REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NUMBER 97 OF 2010

AIDS LAW PROJECT.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

VIHDA ASSOCIATION.....INTERESTED PARTY

CENTER FOR REPRODUCTIVE RIGHTS.....AMICUS CURIAE

JUDGEMENT

Introduction

1. This Petition was instituted by AIDS Law Project which described itself as a registered Non-Governmental Organisation carrying on its activities within the Republic of Kenya.

2. The 1st Respondent, **The Hon. Attorney General,** is sued in its capacity the Legal representative of the Government of Kenya and principal legal adviser of the said Government in accordance with Article 156(4) of the Constitution while the 2nd Respondent, **Director of Public Prosecutions,** is sued in his capacity and under powers exercised by it by virtue of his office under Article 157(6) and 157(11) of the Constitution.

The Petitioner's Case

3. What provoked this petition was the enactment of section 24 of the ***HIV and AIDS Prevention and Control Act, No. 14 of 2006*** (hereinafter referred to as the Act) which came into effect on 1st December 2010 pursuant to Legal Notice No. 180 of 2010.

4. According to the petitioner, based on the principles of legality, if a law is vague, or overbroad, it is not a valid law since a law must be clear enough to be understood and must be precise enough that it only applies to activities connected to the law's purpose. It was pleaded that the common principle behind both vagueness and over breadth is the requirement that laws have a minimum degree of certainty.

5. It was however pleaded that section 24 of the said Act is vague and overbroad, especially with regard to the meaning of ‘inform”, “in advance” and “sexual contact”. Whereas the term “sexual contact” is widely used in the said section, it was averred that the same is not defined in the Act. However a person infected with HIV/AIDS is required to reveal his/her status to this sexual contact and where the person fails to do so, a medical practitioner may disclose such information to the said sexual contact.

6. It was contended that such risk of unwarranted disclosure of confidential information is against the express provisions of both section 22 of the Act and section 31 of the Constitution. To aggravate the situation, it was pleaded that there is no corresponding duty of confidentiality placed upon the said sexual contact once such information is disclosed.

7. It was therefore contended that the fact that an offence may arise, under section 24(1) as read with section 24(3) of the Act from failure to disclose information to this “sexual contact” who is largely undefined means there is a risk to the realisation of the rights to a fair hearing under Article 50 of the Constitution.

8. It was the Petitioner’s case that the said provision violates Article 27(1) and (4) of the Constitution which guarantees that every person is equal before the law and has the right to equal protection and the benefit of the law. To the petitioner, the law does not say what exactly is comprised in “sexual contact” and whether it includes kissing, holding hands, exploratory contact or penetrative intercourse thus leaving the issue to the subjective views of the trial court hence violates Article 24 of the Constitution. Since neither transmission nor intent is required, it was pleaded that it is not clear what behaviour is subject to prosecution.

9. In the Petitioner’s view, anyone accused of an offence under section 24(1) as read with subsection (3) of the Act has no clear knowledge of the scope of his/her duties of disclosure, a situation which is tantamount to facing criminal penalties for an offence which is not adequately clear and precisely defined in violation of Article 50(3) of the Constitution.

10. The petitioner therefore sought the following orders:

> **a. A declaration be made to the effect that Section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 be declared unconstitutional.**
>
> **b. A declaration be made that the offence created by Section 24 of the HIV Aids Prevention and Control Act, No. 14 of 2006 is so wide and vague to come within the group of laws that are an unacceptable discrimination against persons by way of their health status and therefore inconsistent with the Basic Law in that it violates the rights guaranteed under Article 9 of the ICCPR, incorporated into the Basic Law by Article 27 of the Constitution.**
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> **c. The Respondents be condemned to pay costs of the Petition.**
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> **d. Such other orders(s) be made as this Honourable Court shall deem just.**

11. It was submitted on behalf of the Petitioner that Section 24 of the Act discriminates against people living with HIV, women and members of vulnerable groups. To the Petitioner section 24(2) of the Act is extremely broad and could be interpreted to mean that a person who is and is aware of being infected with HIV shall not knowingly and recklessly place another person at risk of becoming infected with HIV. The Petitioner believes that situations under which transmission may occur are such as during sport like boxing or soccer or in emergency situations where a doctor with HIV may have to inform his patient of his status in the event they share a needle or when a person wishes to offer first aid but cannot because they are infected. In such situations, the Petitioners believed that the infected individual is not provided with sufficient guidance on what conduct would constitute a criminal offence and this impacts on the individual's liberty.

