the offence, then, its prosecution, and lastly, the penalty incurred.

Issues

Whether sections 336 to 339 of the Penal Code are unconstitutional for infringing upon the principle of equality.

Decision of the Court

For the Constitutional Court of Benin, a reading of the challenged legal provisions shows that they have established a disparity of treatment between men and women as to the elements of the crime of adultery. Specifically, the Court notes that while the husband's adultery may be punished only when committed in the marital home, the woman is punished regardless of where the act is committed. Consequently, the Constitutional Court declares sections 336 to 339 to be unconstitutional.

Significance

The July 30 decision shows a constitutional court ingeniously open to current realities of the world and to the desired changes in a society concerned with the protection of human rights. Thus, the Court states that the criminalization or non-criminalization of adultery are not contrary to the Constitution, but that any different treatment between men and women who commit adultery is contrary to sections 26, 2, and 3 of the African Charter on Human and Peoples' Rights. In Benin,

the African Charter became law upon ratification and is of greater normative value than domestic laws.[117] Consequently, this decision gets the provisions criminalizing adultery out of Beninese positive law. Since the date of the decision, no one can be prosecuted and convicted on the basis of the provisions that have been declared unconstitutional.

However, what the Constitutional Court of Benin censures is not the repression of adultery, but simply the fact of repressing it in a discriminatory manner. The distinction is important because it helps put the scope of the decision into perspective. We can thus assume that it is still possible for the Beninese legislature to criminalise adultery and even impose imprisonment as the sentence. The only limitation arising out of that decision is that it must provide the same rule for all, without discrimination between men and women. Another evaluation is also possible. One can consider this decision to be a call for the legislature to pay more attention, regarding criminal law, to certain fundamental principles such as equality and non-discrimination.

POLYGAMY

Decision DCC 02-144 of December 23, 2002
Benin, Constitutional Court

COURT HOLDING

The Constitutional Court of Benin, reviewing Law Nº 2002-07 relating to the Code of Persons and Family (*Loi n° 2002-07 portant Code des personnes et de la famille*), found section 74, which relates to polygamy, unconstitutional because it discriminates on the basis of sex.

Summary of Facts

In this case, there are two applicants: the President of the Republic of Benin and Ms. Rosine VIEYRA-SOGLO, a member of Parliament.

The adoption of the Law Nº 2002-07 regarding the Code of Persons and Family, on June 7, 2002, leads the President of the Republic of Benin to submit a request for review of the entire Act's compliance with the Constitution, on June 20, 2002. In parallel, the same day, Ms Rosine VIEYRA-SOGLO submits a request for the constitutional review of certain provisions of the Act.

Noting the similarities between the two applications, the Court considers them jointly and rules with a single decision.

Applicant's argument

We will only present Rosine VIEYRA-SOGLO's argument, because it is the only one to appear in the text of the decision. Before the Constitutional Court, the applicant argues that sections 126, 143, 168, 185, and 335 of the Code of Persons and Family of Benin are not in accordance with section 26 of the Constitution and sections 2, 3, and 5 of the African Charter on Human and Peoples' Rights. We

will pay special attention to the arguments made regarding section 143, with which the applicant contends that the provision is discriminatory and violates the principle of equality between men and women in that it allows a man to marry several women without permitting a woman to marry several men.

Issues

Whether the Code of Persons and Family, as a whole, is unconstitutional.

Whether sections 126, 143, 167, 185 and 334 of the Code of Persons and Family are unconstitutional.

Decision of the Court

The constitutional control by the Constitutional Court takes place in two stages, examining first the terms of Ms VIEYRA-SOGLO's request, and analyzing secondly the compliance of the entire text with the Constitution, as requested by the President of the Republic.

As its holding shows, the Court finds certain provisions to be consistent with the Constitution, and others to be unconstitutional. For the second category – of more interest here – it finds two series of unconstitutional provisions. The first concerns section 12 paragraph 1 of the Code of Persons and Family, which is declared contrary to section 26 of the Constitution, as it does not allow the woman to retain her maiden name like her husband. For the Court, marriage should not cause the married woman to lose her identity; therefore, she ought to be able to keep her maiden name, to which she adds the name of her husband.

The second series is built around the Court's finding that there is unequal treatment between men and women arising from the option provided for in section 74-5 of the Code of Persons and Family, which allows a man to be polygamous whereas the woman can only be monogamous.

Because their content refers to polygamous marriage, numerous provisions, including sections 125, 127 (4), 137, 141, 143, 144, 149, 150, 154 (2), 128, and 155 of the Code of Persons and Family, are also declared unconstitutional.

Significance

The historically symbolic significance of this decision is undeniable. To our knowledge, this is the first time an African constitutional court declares the unconstitutionality of polygyny. In any case, this decision destroys any legal basis in Beninese law for polygamy.

More substantively, the decision is also important. The Court intends to mark its action of constitutional control of laws of a societal character with the seal of the protection of rights and freedoms.

Thus, for the Court, on the one hand, the identity of the woman should not be absorbed in the context of marriage, because persons under the same category should be subject to the same treatment without discrimination. A married woman may thus keep her maiden name, to which she adds her husband's name. On the other hand, the Court considers that section 74 of the Code of Persons and Family constitutes unequal and discriminatory treatment between men and women to the detriment of the latter, since polygamy is exclusively reserved to men.

A hasty reading might suggest that the Beninese judge wanted to encourage the legislature to allow polygyny and polyandry side by side, in order to ensure constitutional compliance. Such a view would be wrong because, through its laconic reasoning, the Court rather seems to want to proceed with realism. Without it being explicit, the decision rendered on December 23, 2002 led in fact to the abolition of polygamy, forcing the legislature to opt for monogamy.[118]

INFANTICIDE

Judgment Nº 216 of December 13, 2005
Niger Republic, Court of Appeals of Niamey

COURT HOLDING

The Court finds that the accused H. A. did not obtain an abortion and is guilty of infanticide, and that there is insufficient proof to establish that her mother is guilty of complicity in infanticide.

Summary of Facts

The allegations against Ms. H. A. date back to December 23, 2002, when a brigade of the police force was informed of an act of infanticide committed by Ms. H. A. The investigation formally established certain elements, notably the fact that Ms. H. A. had given birth. Her arrest led the defendant (Ms. H. A.) to admit a pregnancy of seven months. She nevertheless declared that one night, she felt discomfort followed by bleeding of the genitals, out of which came blood clots that she wrapped in plastic and buried in a hole that she had dug.

The investigations also led to the indictment of Ms. F. B., the mother of Ms. H. A., for complicity in infanticide, despite both women's denials. The mother had denied any knowledge of the crime, or even of her daughter's pregnancy, though the village head claimed to have told her about the pregnancy and testified that even though the mother was not there, she had participated in the commission of the crime (in some way not specified in the decision).

Issues

1. Whether the facts alleged against Ms. H. A. constitute abortion or infanticide; and
2. Whether Ms F. B. is guilty of complicity in infanticide

Decision of the Court

Being a criminal trial, the Court endeavoured to identify the three elements constituting the offence.

The legal element lay in the requirements of sections 186, 237, 240, and 243 paragraph 2 of the Penal Code of Niger, punishing acts of infanticide. Based on the investigation, the Court established the acts attributed to Ms. H. A. By analyzing together different elements of the investigation,

Ms. H. A.'s own statements, and medical expertise, the Court concluded that she had indeed given birth after nine months of a pregnancy which had progressed full term. Consequently, it could not have been an abortion.

Regarding the finding of the element of intent, the Court proceeded by cross-checking the recognise facts to characterise the infanticide: an unwanted pregnancy conceived outside of wedlock (which constituted the motive); childbirth alone without seeking assistance despite the risks involved; burial of the body of the newborn by the accused, even though burial should be done by men and according to established practices; and refusal to show the child's body in order to prevent officials from ascertaining the facts. The addition of all these elements leads the Court of Appeals of Niamey to consider the indictment of Ms. H. A. for the crime of infanticide to be appropriate.

However, with regards to Ms. F. B., accused of complicity in infanticide, the Court, basing itself on elements of the investigation, requalifies the facts alleged in the infraction of not reporting a crime. This requalification results from the observation of the weakness of the evidence of complicity.

