



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 466 OF 2014**

**ROYAL MEDIA SERVICES LTD.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**HIV AND AIDS TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE NATION MEDIA GROUP.....1<sup>ST</sup> INTERESTED PARTY**

**KEMRI CDC RESEARCH AND PUBLIC .....2<sup>ND</sup> INTERESTED PARTY**

**HEALTH COLLABORATION.....3<sup>RD</sup> INTERESTED PARTY**

**MR. M J M.....4<sup>TH</sup> INTERESTED PARTY**

**MRS. M A A.....5<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. This petition concerns the question whether, in the absence of enabling legislation under Article 23(2) of the Constitution, a tribunal such as the 2<sup>nd</sup> respondent can hear and determine matters of alleged violation of constitutional rights.
2. In the petition dated 15<sup>th</sup> September 2014, the petitioner moved the Court to challenge the decision of the HIV and AIDS Tribunal dated 30<sup>th</sup> March 2014 in which it had ruled that it has the jurisdiction to entertain applications for redress for violation of fundamental rights and freedoms under the Bill of Rights. The petition is premised on the jurisdiction of the High Court to interpret the Constitution as well as its supervisory jurisdiction over subordinate courts and tribunals. On

21<sup>st</sup> of January 2015, orders were issued staying the proceedings before the Tribunal pending the hearing and determination of the petition.

3. While some parties elected not to file any responses or submissions in the matter, those who did asked the Court to render judgment on the basis of the submissions.

## **The Facts**

4. The petitioner is a limited liability company carrying on business of broadcasting in the Republic of Kenya. It carried out a media interview with the 3<sup>rd</sup> and 4<sup>th</sup> interested parties who are a sero-discordant couple, who had voluntarily participated in a research programme carried out by the 2<sup>nd</sup> interested party (KEMRI CDC Research & Public Health Corroboration)(KEMRI).
5. According to the petitioner, KEMRI had invited it sometime in May 2011 to cover the release of the early study results of a research dubbed “A Randomized Trial to Evaluate the Effectiveness of Antiretroviral Therapy Plus HIV Primary Care Versus HIV Primary Care alone to Prevent the Sexual Transmission of HIV- 1 in Sero discordant Couples, Version 3.0” in which KEMRI had carried out research in Kisumu. It avers that the 3<sup>rd</sup> and 4<sup>th</sup> interested parties had volunteered in the said research, and that at the launch of the results, it interviewed the 3<sup>rd</sup> and 4<sup>th</sup> interested parties with their own consent. The interview was aired as a feature story by the petitioner on Citizen T.V. It appears that a similar interview was aired by the 1<sup>st</sup> interested party, which is also a media house, and is the 4<sup>th</sup> respondent in the claim before the Tribunal.
6. Following the airing of the interview, the 3<sup>rd</sup> and 4<sup>th</sup> interested parties filed a claim before the Tribunal being **HIV and AIDS Tribunal Case No HAT 004 of 2013: M J and Another vs KEMRI and Others** alleging, inter alia, violation of their fundamental rights under Articles 28 and 31 of the Constitution.
7. The petitioner raised a preliminary objection before the Tribunal to the effect that it had no jurisdiction to hear and determine questions of alleged violation of constitutional rights. In its decision dated 30<sup>th</sup> May 2014, the Tribunal ruled that it had jurisdiction to hear and determine matters alleging violation of constitutional rights under the Bill of Rights in the Constitution.

## **The Petition**

8. In its petition dated 15<sup>th</sup> September, 2014, the petitioner seeks the following orders:

*(a) A declaration that only the High Court and courts of similar status have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the bill of rights.*

*(b) A declaration that in the absence of a legislation enacted by parliament to give subordinate courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedom in the bill of rights, subordinate courts and tribunals, including the 2<sup>nd</sup> respondent, do not have jurisdiction to hear and determine matters arising from the bill of rights.*

*(c) A prohibition order directed against the 2<sup>nd</sup> respondent prohibiting it from hearing and determining issues of violation of fundamental rights under Article 28 and 31 raised in tribunal case No. HAT 004 of 2013.*