12. The Petitioner submitted that because this Section also permits medical practitioners to disclose the HIV status of their patients to other sexual contacts, it directly interferes with the delivery of health care by frustrating the efforts of people from coming forward for testing because these people fear that information regarding their status will be used against them in the criminal justice system.

13. The Petitioner adopted the view that Section 24 of the Act is likely to promote fear and stigma as it imposes a stereotype that people living with HIV are immoral and dangerous criminals and this will negate the efforts being made to encourage people to live openly about their HIV status. The Petitioners believed that the reduction of the spread of HIV is more likely to accrue from the information and education efforts at the community level rather than the prosecution of suspected violators of Section 24.

14. The Petitioner urged this court that placing legal responsibility exclusively on Persons Living with HIV to prevent transmission of the virus will undermine the public health message that everyone should practice safer behaviours regardless of their HIV status. The Petitioner also argued that a false sense of security will be created because people will assume that their partners' HIV status is negative because they have not disclosed their HIV status as required by law, and they will not take measures to protect themselves.

15. According to the Petitioners the current HIV Testing Policy that compels pregnant women to undergo HIV Tests, endangers, oppresses and prosecutes women as against men because they are more likely to know their HIV status before their partners, and in the event they test positive their partners, partners' families and their communities will accuse them of bringing HIV into the home and as such there will be an increase in HIV related violence against women.

16. The Petitioner submitted that the current standards from UNAIDS and WHO are generally to the effect that only criminalisation of deliberate (and not reckless or negligent) transmission of HIV can be considered at all justifiable and that with deliberate transmission one has to be careful as the consequences may include a disincentive to be tested and a disproportionate impact on the vulnerable.

17. It was the petitioner's case that a statute may be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is

prohibited or what punishment may be imposed. In support of its case, the Petitioner relied on the holding in **R vs. Demers (2004) 2 SCR 489, 2004 SCC 46**.

18. Reference was also made to the ***Lectric Law Library's Lexicon*** with respect to the definition of "**sexual contact"** and ***Black's Law Dictionary*** (8th Ed. 2004) on what "**sexual relations"** means. It was therefore the petitioner's contention that sexual relations in the social and legal sense need to rise to the level of sexual intercourse.

19. The Petitioner relied further on the account of **Justice Cameron** of the Supreme Court of Appeal of South Africa while delivering a public lecture on the ***Criminalization of HIV Transmission***, hosted by the Canadian HIV/AIDS Legal Network Osgoode Hall, Toronto, during the 1st Annual Symposium on HIV, Law and Human Rights held on June 12 -13th 2009.

20. The Petitioner further expounded on the meaning of the term "sexual relations" where it referred to the infamous alleged affair between President Bill Clinton and his then intern Monica Lewinsky especially the speech of the President's Counsel to the effect that:

> **"A person engages in "sexual relations" when the person knowingly engages in or causes the genitalia, anus, groin, breast, inner thigh or buttocks of any person with an intent arouse or gratify the sexual desire of any person……"Contact" means intentional touching, either directly or through clothing."**

21. It is the Petitioner's view that Section 24 of the Act fosters discrimination against persons living with HIV and argued that the State has an obligation to prohibit this. In support of this submission the Petitioner relied on Article 27 (4) of the Constitution which provides that:

> ***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

22. In the Petitioner's view, Article 2 of the ***International Covenant on Civil and Political Rights*** (ICCPR) and Article 2 of the ***Covenant on Economic, Social and Cultural Rights*** ("CESCR") both guarantee that the rights recognized therein are respected without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Petitioner also highlighted that prohibition of discrimination on the basis of HIV/AIDS has been explicitly recognized within the Inter-American Human Rights System under Article 24 of the American Convention on Human Rights where the Inter-American Commission on Human Rights construed Article 24 as extending to protect people living with HIV/AIDS and that this Article will be breached when it is demonstrated that persons living with HIV/AIDS are treated differently from people with other diseases without rational justification. The Petitioner therefore insisted that in compliance with Article 27(1) and (4) of the Constitution, a difference of treatment must have a reasonable relationship of proportionality with the legitimate aim it is meant to advance.

23. To the petitioner, the provisions of Section 24 of the Act are likely to undermine the already existing HIV Prevention methods because it will discourage people from getting

tested and finding out their status as lack of knowledge of one's status can be used as a defence in criminal cases. In support, the Petitioners relied on the holding in **Cortez and Others vs. El Salvador Case 12.249 20th March 2009 Report No. 27/09** where the Commission hearing this matter recognized that while the state had the right, and indeed the duty, to adopt measures to prevent the spread of the virus, the differential treatment of the applicant while in hospital had been unreasonable, degrading, constituted unnecessary stigmatization and amounted to discrimination and expressed itself as follows:

> **"Public health considerations must also be taken into account since the stigmatization of, or discrimination against, a person who carries the virus can lead to reluctance to go for medical controls, which creates difficulties for preventing infection."**

24. Apart from the foregoing it was submitted that section 24 of the Act violates Article 31 of the Constitution more specifically Article 31(c) and (d).

