



EM & 6 others v General & another; HIV Justice Worldwide & another (Amicus Curiae); National Aids Control Council (Interested Party) (Petition 447 of 2018) [2022] KEHC 16532 (KLR) (Constitutional and Human Rights) (20 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16532 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 447 OF 2018
HI ONG'UDI, J
DECEMBER 20, 2022

BETWEEN

EM 1ST PETITIONER
 SN 2ND PETITIONER
 SKM 3RD PETITIONER
 MA 4TH PETITIONER
 MR 5TH PETITIONER
 JW 6TH PETITIONER
 KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS
 (KELIN) 7TH PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT
 DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

AND

HIV JUSTICE WORLDWIDE AMICUS CURIAE
 JOINT UNITED PROGRAMME ON HIV/AIDS AMICUS CURIAE

AND

NATIONAL AIDS CONTROL COUNCIL INTERESTED PARTY



Constitutionality of section 26 of the Sexual Offences Act on the deliberate transmission of HIV or any other life threatening sexually transmitted disease

The case challenged the constitutionality of section 26 of the Sexual Offences Act on the deliberate transmission of HIV or any other life threatening sexually transmitted disease. The court found that the acid test upon which the impugned provision was anchored was set out very clearly. The court further found that a reading of the impugned section made it plain that the object of that provision was to charge, prosecute and punish persons living with HIV or any other sexually transmitted disease who committed the crime of infecting their victims with the disease knowingly. Those were the offenders and not the general community of persons living with HIV.

Reported by Kakai Toili

Constitutional Law – constitutionality of statutory provisions – constitutionality of section 26 of the Sexual Offences Act – where section 26 provided for the offence of deliberate transmission of HIV or any other life threatening sexually transmitted disease - whether section 26 was unconstitutional for being vague - whether requiring a person charged under section 26 to provide appropriate sample(s) was unconstitutional - whether section 26 was unconstitutional for limiting the rights of persons who were HIV positive – Constitution of Kenya, 2010, articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53; Sexual Offences Act, Cap 63A, section 26.

Constitutional Law – interpretation of the Constitution and statutes - principles to consider in the interpretation of the Constitution and statutes - what were the principles to consider in the interpretation of the Constitution and statutes.

Civil Practice and Procedure – parties to a suit - amicus curiae – role of an amicus curiae - nature of the role of an amicus curiae - what was the role of a court in light of claims that a proposed amicus curiae was biased.

Brief facts

The petition was premised on section 26 of the Sexual Offences Act No.3 of 2006. According to the petitioners, section 26 was vague and articulated in ambiguous language. Likewise, it failed to define the scope and specific acts attracting the criminal sanctions spelt out. It was asserted that section 26 violated the rule of law which required that laws with criminal penalties ought to be clear.

It was asserted that the purpose of the Sexual Offences Act which was stated to be prevention and protection against unlawful sexual acts ran contrary to section 26. That was since the impugned section perpetuated discrimination, stigma and fear from testing for HIV and disclosing one's status. The petitioners contended that the impugned section unreasonably and unjustifiably limited the rights of persons living with HIV. The petitioners thus sought among other orders; a declaration that section 26 was wholly unconstitutional.

Issues

i. Whether section 26 of the Sexual Offences Act which provided for the offence of deliberate transmission of HIV or any other life threatening sexually transmitted disease was unconstitutional:

1. for being vague and too broad by failing to define the scope and specific acts attracting the criminal sanctions spelt out;
2. for requiring a person charged under section 26 of the Sexual Offences Act to provide appropriate sample(s) for testing to confirm their HIV status; and
3. for limiting the constitutional rights of persons who were HIV positive.

ii. What was the role of a court in light of claims that a proposed amicus curiae was biased?

iii. What were the principles to consider in the interpretation of the Constitution and statutes?

Relevant provisions of the Law

Sexual Offences Act, Cap 63A

Section 26 - Deliberate transmission of HIV or any other life threatening sexually transmitted disease



(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly or willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—

(a) will infect another person with HIV or any other life threatening sexually transmitted disease;

(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;

(c) will infect another person with any other sexually transmitted disease,

shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.

(2) Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the court may direct that an appropriate sample or samples be taken from the accused person, such place and subject to such conditions as the court may direct, for the purpose of ascertaining whether or not he or she is infected with HIV or any other life threatening sexually transmitted disease.

(3) The sample or samples taken from an accused person in terms of subsection (2) shall be stored at an appropriate place until finalization of the trial.

(4) The court shall, where the accused person is convicted, order that the sample or samples be tested for HIV or any other life threatening sexually transmitted disease and where the accused person is acquitted, order that the sample or samples be destroyed.

(5) Where a court has given directions under subsection (4), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned;

(6) An appropriate sample or samples taken in terms of subsection (5)—

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of determining whether or not the accused person is infected with HIV or any other life threatening sexually transmitted disease; and

(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

(a) the State;

(b) any Cabinet Secretary; or

(c) any medical practitioner or designated persons,

in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the cause of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.

(9) Where a person is convicted of any offence under this Act and it is proved that at the time of the commission of the offence, the convicted person was infected with HIV or any other life threatening sexually transmitted disease whether or not he or she was aware of his or her infection, notwithstanding any other sentence in this Act, he or she shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

(10) For purposes of this section—



(a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be prima facie proof that the person concerned is infected with HIV; and

(b) if it is proved that a person was infected with HIV after committing an offence referred to in this Act, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when the offence was committed.

Held

1. Based on medical and scientific evidence and studies, criminalization of transmission of HIV undermined public health efforts and its advancements. Furthermore, criminal sanctions were not useful in the reduction of transmission of HIV. Those observations form considerations which fell outside the court's mandate. The court was only required to ascertain whether a law conformed with the set legal principles not the lacking of certain considerations in making of the law. That was because the Legislature in making laws was mandated to consider all the relevant factors such as those raised before enacting a law.
2. *AIDS Law Project v Attorney General and 3 others*, Petition No. 97 of 2010 was distinguishable from the instant petition as the case challenged the ambiguity of the word 'sexual contact' a term which was not provided for in the impugned provision. The petitioners claimed that it's the entire section 26 of the Sexual Offences Act that was vague and ambiguous.
3. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appeared to be partisan on an issue before the court, the court would consider such an objection by allowing the respective parties to be heard on the issue.
4. From a perusal of the submissions and briefs of the 1st and 2nd *amicus curiae* disclosed that their arguments took a stance of support and back up in relation to the petitioners' case and not an advisory on the legal issues to assist the court make a decision. That position was contrary to their function in a matter. Consideration of their brief in the determination would be imprudent.
5. It was set in law and principle that the Constitution must be interpreted broadly, liberally and purposely. The court should be guided by a number of principles namely that; until the contrary was proved, legislation was presumed to be constitutional. Likewise, the purpose and effect of a Statute were relevant in determining constitutionality of a statute either an unconstitutional purpose or an unconstitutional effect could invalidate legislation. Further that one of the key elements in construing a statute was to ascertain the intention of Parliament as expressed in the Act.
6. It was critical to lay the article of the Constitution which was invoked beside the statute which was challenged to decide whether the latter squared with the former. It was as well imperative to make due consideration to the legislative history of a statute as it was presumed that the Legislature understood the needs of the people and made laws directed at problems made manifest by actual experience. In the absence of an expressed legislative intention to the contrary, the language of the statute must ordinarily be taken as conclusive in its plain meaning.
7. For one to appreciate the context of the impugned provision, regard must be had to the Sexual Offences Act as a whole as it revealed the Legislature's intent in enacting the law. As per the preamble, the Legislature in enacting that statute sought to delineate the acts that qualified as sexual offences and to establish a means of punishing offenders, in an effort to prevent such offences and to protect all persons from unlawful sexual acts. Evidently an examination of the legislative history made it plain that the Legislature in enacting the Sexual Offences Act bore in mind the problems that the society was facing with reference to sexual offences that were not carefully covered under the criminal law.
8. A reading of the introduction of section 26(1) of the Sexual Offences Act disclosed a number of things to which the court would ascribe a plain meaning.
 1. The person referred to must have 'actual knowledge' of his/her status.
 2. The offense was deemed to be committed when that person intentionally, knowingly and willfully did an act that infected another person with HIV or other sexually transmitted disease.