Significance

This ruling illustrates the judge's delicate work in reaching an outcome in a family case raising social issues in an environment that is barely open to the outside world. Some facts as described by the Court are puzzling. However, the Court of Appeals was able to decide in law by specifically identifying the real legal issues raised by the case. Based on the evidence from the investigation, the Court ruled out abortion, highlighting precisely the distinction between abortion and infanticide: infanticide is the killing of a newborn child, while abortion is exercised only on the fetus. The Court's approach is also complemented and supported by expertise, both medical and psychological, regarding the accused.

VIII. L'AFRIQUE FRANCOPHONE

Pour la première fois avec cette édition, la série de publications *Legal Grounds* inclut des décisions rendues par des cours francophones sur les droits sexuels et reproductifs. Cet ajout reflète le pluralisme juridique qui caractérise le continent africain.

Du fait de son héritage colonial, l'Afrique connaît en effet différents systèmes juridiques qui se classent schématiquement en deux grandes catégories: aux côtés des pays anglophones généralement rangés dans la tradition de la common law, on retrouve les États francophones, et, par prolongement, ceux du monde lusophone, dont les systèmes juridiques sont organisés selon la tradition romano-germanique du droit civil. La principale différence entre ces deux systèmes est que, dans la tradition de common law, les précédents – les décisions judiciaires publiées – sont les principales sources de droit qui guident les juges dans leur prise de décision, alors que dans la tradition de droit civil, les juges s'appuient principalement sur la loi codifiée.

L'ouverture de cette troisième édition de *Legal Grounds* à la jurisprudence francophone enrichit grandement cette publication, bien qu'elle ne manque pas de générer certains défis. L'un de ceux-ci résulte de la difficulté d'accéder aux copies des jugements à résumer. Une explication plausible serait l'importance relativement faible que prend le précédent judiciaire pour les juges du système de droit civil. Une autre raison, cependant, est le contexte plus large et bien connu de l'indisponibilité des documents judiciaires, en version électronique ou même sur papier, en Afrique. Ainsi, des recherches approfondies ne garantissent pas une récolte fructueuse. Néanmoins, les quelques cas obtenus aux fins de cette publication fournissent un aperçu de la façon dont la tradition de droit civil a abordé les droits sexuels et reproductifs devant ses tribunaux.

Les deux premiers jugements, rendus par la Cour constitutionnelle du Bénin, concernent la constitutionnalité de dispositions de lois attaquées en raison d'une discrimination basée sur le sexe. Dans le premier cas, la loi établissait une définition de l'adultère dépendante du genre de la personne qui le commet. Dans le deuxième cas, la Cour a dû déterminer si la reconnaissance de la polygamie mais pas de la polyandrie rendait la loi inconstitutionnelle. La troisième décision, rendue par la Cour d'appel de Niamey au Niger, concerne un cas d'infanticide où la Cour a dû distinguer ce crime de celui d'avortement.

D'autres décisions intéressantes, rendues dans d'autres États francophones, méritent d'être évoquées, malgré que leur contenu n'ait pu être connu qu'à travers des sources secondaires. En effet, elles contribuent à dresser le portrait des enjeux relatifs aux droits sexuels et reproductifs soulevés devant les tribunaux francophones. Le champ exploré paraît plutôt large. Il s'étend sur différentes questions comme la transmission volontaire du VIH à son conjoint[119], les violences sexuelles comme le viol, la reconnaissance de l'identité-sexuelle, et la répression criminelle de l'homosexualité.

Parmi les sources secondaires consultées, par exemple, on retrouve un rapport d'Avocats Sans Frontières[120], publié en 2010, qui analyse trois décisions de tribunaux de grande instance de la République démocratique du Congo portant sur des violences sexuelles[121]. D'un bulletin d'information de l'Association Tunisienne de Droit de la Santé, nous apprenons qu'une cour tunisienne a autorisé le changement du nom et du sexe légal à l'acte de naissance d'une personne, pour refléter son identité sexuelle:

> « Née avec l'apparence et les caractéristiques anatomiques d'un enfant de sexe féminin, Fatma, [la personne introduisant la requête], va constater à sa puberté les différences relativement visibles qui commencent à l'opposer à ses sœurs et à ses camarades filles. Souffrant de l'ambiguïté de la situation, [Fatma] finira par demander à subir des analyses génétiques, afin de déterminer son sexe réel. Le rapport d'expertise médicale établi à son sujet qualifie le cas de Fatma Mlaieh de "pseudo hermaphrodisme masculin". C'est sur cette base que [Fatma] saisira le Tribunal de première Instance de Tunis afin d'obtenir l'autorisation de modifier son acte de naissance en changeant de prénom. [Fatma] veut désormais se dénommer Mohamed Ali. Le juge s'inclina devant le rapport médical et rendit un laconique jugement autorisant sur cette base Fatma à changer de prénom et de sexe sur son état civil[122] ».

Finalement, des articles publiés en ligne témoignent de la répression criminelle de l'homosexualité au Cameroun, illustrée dans les affaires « Jonas et Franky » et « Roger Mbebe ». Celles-ci sont, au moment de la rédaction de cet ouvrage, toujours pendantes devant la Cour suprême du Cameroun. L'affaire « Jonas et Franky » concerne deux jeunes personnes, considérées comme des hommes par le tribunal, condamnées pour homosexualité pour avoir porté des « vêtements pour femmes » et avoir bu de la liqueur Baileys (considérée par le juge comme une « boisson de femme »). Ayant été condamnées à cinq ans de prison, elles ont été acquittées par la Cour d'appel après un an d'emprisonnement. Le gouvernement a porté l'affaire devant la Cour suprême[123]. L'affaire Roger Mbebe concerne un homme trouvé coupable d'homosexualité après avoir envoyé en message à un autre homme: « Je suis très en amour avec toi ». La Cour d'appel a maintenu sa condamnation. Mbebe est depuis décédé, mais son avocate a appelé de la décision auprès de la Cour suprême[124].

De nombreux pays africains ont récemment adopté des constitutions progressives qui incluent des Chartes des droits. On observe un mouvement vers la reconnaissance des normes en matière de droits humains codifiées dans différents instruments internationaux, laissant derrière des règles traditionnelles et des pratiques coutumières obscurantistes. On peut y voir un élan vers la réalisation progressive des droits humains de toute personne sur le continent africain. À titre d'exemple, alors que les codes pénaux du Burundi et de la Tunisie incriminent et organisent la répression de l'homosexualité[125], les constitutions de ces deux États consacrent de manière ferme à la fois l'intégrité physique et la dignité humaine[126], ainsi que des conditions strictes à la limitation des droits et des libertés[127]. Le décalage entre la reconnaissance constitutionnelle des droits et leur réalisation ouvre une espace d'opportunités, où le contentieux constitutionnel peut jouer son rôle de catalyseur de changement. Les trois décisions résumées plus bas offrent donc l'espoir de voir les cours francophones, ainsi que le reste de l'Afrique, continuer d'avancer vers la pleine réalisation des droits sexuels et reproductifs.

L'ADULTÈRE

Décision DCC 09-081 du 30 juillet 2009
Bénin, Cour constitutionnelle

LA DÉCISION

La Cour constitutionnelle de la République du Benin déclare que les articles 336 à 339 du Code Pénal, qui criminalisent l'adultère, sont contraires à la Constitution en raison d'une discrimination fondée sur le sexe.

Résumé des faits

Il s'agit d'un procès constitutionnel à l'encontre de dispositions du Code pénal dans le cadre d'un procès ordinaire.

Plus précisément, l'exception d'inconstitutionnalité soulevée devant le Tribunal de première instance de Cotonou découle du contexte suivant: en février 2007, Mme Nelly HOUSSOU saisit le Tribunal de première instance de Porto-Novo afin d'obtenir le divorce, en invoquant des sévices graves et la maltraitance. Le mari riposte en traduisant son épouse devant un juge pénal du Tribunal de première instance de Cotonou – plus d'un an après la demande en divorce de celle-ci – en l'accusant d'avoir commis l'adultère. « Alors que la procédure engagée par l'épouse n'avait enregistré aucune audience utile à cause de la politique de la chaise vide adoptée par le défendeur [c'est-à-dire son refus d'assister aux audiences], celle du mari était menée au pas de charge. L'objectif était simple: obtenir un jugement pénal constatant l'adultère de l'épouse et le verser dans le dossier de Porto-Novo afin d'avoir un divorce aux torts exclusifs de Madame[128]. » Ainsi, le 15 mai 2009, Mme HOUSSOU et son complice allégué, M. Akanbi Kamarou AKALA, déposent, par l'entremise de leurs avocats, une demande à la Cour constitutionnelle. Les requérants reprochent aux dispositions légales attaquées d'être contraires à la Constitution, en ce qu'elles organisent un régime juridique différent selon que l'auteur de l'adultère soit un homme ou une femme.