25. To the Petitioner, confidentiality is crucial to persons living with HIV/AIDS because HIV infection is associated with sexual and drug related activities and as such disclosure of ones HIV status can expose HIV Positive individuals to stigmatization, discrimination and rejection by family, friend and community. In support of this position, the Petitioner cited an article ***"A global assessment of the role of law in the HIV/AIDS pandemic"*** **by L. Gable, L. Gostin and J. Hodge Jr. Public Health 123 (2009) 260 -264.**

26. The Petitioner also referred to **John B vs. Superior Court of the State of California for the County of Los Angeles (B169563) Los Angeles County Super Ct. No. BC271134** in which a number of inalienable rights among these the constitutional right of sexual privacy were recognised.

27. To the petitioner, the term "sexual contact" should be defined with more precision, as a contact who is at a clear risk of being infected and that Parliament should impose a corresponding duty to keep information disclosed to third parties on the HIV status of an individual, confidential. In the petitioner's view, coercive approaches such as mandatory HIV testing, restriction of movement and criminalization of harm reduction measures are not conducive to HIV prevention. They further add that the presence and/or existence of a HIV positive person in a country is not a threat to public health because HIV is not air borne or transmitted through casual contact but through unprotected sex or the use of contaminated injection equipment. Therefore the prevention of HIV is not solely in the control of a HIV Positive person but also the HIV Negative individuals are called upon to take steps to protect themselves against the transmission.

28. It was argued that even if a causal link between HIV-related transmission and HIV prevention could be established, the government should adopt less restrictive but more effective alternatives such as the ones adopted in the UNAIDS Practical Guidelines for Intensifying HIV Prevention that emphasize human dignity, responsibility, agency and empowerment through access to health information, services and community support and participation. To the petitioner, women who are charged in court for transmission of HIV will bear the brunt of disease transmission in their homes and relationships and that women also tend to know their HIV status before men because of regular gynaecological care where

pregnant women must undergo HIV testing for mother and child care. Therefore the Petitioners submit that in such situations women may be hesitant to disclose their HIV status to their partners because of fear of accusations of infidelity which may lead to violence. To this end reliance was placed on the seminal work of **Justice Cameron: *The Case against Criminalization of HIV Transmission,* Scott Burris, and Edwin Cameron JAMA 2008** where he said that:

> **"In Sub-Saharan Africa many HIV diagnoses occur among women presenting for antenatal testing. First to be diagnosed, they are blamed for introducing HIV into the family; many report violent reactions by spouses and others. Some women are unable to disclose their HIV status because of the risk of violence or ostracism, yet they face the added responsibility of prosecution if they fail to disclose."**

29. The Petitioners reiterated that section 24 is drafted so widely as to include women who transmit HIV to a child during pregnancy or during breastfeeding, thereby making pregnancy an offense. Instead, the Petitioners argue that there are more effective ways to prevent mother to child transmission of HIV by supporting the rights of all women to make informed choices about pregnancy and providing them with sexual and reproductive health information and services, preventing unwanted pregnancies among women and providing effective medication to prevent mother to child transmission of HIV to HIV positive women who wish to have children.

30. In conclusion the Petitioners argued that there is a growing recognition that the measures being taken to restrict the rights of people living with HIV are discriminatory and the human rights of these people should not be compromised in the name of HIV prevention.

The 1st Respondent's Case

31. The 1st Respondent, opposed the Petition on the grounds that the petition is incompetent and a gross abuse of the court's process; that section 22 and 24 of the HIV/AIDS Prevention and Control Act No. 14 of 2006 is not vague, ambiguous and/or unconstitutional; that laws once published are deemed to be sufficient notice; that the rights claimed are not absolute; that there is no violation of constitution or constitutional right of the applicant/petitioner disclosed, hence no justifiable cause; and that the substance of the petition is an affront to the principle of separation of power embodied in the Constitution.

32. On behalf of the 1st Respondent it was submitted that in interpreting the import and extent of the rights and fundamental freedoms, the Constitution should be read in harmony and as a whole as was stated in **Federation of Women Lawyers of Kenya and 8 Others vs. Attorney General and Another (2011) eKLR.** In so doing the Court was urged to be guided by the intention of the citizens of Kenya, the people who ratified the Constitution.