9. The acid test upon which the impugned provision was anchored was set out very clearly. That was supported by the fact that the ingredients required to instigate a criminal matter being the *mens rea* and *actus reus* were clearly provided for. One must know of their status and proceed to act with intent to infect the victim or other person for it to be an offence. In that regard the language of the Act was clear with no ambiguity. That meant that a contrary interpretation or application other than its ordinary meaning would invoke an absurd interpretation of the provision which the principles of interpretation cautioned against.
10. One of the principles of interpretation was that a statute in its interpretation and application was presumed to adhere to the dictates of the Constitution. The impugned provision under section 26(2) of the Sexual Offences Act informed that once the alleged offender was charged the court could proceed to direct that an appropriate sample or samples be taken from the accused person. The wording of that portion did not indicate a compulsory application as adopted by the petitioners. That was because the Legislature as could be discerned intended that where a court in its wisdom assessed a situation and deemed such an exercise necessary would require the same to be undertaken.
11. Since a statute enjoyed presumption of constitutionality the action by the court was done in line with the dictates of the Constitution in mind. Undoubtedly, that presumption could only be rebutted by a person claiming otherwise. Appreciating the possibility of abuse of that provision, the Legislature put that guideline as a safeguard in the application of that provision.
12. The advanced argument by the petitioners in that regard was erroneous. That was so because they suggested that the impugned provision specifically targeted persons living with HIV and as such those persons lived in fear of being prosecuted under the impugned provision. Such an interpretation was in error because it implied that living with HIV was a crime in itself. That was not so, and there was no ground for stating so, as such.
13. A reading of the impugned section made it plain that the object of that provision was to charge, prosecute and punish persons living with HIV or any other sexually transmitted disease who committed the crime of infecting their victims with the disease knowingly. Those were the offenders and not the general community of persons living with HIV. The provision in the same way did not criminalize being in a relationship with someone who was HIV positive. It could not therefore be said that the impugned provision violated and limited the petitioners' rights.
14. A reading of the impugned provision against the Constitution did not divulge any contradiction in relation to the alleged violations. The cumulative result of that was that the petitioners had not been able to rebut the presumption of constitutionality which that provision enjoyed. Section 26 of the Sexual Offences Act was constitutional and did not violate or limit the rights of persons living with HIV under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution.
15. The bone of contention in the matter was presented as the deficiency of the impugned provision. The discernable issue was the application and interpretation of the objectives of the impugned section by the various authorities involved in its application. The cry of the petitioners and persons living with HIV was that section 26 of the Sexual Offences Act had been used to harass and charge them wrongfully. The implementing authorities remained accountable and were bound by the dictates of article 10(2)(c) of the Constitution. Where they failed to discharge their mandate in accordance with the dictates of the Act and the Constitution, an affected party was at liberty to seek redress in court.
16. More training ought to be done to ensure a greater understanding of HIV, by everyone whether infected or not. That was in light of the medical and scientific information advanced by the relevant bodies. That would assist in removal of any biases created by the lack of that knowledge in the minds of authorities and persons in the criminal justice system.
17. In cases like children's matters, HIV related cases and divorce ones courts upon noticing any sensitivity of the matter had held such matters in camera to avoid exposure of the victim to the public. HIV positive results were not supposed to be announced in open court as that would demean the dignity of



the person/ persons concerned. That had however nothing to do with section 26 of the Sexual offences Act. The impugned section did not in any way criminalize one for being HIV positive, neither did it allow publication of the results of a person who had been tested.

Petition dismissed; each party to bear their own costs.

Citations

Cases

Kenya

1. *AIDS Law Project v Attorney General & 3 others* Petition 97 of 2010; [2015] eKLR; [2015] 1 KLR 188 - (Mentioned)
2. *ANN v Attorney General* Petition 240 of 2012; [2013] KEHC 6004 (KLR); [2013] eKLR; [2013] 2 KLR 533 - (Mentioned)
3. *Center for Rights Education and Awareness & Caucus for Women's Leadership v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR); [2012] eKLR; [2012] 2 KLR 261 - (Followed)
4. *Chege, Richard Wabome v Republic* Criminal Appeal 61 of 2014; [2005] eKLR - (Mentioned)
5. *Council of County Governors v Attorney General & Independent Electoral and Boundaries Commission* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR); [2017] eKLR - (Mentioned)
6. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR); [2011] eKLR - (Mentioned)
7. *Gichuki, David Lawrence Kigera v Aga Khan University Hospital* Petition 195 of 2013; [2014] eKLR - (Mentioned)
8. *Havi, Nelson Andayi v Law Society of Kenya, Attorney General, Apollo Mboya & Fred Ojiambo* Petition 607 of 2017; [2018] KEHC 8791 (KLR); [2018] eKLR - (Mentioned)
9. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] eKLR; [2011] 2 KLR 32 - (Mentioned)
10. *Katiba Institute v Judicial Service Commission & 7 others* Civil Appeal 343 of 2014; [2017] KECA 478 (KLR); [2017] eKLR - (Followed)
11. *Kenya National Commission on Human Rights & another v Attorney General & 3 others* Constitutional Petition 87 of 2017; [2017] eKLR - (Mentioned)
12. *Kenya Wildlife Service v Joseph Musyoki Kalonzo* Civil Appeal 306 of 2015; [2017] KECA 234 (KLR); [2017] eKLR - (Mentioned)
13. *Law Society of Kenya v Kenya Revenue Authority & another* Petition 39 of 2017; [2017] eKLR - (Mentioned)
14. *Mboya, Apollo v Attorney General, National Assembly & Senate* Petition 472 of 2017; [2018] KEHC 6933 (KLR); [2018] eKLR - (Mentioned)
15. *Mbura & 18 others suing for themselves and on behalf of other former Employees of Cast Brewing Kenya Ltd v Castle Brewing Kenya Ltd & another* Civil Case 1119 of 2003; [2006] KEHC 2316 (KLR); [2006] eKLR - (Mentioned)
16. *Murambi, Isaac Robert v Attorney General, Director of Public Prosecutions, Inspector General of Police & Busia Chief Magistrate's Court* Constitutional Petition 3 of 2016; [2017] KEHC 3034 (KLR); [2017] eKLR - (Followed)
17. *Mwau v Independent Electoral and Boundaries Commission & Another* Petition 26 of 2013; [2013] eKLR; [2013] 3 KLR 402 - (Mentioned)
18. *Mwaura & 2 others v Republic* Criminal Appeal 5 of 2008; [2013] eKLR; [2013] 3 KLR 552 - (Mentioned)
19. *Njenga, Adrian Kamotho v Kenya School of Law* Petition 398 of 2017; [2017] KEHC 2158 (KLR); [2017] eKLR - (Mentioned)



20. *Njoya & 6 others v Attorney General & 4 others* Misc Civil Appl 82 of 2004; [2004] KEHC 1467 (KLR); [2004] 1 KLR 232 - (Mentioned)
21. *Obuya, Mark & 2 others Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* Petition 383 of 2013; [2014] KEHC 4336 (KLR); [2014] eKLR - (Followed)
22. *Ogendo & 2 others v Attorney General & 5 others* Petition 70 of 2013; [2014] KEHC 6197 (KLR); [2014] eKLR; [2014] 4 KLR 215 - (Mentioned)
23. *Osire, Denish Gumbe v Cabinet Secretary, Ministry of Defence & another* Petition 572 of 2013; [2017] eKLR - (Mentioned)
24. *Republic v Amos Kipyegon Cheruiyot* Criminal Case 29 of 2016; [2016] KEHC 3553 (KLR); [2016] eKLR - (Mentioned)
25. *Republic v John Kithyululu* Criminal Case 12 of 2015; [2016] KEHC 5990 (KLR); [2016] eKLR - (Mentioned)
26. *Republic v Mark Lloyd Steveson* Criminal Revision 1 of 2016; [2016] KEHC 4022 (KLR); [2016] eKLR - (Mentioned)
27. *Sony Holdings Ltd v Registrar of Trade Marks Sony Corporation* Civil Appeal 37 of 2013; [2015] KECA 904 (KLR); [2015] eKLR - (Mentioned)
28. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Petition 12 of 2013; [2015] eKLR - (Mentioned)
29. *Wanjiku & another v Attorney General & another; Muna & another (Interested Parties)* Petition 190 of 2011; [2012] KEHC 5410 (KLR) - (Mentioned)
30. *Wanjiru, Jessicar Clarise v Davinci Aesthetics & Reconstruction Centre & 2 others* Constitutional Petition 410 of 2016; [2017] eKLR - (Mentioned)
31. *Waweru, Peter K v Republic* Miscellaneous Civil Application 118 of 2004; [2006] KEHC 3202 (KLR); [2016] eKLR - (Mentioned)