L'argumentation des requérants

Par l'exception soulevée devant le tribunal de Cotonou, les requérants estiment que les articles 336 à 339 du Code Pénal sont contraires au principe d'égalité garanti par l'article 26 de la Constitution du Bénin ainsi que par les articles 2 et 3 de la Charte Africaine des Droits de l'Homme et des Peuples. L'incompatibilité alléguée entre ces dispositions résulterait de conditions plus favorables à l'homme qu'à la femme, et serait perceptible à un triple point de vue: tout d'abord, au niveau de la constitution de l'infraction, ensuite, en ce qui concerne la poursuite pour l'infraction, et enfin, au regard de la peine encourue.

La question en litige

Les articles 336 à 339 du Code pénal sont-ils inconstitutionnels en ce qu'ils contreviennent au principe d'égalité?

La décision rendue par la Cour

Pour le juge constitutionnel béninois, la lecture des dispositions litigieuses montre qu'elles ont instauré une disparité de traitement entre l'homme et la femme en ce qui concerne les éléments constitutifs du délit d'adultère. Plus précisément, la Cour fait le constat suivant: « alors que l'adultère du mari ne peut être sanctionné que lorsqu'il est commis au domicile conjugal, celui de la femme est sanctionné quel que soit le lieu de commission de l'acte ». Par conséquent, la Cour constitutionnelle du Bénin déclare les articles 336 à 339 contraires à la constitution.

La portée de l'arrêt

La décision du 30 juillet illustre une cour constitutionnelle ingénieusement ouverte aux réalités actuelles du monde et aux évolutions souhaitées d'une société soucieuse de la protection des droits de la personne humaine. Ainsi, la Cour indique que « l'incrimination ou la non-incrimination de l'adultère ne sont pas contraires à la Constitution, mais que toute différence de traitement de l'adultère entre l'homme et la femme est contraire aux articles 26, 2 et 3 de la Charte Africaine des Droits de l'Homme et des Peuples ». Notons qu'au Bénin, la Charte africaine est entrée en vigueur lors de sa ratification, acquérant ainsi, dans la hiérarchie des normes, une position supérieure aux lois internes [129]. Par conséquent, cette décision fait sortir du droit béninois les dispositions incriminant l'adultère. Depuis la date de la décision, plus personne ne peut être poursuivi et condamné sur la base des dispositions déclarées contraires à la Constitution.

Pour autant, ce que la Cour constitutionnelle béninoise censure n'est pas la répression de l'adultère, mais simplement le fait de le réprimer de façon discriminatoire. La nuance est importante, car elle permet relativiser la portée de la décision. L'on peut ainsi supposer qu'il demeure possible pour le législateur béninois de criminaliser l'adultère, voire de prévoir l'emprisonnement comme sanction. La seule limite imposée et découlant de cette décision réside dans le fait qu'il doit prévoir la même règle pour tous, sans discrimination entre l'homme et la femme. Une autre appréciation est tout aussi possible: l'on peut considérer qu'il s'agit d'un appel lancé au législateur afin qu'il soit plus attentif, en matière de législation pénale, à certains principes fondamentaux, tels que l'égalité et la non-discrimination.

LA POLYGAMIE

Décision DCC 02-144 du 23 décembre 2002
Bénin, Cour constitutionnelle

LA DÉCISION

La Cour constitutionnelle béninoise, se prononçant sur la Loi n° 2002-07 portant Code des personnes et de la famille, déclare l'article 74, ayant trait à la polygamie, inconstitutionnel en raison d'une discrimination fondée sur le sexe.

Résumé des faits

Dans cette affaire, il y a deux requérants: le Président de la République du Bénin et la députée Rosine VIERYRA-SOGLO.

L'adoption de la Loi n° 2002-07 portant Code des personnes et de la famille, le 7 juin 2002, conduit le Président de la République du Bénin à soumettre l'ensemble de ladite loi au contrôle de conformité à la Constitution, dès le 20 juin 2002. Parallèlement, le même jour, Mme Rosine VIEYRA-SOGLO soumet une requête de contrôle de constitutionnalité de certaines dispositions de cette loi.

Constatant les similitudes entre les deux requêtes, la Cour les examine de manière jointe et y statue par une seule et même décision.

L'argumentation de la requérante

Le texte de la décision ne faisant apparaître que l'argumentation de la requérante, seule cette dernière sera présentée. Devant le juge constitutionnel, la requérante soutient que les articles 126, 143, 168, 185 et 335 du Code des personnes et de la famille sont non conformes à l'article 26 de la Constitution ainsi qu'aux articles 2, 3 et 5 de la Charte Africaine des Droits de l'Homme et des Peuples. Nous retiendrons particulièrement l'argumentation développée vis-à-vis de l'article 143, par laquelle la requérante avance que cette disposition est discriminatoire et viole le principe d'égalité entre l'homme et la femme en permettant à un homme d'épouser plusieurs femmes sans toutefois permettre à une femme d'épouser plusieurs hommes.

Les questions en litige

La Loi n° 2002-07 portant Code des personnes et de la famille est-elle, dans son ensemble, inconstitutionnelle?

Les articles 126, 143, 168, 185 et 335 du Code des personnes et de la famille sont-ils inconstitutionnels?

La décision rendue par la Cour

Le contrôle de constitutionnalité effectué par la Cour constitutionnelle est réalisé en deux temps, en examinant en premier lieu les termes de la requête de Mme VIEYRA-SOGLO, et en analysant en second lieu la conformité à la constitution de l'ensemble du texte déféré par le Président de la République.

Comme l'illustre le dispositif de la décision, la Cour trouve certaines dispositions conformes à la Constitution, et d'autres inconstitutionnelles. Dans le cas de la deuxième catégorie – qui intéresse davantage cette analyse –, elle constate deux séries de dispositions inconstitutionnelles. La première concerne l'article 12 alinéa 1 du Code des personnes et de la famille, déclaré contraire à l'article 26 de la constitution car ne permettant pas à la femme de conserver son nom de jeune fille à l'instar de son mari. Pour la Cour, « le mariage ne devant pas faire perdre son identité à la femme mariée, celle-ci doit pouvoir garder son nom de jeune fille auquel elle ajoute le nom de son mari ».

La deuxième série est articulée autour du constat effectué par la Cour qu'il y a traitement inégal entre l'homme et la femme découlant de l'option prévue au 5ème tiret de l'article 74 du Code des personnes et de la famille, qui « permet à l'homme d'être polygame alors que la femme ne peut être que monogame ».

Leur contenu renvoyant au mariage polygamique, de nombreuses dispositions, dont les articles 125, 127 (4), 137, 141, 143, 144, 149, 150, 154 (2), 128 et 155, sont également déclarées non conformes à la Constitution.

La portée de l'arrêt

La portée historiquement symbolique de cette décision est indéniable. À notre connaissance, il s'agit de la première décision en Afrique où un juge constitutionnel déclare l'inconstitutionnalité de la polygynie. Quoi qu'il en soit, cette décision prive la polygamie de tout fondement juridique dans le droit béninois.

De manière plus substantielle, la décision est également importante. La Cour entend marquer son action de contrôle de la constitutionnalité des lois à caractère sociétal du sceau de la protection des droits et libertés.

Ainsi, pour la Cour, l'identité de la femme ne devrait pas être absorbée dans le cadre du mariage, puisque les personnes relevant de la même catégorie doivent être soumises au même traitement sans discrimination. La femme mariée peut ainsi conserver son nom de jeune fille, auquel elle ajoute celui de son mari. Par ailleurs, la Cour considère que l'article 74 du Code des personnes et de la famille constitue un traitement inégal et discriminatoire entre l'homme et la femme au détriment de cette dernière, puisque la polygamie est exclusivement réservée aux hommes.