33. To the 1st Respondent the rights and freedoms enshrined in the Constitution are not absolute but can be derogated from only within the limits of the Constitution hence the court ought to be guided by the words of **Madan, J** (as he then was) in **Githunguri vs. Republic [1986] KLR** to the effect that:

> **"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community."**

34. It was therefore contended that personal freedoms and rights must necessarily have limits, and the interest of the Petitioners must be looked at vis-à-vis the interest of the larger community. To the 1st Respondent, the constitution provides a framework for the limitation of various rights and fundamental freedoms under Article 24 (1), (2) and (3).

35. Therefore in considering the constitutionality or otherwise of a statute this Honourable court should be guided by the intentions of the legislature in enacting the statute and ought to take judicial notice of the socio-economic conditions in Kenya which informed the enactment of the legislation. Based on **Federation of Women Lawyers of Kenya and 8 Others vs. Attorney General and Another [2011] eKLR** it was submitted that the Legislature does not act in a vacuum but will always respond to a situation in which they and the court are fully cognizant.

36. To the 1st Respondent, Article 35(1) (b) of the Constitution gives every person a right to access information held by another person and required for the exercise or protection of any right or fundamental freedom while Article 35(3) gives the state the right to publish and publicise any important information affecting the nation. Further the 1st Respondent argued that Article 43 (1) (a) of the Constitution gives every person the right to the highest attainable standards of health care services including reproductive health care while Article 43(3) places the obligation for the provision of social security to persons who are unable to support themselves and their dependants on the state. The 1st Respondent therefore submitted that Section 24 of the Act is in line with Articles 24, 35 and 43 aforesaid and does not violate Articles 27, 31 and 50 of the Constitution as averred by the Petitioner.

37. With regard to the terms "sexual contact" it was the position of the 1st Respondent that where the statute does not define any word or term, the said word should be given its ordinary meaning. Since the Legislature is the only organ of government that is empowered by the Constitution under Articles 94, 95 and 96 to make laws, it was submitted that in exercising its powers under Articles 2(3) and 165 of the Constitution this court should take into consideration the principles of separation of power as envisaged in the Constitution.

38. It was further contended, based on **Rashid Odhiambo Aloggoh and 245 Others vs. Haco Industries Limited [2007] eKLR,** that that which is alleged must be proved and that any applicant who alleges that his/her rights have been infringed must not only make allegations but also state clearly with supporting facts and instances where such rights have been infringed. The 1st Respondent urged the court to adopt the holding in the case of **Kenya Bus Company vs. Attorney General and Others Misc Civil Application No. 413 of 2005** where the court held that non-disclosure of material facts is sufficient to warrant the dismissal of a constitutional application and that a constitutional court has inherent powers to prevent abuse of its process hence a constitutional application brought in violation of fundamental principles of law is incompetent and should be dismissed.

Interested Party's Case

39. The Interested Party described itself as a non-governmental organization advocating for the rights of children and its objectives are *inter alia* to decrease the morbidity and mortality related to HIV/AIDS by supporting the Ministry of Health in the fight against the pandemic through transferring skills, building capacity and providing financial support; and without limitation, to organize regular trainings for the Kenyan Health care workers on the various HIV topics such as clinical care, anti-retroviral therapy, prophylaxis and treatment of opportunistic infections, prevention of mother to child transmission of HIV, general awareness, prevention strategies, behaviour change, psychosocial support, laboratory procedures and others. It also engages in promoting or assisting in the promotion of any organization or company or other body having similar objects to those it espouses.

40. According to the interested party, section 24 does not deal with infection *per se* but simply obliges a person living with HIV to prevent the transmission of the virus to others who are at risk of infection. The Interested Party argued that Section 24 addresses the non-disclosure of one's HIV positive status rather than the actual infection and therefor if this provision is well enforced the ability of person's living with HIV to enjoy their social and economic rights will not be infringed upon. The Interested Party believes that a medical practitioner who is responsible for the treatment of HIV positive person may disclose the status of such person to his sexual contact who is at risk of getting infected is in the general public's interest because there will be a significant reduction on transmission of the virus among the general public.