Uganda

Tinyefunza v Attorney General of Uganda (Constitutional Petition No 1 of 1996); [1997] UGCC 3 (25 April 1997) - (Mentioned)

South Africa

Re Hyundai Motor distributors (PTY) & others v. Social NO & others [2000] ZACC 12 2001 (1) SA 545 - (Mentioned)

Botswana

Dijaje Makuto v State Criminal Appeal No 31 of 1999 - (Mentioned)

United Kingdom

W v Edgell [1990] 1 All ER 835 - (Mentioned)

India

Hamdard Dawakhana & another v The Union of India (Uoi) & others AIR 1960 SC 554; 1960 CriLJ 671; (1960) IIMLJ 1 SC; 1960 2 SCR 671 - (Mentioned)

Australia

Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council (1948) 77 CLR 544 at 568 - (Mentioned)

Regional Court

1. *Ndyanabo v Attorney General* [2001] EA 495 - (Applied)
2. *Obbo & another v Attorney General* [2004] EA 265 - (Mentioned)

Texts

1. Joint United Nations Programme on HIV/AIDS (UNAIDS) (2020), *UNAIDS Data 2020* Joint United Nations Programme on HIV/AIDS (UNAIDS)



2. Ministry of Health (2016), *Kenya AIDS Response Progress Report 2016* Ministry of Health pp 1-96
3. Ministry of Health (2019), *National AIDS Control Council's Kenya AIDS Strategic Framework 2014/15-2018/19* Ministry of Health pp 1-89
4. Onyango-Ouma, et al (Eds) (2009), *"The Making of the Kenya Sexual Offences Act, 2006: Behind the Scenes."* Nairobi: Kwani Trust

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 2(4); 2(5); 2(6);10; 10(2)(c);19; 20; 23; 24; 25; 27; 28; 29; 29(f); 31 32; 35; 43(1)(a); 45; 49; 50(2); 53; 53(1)(c); 53(1)(e);165; 258; 259 - (Interpreted)
2. HIV Aids Prevention and Control Act (cap 246A) section 24 - (Interpreted)
3. Medical Practitioners and Dentists Board (Disciplinary Proceedings) Procedures Rules, 1979 (cap 253 Sub Leg) rule 8 - (Interpreted)
4. Penal Code (cap 63) section 122A - (Interpreted)
5. Sexual Offences Act (cap 63A) sections 26(1)(9); 36 - (Interpreted)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. International Covenant on Civil and Political Rights (ICCPR), 1966
3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
4. United Nations Political Declaration on Ending AIDS sets world on the Fast-Track to end the epidemic by 2030, 2016

Advocates

None mentioned

JUDGMENT

1. The petition dated December 10, 2018 was filed under articles 19, 20, 22, 23, 24, 165, 258 and 259 of the Constitution for the alleged contravention of the petitioners' constitutional rights under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution. Accordingly, the petitioners seek the following orders:
 - i. A declaration that section 26 of the Sexual Offences Act No 3 of 2006 is inconsistent with the Constitution and therefore void and invalid in terms of article 2(4) of the Constitution.
 - ii. A declaration that section 26 of the Sexual Offences Act No 3 of 2006 is wholly unconstitutional and it accordingly stands to be struck from the Statute.
 - iii. This honourable court be pleased to issue an order that each party should bear their own costs on the grounds that this petition is in the public interest.
 - iv. This honourable court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.

The Petitioners' Case

2. The crux of this petition is premised on section 26 of the Sexual Offences Act No 3 of 2006. According to the petitioners this Section is vague and articulated in ambiguous language. Likewise, it fails to define the scope and specific acts attracting the criminal sanctions spelt out therein. In view of this it was asserted that this provision violates the rule of law which requires that laws with criminal penalties



ought to be clear. This is so as not to limit the understanding of their scope and avoid their arbitrary enforcement and prosecution.

3. It was asserted that the purpose of the *Sexual Offences Act* which is stated to be prevention and protection against unlawful sexual acts runs contrary to section 26 of the *Act*. This is since the impugned section perpetuates discrimination, stigma and fear from testing for HIV and disclosing one's status.
4. Moreover, the impugned section unreasonably and unjustifiably limits the rights of persons living with HIV particularly under articles 27, 28, 29(f), 31, 43(1)(a), 45, 50(2), 53(1)(c, e) of the *Constitution*. The petition was supported by all the petitioners' supporting affidavits of even date as outlined below.

The 1st Petitioner's Case

5. He deposed that he was married to two wives and had two children. He deposed that on February 27, 2018, he was arraigned in court and charged with the offense of deliberate transmission of a life threatening sexually transmitted disease contrary to section 26(1) of the *Sexual Offences Act* No 3 of 2006. This was on the basis that he had exposed a police officer to HIV due to his alleged action of biting the officer's thumb. He learnt of this in court.
6. He deposed that he had bitten the officer the previous day as the officer forcefully handcuffed him. Upon being arrested, the police officers took him to Sigowet Sub - County hospital where his blood samples were taken and tested for HIV without his consent or an explanation. He was thereafter detained at Sondu police station.
7. He deposed that the charge under section 26 of the *Sexual Offences Act* was discriminatory as it was solely based on his HIV status. Furthermore he stated that disclosure of his HIV status in public exposed him to psychological torture and mental anguish. Likewise, violated his right to dignity and privacy as was subjected to cruel, inhuman and degrading treatment. He deposed that there is no scientific proof that HIV can be transmitted through biting due to an infected person's saliva.
8. According to him the impugned section entrenches discrimination and stigma as it makes persons living with HIV susceptible to abuse as demonstrated in his prosecution. In view of this he supported the petition since this section not only violates his rights under the *Constitution* as cited in the petition but also his rights under the *International Covenant on Civil and Political Rights* (ICCPR), The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and The *African Charter on Human and Peoples' Rights* (also known as the Banjul Charter).

The 2nd Petitioner's Case

9. The 2nd petitioner deposed that she is married to SM and have seven children together. She informed that sometime in 2012 before conceiving her sons, she became unwell and discovered she had HIV when she sought treatment at Njoro District Hospital. She began her treatment immediately which she continues to date. She informed that her viral load as at June 28, 2018 was undetectable.
10. She was later on able to conceive adhering to her doctor's instructions on how to prevent transmission to her sons. She deposed that she was able to breastfeed her sons for 6 months as they had been put on Neverapine. She made known that all her children are HIV negative.
11. She deposed that sometime in September 2018 her neighbor, Priscilla Ndungu left her son for her to watch over as she went to the posho mill only to later falsely accuse her of breastfeeding the boy. The matter went upto the village elders who ordered her husband to pay a fine which he did not.



12. She was later charged with violation of section 26 of the *Sexual Offences Act* by the police, who arrested and detained her. It is her disposition that before this her HIV status was known to only her family members and health providers. She noted that her case was published in the mainstream media. This disclosure as a result of the arrest caused her anguish and suffering. For the reasons stated above she averred that her constitutional rights as cited in the petition were violated.

The 3rd Petitioner's Case

13. The 3rd petitioner averred that she met her husband around 2002 when they started living together. She soon after conceived in August 2002 and began attending a prenatal clinic at Mathare North Health Centre. At the clinic she was tested for HIV. She stated that she was not given the test results but was instructed to give medication to her baby within 72 hours after birth.
14. It was after conception of her second child that she learnt she was HIV positive. She started taking her medication and adhered to the doctor's instructions to prevent transmission to her unborn child. She informed her husband her status but he remained in denial.
15. She deposed that when her husband started experiencing complications he still refused to get tested. He instead accused her of bringing HIV to their home and became violent towards her threatening to kill her. He moreover swore that he would report her to the police for bringing HIV to their home. She in view of this supports this petition since the impugned section makes women vulnerable to violence and violates her constitutional rights.