Une lecture rapide pourrait porter à croire que le juge béninois a voulu encourager le législateur à consacrer côte à côte la polygynie et la polyandrie, afin d'assurer la conformité constitutionnelle. Une telle vue serait fausse, car, à travers des motifs laconiques, la Cour semble plutôt vouloir procéder par réalisme. Sans que cela ne soit explicite, la décision, rendue le 23 décembre 2002, a conduit en réalité à l'abolition de la polygamie, en contraignant le législateur à opter pour la monogamie[130].

L'INFANTICIDE

Arrêt n°216 du 13 décembre 2005
Niger, Cour d'appel de Niamey

LA DÉCISION

La Cour juge que l'accusée H. A. doit être inculpée d'infanticide, et que la preuve est insuffisante pour conclure à la culpabilité de sa mère pour complicité d'infanticide.

Résumé des faits

Les faits reprochés à Mme H. A. remontent au 23 décembre 2002, lorsqu'une brigade de gendarmerie est informée d'un acte d'infanticide commis par Mme H. A. Les investigations menées permettent d'établir formellement certains éléments, notamment le fait que Mme H. A. a accouché. Son interpellation conduit la prévenue à admettre une grossesse de sept mois. Elle déclare néanmoins « qu'une nuit, elle [a] senti des malaises puis [qu'il] s'en [est] suivi un saignement de ses organes génitaux desquels [sont] sortis des caillots de sang qu'elle [a] emballé[s] dans un plastic et enterré[s] dans un trou qu'elle [a] creusé ».

Les enquêtes conduisent également à l'inculpation de Mme F. B., la mère de Mme H. A., pour complicité d'infanticide, en dépit des dénégations des deux prévenues. La mère avait en effect nié toute connaissance du crime, et même de la grossesse de sa fille. Le chef du village avait toutefois affirmé l'avoir informée de la grossesse et avait témoigné à l'effet que, malgré qu'elle n'ait pas été présente lors du crime, la mère avait participé à sa commission (d'une manière qui n'est pas spécifiée dans la décision).

Les questions en litige

Les faits reprochés à Mme H. A. relèvent-ils de l'avortement ou de l'infanticide?

Mme F. B. est-elle coupable de complicité d'infanticide?

La décision rendue par la Cour

S'agissant d'un procès au pénal, la Cour s'attache à identifier les trois éléments constitutifs du crime d'infanticide.

L'élément légal réside dans les prescriptions des articles 186, 237, 240 et 243 alinéa 2 du code pénal nigérien, qui punissent les actes d'infanticide.

Sur la base des éléments d'enquête, la Cour établit la matérialité des faits imputés à Mme H. A. En croisant différents éléments d'enquête, les propres déclarations de Mme H. A. et l'expertise médicale, la Cour conclut qu'elle a effectivement accouché au neuvième mois de sa grossesse, qui était à terme. Par conséquent, il ne peut pas s'agir d'un avortement.

En ce qui concerne l'établissement de l'élément intentionnel, la Cour procède par recoupement de certains faits avérés pour caractériser l'infanticide : une grossesse non désirée « car conçue hors mariage (ce qui constitue le mobile du crime), l'accouchement seule sans solliciter une assistance en dépit des risques encourus, l'enterrement du corps du nouveau-né par l'accusée alors que l'inhumation se fait par les hommes et selon des usages établis, le refus de montrer le corps de l'enfant afin d'empêcher les constatations ». La réunion de tous ces éléments conduit la Cour d'appel de Niamey à considérer qu'il y a lieu de prononcer la mise en accusation de l'inculpée H. A. pour le crime d'infanticide.

Pour autant, en ce qui concerne Mme F. B., accusée de complicité d'infanticide, la Cour, sur la base des éléments d'enquête, aboutit à une requalification des faits reprochés en délit de non-dénonciation de crime. Cette requalification découle du constat de la faiblesse de la preuve de complicité.

La portée de l'arrêt

Cet arrêt illustre le travail délicat du juge dans le dénouement d'une affaire familiale soulevant des questions de société dans un cadre de vie peu ouvert sur le monde extérieur. Certains faits, tels que décrits par la Cour, ne manquent pas d'étonner: ainsi, par exemple, l'on peut s'interroger sur les compétences du « chef de village de G. [qui] conduit toutes les filles susceptibles d'être en état de grossesse au centre intégré de santé aux fins d'examen et éventuellement de consultations prénatales ».

Toutefois, la Cour d'appel a su trancher en droit, en identifiant précisément les véritables questions de droit soulevées par l'affaire. S'appuyant sur des éléments d'enquête, la Cour a su écarter l'avortement, en mettant en évidence précisément la distinction entre l'avortement et l'infanticide: l'infanticide est le meurtre d'un enfant nouveau-né, alors que l'avortement ne se pratique que sur le fœtus. La démarche de la Cour est aussi complétée et corroborée par l'expertise, à la fois médicale et psychologique, de la prévenue.

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AFRICAN HUMAN RIGHTS RESOURCES

http://www1.umn.edu/humanrts/africa

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CONSTITUTIONAL COURT OF SOUTH AFRICA

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Provides both full-text and summarised judgments, court records, and information on forthcoming hearings of the Constitutional Court of South Africa.

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SUPREME COURT OF APPEAL OF SOUTH AFRICA

http://www.justice.gov.za/sca

Provides decisions of the Supreme Court of Appeal of South Africa.

FULL CITATION INFORMATION AND CASE LINKS

AAA v Registered Trustees (Aga Khan University Hospital, Nairobi) [2015] eKLR, Civil Case No. 3 of 2013 (High Court of Kenya at Nairobi, Civil Division).	http://kenyalaw.org/caselaw/cases/view/109369/
AB and Surrogacy Advisory Group v Minister of Social Development [2015] ZAGPPHC 580 (North Gauteng High Court, Pretoria, South Africa)	http://www.saflii.org/za/cases/ZAGPPHC/2015/580.html
AIDS Law Project v Attorney General & 3 Others [2015] eKLR, Petition No. 97 of 2010 (High Court of Kenya at Nairobi).	http://kenyalaw.org/caselaw/cases/view/107033/
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 (Court of Appeal of the Republic of Botswana at Gaborone)	http://www.saflii.org/bw/cases/BWCA/2015/1.html
Attorney General of Botswana v Thuto Rammoge & 19 Others [2016] CACGB-128-14 (Court of Appeal of the Republic of Botswana at Gaborone).	http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/LEGBIBO-CoA-judgment.pdf
B*aby "A" (suing through her mother, E.A.) and The Cradle the Children Foundation v Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths* [2014] eKLR, Petition No. 266 of 2013 (High Court of Kenya at Nairobi, Constitutional and Human Rights Division	http://kenyalaw.org/caselaw/cases/view/104234/
Case no. RPA 0787/15/HC/KIG (2015), Unreported, Official English Translation (High Court of Rwanda, Kigali).	http://womenslinkworldwide.org/premios/docs_postulacion/571deb06d7b4b_gjua_judgment_en.pdf
Center for Health Human Rights and Development (CEHURD) and 3 Others v Attorney General [2012] UGCC 4, Constitutional Petition No. 16 of 2011 (Constitutional Court of Uganda at Kampala).	http://www.ulii.org/ug/judgment/constitutional-court/2012/4/