41. It was its position that if Parliament intended that criminalization of HIV transmission was only between sexual partners and not poor infected HIV mothers, then this transmission was based on fault and not strict liability. The Interested Party asserted that intention or recklessness is a cardinal element in finding of criminal responsibility. It added that knowing one's HIV positive status and putting another person at risk of infection due to non-disclosure of the same should be punished. The Interested Party argued that where an infected person knowingly and recklessly infects other persons, there is lack of personal responsibility and care for the health and life of the other persons, and the intention to infect should be implied from this lack of care and concern in transmitting the infection. The Interested Party insisted that in the absence of Section 24 of the Act, there would be a gap in the law to punish those who intentionally infect others with HIV and the victims of such behaviour, who include children and infants, are entitled to recourse.

42. The Interested Party submitted that in section 24 there is no distinction between sexual transmission and mother to child transmission in terms of the options for the person infected to protect him/her. The Interested Party added that many HIV Negative people in Kenya are aware that their sexual partners are HIV infected and they still practise unprotected sex, and this is a risk they take as an informed choice. However infants cannot make an informed choice but they are totally dependent and ignorant and as such there is need to protect them and the responsibility of the State to ensure that protection. The Interested Party urged the court to make a distinction between the horizontal transmission from an infected person to his or her sexual partner from the vertical transmission from mother to child since an adult who wants to have sex with someone infected with HIV after knowing the status is a very different case from an infant who has no choice.

43. According to the Interested Party, children, more so infants, have no power to negotiate for safe breast feeding and added that breast feeding of infants by HIV positive mothers has been proven to be harmful to these infants because they get infected with HIV and their life expectancy is lowered drastically. The Interested Party submitted that there is therefore need to place a legal responsibility on mothers and other institutions mandated to protect their children because the act of a HIV mother breastfeeding her infant can be criminalized by Section 24 (2) of the Act. The Interested Party is of the view that many poor HIV infected mothers cannot provide safe feeding alternatives to their infants and therefore they have no other option but to expose their infants to HIV and as such the child perspective should prevail and the rights of the infant should be preserved so that they are not discriminated against based on economic criteria and they are spared HIV exposure and infection.

44. The Interested Party alluded to the view that the State has the responsibility to provide safe feeding alternatives for infants. The Interested Party took issue with the fact that in Kenya the state provides anti-retroviral therapy to the infected mothers but does not have a child focused programme that can safeguard the interest of the child on time rather than later. The Interested Party asserted that it makes no sense to spend millions treating an infected infant when the State would have simply provided milk; the Interested Party added that a child who is born HIV Negative but acquires the virus through breastfeeding may sue the State for neglect upon attaining majority age and that the presence of anti-retroviral drugs in breats milk may have negative implications for infants who become infected before or during breast feeding because of the risk of acquisition of drug resistance caused by the viral replication in the presence of low drug concentrations in the infant.

45. According to the Interested Party, since Article 43(1)(a) of the Constitution gives every person the right to the highest attainable standards of health care and Article 53 of the Constitution further guarantees the right of every child to basic nutrition, shelter and health care, a child's protection from HIV infection through breastfeeding should be upheld and the State compelled to provide formula for poor HIV positive mothers. The Interested Party advocated for the provision of formula milk, nutrition, counselling and safe water which it attests has achieved optimal infant survival while protecting infants from HIV exposure.

The Case of the Amicus Curiae

46. On behalf of the amicus it was submitted that the issues at stake in this petition have serious implications for fundamental human rights as protected by national, regional, and international laws, and are of particular relevance to safeguarding the rights of women, including their reproductive rights. According to the *amicus*, the Act contains several flawed provisions which run counter to the legislation's overall goal of protecting the rights of those living with HIV and countering discrimination against them.

47. It was submitted that the provisions of the Act have a particularly deleterious impact on women, regardless of their HIV status, especially pregnant women as well as human rights and public health initiatives. According to the *amicus*, the Act's broad criminalisation of HIV exposure and transmission also raises serious questions in the context of vertical or mother-to-child transmission particularly when it is clear that women often lack the information and

services necessary to prevent HIV exposure or transmission during pregnancy, delivery, or breastfeeding.

48. To the amicus, allowing non-voluntary partner disclosure of HIV status and criminalising HIV exposure and transmission would further compound violations which are already occurring around HIV testing of women and failure to respect confidentiality in health care settings. It was further contended that allowing healthcare workers to disclose a person's status to sexual partners without that person's consent can harm women who are more likely to know their status and are at risk of violence and discrimination by partners, family, and communities.

49. It was further submitted that human rights bodies and international standards and guidelines affirm that non-voluntary partner disclosure violates women's rights and undermines public health initiatives.