The 4th Petitioner's Case

16. The 4th petitioner deposed that she is married to the 5th petitioner and have one child together. She made known that she got married to the 5th petitioner following the demise of her husband in 2004. She had two children with her late husband. It was after her first husband's death that she learnt that their child and her, were HIV positive. They were placed on treatment and she was counselled.
17. She later met the 5th petitioner who is HIV negative but they agreed to live together. With treatment and counselling she was able to conceive their child who is on medication.
18. She supports the petition as the impugned section makes her a potential suspect due to her relationship with the 5th petitioner yet it is consensual on their part. According to her, thousands of discordant couples and breastfeeding mothers in Kenya run a risk of being arrested and charged under this provision in turn violating their constitutional rights. Moreover she averred that this criminalization deters people from testing for HIV and other sexually transmitted diseases and disclosing of their status.

The 5th Petitioner's Case

19. He deposed that he met the 4th petitioner in 2011 and married her with full knowledge of her HIV status. Prior to being educated on HIV he had a lot of stigma against people living with HIV, which later changed. He deposed that when he learnt of the 4th petitioner's status they got counselled and taught how to live together safely. He is apprehensive that the impugned provision will negatively affect his wife, their marriage and family. This is because the law can be used against his wife in the event he gets infected with HIV despite him consenting to their discordant relationship.
20. He supported this petition because according to him the impugned law jeopardizes the institution of marriage and discriminates against persons living with HIV hence perpetuating its stigma. He additionally deposed that the law violates their constitutional rights.



The 6th Petitioner's Case

21. The 6th petitioner deponed that she is HIV positive and married to a husband who is HIV negative. They have four children who are also HIV negative. She is currently working at the National Empowerment Network of Persons Living with HIV and AIDS Kenya (NEPHAK). She noted as well that she takes her medication as required.
22. She stated that over the years she had witnessed how persons living with HIV are exposed to stigma and discrimination, disclosures of their confidential information, neglected by health care providers, required to be tested before employment and some dismissed from employment due to their status and exposed to violence. She deposed that her husband knew of her HIV status before they got married but were stigmatized due to their discordant HIV status by their family and friends who said that she would infect her husband. This she says caused her psychological torture and mental anguish.
23. She averred that due to the provision of section 26 of the *Sexual Offences Act*, she is apprehensive that she may be charged with a criminal offense under this provision yet they consented to marry with full knowledge of their HIV status. It is on this ground that she supported the petition.

The 7th Petitioner's Case

24. The 7th petitioner filed an affidavit by Ambrose Rachier an advocate of the High Court of Kenya working at Rachier and Amollo Advocates and the Chairman of the Board of the 7th petitioner. He deponed that the mandate of the 7th petitioner is to protect and promote health related human rights in Kenya.
25. He deposed that there is a general consensus among experts and intergovernmental organizations that laws criminalizing HIV transmission and exposure undermine public health and human rights. He noted that as per UNAIDS instead of introducing HIV specific laws, the government ought to apply general criminal law offences in a manner that is consistent with international human rights obligations. He further deposed that in its November 2018 report 'Knowledge is power', UNAIDS lamented that these legislations create barriers to care and reinforce stigma and discrimination.
26. On emerging jurisprudence, he averred that the Ministry of Health had committed to review and reform laws that perpetuate stigma and discrimination. This he said was apparent by reading the *National AIDS Control Council's Kenya AIDS Strategic Framework 2014/15-2018/19* and the *Kenya AIDS Response Progress Report 2016*. Similarly, he stated that the three Judge bench in the case of *AIDS Law Project v Attorney General and 3 others* Petition No 97 of 2010 pronounced that section 24 of the *HIV and AIDS Prevention and Control Act* which criminalized HIV in like manner was unconstitutional.
27. It is his disposition that criminalization of HIV transmission and exposure undermines an effective HIV response as the stigma and discrimination makes it less likely that people will pursue health affirming behavior. He argued that these laws in addition encourage a public view that people living with HIV should be shunned and deemed as criminals. This is against the background where it has been affirmed by UNAIDS that persons living with HIV are able to live normal lives and disease no longer results in premature death. Moreover, that there is no evidence that these laws reduce the incidence of HIV transmission or have had a positive impact in the society.
28. He further deponed that these laws increase fear through misinformation on the accurate scientific and medical perspective of HIV. People are as a result discouraged from testing for HIV, receiving education from the health providers by freely consulting them and afraid to disclose their status to others and



their partners. He deposed in closing that for the reasons set out above, section 26 of the [Sexual Offences Act](#) No 3 of 2006 violates the constitutional rights stated in the petition.

The 1st Respondent's Case

29. In reply to the petition the 1st respondent filed grounds of opposition (undated) on the basis that:
- i. The petitioners have failed to demonstrate that the challenged section is unconstitutional or in any manner infringes any provisions of the [Constitution](#).
 - ii. The challenged provisions are clear, precise and unambiguous and do not disclose any infringement of the provisions of the [Constitution](#).
 - iii. The petitioners have failed to consider the history behind the enactment of the challenged provision in question.
 - iv. Section 26 of the [Sexual Offences Act](#) is constitutional and that Parliament exercised its mandate in enacting the [Act](#).
 - v. There is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.
 - vi. The object and purpose of the impugned statute must be determined for it is important to discern the intention expressed in the Act. Further the court must have regard not only to its purpose but also its effect which was prevention of intentional spread of HIV AIDS.
 - vii. The petition is misconceived, incompetent and bad in law and the orders sought by the petitioners are not tenable against the respondents.

The 2nd Respondent's Case

30. The 2nd respondent did not file any response or submissions. The party however sought to rely wholly on the 1st respondent's response and submissions.

The Interested Party's Case

31. The interested party through its Chief Executive Officer, Dr Ruth Laibon-Masha filed a replying affidavit dated May 17, 2021. She deposed that HIV and AIDS as a global epidemic remains a major public health challenge with 38 Million (36.2 million adults and 1.8 million children) people living with HIV, 1.7 million new infections annually and 690,000 AIDS related deaths annually ([UNAIDS, 2020](#)). In Kenya, about 1.5 million people are living with HIV, 41,000 people (6,806 children and 34,610 adults) are newly infected with HIV every year and 21,000 (4,333 children and 16,664) Kenyans die of HIV related causes every year.
32. She further averred that according to the Kenya Population-based HIV Impact Assessment (KENPHIA) 2018 survey, the prevalence of HIV in women (15 - 65 years) is at 6.6%, twice that in men (15 -64 years) at 3.1 %, thereby making women and young girls a more vulnerable group in need of state protection.
33. She deposed that the HIV criminalization laws were brought about by the anecdotal incidents of deliberate HIV transmission including myths of "Virgin cleansing of HIV" which caused the government to respond to the rising cases of sexual violence within the ambit of sexual offences. She made known that despite the progressing policies in Kenya, gender-based and other forms of violence against vulnerable populations still remain high. She however noted that a multi-sectoral approach to



reducing HIV and AIDS prevalence in Kenya including enhancing the legal and policy environment for vulnerable groups has witnessed a tremendous decrease in HIV prevalence in the country, decrease in new infections as well as increase in the uptake of HIV care and support services by persons living with HIV.

34. She deposed that with regard to the impugned law, the responsibility to protect citizens against perilous acts that may include deliberate infection lies with the State. As such she noted that the provision does not constitute discrimination against persons living with HIV merely due to their health status as alleged but geared towards penalizing malafide actors who, although aware of their condition, decide to infect, adversely affect and endanger the health and lives of others.
35. It was her disposition therefore that the application of the impugned provision does not impede and/or act as a barrier to the enjoyment of rights and fundamental freedoms by the petitioners since the wording used in the provision is clear, precise, unequivocal and do not in any way purport or intend to harm or discriminate the petitioners.
36. Nevertheless, she averred that statutes enjoy the presumption of legality and that the petitioners had not rebutted this presumption. She moreover deposed that legislation should be given a purposive interpretation which conforms to the provisions of article 259 of the *Constitution*. To that end she averred that the petitioners had not established a case for grant of the prayers sought and hence petition should be dismissed.

