



AIDS Law Project v. Attorney General, et al.

Petition No. 97 of 2010

Country: Kenya

Region: Africa

Year: 2015

Court: High Court at Nairobi

Health Topics: Child and adolescent health, Health information, HIV/AIDS, Infectious diseases, Poverty, Public safety, Violence

Human Rights: Freedom from discrimination, Right of access to information, Right to due process/fair trial, Right to privacy

Facts

The Petitioner, AIDS Law Project, brought suit against the Government of Kenya, arguing that Section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 (the Act) was unconstitutional. The Petitioner argued that Section 24 of the Act was vague and overbroad, and therefore unconstitutional. Section 24 imposed criminal sanctions upon HIV positive persons who failed to inform, in advance, a "sexual contact" of their HIV positive status. Section 24 also allowed for medical practitioners to share a person's HIV status with such person's sexual contacts. The Petitioner argued that because the Act failed to define "sexual contact" law was vague, overbroad, and invalid based on the principle of legality (because individuals would not know what constituted a criminal offense). Furthermore Section 24 violates the constitutionally protected right to privacy.

The Petitioner maintained that Section 24's potential to be interpreted broadly discriminated against people living with HIV, women, and members of vulnerable groups. For example, the Section could be read as criminalizing the transmission of HIV from mother to child during pregnancy or breastfeeding. The Petitioner expressed further concerns that this discrimination would place legal responsibility exclusively on persons living with HIV to prevent transmission, was unlikely to help slow the spread of HIV, would undermine important public health messages, and might discourage individuals from getting tested or seeking medical care. The Petitioner argued that the State had an obligation, under Article 27 (4) of the Constitution, to prohibit the discrimination fostered by Section 24.

The Attorney General, contended that limitations to personal freedoms and rights, were necessary in the interest of the larger community and noted that the Constitution gave every person the right to access information held by another person when required for the exercise or protection of a fundamental freedom, including the right to the highest attainable standards of health care services. The Attorney General further contended that, regarding the term "sexual contact", the legislature could assign the ordinary meaning of the words and it was therefore not vague or overbroad. The Attorney General also entreated the Court to take into consideration the principle of separation of powers, remembering that only the Legislature makes laws, not the courts.

The Interested Party, VIHDA Association, an NGO advocating for the rights of children, argued that Section 24, if well enforced, would not infringe upon the rights of person's living with HIV. The Interested Party argued that there was a need to place legal responsibility on mothers to protect their children, who were unable to protect themselves, from transmission. However, the Interested Party noted that mothers often have no option other than breastfeeding, through which HIV may be transmitted; therefore, the State should be compelled to provide formula for poor mothers with HIV. Otherwise, the criminal sanctions would be discriminatory based on the economic status of mothers.

The Amicus Curiae, the Center for Reproductive Rights, argued that Section 24 allowed for non-voluntary partner disclosure of HIV status. The Amicus argued that international guidelines indicated that such disclosure violated women's rights and undermined public health initiatives and that the broad drafting of Section 24 would expose women to risks of prosecution, and would undermine the goal of the act--to decrease transmission of HIV.

Decision and Reasoning

The Court held that Section 24 was unconstitutional as it was vague and lacked in certainty. The Court further held that Section 24 was overbroad and would likely violate individuals'™ right to privacy, protected by Article 31 of the Constitution.

In so ruling, the Court noted that the Constitution expressly imported the general rules of international law. The Court cited numerous authorities indicating that principle of legality was a well-recognized rule in international law. Accordingly, the Court noted that legislation should not be so vague that interpretation by judges was required before individuals could know what was and what was not prohibited, and that criminal sanctions required clarity and certainty. The Court then considered the term "œsexual contact," concluding that without a clear definition under Section 24, the term was vague and Section 24 overbroad.

The Court then looked to the issue of privacy and found that Article 31 of the Constitution clearly protected the right to privacy. Under Article 24 of the Constitution, a valid limitation of that right must be "œreasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." The Court agreed with the Petitioners that because "œsexual contacts" to whom the HIV infected person must disclose his/her status were under no duty to keep information about such person's™ HIV status private, Section 24 violated Article 31 of the Constitution.

The Court refrained from determining the constitutionality of the Act as a whole, determining only the constitutionality of Section 24. However, the Court noted a serious need for the State Law Office to reconsider the Act as a whole in order to avoid further litigation.

Decision Excerpts

"œTherefore elementary justice or the need for legal certainty demands that rules by which the citizen is to be bound should be ascertainable by him by reference to identifiable sources that are publicly accessible. In criminal matters it is important to have clarity and certainty. It is therefore clear under the principle of legality, two principles emerge: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly ascertainably punishable when the act was done." Paragraph 71.

"œ[W]here the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language." Paragraph 74.

"œTo that extent we agree that section 24 is in contravention of Article 31 of the Constitution to the extent that the right of others to disclosure of such information has the likelihood of prejudicing the right to privacy unless corresponding obligations are placed on the recipients of the information with respect to adherence to the confidentiality principle. It is therefore imperative that the duty to disclose the information, being a limitation on the right to privacy, strictly falls within the confines of Article 24 of the Constitution." Paragraph 87.