Center for Health, Human Rights and Development (CEHURD) and 3 Others v Attorney General (2015), Constitutional Appeal No. 01 of 2013 (Supreme Court of Uganda at Kampala	https://www.escr-net.org/sites/default/files/caselaw/cehurd_and_others_v_attorney_general.pdf
Center for Health, Human Rights and Development (CEHURD) and 4 Others v Nakaseke District Local Administration (2015), Civil Suit No. 111 of 2012 (High Court of Uganda at Kampala)	https://www.escr-net.org/caselaw/2015/center-health-human-rights-and-development-4-others-v-nakaseke-district-local
Center for Health, Human Rights and Development (CEHURD) and Iga Daniel v Attorney General (2015), Constitutional Petition No. 64 of 2011 (Constitutional Court of Uganda at Kampala).	http://www.cehurd.org/wp-content/uploads/2015/11/constitutional-petition-64.pdf
C.O.L. & G.M.N. v Resident Magistrate Kwale Court & Others Petition No. 51 of 2015 (High Court of Kenya at Mombasa, Constitutional and Judicial Review Division).	http://kenyalaw.org/caselaw/cases/view/123715/
C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v Commissioner of Police/Inspector General of The National Police Service & 3 Others [2013] eKLR, Petition No. 8 of 2012 (High Court of Kenya at Meru).	http://kenyalaw.org/caselaw/cases/view/89322/
C.K.W. v Attorney General & Another [2014] eKLR, Petition 6 of 2013 (High Court of Kenya at Eldoret)	http://kenyalaw.org/caselaw/cases/view/100510/
Decision DCC 02-144 Cour constitutionnelle du Bénin [Constitutional Court of Benin], 23 December 2002	http://www.cour-constitutionnelle-benin.org/doss_decisions/0212144.pdf
Decision DCC 09-081 Cour constitutionnelle du Bénin [Constitutional Court of Benin], 30 July 2009.	http://www.cour-constitutionnelle-benin.org/doss_decisions/09081.pdf
Dickson Tapela & 2 Others v Attorney General & 2 Others [2014] MAHGB-000057-14 (High Court of Botswana at Gabarone)	http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/02/Tapela-Others-v-Attorney-General-Others_22-08-14.pdf

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 (Federal High Court at Makurdi, Nigeria).	Available only in hard copy.
Dwenga and Others v Surgeon-General of the South African Military Health Services and Others [2014] ZAGPPHC 727, Case No. 40844/2013 (North Gauteng High Court, Pretoria, South Africa)	http://www.saflii.org/za/cases/ZAGPPHC/2014/727.html
Eric Gitari v Non-Governmental Organizations Co-Ordination Board & 4 Others [2015] eKLR, Petition No. 440 of 2013 (High Court of Kenya at Nairobi)	http://kenyalaw.org/caselaw/cases/view/108412/
E. R.O. v Board Of Trustees, Family Planning Association of Kenya [2013] eKLR, Civil Case 788 of 2000 (High Court of Kenya at Nairobi	http://kenyalaw.org/caselaw/cases/view/86655/
Ex Parte: MS and Others [2014] ZAGPPHC 457 (North Gauteng High Court, Pretoria, South Africa)	http://www.saflii.org/za/cases/ZAGPPHC/2014/457.html
Gary Shane Allpass v Mooikloof Estates (Pty) Ltd [2011] ZALCJHB 7, Case No. JS178/09 (Johannesburg Labour Court, Johannesburg, South Africa).	http://www.saflii.org/za/cases/ZALCJHB/2011/7.html
Georgina Ahamefule v Imperial Medical Centre & Dr. Alex Molokwu [2012] Suit No. ID/1627/2000 (High Court of Lagos State, Nigeria).	https://www.escr-net.org/sites/default/files/Mrs%20Georgina%20Ahamefule%20v.%20Imperial%20Medical%20Centre%20%26%20Alex%20Molukwu.pdf
GK v BOK, CGLK, MT and the Attorney General [2015] BWHC 1, MAHGB-000291-14 (High Court of Botswana at Gaborone)	http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/06/High-Court-Judgment_redacted.pdf
Government of the Republic of Namibia v L.M. & 2 Others [2014] Case No. SA 49/2012, NASC 19 (Supreme Court of Namibia)	https://www.escr-net.org/sites/default/files/Govt%20of%20Namibia%20v%20LM.pdf

Head of Department, Department of Education, Free State Province v Welkom High School & Another; Head of Department, Department of Education, Free State Province v Harmony High School & Another [2013] ZACC 25 (Constitutional Court of South Africa).	http://www.saflii.org/za/cases/ZACC/2013/25.html
H v Fetal Assessment Centre [2014] ZACC 34 (Constitutional Court of South Africa)	http://www.saflii.org.za/za/cases/ZACC/2014/34.html
J.L.N. & 2 Others v Director of Children's Services & 4 Others [2014] eKLR, Petition No. 78 of 2014 (High Court of Kenya at Nairobi, Constitutional and Human Rights Division).	http://kenyalaw.org/caselaw/cases/view/99217/
Judgement No 216 Cour d'appel [Court of Appeals], Niamey (Niger) 13 December 2005.	http://www.juricaf.org/arret/NIGER-COURDAPPELDENIAMEY-20051213-2005CA6JN
Law and Advocacy for Women in Uganda v The Attorney General [2010] UGCC 4, Constitutional Petition No. 8 of 2007 (Constitutional Court of Uganda at Kampala).	http://www.ulii.org/node/15823
LM and Others v Government of the Republic of Namibia [2012] NAHC 211 (High Court of Namibia)	http://www.saflii.org/na/cases/NAHC/2012/211.html
Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 Others [2011] eKLR, Petition No. 286 of 2009 (High Court of Kenya at Mombasa).	http://kenyalaw.org/caselaw/cases/view/74769
M I A v State Information Technology Agency (Pty) Ltd. [2015] ZALCD 20 (Durban Labour Court, Durban, South Africa).	http://www.saflii.org/za/cases/ZALCD/2015/20.html
Mildred Mapingure v Minister Of Home Affairs and 2 Others (2014), Judgment No. SC 22/14, Civil Appeal No. SC 406/12 (Supreme Court of Zimbabwe).	http://www.zimlii.org/zw/judgment/supreme-court/2014/22/14-S-022.pdf
Millicent Awuor Omuya alias Maimuna Awuor & Another v The Attorney General & 4 Others (2015), Petition No. 562 of 2012 (High Court of Kenya at Nairobi, Constitutional and Human Rights Division)	http://kenyalaw.org/caselaw/cases/view/120675/

Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others (Const. Application No. 79/14) [2015] ZWCC 12 (Constitutional Court of Zimbabwe).	http://www.zimlii.org/zw/judgment/constitutional-court/2016/12/CCZ%2012-15.pdf
Ntsele v MEC for Health, Gauteng Provincial Government [2012] ZAGPJHC 208 (South Gauteng High Court, Johannesburg, South Africa).	http://www.saflii.org/za/cases/ZAGPJHC/2012/208.html
Nvumeleni Jezile v The State and 7 Others [2015] ZAWCHC 31, Case No. A 127/2014 (Western Cape High Court, Cape Town, South Africa).	http://saflii.org/za/cases/ZAWCHC/2015/31.html
Oloka-Onyango and 9 Others v Attorney General [2014] UGCC 14, Constitutional Petition No. 8 of 2014 (Constitutional Court of Uganda at Kampala).	http://www.ulii.org/ug/judgment/constitutional-court/2014/14/
P. A. O. and 2 Others v The Attorney General & Another (2012), Petition No. 409 of 2009 (High Court of Kenya at Nairobi).	http://kenyalaw.org/caselaw/cases/view/79032
People v Paul Kasonkomona [2015] HPA/53/2014 (High Court for Zambia)	http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/01/Kasonkomona-High-Court-judgment.pdf
Republic v Jackson Namunya Tali [2014] eKLR, High Court Criminal Case No. 75 of 2009 (High Court of Kenya at Nairobi).	http://kenyalaw.org/caselaw/cases/view/101799/
Republic v Kenya National Examinations Council & Another [2014] eKLR, JR Case No. 147 of 2013 (High Court of Kenya at Nairobi)	http://kenyalaw.org/caselaw/cases/view/101979/
Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 Others [2014] eKLR, JR Miscellaneous Application No. 308a of 2013 (High Court of Kenya at Nairobi, Milimani Law Courts)	http://kenyalaw.org/caselaw/cases/view/100341/
R.M. v Attorney General & 4 Others [2010] eKLR, Petition No. 705 of 2007 (High Court of Kenya at Nairobi, Nairobi Law Courts).	http://kenyalaw.org/caselaw/cases/view/72818