The 1st Amicus Curiae's Brief

37. The 1st amicus curiae filed detailed written submissions dated February 18, 2020 through the firm of Osiemo Wanyonyi and Company Advocates. As an introduction the origin of HIV criminalization was noted to have first emerged in the 1980's. This was at the time when HIV was considered fatal due to lack of treatment. As at 2019 at least 75 countries had laws that criminalize HIV non-disclosure, exposure and transmission. These laws include both punitive and protective provisions against people living with HIV.
38. The amicus curiae pointed out that an examination of all these legal provisions reveals the limited scientific understanding of HIV at the time of enactment. That following all this the experts urged the States to refrain from adopting HIV specific criminal laws, which were found to be unconstitutional. That in Kenya the High Court in the case of *AIDS Law Project (supra)* declared that the provision criminalizing HIV non-disclosure and exposure was unconstitutional. He referred to several countries which have chosen not to criminalize HIV non-disclosure, exposure and transmission.
39. On the constitutionality of the impugned provision, counsel submitted that the impugned section is vague and too broad and does not allow a person to know what conduct is criminalized under the provision hence leading to arbitrary application. It was argued that the provision risks being interpreted in a way that would criminalize people who engage in activities that pose no risk of transmission based on medical and scientific evidence as seen in the 1st petitioner's case and in the absence of any intent to transmit the virus. Furthermore it was submitted that the section does not provide the defense for consent for couples in sero-discordant relationships or for women living with HIV who are pregnant or breastfeeding
40. It was stated that the provision does not define a life threatening sexually transmitted disease neither the phrases 'the doing of anything', "ought to reasonably know" and "is likely to lead to another person being infected" are defined. It was contended that the wording of the impugned section reinforces stigma against persons living with HIV by presuming it is them who engage in the acts which spread STIs and not their partners hence undermining shared responsibility. Likewise, the HIV testing done



on a person in the impugned Section is without consent which means that the HIV status of the individual who was forcibly tested will be disclosed in open court despite being private and confidential medical information.

41. He submitted further that section 26(1)) creates a presumption that a positive HIV test result is *prima facie* evidence that an accused person had HIV at the time of the alleged incident. Likewise, that both section 26(1) and 26(9) impose a mandatory minimum and maximum sentence of 15 years which was argued to be disproportionate. In a nutshell he argued that the impugned Section violates articles 27, 28, 29, 31, 43(1)(a) & 50 of the Constitution.

The 2nd Amicus Curiae's Brief

42. The 2nd amicus curiae did not file any written submissions but sought to rely on their brief dated September 16, 2019. It's brief was categorized into five areas.

On the first point, it was stated that international law operates in Kenya by virtue of articles 2(5) and 2(6) of the Constitution as long as it does not conflict with the Constitution as held in the case of Wanjiku & another v the Attorney General & others (2012) eKLR. Considering this, these rights are based on evidence informed policies provided by international organizations such as UNAIDS and WHO which constitute normative guidance that assists member states such as Kenya fulfill their international human rights obligations.

43. It noted that member states adopted the 2016 Political Declaration on HIV and AIDS that affirmed that the promotion and protection of and respect for human rights and fundamental freedoms should be mainstreamed into all HIV and AIDS policies and programs.

It stated that there is need to take measures that prevent third parties from interfering with the right and adopt appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the right. Further that it was a violation of the right to health for any adoption of any retrogressive measures incompatible with the core obligations under the said right.

44. It stated that no legislation or policies should create barriers to the realization of the right to sexual and reproductive health including laws criminalizing HIV non-disclosure, exposure and transmission. That this is stipulated in the African Commission on Human and Peoples' Rights. Therefore anything to the contrary is unconstitutional.

45. On the third point, it was made known that there is consistent evidence as gathered by UNAIDS from various countries that shows that the criminalization of HIV is likely to undermine national efforts to scale-up HIV testing and treatment. This is since it discourages the demand for HIV testing and interferes with the adequate care of people living with HIV, including their adherence to antiretroviral therapy. The fear of prosecution was derailing the progress in testing for HIV. This also made it difficult for one to disclose their status to their partner. In respect of all this it was argued that laws should be applied in a manner that avoids stigmatization to persons living with HIV and considers scientific and epidemiological evidence.

46. It was contended that the criminalization of HIV puts the sole burden on people living with HIV to disclose and take measures to prevent HIV transmission, while minimizing all individuals' responsibility to take charge of their own health. On the flipside, evidence has shown that where individuals undergo voluntary HIV counselling and testing and learn of their status, they change their sexual behavior to avoid transmitting HIV to others.

47. With regard to the impact on the vulnerable population, it was stated that HIV criminalization has had a dire impact on women living with HIV. Since women are the ones who discover their status first



they are legally obligated to enforce safety precautions when they learn their status in the face of the gendered power imbalance between men and women. This as observed has fostered violence in families. What is more women living with HIV who conceive are prosecuted for exposing or transmitting HIV to their children. This in turn makes women living with HIV reluctant to seek pre-natal and post-natal care. It is contended that HIV criminalization laws act as barriers to access HIV prevention, testing, treatment and care services especially for people who need them the most.

48. On the final point, it was stated that owing to scientific evidence HIV was easily preventable and with antiretroviral therapy had become a manageable chronic condition that should not be treated any different from similar conditions. In conclusion it was noted that member states had an international obligation to adopt and review their laws to enable the enjoyment of the right to health by all and especially the most vulnerable populations.

Submissions

The petitioners' submissions

49. The petitioners through their advocates Caroline Oduor and Associates filed written submissions dated December 8, 2021 and supplementary submissions dated April 26, 2022. To begin with counsel submitted that neither the 1st respondent nor the interested party responded to the experiences of the petitioners as deponed in their respective affidavits. That their evidence was therefore uncontroverted.
50. He further submitted that section 26 of the *Sexual Offences Act* violates the principle of legality which requires that legislation should not be so vague to require an interpretation by a judge to know what is prohibited. This was the holding in *Law Society of Kenya v Kenya Revenue Authority & Another* (2017) eKLR, where the court noted that for a law to be deemed as qualifying this principle it must state explicitly what it mandates, what is enforceable and provide definitions of potentially vague terms. Also see *AIDS Law Project* (*supra*).
51. Counsel further submitted that the provisions under section 26 of the *Sexual Offences Act* are vague and expressed in ambiguous language and fail to state the scope or specific acts and/or omissions that attract criminal sanctions. Additionally that the words in the provision

“... does anything or permits the doing of anything ”

are equally ambiguous. Further that the wording

“... is likely to lead”

is overly broad and ambiguous and doesn't specify what is meant by

“... life threatening sexually transmitted disease”.

From this he argues that an accused person would not know what exactly is outlawed.

52. Turning to the next point, counsel submitted that the impugned provision violates article 10 and other various constitutional provisions. To begin with is the right to dignity and freedom from cruel, inhuman and degrading treatment. He submitted that the impugned provision singles out persons living with HIV and permits the taking of samples of their blood, urine or tissue without their consent. Moreover, it proceeds to create an offence carrying a jail term of not less than 5 years should the accused person refuse to give a sample hence violating his/her right to dignity.



53. Relying on the cases of *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017)eKLR and *ANN v Attorney General* [2013] eKLR, counsel submitted that the rights to life and dignity are the most important of all human rights, and the source of all other personal rights.
54. On the right to freedom from discrimination, counsel noted that women are affected more by the discrimination that is perpetuated by the impugned provision. This was corroborated by the 2nd, 3rd and 4th petitioners' affidavits. That despite the petitioners taking medication and adhering to treatment they were still discriminated against by their spouses and neighbours. In support of the element of discrimination he relied on:-
- (i) *Dijaje Makuto v State* Criminal Appeal No 31 of 1999 and
 - (ii) *Peter K Waweru v Republic* [2006] eKLR.
55. On the right to a fair trial, it was submitted that article 50 of the *Constitution* provides for the right to refuse to give self-incriminating evidence which if obtained in a manner that violates any right or fundamental freedom in the Bill of Rights should be excluded. Counsel submitted that section 26(2) of the impugned section allows for the mandatory testing for HIV for a person charged under the Act which violates the provisions under articles 49(1)(d), 50(2) and (4) of the *Constitution*.
56. Moreover, counsel stated that section 26(10) presumes the guilt of the arrested person once a positive test result is achieved, which violates the accused persons right to be presumed innocent. Further that there is no medical test to definitely ascertain when transmission exactly occurred. In light of this he contended that this presumption was a clear infringement of the right to fair trial. In support he cited the case of *Wabome v Republic* (2005)eKLR.
57. On the right to privacy counsel submitted that the right to privacy consists essentially of the right to live one's life with minimum interference as held in the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* (2017) eKLR. It was noted that the impugned provision allows the taking of samples from the accused person and storage of these samples until the finalization of trial. According to him this provision exposes information relating to a person's HIV status to third parties without any safeguard provisions for confidentiality. In the same way the provision does not provide for protection with respect to disclosure of such information which information may expose persons living with HIV to further stigma and discrimination hence violating their right to privacy.
58. On the right to family counsel submitted that the impugned provision denies people living with HIV their constitutional right to family by purporting to criminalize consensual sexual activity on the sole basis of health status. This can be seen in the case of the 4th and 5th petitioners who are in a sero-discordant relationship. This is regardless of the steps taken to protect themselves and their child in order to enjoy their constitutional right to family. Considering this it was submitted that the impugned provision is unjust and unconstitutional for purporting to criminalize physical intimacy.
59. Counsel submitted that the impugned provision is contrary to article 24 of the *Constitution* which only allows a limitation that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Counsel relied on the case of *Obbo and another v Attorney General* (2004) EA 265 as cited in the case of *AIDS Law Project* (*supra*) and submitted that the test must conform to what is universally accepted to be a democratic society. Counsel thus argued that the petitioners had demonstrated that the purported limitation of the rights of persons living with HIV contravenes the express provisions of article 25 of the *Constitution* and should be adjudged unconstitutional.



