



## Kingaibe and Chookole v. Attorney General

2009/HL/86

**Country:** Zambia

**Region:** Africa

**Year:** 2010

**Court:** High Court at Livingstone

**Health Topics:** Health care and health services, HIV/AIDS, Infectious diseases, Informed consent

**Human Rights:** Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Right to bodily integrity, Right to health, Right to liberty and security of person, Right to life, Right to privacy, Right to social security, Right to work

### Facts

Petitioners Stanley Kingaibe and Charles Chookole sued the Zambian Air Force (ZAF) alleging violations of their constitutional rights to liberty, privacy, life, protection from inhuman and degrading treatment, and protection from discrimination. They also alleged violations of their rights to adequate medical and health facilities and adequate educational opportunities contained in the Directive Principles of the Constitution. Petitioners alleged that they had been subject to mandatory HIV testing, denied pre- and post-test counselling services, placed on medical treatment without their knowledge, and dismissed from the ZAF solely due to their HIV status.

Kingaibe and Chookole joined the ZAF in June and July of 1989. Between 2001 and 2002, both underwent compulsory medical examinations without being informed they were being tested for HIV. Both men tested positive for HIV and were prescribed antiretroviral drugs (ARVs). According to their testimony, however, they were neither informed of their HIV-positive status, nor advised on the nature of the prescribed drugs. They were ultimately discharged in October 2002.

### Decision and Reasoning

The Court found that both Petitioners were subjected to HIV testing without their informed consent in violation of their rights to privacy and protection from inhuman and degrading treatment. The Court held that the Petitioners were entitled to damages for mental anguish and emotional distress as a result of these violations. The Court also found that the Petitioners received no pre- or post-test counselling following their testing for HIV. However, the Court dismissed the claim that the Petitioners had not been given counseling concerning adherence to the antiretroviral drug regime they were prescribed; the Court found it improbable that antiretrovirals were administered without counselling in light of the doctor's testimony and the Petitioners' medical history.

The Court also rejected the Petitioners' claims related to the rights to health and education, confirming that the Directive Principles of the Constitution were non-justiciable and non-enforceable.

Finally, the Court did not agree that the Petitioners had been dismissed from the ZAF on the basis of their HIV status. Upon review of their medical history and the effect of their medical conditions on their ability to work, the Court concluded that the Petitioners had been discharged by the ZAF on the basis of their medical conditions and not their HIV status. The Court also dismissed a number of arguments challenging the validity of the statute under which the Petitioners had been dismissed.

### Decision Excerpts

“This case underscores the stand that Zambian courts have taken on issues touching fundamental rights and freedoms enshrined in our Constitution. This court is at large to consider and take into account provisions of international instruments and decided cases in other countries. The Zambian courts are not operating in isolation, and any decision made by other courts on any aspect of the law is worth considering.” Page J42.

“I must hasten to note that after the petitioners were put on ARVs they responded positively to the treatment but this does not take away the fact that their fundamental rights to privacy and protection from inhuman treatment were infringed.” Page J45.

â€œIndeed, having regard to the facts of the whole case, I find that there is no evidence to show that the petitioners were discharged because they were HIV positive.â€• Page J53.

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