*(d) Costs.*

***(e) Any other, further or better relief that the Honourable court may deem fit to grant.***

9. The petitioner argues that under Article 23 and 165 of the Constitution, only the High Court has jurisdiction to hear and determine matters of violation of rights or fundamental freedoms provided for in the Bill of Rights. The High Court has also ruled that the Environmental and Land Court and the Industrial Court, which are of the same status as the High Court, can hear and determine matters of rights or fundamental freedoms provided for in the Bill of Rights. Its case is that the Tribunal has no jurisdiction to hear and determine matters relating to violation of rights and fundamental freedoms provided for in the Bill of Rights, and it was its contention that by holding that it has such jurisdiction, the Tribunal was acting in excess of its power.
10. The Attorney General supported the position taken by the petitioner, as did the 1<sup>st</sup> and 2<sup>nd</sup> interested party.
11. The 3<sup>rd</sup> and 4<sup>th</sup> interested parties filed grounds of opposition dated 14<sup>th</sup> November, 2014 in which they contended that the petition is misconceived, incompetent and bad in law for several reasons. They contend, first, that the petitioner has misconstrued the meaning and purport of Article 165 (3) (b) as the Article does not expressly confer the High Court exclusive jurisdiction to determine questions of violation of constitutional rights; secondly, that the petition is a result of a misapprehension of the nature of the 3<sup>rd</sup> and 4<sup>th</sup> interested parties' claim before the Tribunal which is predicated on sections 20, 21 and 22 as read with section 26 of the HIV and AIDS Prevention and Control Act (hereafter HIV Act) which are complemented by Articles 28 and 31 of the Constitution.
12. It is their contention, thirdly, that it is ill advised and is the result of a disjunctive interpretation of the Constitution as Article 20 (4) confirms that Tribunals (including the HIV and AIDS Tribunal) are empowered to interpret the Bill of Rights; fourth, that it is legally untenable and if upheld, would render Article 23 (2) of the Constitution of no legal sense as it would lead to a preposterous conclusion that no other court or tribunal can entertain any question on the Bill of Rights; and finally, that it undermines the significant and indispensable complementary role tribunals play in Kenya and flies in the face of Article 159 (1) of the Constitution.

### **The Submissions**

13. In its submissions dated 12<sup>th</sup> January, 2015, the petitioner argues that the High Court has power to supervise the Tribunal in exercise of its supervisory power under Article 165 of the Constitution. It contends that the Tribunal is not a High Court as envisaged under Article 23 (1) of the Constitution, nor is it a court with the status of the High Court, and it is only the High Court and Courts with the status of the High Court established under Article 162 (2) of the Constitution which have the jurisdiction to hear and determine issues of violation of the Bill of Rights. The petitioner relies on the decision in **United States International University vs The Attorney General and 2 Others [2012] eKLR, Omar Tahir Said vs Registrar of Titles, Mombasa High Court Petition No 22 of 2012, Kipsiwo Community Self Help Group vs Hon. Attorney General and 6 Others, Eldoret ELC Petition No. 9 of 2013 and Mohammed Said vs County Council of Nandi and Another, Eldoret High Court Petition No. 2 of 2013** in support of this argument.
14. According to the petitioner, although Article 23 (2) confers jurisdiction to hear and determine matters in the Bill of Rights on subordinate courts created by Parliament and conferred with original jurisdiction, the Tribunal is not such a subordinate court. Further, no law has been enacted to give subordinate courts and especially the Tribunal the jurisdiction and that in any event, it was created in an enactment of 2006, long before the enactment of the Constitution and as such, it cannot be the court envisaged under Article 23 (2).
15. The petitioner submits that the provisions of Article 20 cannot be interpreted to give subordinate