Rosemary Namubiru v Uganda (2014), HCT-00-CR-CN -- 0050-2014 (High Court of Uganda at Kampala).	Available only in hard copy.
S v Brian M. [surname editorially abridged] [2015] ZWHHC 106, CRB No. B467/14 (High Court of Zimbabwe at Harare).	http://www.zimlii.org/zw/judgment/harare-high-court/2015/106/HH%20106-15.pdf
S v Chirembwe [2015] ZWHHC 162, CRB No. R 1006/12 (High Court of Zimbabwe at Harare)	http://www.zimlii.org/zw/judgment/harare-high-court/2015/162/
Stanley Kingaipe & Another v The Attorney General [2010] 2009/HL/86 (High Court for Zambia)	http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/10/ZAF-High-Court-judgment.pdf
Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another [2013] ZAGPPHC 1, Case No. 73300/10 (North Gauteng High Court, Pretoria, South Africa).	http://www.saflii.org/za/cases/ZAGPPHC/2013/1.html
Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another CCT 12/13, [2013] ZACC 35 (Constitutional Court of South Africa)	http://www.saflii.org/za/cases/ZACC/2013/35.html
Thuto Rammoge & 19 Others v The Attorney General of Botswana [2014] MAHGB-000175-13 (High Court of Botswana at Gaborone)	http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/LEGABIBO-judgment-low-resolution.pdf
W.J. & Another v Astarikoh Henry Amkoah & 9 Others [2015] eKLR, Petition No. 331 of 2011 (High Court of Kenya at Nairobi, Constitutional and Human Rights Division).	http://kenyalaw.org/caselaw/cases/view/109721/

Endnotes

Chapter 1: Introduction

1 See also Gladys Mirugi-Mukundi,"A human rights-based approach to realising access to sexual and reproductive health rights in Sub-Saharan Africa," in Ebenezer Durojaye (ed), *Litigating Right to Health in Africa: Challenges and Prospects* (Ashgate, 2015) at 53.

Chapter 2: Children and Adolescents

2 *Report of the International Conference on Population and Development, Program of Action*, A/CONF.171/13/Rev.1 (13 September 1994) para. 7.3 [ICPD*, Program of Action*].

3 *Nvumeleni Jezile v The State and 7 Others* (A 127/2014), [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC) (High Court of South Africa, Western Cape Division, Cape Town) [*Jezile*] see also case summary *supra* p. 23.

4 *W.J. & Another v Astarikoh Henry Amkoah & 9 Others* (Petition No. 331 of 2011), [2015] eKLR, (High Court of Kenya at Nairobi, Constitutional and Human Rights Division); see also case summary *supra* p. 36.

5 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (Case No. 73300/10) [2013] ZAGPPHC 1 (North Gauteng High Court, Pretoria); *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; (South Africa, Constitutional Court); see also case summaries *supra* p. 45, 49.

6 Samantha Spooner, "Legal ages of marriage across Africa" *Mail & Guardian Africa* (14 July 2014), online: Mail & Guardian Africa.

7 *Jezile, supra* note 3, at para. 56.

8 *Ibid.,* at para. 69.

9 UN General Assembly, *Child, early and forced marriage: resolution / adopted by the General Assembly*, 69th session, UN Doc A/RES/69/156 (22 January 2015).

10 African Union, *End child marriage now*, online: African Union, <http://pages.au.int/cecm>; United Nations Population Fund, *Africa launches historic campaign to end child marriage* (9 June 2014), online: UNFPA <http://www.unfpa.org/news/africa-launches-historic-campaign-end-child-marriage>.

11 African Union, *Outcome Statement of the First African Girls' Summit on Ending Child Marriage in Africa* (November 2015), online: African Union <http://pages.au.int/sites/default/files/Outcome%20Statement%20in%20English_0.pdf>.

12 Nyasha Karimakwenda, "Jezile Ukuthwala Judgment Signals Progress and Continuing Challenges", *Custom Contested Views and Voices* (29 April 2015), online: Custom Contested <http://www.customcontested.co.za/jezile-ukuthwala-judgment-signals-progress-and-continuing-challenges/>; Elizabeth Thornberry, "'Ukuthwala': Even living custom must be developed to comply with Constitution", *Custom Contested Views and Voices* (5 August 2015), online: Custom Contested <http://www.customcontested.co.za/ukuthwala-even-living-custom-must-be-developed-to-comply-with-constitution/>; Elizabeth Thornberry, "Customary status of "ukuthwala" debated since 19th century", *Custom Contested Views and Voices* (30 August 2015), online: Custom Contested <http://www.customcontested.co.za/customary-status-of-ukuthwala-debated-since-19th-century/>.

13 *Jezile, supra* note 3, at para. 104.

14 MJ Grant, "Girls' schooling and the perceived threat of adolescent sexual activity in rural Malawi" (2012) 14:1 Culture, health & sexuality 73.

[15] D Helitzer-Allen, *An investigation of community-based communication networks of adolescent girls in rural Malawi for HIV/STD prevention messages* (Washington, DC: International Center for Research on Women, 1994).

[16] *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N O) & Others* (Const Application No. 79/14) [2015] ZWCC 12 (Constitutional Court of Zimbabwe); see also case summary *supra* p. 20.

[17] *Rebeca Z. Gyumi v The Attorney General*, Miscellaneous Civil Cause No. 5 of 2016 (High Court of Tanzania).

[18] *Jessica Lenahan (Gonzales) and others v United States* (2011), Inter-Am Comm HR, No 80/11.

[19] *R v Commissioner of Police & 3 others ex-parte Phylis Temwai Kiptey* (HC Misc Appl. 27 of 2008), [2011] eKLR (Kenya).

[20] *C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v Commissioner of Police/Inspector General of The National Police Service & 3 Others* (Petition No. 8 of 2012) [2013] eKLR (High Court at Meru, Kenya) [*Ripples International*]; see also case summary *supra* p. 33.

[21] *Ibid.,* at para. 56.

[22] *Ibid.,* at para. 58.

[23] *Ibid.,* at para. 90.

[24] Laws of Malawi, Penal Code, c 7:01, s 138.

[25] The Law Reform Commission of Tanzania, Report on Criminal Law as a Vehicle for the Protection of the Right to Personal Integrity, Dignity and Liberty of Women (Dar es Salaam, 1998) at 50, online: <http://www.lrct.go.tz/download/reports(2)/CRIMINAL%20LAW%20%20Fin%20ps.pdf>.

[26] *Head of Department, Department of Education, Free State Province v Welkom High School & Another; Head of Department, Department of Education, Free State Province v Harmony High School & Another* (CCT 103/12), [2013] ZACC 25, 2013 (9) BCLR 989 (CC) (South Africa Counstitutional Court), see also case summary *supra* p. 54.

[27] A Skelton, "Balancing Autonomy and Protection in Children's Rights: A South African Account" (2015) 88 Temple L Rev 887, 904.

[28] *Ripples International, supra* note 20, at para. 238.

Chapter 3: Maternal Health Care and Services

[29] ICPD*, Program of Action, supra* note 2, was the first international framework that expressly asserted the right of women to go through pregnancy and childbirth safely.

[30] *Ibid.,* at para. 7.3.

[31] *Convention on the Elimination of All Forms of Discrimination Against Women,* 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (entered into force 3 September 1981), art. 12(1) [*CEDAW*].

[32] UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development*, 70th Sess, 21 October 2015, UN Doc A/RES/70/1, at 16 (Target 3.3).

[33] *Ibid.,* at 14 (Target 5.6).

[34] *Center for Health, Human Rights and Development and others v. Attorney General* (Constitutional Petition No. 16 of 2011), [2012] UGCC 4 (Constitutional Court of Uganda); see also case summary *supra* p. 58.

[35] *Center for Health, Human Rights and Development and Three Others v Attorney General* (Constitutional Appeal No. 01 of 2013) [2015] (Supreme Court of Uganda at Kampala); see also case summary *supra* p. 61.

[36] *Center for Health, Human Rights and Development and Four Others v Nakaseke District Local Administration* (Civil Suit No. 111 of 2012) [2015] (High Court of Uganda at Kampala); see also case summary *supra* p. 65.

[37] *Ntsele v MEC for Health, Gauteng Provincial Government*, (2009/52394) [2012] ZAGPJHC 208; [2013] 2 All SA 356 (GSJ) (High Court of South Africa); see also case summary *supra* p. 72.

[38] *Millicent Awuor Omuya alias Maimuna Awuor and Another v The Attorney General and Four Others* (Petition No. 562 of 2012) [2015] (High Court of Kenya at Nairobi, Constitutional and Human Rights Division); see also case summary *supra* p. 69.