50. To the amicus section 24 of the Act is drafted so broadly that it could be interpreted to apply to women who expose or transmit HIV to a child during pregnancy, delivery or breastfeeding. It was its contention that criminalising HIV exposure and transmission does not protect women from transmission but instead exacerbates existing stigma and discrimination against women and exposes women to the risks of prosecution which undermines the overall goals of the Act as well as Kenya's key public health goals.

51. In the amicus' view, the Act would be better aligned with its object and purpose of ensuring non-discrimination, protecting rights and encouraging uptake of services without the problematic provisions in section 24.

Determination

52. We have considered the petition, the positions taken by the various parties vide their pleadings, submissions and authorities herein.

53. The central issue in this Petition is that Section 24 of the ***HIV Aids Prevention and Control Act*** ("the Act") is vague and broad and should therefore be declared unconstitutional.

54. Article 2(4) of the Constitution provides:

> ***Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.***

55. Article 165(3) of the Constitution empowers this Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution.

56. A law is declared unconstitutional when it is contrary to or in conflict with the Constitution. This court must establish whether the provisions of Section 24 of the Act run in conflict with the Constitution as alleged by the Petitioners.

57. In **Marbury vs. Madison, 5 U.S. (1 Cranch) 137 (1803) Chief Justice John Marshall** observed that the Constitution is:

> **"the fundamental and paramount law of the nation", and that it cannot be altered by an ordinary act of the legislature. Therefore, "an act of the Legislature repugnant to the Constitution is void…It would be an "absurdity" to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply the Constitution, and to determine whether there is a conflict between a statute and the Constitution: It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply....."**

58. Therefore where a statutory provision offends the constitution, the court is duty bound to declare it unconstitutional; and it is incumbent upon any person claiming unconstitutionality of a statutory provision to identify clearly the constitutional provision contravened as well as the offending statutory provision.

59. Legality is a fundamental rule of criminal law that nothing is a crime unless it is clearly forbidden in law. This principle is a core value, human right, but also a fundamental defense in criminal prosecution in a way that no crime can exist without a legal ground.

60. Article 50(2)(n) of the Constitution of Kenya, 2010, provides as follows:

> ***"Every accused person has the right to a fair trial, which includes the right—***
>
> **……..**
>
> ***(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—***
>
> ***(i) an offence in Kenya; or***
>
> ***(ii) a crime under international law."***

61. Article 11 of the ***Universal Declaration of Human Rights, 1948***, also gives a well-structured definition of the principle echoing what is provided in the Constitution.

62. Article 2(5) of the Constitution expressly imports the general rules of international law and makes them part of the law of Kenya. Apart from that Article 10 of the Constitution binds State organs, State officers, public officers and all persons to national values and principles of governance whenever they apply or interpret the Constitution; enact, apply or interpret any

law; or make or implement public policy decisions. One of the said values and principles is the rule of law. It is now recognised as part of the rules of international law that the principle of legality is an integral part of the rule of law and as was appreciated by **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240:**

> **"One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law."**

63. This principle was expounded by the European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") in **Kokkinakis vs. Greece 3/1992/348/421** in which a majority of the Court expressed itself as follows:

> **"The Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; 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."**

64. According to **Judge Pettiti** in the above case:

> **"The expression "proselytism that is not respectable", which is a criterion used by the Greek courts when applying the Law, is sufficient for the enactment and the case-law applying it to be regarded as contrary to Article 9 (art. 9). The Government themselves recognised that the applicant had been prosecuted because he had tried to influence the person he was talking to by taking advantage of her inexperience in matters of doctrine and by exploiting her low intellect. It was therefore not a question of protecting others against physical or psychological coercion but of giving the State the possibility of arrogating to itself the right to assess a person's weakness in order to punish a proselytiser, an interference that could become dangerous if resorted to by an authoritarian State. The vagueness of the charge and the lack of any clear definition of proselytism increase the misgivings to which the Greek Law gives rise. Even if it is accepted that the foreseeability of the law in Greece as it might apply to proselytes was sufficient, the fact remains that the haziness of the definition leaves too wide a margin of interpretation for**

> **determining criminal penalties… At all events, even if the principle is accepted, it should not lead to the retention of legislation that provides for vague criminal offences which leave it to the court's subjective assessment whether a defendant is convicted or acquitted. In its judgment in the Lingens vs. Austria case (8 July 1986, Series A no. 103) concerning freedom of expression the European Court noted its misgivings about the freedom left to the courts to assess the concept of truth. Interpretation criteria in relation to proselytism that are as unverifiable as "respectable or not respectable" and "misplaced" cannot guarantee legal certainty."**

65. In **R vs. Demers (supra)**, the Canadian Supreme Court adopted the view that if the state in pursuing a legitimate objective uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.