60. On the appropriate remedy to be issued, he submitted that the petitioners had proved that the enforcement of the impugned provision violates the rights of persons living with HIV. They were hence entitled to the prayers sought.
61. In response to the 1st respondent and interested party's submissions counsel argued that the same were general in nature and had not demonstrated in any manner, the extent to which the impugned provision achieves its purpose.

The 1st Respondent and Interested Party's Submissions

62. The 1st respondent and interested party through senior state counsel Gracie M Mutindi filed written submissions dated January 28, 2022, identifying several issues for determination.

Counsel commenced by stating that a statute enjoys a presumption of constitutionality and the burden to prove otherwise rests on the party alleging so. In support reliance was placed on *Hamdard Dawakhana & Anor v The Union of India (Uoi) & others*. AIR1960 SC 554, 1960 CriLJ 671, (1960) IIMLJ 1 SC, 1960 2 SCR 671 where it was held that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived as existing, at the time of enacting the legislation.

63. She further noted that the principles of constitutional interpretation are well settled in a plethora of authorities. The courts in exercising judicial authority are obliged under article 259 of the Constitution to protect and promote the purposes and principles of the Constitution. In support reliance was placed on the cases of the *Matter of Interim Independent Electoral Commission* Constitutional Application No 2 of 2011 [2011] eKLR, *Council of County Governors v Attorney General & another* [2017] eKLR and *Njoya & 6 others v Attorney General & another* [2004] eKLR.
64. Counsel pointed out the principles of constitutional interpretation namely; reading the impugned provision in conformity with the constitution to avoid an interpretation that clashes therewith; the court being mindful of the mischief sought to be remedied by the legislation such as social and historical background; and the desires and aspirations of the people on whom the constitution vests the sovereign power; requirement that the words and expression used in a statute be interpreted according to their ordinary literal meaning in the statement and in light of their context. Reference was made to the following cases;
- (i) *Re Hyundai Motor distributors (PTY) & others v Social NO & others* [2000] ZACC 12 2001 (1) SA 545.
 - (ii) *Tinyefunza v Attorney General of Uganda*, Constitutional Petition No 1 of 1997, UGCC 3,
 - (iii) *Apollo Mboya v Attorney General & 2 others* [2018] eKLR.
 - (iv) *Adrian Kamotho Njenga v Kenya School of Law* [2017] eKLR
 - (v) *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR.
65. Counsel while relying on the interested party's data in the replying affidavit submitted that Kenya continues to be ravaged by the scourge that is the HIV/AIDS epidemic despite the scientific gains that have been made towards reducing the mortality rate. She argued that by passing the impugned law, the legislature was not acting in a vacuum but responding to a situation in which the State needed to intervene. Moreover it was stated that article 43 of the *Constitution* places the obligation to provide the highest attainable standards of health on the state. In view of this she argued that the petitioners'



- rights must be weighed within this limitation and the limitations provided under article 24 of the [Constitution](#).
66. On the alleged contravention of the right to dignity, freedom from cruel, inhuman and degrading treatment, counsel submitted that this is what is done for sadistic pleasure, in order to cause extreme physical or mental pain, and is disproportionate to the crime as stated by the Court of Appeal in the case of [Joseph Njuguna Mwaura & 2 others v Republic](#) [2013] eKLR. Similar reliance was placed on the cases of [Denish Gumbo Osire v Cabinet Secretary, Ministry of Defence & another](#) [2017]eKLR and [Samwel Rukonya Mburu v Castle Breweries](#), Nairobi HCC 1119 of 2003.
 67. Counsel noted that the impugned section was supposed to be read together with section 36 of the [Act](#) that provides for taking of evidence of medical or forensic nature from persons charged with offences under the [Sexual Offences Act](#). These are stored until the finalization of the trial and where the accused person is acquitted the samples are destroyed. As such she noted that the taking of samples as required by the [Act](#) is not aimed at subjecting persons such as the petitioners, to cruel, inhuman and degrading treatment but to ensure all material is availed to enable the court reach a just determination.
 68. On the allegation of contravention of the right to equality and freedom from discrimination, counsel noted that the requirements of the impugned provision such as taking samples applied to all persons suspected to have committed a sexual offence hence not discriminatory to persons living with HIV. It was emphasized that courts have held that mere differentiation or inequality of treatment does not per se amount to discrimination and neither is the right an absolute right as seen in the case of [Peter K Waweru v Republic](#) [2006] eKLR. Additional dependence was placed on:
 - i. [John Harun Mwau v Independent Electoral and Boundaries Commission & another](#) [2013] eKLR,
 - ii. [Nelson Andayi Havi v Law Society of Kenya & 3 others](#) Petition No 607 of 2017 (2018) eKLR,
 - iii. [Federation of Women Lawyers Kenya \(FIDA-K\) & 5 others v Attorney General & another](#) (2011) eKLR.
 69. Counsel pointed out that the wording of section 26(2) informed that ' ... the court may direct' underlining the word may, she noted that the court had in numerous authorities held that the use of the word 'may' unlike 'shall', is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used as held in the case of [Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council](#) (1948) 77 CLR 544 at 568. This was similarly observed in the cases of [Sony Holdings Ltd v Registrar of Trade Marks & another](#) [2015] eKLR, and [Kenya Wildlife Service v Joseph Musyoki Kalonzo](#) [2017] eKLR. According to counsel this section grants the court discretion noting that a person may voluntarily agree to have their blood samples taken.
 70. On the right to a fair trial, counsel while relying on the case of [Richard Dickson Oendo & 2 others v Attorney General & 5 others](#) [2014] eKLR noted that the privilege of an accused person not to incriminate himself protects against compulsory oral examination for the purposes of extorting unwilling confession or declaration implicating the accused in the commission of crime. The court in the case of [Republic v Amos Kipyegon Cheruiyot](#) [2016] eKLR adopting this holding observed that the accused was not being asked to provide testimonial or communicative (written) material that may implicate him rather he was being asked to provide 'real or physical evidence' in the form of a blood sample. Additional reliance was placed on [Republic v John Kitbyululu](#) [2016] eKLR, and [R v Mark Lloyd Stevenson](#) [2016] eKLR (Kiambu Criminal Revision No 1 of 2016)
 71. On the alleged contravention of the right to privacy by allowing the taking and storage of blood samples, it was submitted that this notion was based on a misguided interpretation of both the



Constitution and the applicable laws. To explain this point counsel relied on a number of provisions, beginning with section 36 of the [Sexual Offences Act](#) as discussed above which is also similar to section 122A of the [Penal Code](#) cap 63.

72. She further referred to rule 8 of the [Medical Practitioners and Dentists Board \(Disciplinary Proceedings\) Procedures Rules](#) which prohibits disclosure of a patient's medical information. She equally noted that the right was not absolute and where the information regards public interest the same ought to be disclosed under article 35 of the [Constitution](#). She argued that this information is disclosed in line with the principles set out in law as emphasized in the cases of [W v Edgell](#) [1990] 1 All ER 835, and [David Lawrence Kigera Gichuki v Aga Khan University Hospital](#) [2014] eKLR.
73. On the alleged violation of the right to family, counsel pointed out that the impugned provision does not prohibit persons living with HIV from having sexual relations and so the petitioners' arguments are based on a non-existent legal proposition. To this end she submitted the petition has no merit and so should be dismissed.
74. On a final note, counsel opposed the 1st and 2nd *amicus curiae's* submissions. According to her, they did not understand the impugned law and took a partisan position in favour of the petitioners. In turn they failed to identify issues not addressed by the parties so as to give this court guidance on the same while remaining neutral to the purpose and intention of the law. She submitted that this position was informed by the Supreme Court decision in the case of [Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others](#) [2015] eKLR that stated the principles that govern the *amicus curiae's* brief. She urged the court to disregard the 1st and 2nd *amicus curiae's* submissions.

