



E.L v. The Republic

[2016] MWHC 656

Country: Malawi

Region: Africa

Year: 2016

Court: High Court of Malawi, Zomba District Registry

Health Topics: Child and adolescent health, HIV/AIDS, Infectious diseases, Medicines, Sexual and reproductive health

Human Rights: Freedom from discrimination, Right to due process/fair trial

Facts

The appellant was convicted and sentenced to nine months of imprisonment under Section 192 of the Malawian Penal Code. Section 192 made it an offence to negligently engage in an act, which was likely to spread a dangerous life-threatening disease. E.L (the appellant) was HIV positive undergoing Anti Retroviral Treatment (ART). It was alleged that she had breastfed the complainant's baby, who was left in her care. E.L pleaded guilty at trial but later on appealed in the High Court stating that Section 192 is unconstitutional for the reasons of vagueness and over-breadth. She further stated that the charge-sheet was unclear and the elements of a valid offense were not made out.

She stated that as she was on ART, the risk of transmission was less than one percent. She relied on expert testimony to support her assertion. She also relied on the World Health Organisation Guidelines of 2016 and Malawi's Ministry of Health guidelines.

Decision and Reasoning

The High Court held that the prosecution had not established the elements of the offense under Section 192 of the Criminal Code. It stated that Section 192 had three different elements, which were unlawfulness, negligence, or recklessness. The prosecution failed to separate the elements and satisfy the said ingredients of each.

The Court further stated that the police and the courts have to take extra precaution while dealing with the rights of people living with HIV. It also stressed on the importance of Malawi's international human rights obligations while dealing with criminal cases related to HIV transmission.

The Court stated that criminal law should only be applied when there is a significant risk of transmission. It also highlighted the impact of custodial sentences on women with children. In this case E.L was the mother of four.

The Court held that the procedure in the trial court was a blatant violation of E.L's right to a fair trial impinging upon her constitutional rights. However, the Court declined to hear the constitutional challenge to Section 192.

Decision Excerpts

“[However, this court after noting the various material provided by the experts as well as upon its own reading of the various available jurisprudence, research and material, is of the view that negligence infection of a deadly disease through breast-feeding should not be put in the same category or class of intentional infections. The law must be sensitive to various issues including the lack of knowledge on how HIV is transmitted. Most importantly, the circumstances of the accused must also play a role. Unquestionably, the law must still ensure the traditional standard of proof applies and should be established by prosecutors. Fundamentally, in this human rights era, the law should remember to uphold the accused person's rights to privacy, dignity and due process. Courts in the words of the renowned South African judge and HIV activist living with the disease, Edwin Cameron in his lecture, Using the Law in the HIV Pandemic: Sword or Shield at Birkbeck College, London delivered on 28th June 2007 accessed at <http://www.aidsmap.com/SouthAfricas-Justice-Edwin-Cameronirrational-fear-and-stigma-feed-increasing->

callsfor-criminal-HIVtransmission-laws/page/1427669/on 9/03/2012 stated that the role of the law in a public health crisis should be to contain the epidemic and to mitigate its impact. He added that the law's function should be primarily protective and should aim to save the uninfected from infection and to protect the infected from the unjust consequences of public panic.â€• (para 4.29)

â€œThe circumstances in this case demanded leniency, especially when the tests revealed that the Complainantâ€™s child tested negative. Incidentally, that the facts themselves barely showed any wrongdoing on her part. Further that the Appellant also had a small breastfeeding child who if she had not been breastfeeding on that day and had her breasts exposed would not have led to her finding herself in this situation. The court should have remembered that Malawians courts have always upheld the principle of the best interests of the child.â€• (para 4.24)

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