66. When the issue of whether or not a person is guilty of a crime is left for the subjective assessment of the judges, it inevitably leads to what **Jeremy Bentham** called rather harshly the "dog-law" in his famous polemic ***Truth versus Asthurst***, written in 1792 and published in 1823 where he stated:

> **"It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way judges make law for you and me. They wont tell a man beforehand what it is he *should not do*-they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."**

67. Though Bentham's language and comparison may have been exaggerated, the point is that legislation ought not to be too vague that the subjects have to await the interpretation given to it by the judges before he can know what is and what is not prohibited. Whereas judge-made laws may be tolerated under common law it certainly has no place in criminal legal system. It was for example held by the House of Lords in **R vs. Withers [1975] AC 842** that judges have no power to create new offences. Nor may the courts widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment.

68. It was similarly said by **Sir Francis Bacon** in ***A Treatise On Universal Justice*** quoted in ***Coquiellette*** pp 244 and 248, from *Aphorism* 8 and *Aphorism* 39:

> **"For if the trumpet give an uncertain sound, who shall prepare himself for the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes...Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known law and certain law...Nor should a man be deprived of his life, who did not first know that he was risking it."**

69. In **Grayned vs. City of Rockford [1972] 408 US 104**, the United States Supreme Court identified:

> **"'a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important rules...A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."**

70. On his part **Lord Diplock** in **Black-Clawson International Ltd vs. Papierwerke Waldhof-Aschaffenberg AG [1975] AC 591, 638** commented 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."**

71. Therefore 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.

72. This was the position taken by **Lord Reid** in his dissenting opinion in **Shaw vs. DPP (1961) 2 All ER 446** where he expressed himself as follows:

> **"It has always been thought to be of primary importance of our law, and particularly our criminal law should be certain. That a man should be able to know what conduct is and what is not criminal, particularly when any penalties are involved. It is the province of the legislature and not the judiciary to create new criminal offences."**

73. It was therefore held in **R vs. Rimmington [2006] 1 AC 459 at 481** that:

> **"The principle [of legal certainty] enables each community to regulate itself: 'with reference to norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible –an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law."**

74. The law with respect to legislation which impose penal consequences was rested in **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, where it was held that where 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.

75. Section 24 of the Act which is the subject of challenge in this petition 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; (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 subsection (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.***

76. In the petitioner's view, the law does not say what "any sexual contact" is and does not explain the extent of sexual contact and whether it entails holding hands, kissing or only more intimate forms of exploratory contact or whether it only applies to penetrative intercourse. It is true that the Act does not define what "sexual contact" means. According to ***Lectric Law Library's Lexicon***, the term is described as:

> **"The intentional touching either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh or buttocks of any person with**

> **an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person."**

77. Black's Law Dictionary (8th Ed. 2004) on the other hand while not defining "**sexual contact**" defines "**sexual relations"** to include "**both sexual intercourse and physical sexual activity that does not necessarily culminate in intercourse".**

78. The term "sexual contact" has been the subject of criticism by legal scholars on the ground of its lack of certainty and precision. While dealing with several pieces of legislation enacted for the purposes of criminalising HIV exposure and transmission **Justice Cameron** in his ***Criminalization of HIV Transmission***, (supra) opined:

> **"Many of these laws are extremely poorly drafted. For instance, under a poorly drafted "model law" that many countries in East and West Africa have adopted, a person who is aware of being infected with HIV must inform "any sexual contact in advance" of this fact. But the law does not say what "any sexual contact" is. Is it holding hands? Kissing? Or any forms of exploratory contact? Or does it apply only to penetrative intercourse? Nor does it say what "in advance" means. No transmission is required and no intent is required making it extremely difficult for the average person to determine precisely what behaviour is subject to prosecution. The "model" law would not – or should not – pass muster in any constitutional state where the rule of law applies. The rule of law requires clarity in advance on the meaning of criminal provisions and the boundaries of criminal liability....Non-disclosure of HIV status should be criminal only if intentional behaviour actually led to HIV transmission."**

79. In the said Article **Justice Cameron** was clear that his opinion was in reference to consensual sexual intercourse and did not apply to non-consensual sexual intercourse which is already criminalized.