Analysis and Determination

75. Before commencing this determination I wish to highlight some issues raised by the petitioners in their petition. It was noted that based on medical and scientific evidence and studies, criminalization of transmission of HIV undermined public health efforts and its advancements. Furthermore, it was observed that criminal sanctions are not useful in the reduction of transmission of HIV.
76. It is imperative to note that these observations form considerations which fall outside this court's mandate. This court is only required to ascertain whether a law confirms with the set legal principles not the lacking of certain considerations in making of the law. I say so because the legislature in making laws is mandated to consider all the relevant factors such as those raised before enacting a law. I find the holding in the case of [Mark Obuya, Tom Gitogo & Thomas Maara Gichubi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others](#) [2014] eKLR relevant in this regard:
 - “ 32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the [Constitution](#), the court cannot question the wisdom of legislation or its policy object ... ”
77. The other issue was the heavy reliance placed on the [Aids Law Project case](#) (*supra*) in relation to the instant petition. In my view that case is distinguishable from the instant petition as the case challenged the ambiguity of the word 'sexual contact' a term which is not provided for in the impugned provision.



The petitioners claim that it's the entire section 26 that is vague and ambiguous. The Court in its finding stated as follows:

“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.”

78. That said, I have carefully considered the petition, affidavits, submissions case law and I find the issues that arise for determination to be follows:
- i. Whether this court should consider the 1st and 2nd amicus curiae's submissions.
 - ii. Whether section 26 of the *Sexual Offences Act* No 3 of 2006 is unconstitutional for being inconsistent with the *Constitution*.
 - iii. Whether the petitioners are entitled to the reliefs sought.

Whether this Court should consider the 1st and 2nd Amicus Curiae's Submissions

79. The contribution of the 1st and 2nd *amicus curiae* through their brief was challenged by the 1st respondent and interested party. They asserted that the said parties had taken a partisan position in this petition contrary to the legal dictates of their admission in a matter. Reliance was placed on the Supreme Court decision in the *Trusted Society of Human Rights Alliance case* (*supra*) that stressed this point. The petitioners did not respond to this opposition.
80. The Court of Appeal in the case of *Katiba Institute v Judicial Service Commission & 8 others* [2017] eKLR relying on the Supreme Court direction stated as follows:

“30. In *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR the Supreme Court set out guidelines in relation to the role of *amicus curiae*. In doing so, that court reaffirmed its position on partisanship as stated in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (above) . It stated as follows:

“Where, in adversarial proceedings, parties allege that a proposed *amicus curiae* is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the court, the court will consider such an objection by allowing the respective parties to be heard on the issue.” [Emphasis]

31. The question whether “partisanship” is a proper factor or a relevant consideration when considering an application to admit *amicus curiae* is therefore settled by the Supreme Court. It is undoubtedly a relevant consideration.”
81. A perusal of the submissions and briefs of the 1st and 2nd *amicus curiae* disclose that their arguments take a stance of support and back up in relation to the petitioners' case and not an advisory on the legal issues to assist this court make a decision. As guided by the Supreme Court, this position is contrary



to their function in a matter. I there find that consideration of their brief in this determination will be imprudent.

Whether Section 26 of the Sexual Offences Act No 3 of 2006 is unconstitutional for being inconsistent with the Constitution

82. The main issue raised by the petitioners is their alleged unconstitutionality of the impugned section. According to them the provision is too vague, ambiguous and lacks definition of terms hence violating the principle of legality that requires a law to assure certainty. Further that the law violates and limits the petitioners' rights under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution.
83. This argument was challenged by the 1st respondent and the interested party who informed that the law enjoys presumption of constitutionality which the petitioners had not rebutted. Similarly it was contended that the petitioners failed to appreciate the mischief that was sought to be cured by the law.
84. The parties counsel while submitting on this issue, urged the court to be guided by the constitutional principles under article 259 and 159(2)(e) of the Constitution. Similarly, the guidance provided by the Supreme Court in the Matter of Interim Independent Electoral Commission (supra), was relied on. In the same way counsel relied on a plethora of cases that contain the now well settled principles on the topic of interpretation of a statute by the court. This court is guided by these authorities and will outline some of the cases in the determination below to put the discussion in context.
85. It is set in law and principle that the Constitution must be interpreted broadly, liberally and purposely. The Court of Appeal resounded this principle in Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR. The principles are that in interpreting the Constitution a Court should observe as follows:
- a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by article 259.
 - b. The spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
 - c. It must be interpreted broadly, liberally and purposely so as to avoid "the austerity of tabulated legalism."
 - d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).
86. On the other hand, there are a number of principles that have been established to guide the court when interpreting an Act of Parliament. The first principle in determining the constitutionality of a statute or a provision is the general presumption that statutes are enacted in conformity with the Constitution as was highlighted in the parties submissions. This position was affirmed by the Court of Appeal of Tanzania in the case of Ndyanabo v Attorney General [2001] EA 495 where it held that:
- "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"



87. Likewise, the court in the case of *Isaac Robert Murambi v Attorney General & 3 others* [2017]eKLR held as follows:

“

“b) A statute should be construed according to the intention expressed in the statute itself as confirmed the Court of Appeal case *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR when it stated that:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context ...”

c) The *Constitution* should be given a purposive and liberal interpretation as provided in on article 259(1) of the *Constitution*.”

Also see:

(i) *Council of County Governors case*(*supra*).

(j) *Hamdard Dawakhana case* (*supra*).

88. In a nutshell, the cited authorities altogether implore this court to be guided by a number of principles namely that; until the contrary is proved, legislation is presumed to be constitutional. Likewise, the purpose and effect of a statute are relevant in determining constitutionality of a statute either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. Further that one of the key elements in construing a statute is to ascertain the intention of Parliament as expressed in the Act.

89. In addition that it is critical to lay the article of the *Constitution* which is invoked beside the Statute which is challenged to decide whether the latter squares with the former. It is as well imperative to make due consideration to the legislative history of a statute as it is presumed that the legislature understands the needs of the people and makes laws directed at problems made manifest by actual experience. Lastly, in the absence of an expressed legislative intention to the contrary, the language of the statute must ordinarily be taken as conclusive in its plain meaning.

90. Guided by the cited authorities I proceed to apply the principles to the circumstances of this case. As a starting point it is necessary to interrogate the object and purpose of this Act to align it with the context of the impugned provision. This is divulged in the preamble of the *Act* which provides as follows:

An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.

91. The legislature’s history in enacting the *Sexual Offences Act* was well captured in *Onyango-Ouma W, Njoki Ndung’u, Baraza N, Birungi H, 2009. The making of the Kenya sexual offenses act, 2006: Behind the scenes. Nairobi: Kwani Trust* where it was stated as follows:

“The circumstances under which the *Sexual Offences Bill* in Kenya was formulated dates back to the 1990s when human rights advocacy groups realized that the country’s laws (as inherited at independence) had a weak legal framework for addressing sexual and



gender-based violence perpetrated against women and children. The Federation of Women Lawyers-Kenya (FIDA) and the Kenya Anti-Rape Organization provided leadership to groups that made concerted efforts to have the sexual violations against women and children addressed.

Under the existing law at that time issues affecting women's rights such as sexual assault and rape were found within the *Penal Code* and were described as offenses against morality alongside other offenses such as homosexuality and abortion. the law did not prescribe minimum sentences for such offenses against morality. As a result convicts got away with a fine or a few days of imprisonment. It was realized that provisions within the *Penal Code* that were borrowed from English statutes of the Victorian period did not comprehensively address the sexual offenses as was experienced in Kenya."