[39] World Health Organization, *Trends in maternal mortality: 1990 to 2015: estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division* (Geneva: World Health Organization, 2015).

[40] African Commission on Human and Peoples' Rights, *Resolution 135: Resolution on Maternal Mortality in Africa*, 44th session, November 2008, online: African Commission on Human and Peoples' Rights <http://www.achpr.org/sessions/44th/resolutions/135/>.

[41] Alfred Anangwe, "Health sector reforms in Kenya: User fees" in Martyn Sama & Vinh-Kim Nguyen (eds), *Governing health systems in Africa,* (Dakar: Council for the Development of Social Science Research in Africa, 2008) 44-59.

[42] African Commission on Human and People's Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, online: African Commission on Human and Peoples' Rights <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf>.

[43] See also Onyema Afulukwe-Eruchalu, "Accountability for non-fulfilment of human rights obligations: A key strategy for reducing maternal mortality and disability in Sub-Saharan Africa," in Charles Ngwena and Ebenezer Durojaye (eds), *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (Pretoria, South Africa: Pretoria University Law Press, 2014) at 119, online: <http://www.pulp.up.ac.za/pdf/2014_14/2014_14.pdf>.

[44] UN Human Rights Council, "Preventable maternal mortality and morbidity," Resolution 18/2, UN Doc A/HRC/18/L.8 (28 September 2011).

Chapter 4: Abortion and Fetal Interests

[45] On the rape indication for legal abortion, see Simangele Mavundla and Charles Ngwena, "Access to legal abortion for rape as a reproductive health right: A commentary on the abortion regimes of Swaziland and Ethiopia," in Charles Ngwena and Ebenezer Durojaye (ed), *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (Pretoria, South Africa: Pretoria University Law Press, 2014) at 61 ["Abortion regimes of Swaziland and Ethiopia"].

[46] Organic Law N° 01/2012/OL of 02/05/2012 instituting the *Penal Code of Rwanda* (*Penal Code*), art. 165 (1) (There is no criminal liability for a woman who commits abortion and a medical doctor who helps a woman to abort if one of the following conditions is met: 1° when a woman has become pregnant as a result of rape.)

[47] *Ibid.,* at art. 190 ("Child defilement means any sexual intercourse or any sexual act with a child regardless of the form or means used.").

[48] CG Ngwena, "Reforming African abortion laws and practice: the place of transparency" in Rebecca Cook, Joanna Erdman and Bernard Dickens (eds), *Abortion Law in Transnational Perspective: Cases and Controversies.* (Philadelphia, PA: University of Pennsylvania Press, 2014) 166 at 169.

[49] Francoise Girard, "Death Sentence in Abortion Case Compounds Dangers for Kenyan Women" *Rewire* (2 October 2014), online: Rewire <http://rhrealitycheck.org/article/2014/10/02/death-sentence-abortion-case-compounds-dangers-kenyan-women/>.

[50] Janie Benson, Kathryn Andersen, and Ghazaleh Samandari, "Reductions in abortion-related mortality following policy reform: evidence from Romania, South Africa and Bangladesh" (2011) 8 Reprod. Health 39.

[51] Regarding abortion laws of Swaziland and Ethiopia in cases of rape, see "Abortion regimes of Swaziland and Ethiopia", *supra* note 45.

[52] Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Kenya,* UN Doc CRC/C/KEN/CO/3-5 (21 March 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/055/60/PDF/G1605560.pdf> accessed 12 Oct 2016.

[53] *Ibid.,* at para. 20.

[54] Compare Frans Viljoen, "The African Charter on Human and People's Rights/The Travaux Préparatoires in the Light of Subsequent Practice" (2004) 25 Hum Rts LJ 313 at 314 (noting that the drafters of the African Charter relied largely on the American Convention on Human Rights); *Draft African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/1 (1979) art. 17, (adopting the language of art. 4(1) of the American Convention on Human Rights, but replacing "moment of conception" with the "moment of his birth"); *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003 ("Maputo Protocol"), art. 14(2)(c).

[55] *AAA v Registered Trustees (Aga Khan University Hospital, Nairobi)* (Civil Case No 3 of 2013) [2015] eKLR at para. 18 (High Court of Kenya at Nairobi, Civil Division); see also case summary *supra* p. 90.

[56] *Ibid.,* at para. 18.

[57] *Ibid.*

[58] *Ibid.,* at para. 23.

[59] ICPD*, Program of Action, supra* note 1, para. 7.3.

[60] *Maputo Protocol, supra* note 54, at art. 14 (2)(a).

[61] The African Commission on Human and Peoples' Rights (African Commission), *General Comment No 2 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Maputo Protocol*, online: African Commission on Human and People's Rights at para. 55 < http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf>.

[62] Center for Reproductive Rights, *Failure to Deliver: Violations of Women's Human Rights in Kenyan Health Facilities* (Center for Reproductive Rights and Federation of Women Lawyers – Kenya, 2007), online: Reproductive Rights < http://www.reproductiverights.org/sites/default/files/documents/pub_bo_failuretodeliver.pdf>.

[63] Kenya National Commission on Human Rights, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?* (April 2012), online: KNCHR <http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf>.

Chapter 5: Adoption and Surrogacy

[64] *Ex Parte WH and Others* 2011 (6) SA 514 (GNP) at para. 2; *see also* case summary *supra* p. 110.

[65] See, e.g., *Convention on the Rights of the Child,* 20 November 1989 1577 UNTS 3 arts. 7-8 (entered into force 2 September 1990); African Union, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, ACERWC/GC/02 (2014). See generally, the approach to identity, birth registration and being able to trace one's origins.

[66] UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland,* 31st Session, UN Doc CRC/C/15/Add.188, paras 31-32 (9 October 2002).

[67] *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at para. 56-61, online: CanLii <http://www.canlii.org/en/bc/bcca/doc/2012/2012bcca480/2012bcca480.pdf>' See also, Jane Fortin, "Children's Right to Know their Origins: Too Far, too Fast?" (2009) 21:3 Child and Family Law Quarterly 336.

[68] *Adoptive Couple v Baby Girl* 398 S C 625, 731 S E 2d 550 (US Supreme Court), online: https://www.law.cornell.edu/supremecourt/text/12-399.

[69] Aamera Jiwaji, "Kenya: The Baby Market," *AllAfrica* (1 August 2013), online: AllAfrica< http://allafrica.com/stories/201308052161.html>.

[70] OUJ Umeora et al, "Surrogacy in Nigeria: Legal, ethical, socio-cultural, psychological and religious musings" (2014) 13:2 African Journal of Medical and Health Sciences 105 at 109.

[71] Lauren Wilson, "Baby Gammy case sparks international surrogacy trading concern" (8 August 2014), online: News.com < http://www.news.com.au/lifestyle/parenting/babies/baby-gammy-case-sparks-international-surrogacy-trading-concern/news-story/0c16a95b16d49be8046c9b7137222817>.

[72] ICPD*, Program of Action, supra* note 2, para. 7.3.

[73] Barbara Stark, "Transnational Surrogacy and International Human Rights" (2012) 18:2 ILSA Journal of International & Comparative Law 369 at 378.

[74] Recognised in *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) art. 27; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art. 15(1)(b) (entered into force 3 January 1976).

[75] Vida Panitch, "Surrogate tourism and reproductive rights" (2013) 28:2 Hypatia 274 at 286.

[76] *Children's Act,* (S Afr), No 38 of 2005, s 9.

Chapter 6: Gender, Sexuality Women and Discrimination

[77] A Miller, "Sexual but not reproductive: exploring the junction and disjunction of sexual and reproductive rights" (2000) 4 Health and Human Rights 68 at 83.

[78] Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (London: Palgrave Macmillan, 2005) 217.

[79] Dianne Grant, " Sexin' Work: The Politics of Prostitution Regulation" (2008) 2:1 New Proposals: Journal of Marxism and Interdisciplinary Inquiry 61 at 71.

[80] *Ibid.,* at 67.

[81] *Baby "A" (suing through her mother, E.A.) and The Cradle the Children Foundation v Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths* (Petition No. 266 of 2013) [2014] eKLR at para. 47 (High Court of Kenya at Nairobi, Constitutional and Human Rights Division);[*Baby "A"*]; see also case summary *supra* p. 129.