80. In the absence of a clear definition of what amounts to "sexual contact" under section 24 of the Act, it is impossible to state with certainty and precision how the targets of the section are expected to conduct themselves and in respect of whom. Are, for example, children "sexual contacts" in relation to their mothers and if so how is the disclosure supposed to take place between the mother and the child? We therefore agree with the position taken by the petitioner and the amicus curiae that section 24 of the Act as drafted is so broad that it could be interpreted to apply to women who expose or transmit HIV to a child during pregnancy, delivery or breastfeeding. Such overbroad legislation are to be deprecated and the spirit of the Constitution and its principles frowns upon such overbroad enactments.

81. Although the interested party seems to align itself with section 24 of the Act, it is clear that it also appreciated some difficulty with respect to mother to child transmission of the virus hence its advise to the state to re-draft the said section. It is therefore clear that section 24 is not without some difficulties when it comes to clarity of purpose and target.

82. Article 31 of the Constitution on the other hand provides:

> ***Every person has the right to privacy, which includes the right not to have:(c) information relating to their family or private affairs unnecessarily required or revealed; or(d) the privacy of their communications infringed.***

83. It is therefore clear that the right to privacy is one of the fundamental rights enshrined in the Constitution. For the said right to be limited the provisions of Article 24 of the Constitution must be satisfied. Article 24 (1), (2) and (3) provide as follows:

> ***(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***
>
> ***a. The nature of the right or fundamental freedom;***
>
> ***b. The importance of the purpose of the limitation;***
>
> ***c. The nature and extent of the limitation;***
>
> ***d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
>
> ***e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***
>
> ***(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—***
>
> ***f. In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;***
>
> ***g. Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and***
>
> ***h. Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***
>
> ***(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.***

84. Therefore for a limitation to be justified it must satisfy the criteria that it is "***is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".*** In dealing with these standards, the Supreme Court of Uganda while dealing with a similar provision in **Obbo and Another vs. Attorney General [2004] 1 EA 265** expressed itself as follows:

> **"It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons:- (i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples. (ii). Secondly, the preamble to the Constitution recalls the history of Uganda as characterised by political and constitutional instability: recognises the people's struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so."**

85. It is therefore imperative for the Court to take into account the international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy as well as decisions by Courts in jurisdictions with similar legal systems in determining what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

86. As is stated in ***A global assessment of the role of law in the HIV/AIDS pandemic*** (supra):

> **"From the inception of the HIV/AIDS pandemic, privacy has been of paramount concern. Grounded in legal, ethical and human rights principles of autonomy and justice, privacy requires that persons: (1) Have the right not to have their health status disclosed without their consent; (2) Are entitled to make health and other personal decisions without interference; and (3) have a right to control others' access, use and disclosure of their HIV/AIDS health data……..."**

87. In this case it is contended by the petitioners that whereas those who suffer from HIV/AIDS are legally required to disclose their status to "sexual contacts" the later are not under any duty to keep such information confidential. To 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.

88. Having considered the foregoing it is our view and we so hold that section 24 of the ***HIV and AIDS Prevention and Control Act, No. 14 of 2006*** does not meet the principle of legality which is a component of the rule of law. The said section is vague and overbroad and lacks certainty especially with respect to the term "sexual contact". It fails to meet the legal requirement that an offence must be clearly defined in law as one cannot know from the wording of the section what acts and omissions will make him or her liable. To retain that provision in the statute books would lead to an undesirable situation of the retention of legislation that provides for vague criminal offences which leave it to the court's subjective assessment whether a defendant is to be convicted or acquitted.

89. Apart from that it is our view that the limitation to privacy imposed by section 24 aforesaid does not satisfy the requirements of Article 24 of the Constitution.

90. Although the submissions made by the parties herein in particular the petitioner and the amicus tended to attack the constitutionality of the Act as a whole we have refrained from dealing with the issues other than those which focus on section 24 of the Act since the petition before us was directed at the said provision. We however are of the view, having considered the issues raised by the parties before us that there is a serious need for the State Law Office to take another look at the ***HIV and AIDS Prevention and Control Act, No. 14 of 2006*** with a view to avoiding further litigation surrounding the said piece of legislation.

91. In the result we find that section 24 of the ***HIV and AIDS Prevention and Control Act, No. 14 of 2006*** is unconstitutional for being vague and lacking in certainty. The same is also overbroad and is likely to violate the rights to privacy as enshrined under Article 31 of the Constitution.

This being public interest litigation we direct each party to bear own costs.

It is so ordered.

Signed, Dated and Delivered at Nairobi this 18th day of March, 2015

I LENAOLA	**M NGUGI**	**G V ODUNGA**
JUDGE	**JUDGE**	**JUDGE**

In the presence of:

Mr Ngatia with Mr Omwanza for the Petitioners

Mr Omwanza for the amicus

Cc Patricia