92. For one to appreciate the context of the impugned provision, regard must be had to the [Sexual Offences Act](#) as a whole as it reveals the legislature's intent in enacting the law. As per the preamble it is clear that the legislature in enacting this statute sought to delineate the acts that qualify as sexual offences and to establish a means of punishing offenders, in an effort to prevent such offences and to protect all persons from unlawful sexual acts. Evidently an examination of the legislative history makes it plain that the legislature in enacting the [Sexual Offences Act](#) bore in mind the problems that the society was facing with reference to sexual offences that were not carefully covered under the criminal law.
93. The impugned provision is found under section 26 of the [Act](#). It is important that the said section is set out here. It reads as follows:
26. Deliberate transmission of HIV or any other life threatening sexually transmitted disease
- (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know-
 - (a) will infect another person with HIV or any other life threatening sexually transmitted disease;
 - (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;
 - (c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.
 - (2) Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the court may direct that an appropriate sample or samples be taken from the accused person, such place and subject to such conditions as the court may direct, for the purpose of ascertaining whether or not he or she is infected with HIV or any other life threatening sexually transmitted disease.
 - (3) The sample or samples taken from an accused person in terms of subsection (2) shall be stored at an appropriate place until finalization of the trial.



- (4) The court shall, where the accused person is convicted, order that the sample or samples be tested for HIV or any other life threatening sexually transmitted disease and where the accused person is acquitted, order that the sample or samples be destroyed.
- (5) Where a court has given directions under subsection (4), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned;
- (6) An appropriate sample or samples taken in terms of subsection (5)-
 - (a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of determining whether or not the accused person is infected with HIV or any other life threatening sexually transmitted disease; and
 - (b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.
- (7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against-
 - (a) the State;
 - (b) any Minister; or
 - (c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.
- (8) Any person who, without reasonable excuse hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the cause of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.
- (9) Where a person is convicted of any offence under this Act and it is proved that at the time of the commission of the offence, the convicted person was infected with HIV or any other life threatening sexually transmitted disease whether or not he or she was aware of his or her infection, notwithstanding any other sentence in this Act, he or she shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.
- (10) For purposes of this section-
 - a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be prima facie proof that the person concerned is infected with HIV; and
 - b) if it is proved that a person was infected with HIV after committing an offence referred to in this Act, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when the offence was committed.



94. The petitioners as detailed in the petition and submissions took issue with the impugned section for being vague and overly broad for acts considered criminal. This was opposed by the 1st respondent and interested party in their submissions where counsel noted that the impugned provision was clear.

95. The court in examining this issue in the *Law Society of Kenya case (supra)* observed as follows:

“Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean.

[38] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.

These principles are not new. There are important principles which apply to the construction of statutes such as

- (a) presumption against "absurdity" - meaning that a court should avoid a construction that produces an absurd result;
- (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result;
- (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and
- (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,
- (e) the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," "economic", "social" and "political" or "otherwise." The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it."

96. A reading of the introduction of section 26(1) discloses a number of things to which I will ascribe a plain meaning. First the person referred to must have ‘actual knowledge’ of his/her status. Secondly, the offense is deemed to be committed when this person ‘intentionally, knowingly and willfully’ does an act that infects another person with HIV or other sexually transmitted disease. My finding is that the acid test upon which the impugned provision is anchored is set out very clearly.

97. This is supported by the fact that the ingredients required to instigate a criminal matter being the *mens rea* and *actus reus* are clearly provided for. One must know of their status and proceed to act with intent to infect the victim or other person for it to be an offence. In this regard the language of the Act is clear with no ambiguity. This means that a contrary interpretation or application other than its ordinary meaning would invoke an absurd interpretation of the provision which the principles of interpretation caution against.



98. In the same way, one of the principles of interpretation is that a statute in its interpretation and application is presumed to adhere to the dictates of the Constitution. The impugned provision under section 26(2) of the Sexual Offences Act informs that once the alleged offender is charged the court may proceed to direct that an appropriate sample or samples be taken from the accused person. The wording of this portion in my understanding does not indicate a compulsory application as adopted by the petitioners. This is because the legislature as can be discerned intended that where a court in its wisdom assesses a situation and deems such an exercise necessary would require the same to be undertaken.
99. Since a statute enjoys presumption of constitutionality the action by the court is done in line with the dictates of the Constitution in mind. Undoubtedly this presumption can only be rebutted by a person claiming otherwise. Appreciating the possibility of abuse of this provision, I find that the legislature put this guideline as a safeguard in the application of this provision.
100. The petitioners argued that the impugned provisions were inconsistent with and violated articles 27, 28, 29, 31, 32, 43(1)(a), 45, 50(2) and 53 of the Constitution. According to them the impugned provision limits the rights of persons living with HIV unjustifiably which they claim is offensive to the Constitution. They make known that the impugned provisions make room for affected parties to be deprived of their rights as stated.
101. The 1st respondent and interested party disputed these assertions arguing that the allegation of violation of the constitutional rights was unfounded. In their view no particulars have been provided to show how the impugned provision amounted to violation adding that article 24 of the Constitution makes room for limitation of rights that are not absolute in a manner that is reasonable and justifiable.
102. It is my considered view that the advanced argument by the petitioners in this regard is erroneous. This is so because they suggest that the impugned provision specifically targets persons living with HIV and as such these persons live in fear of being prosecuted under the impugned provision. Such an interpretation is in error because it implies that living with HIV is a crime in itself. This is not so, and there is no ground for stating so, as such.
103. A reading of this section makes it plain that the object of this provision was to charge, prosecute and punish persons living with HIV or any other sexually transmitted disease who commit the crime of infecting their victims with the disease knowingly. These are the offenders and not the general community of persons living with HIV. The provision in the same way does not criminalize being in a relationship with someone who is HIV positive. It cannot therefore be said that the impugned provision violates and limits the petitioners' rights as submitted. The petitioners have explained how they have even gone for treatment and counseling. Their marriages have not been declared unlawful because one party has HIV Nobody is looking down upon them. HIV must be contained hence the provisions in the Sexual Offences Act.
104. From the foregoing I am inclined to differ from the petitioners' notion that the impugned provision runs a foul the Constitution. The principles of interpretation give clear guidance on this. Furthermore, the erroneous interpretation of the impugned provision by the petitioners in the end would lead to an incorrect conclusion of the meaning of the Section.
105. Additionally a reading of the impugned provision against the Constitution does not divulge any contradiction in relation to the alleged violations. The cumulative result of this is that the petitioners have not been able to rebut the presumption of constitutionality which this provision enjoys. It is my humble finding therefore that section 26 of the Sexual Offences Act is constitutional and does not violate or limit the rights of persons living with HIV under articles 27, 28, 29, 31, 32, 43(1)(a), 45, 49, 50(2) and 53 of the Constitution.



106. That said, it is my observation that the bone of contention in this matter is presented as the deficiency of the impugned provision. I find the discernable issue to be the application and interpretation of the objectives of the impugned Section by the various authorities involved in its application.
107. The cry of the petitioners and persons living with HIV is that this section has been used to harass and charge them wrongfully as clearly showcased in the petitioners affidavits. My take on the matter is that the implementing authorities remain accountable and are bound by the dictates of article 10(2) (c) of the Constitution. Where they fail to discharge their mandate in accordance with the dictates of the Act and the Constitution, an affected party is at liberty to seek redress in court. For example where samples are taken for testing the impugned section clearly outlines what should be done and that must be adhered to. This cannot therefore be said to be unconstitutional. If testing is not done how will the government know how we as a Nation are doing in this area of HIV?
108. Secondly, it is my considered view that more training ought to be done to ensure a greater understanding of HIV, by everyone whether infected or not. This is in light of the medical and scientific information advanced by the relevant bodies. This will assist in removal of any biases created by the lack of this knowledge in the minds of authorities and persons in the criminal justice system. In cases like children's matters, HIV related cases and divorce ones courts upon noticing any sensitivity of the matter have held such matters in camera to avoid exposure of the victim to the public. HIV positive results are not supposed to be announced in open court as this would demean the dignity of the person / persons concerned. This has however nothing to do with section 26 of the Sexual offences Act. The impugned section does not in any way criminalize one for being HIV positive, neither does it allow publication of the results of a person who has been tested.
109. That said and done the upshot is that the petitioners have not established their claims to warrant the issuance of the orders sought. The petition is dismissed. Owing to the nature of the suit I order each party to bear their own costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 20TH DAY OF DECEMBER 2022 IN
OPEN COURT AT MILIMANI, NAIROBI.**

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