[82] *RM v The Hon. Attorney General & 4 Others* (Petition no 705 of 2007), (2010) eKLR at para. 148 (High Court of Kenya at Nairobi, Nairobi Law Courts) [*RM*]; see also case summary *supra* p. 133.

[83] *Baby "A" supra* note 81, at para. 66.

[84] *Ibid.,* at para. 61.

[85] *RM, supra* note 82, at para. 109.

[86] *Ibid.,* at para. 124.

[87] *Ibid.,* at para. 133.

[88] UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Germany*, UN Doc CAT/C/DEU/CO/5 (12 December 2011) at para. 20.

[89] UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53 (1 February 2013).

[90] *RM, supra* note 82, at para. 148.

[91] See World Health Organization *Sexual Health, Human Rights and Law* (Geneva: WHO, 2015) at 24.

[92] *Yogyakarta Principles (the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity),* online: Yogyakarta Principles <http://www.yogyakartaprinciples.org/>.

[93] United Nations Development Programme, *Discussion Paper on Transgender Health & Human Rights* (6 January 2014), online: UNDP <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>.

Chapter 7: HIV

[94] Colin D. Mathers, Ties Boerma & Doris Ma Fat, "Global and regional causes of death" (2009) 92 British Medical Bulletin 27.

[95] E Durojaye, "Advancing gender equity in access to HIV treatment through the Protocol to the African Charter on the Rights of Women" (2006) 6: 1 *African Human Rights Law Journal* 188.

[96] P Eba "HIV-specific legislation in Sub-Saharan Africa: A comprehensive human rights analysis,"(2015) 15 (2) *African Human Rights Law Journal* 224-262.

[97] Ebenezer Obadare and Iruka N. Okeke, "Biomedical loopholes, distrusted state, and the politics of HIV/AIDS 'cure' in Nigeria" 110:439 African Affairs 191.

[98] *Ibid.,* at para. 34.

[99] UNAIDS, *Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations* (Geneva: UNAIDS, 2013), online: UNAIDS <http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf>.

[100] UNAIDS, *Criminalization of HIV Transmission* (Geneva: UNAIDS, 2008), <http://files.unaids.org/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf>.

[101] ICPD, *Program of Action, supra* note 2, at para. 7.3.

[102] International Community of Women Living with HIV/AIDS, *The forced and coerced sterilization of HIV-positive women in Namibia* (London: International Community of Women Living with HIV/AIDS, 2009).

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

[104] Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights),* UN Doc E/C.12/GC/23 (2 May 2016).

[105] *LM supra* note 103.

[106] Southern Africa Litigation Centre, *Equal Rights for All: Litigating Cases of HIV-related Discrimination* (Johannesburg, SA: SALC, 2011), online: SALC <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/10/HIV-and-Discrimination-Manual-pdf.pdf>.

Chapter 8: Francophone Africa / L'Afrique Francophone

[107] Tribunal de première instance [Court of First Instance], Yaoundé, 14 June 2010, Case spouses Mbahyong, n°09 B2 lun 1248 (Cameroon).

[108] Avocats Sans Frontières [Lawyers without Borders], "La justice face à la banalisation du viol en République démocratique du Congo" (May 2012), online: <http://www.uianet.org/sites/default/files/ASF_RDC_BanalisationViol_EtudeJurisprudence_2012.pdf>.

[109] Tribunal de grande instance, Uvira, 2 octobre 2010, RP 4049 (République démocratique du Congo); Tribunal de grande instance, Mbandaka, 8 octobre 2010, RP 9469 (République démocratique du Congo) ; Tribunal de grande instance, Uvira, 25 janvier 2008, RP 1577 (République démocratique du Congo).

[110] Paraphrased translation of: Association Tunisienne de Droit de la Santé, online: (2013) 68 Bulletin d'information, online at: http://www.atds.org.tn/b68.html, summarizing *Tribunal de première instance [Court of First Instance], Tunis, 24 June 2013, No 88908 (Tunisia).*

[111] "Cameroon: Drop Charges Against 2 Transgender Youth" (17 May 2013), *Human Rights Watch*, online: <https://www.hrw.org/news/2013/05/17/cameroon-drop-charges-against-2-transgender-youth>.

[112] Clár Ní Chonghaile, "Cameroonian lawyer urges world to join her in fight against anti-gay legislation", *The Guardian* (10 March 2015), online: <https://www.theguardian.com/global-development/2015/mar/10/cameroon-lawyer-campaign-against-anti-gay-legislation>.

[113] Penal Code of Burundi, s 567; Penal Code of Tunisia, s 230.

[114] Constitution of Burundi, s 17 and 21; Tunisian Constitution of 2014, s 23.

[115] Constitution du Burundi, s 47; Tunisian Constitution of 2014, s 49.

[116] [our translation] Ibrahim Salami, "La question préjudicielle de constitutionnalité sur l'adultère. Les cas du Bénin et du Congo" (2010-2011) 25 and 26 Dr & Lois R trimestrielle d'informations juridiques et judiciaires 18.

[117] Constitution of Benin, s. 147.

[118] Stéphane Bolle, "Le Code des personnes et de la famille devant la Cour constitutionnelle du Bénin. La décision DCC 02-144 du 23 décembre 2002" (2004) 4 Afrilex 315 at 339.

[119] Tribunal de première instance, Yaoundé, 14 juin 2010, Affaire époux Mbahyong, n°09 B2 lun 1248 (Cameroun).

[120] Avocats Sans Frontières, « La justice face à la banalisation du viol en République démocratique du Congo » (mai 2012), en ligne: http://www.uianet.org/sites/default/files/ASF_RDC_BanalisationViol_EtudeJurisprudence_2012.pdf.

[121] Tribunal de grande instance, Uvira, 2 octobre 2010, RP 4049 (République démocratique du Congo) ; Tribunal de grande instance, Mbandaka, 8 octobre 2010, RP 9469 (République démocratique du Congo) ; Tribunal de grande instance, Uvira, 25 janvier 2008, RP 1577 (République démocratique du Congo).

[122] Association Tunisienne de Droit de la Santé, (2013) 68 *Bulletin d'information*, en ligne: <http://www.atds.org.tn/b68.html>, résumant Tribunal de première instance, Tunis, 24 juin 2013, No 88908 (Tunisie).

[123] « Cameroun: Les poursuites judiciaires contre les deux jeunes transgenres devraient être abandonnées » (17 mai 2013), *Human Rights Watch*, en ligne: https://www.hrw.org/fr/news/2013/05/17/cameroun-les-poursuites-judiciaires-contre-deux-jeunes-transgenres-devraient-etre.

[124] Clár Ní Chonghaile, « Cameroonian lawyer urges world to join her in fight against anti-gay legislation », *The Guardian* (10 mars 2015), en ligne: <https://www.theguardian.com/global-development/2015/mar/10/cameroon-lawyer-campaign-against-anti-gay-legislation>.

[125] Code pénal du Burundi, art. 567; Code pénal Tunisien, art. 230.

[126] Constitution du Burundi, art. 17 et 21; Constitution tunisienne de 2014, art. 23.

[127] Constitution du Burundi, art. 47; Constitution tunisienne de 2014, art. 49.

[128] Ibrahim Salami, « La question préjudicielle de constitutionnalité sur l'adultère. Les cas du Bénin et du Congo » (2010-2011) 25 et 26 Dr & Lois R trimestrielle d'informations juridiques et judiciaires 18.

[129] Constitution du Bénin, s. 147.

[130] Stéphane Bolle, « Le Code des personnes et de la famille devant la Cour constitutionnelle du Bénin. La décision DCC 02-144 du 23 décembre 2002 » (2004) 4 Afrilex 315 à la p. 339.

Reproductive and sexual rights, which are guaranteed in constitutions and in international and regional human rights treaties, have no impact if they are not recognized and enforced by national-level courts. *Legal Grounds: Sexual and Reproductive Rights in Sub-Saharan African Courts* Volume III continues to provide much-needed information about whether and how national courts of African countries apply human rights laws in decisions that affect the rights of women and others. The case summaries and thematic highlights can be useful resources for advocates seeking to further develop litigation, advocacy, and capacity building strategies.

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The Center for Reproductive Rights uses the law to advance reproductive freedom as a fundamental right that all governments are obligated to protect, respect, and fulfill.

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