- courts and tribunals jurisdiction which they do not have under Article 23 since there is a principle of constitutional law that provisions of Articles of the Constitution cannot contradict each other and should be interpreted in a way that removes any contradiction or inconsistency. It is its case that the interpretation adopted by the Tribunal is not only dangerous but if accepted, will lead to an absurdity in that every person, state organ or even Parliament can enforce a claim for violation of the Bill of Rights and freedoms under Article 23. It would also imply that Article 23 is a mere supplusage of the Constitution with no meaning.
16. The petitioner further argues that the different headings used in Article 20 and 23 were intended to and actually mean different things. It points out that words such as ‘to bind’, ‘apply’ and ‘interpret’ were used in Article 20, while the words used in Article 23 were ‘jurisdiction’ ‘to hear and determine’, ‘proceedings brought under Article 22’, to ‘grant appropriate relief’ used in Article 23. Its submission was that the two provisions are completely different as Article 20 makes the Bill of Rights central to and binding on all persons, organs and decision makers, and requires them to be conscious of its provisions and to give effect to it in all their processes and proceedings. In its view, the Tribunal is acting ultra vires the Constitution in holding that it has jurisdiction to determine matters of alleged violation of constitutional rights, and it urged the Court to allow its petition.
  17. In the submissions dated 25<sup>th</sup> February, 2015, the AG substantially agreed with the submissions of the petitioner. He urged the Court to consider the Constitution as a whole, bearing in mind that all provisions bearing upon a specific issue should be considered together as was held in the case of **Olum vs Attorney General of Uganda (2002) 2 EA 508**.
  18. According to the AG, it is trite law that a statutory tribunal can only exercise the jurisdiction donated to it by the statute that establishes it, and such tribunals are subject to the supervision of the High Court. It was his submission further that section 3 (b) (ii) of the HIV and AIDS Prevention and Control Act provides for the object and purpose of the Act, which is to guarantee the right to privacy of the individual, and statutory provisions are strictly construed and cannot be implied.
  19. The AG submitted, further, that section 26 of the HIV and AIDS Prevention and Control Act donates no power to the Tribunal to hear breaches of fundamental rights and freedoms, but only power to hear complaints regarding the Act itself. In his view, strictly construed, there is no jurisdiction to hear breaches of the Constitution no matter how similar they may be to the complaints under the Act since to do so would be to flout the cardinal principle contained in the decision in **Choitram vs Mystery Model Hair Salon [1972] EA 525** that jurisdiction cannot be implied.
  20. The AG submitted that the extra-statutory expansion of its jurisdiction by the Tribunal would make it very difficult for the High Court to exercise its supervisory jurisdiction; that the Tribunal’s ultra vires action would only frustrate the exercise of judicial review jurisdiction; that the HIV Act conforms to the Constitution, in its current form, and there is no disconformity to be cured in the manner suggested by the Tribunal in its ruling.
  21. The AG relied on the decision of the Supreme Court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd and 2 Others** to submit that the HIV Act donates no power to the Tribunal to hear and determine breaches of the Constitution and it must thus be confined to its Act or risk exercising extra-statutory powers incapable of supervision, to the detriment of the parties before it.
  22. The AG further argued that no legislation has been passed by Parliament to confer on it such jurisdiction; that the Tribunal is clearly not a court within the meaning of Article 23 (2) and thus could not be the beneficiary of any legislation enacted by Parliament under the Article; and it would be wholly inappropriate for a tribunal such as the HIV Tribunal to hear and determine violations of rights without express and statutory authority.

## Determination

23. The sole question for determination in this petition is whether the 2<sup>nd</sup> respondent, the HIV and AIDS Tribunal, has the jurisdiction to hear and determine matters that fall within the Bill of Rights. The 2<sup>nd</sup> respondent did not file any response or submissions on the matter, and I will therefore take its position as that set out in its ruling dated 30<sup>th</sup> May 2014.

24. In determining this question, I must bear in mind the principles established for construction of the Constitution. The first of these principles is set out in Article 259 of the Constitution which provides that:

1. *This Constitution shall be interpreted in a manner that-*

- a. *Promotes its purposes, values and principles;*
- b. *Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
- c. *Permits the development of the law; and*
- d. *Contributes to good governance.*

2. ...

3. *Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.”*

25. In **Coalition For Reform and Democracy and Others vs Attorney General and Others, Petition 628 of 2014**, it was observed that:

*“[91] The Constitution has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.*

*[92] We are also guided by the provisions of Article 159(2) (e) of the Constitution which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the Constitution.*

*[93] Thirdly, in interpreting the Constitution, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of S. vs Acheson, 1991 (2) S.A. 805 (at p.813) where he stated that:*

*“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”*

26. Further guidance on the interpretation of the Constitution is to be found in the decision in **Tinyefuza vs Attorney General of Uganda, Constitutional Petition No. 1 of 1997 (1997 UGCC 3)** where the principle that a court is required, in interpreting the Constitution, to be guided

by the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other, was enunciated. See also the decision of the Constitutional Court of Uganda in **Olum vs Attorney General of Uganda [2002]2 EA 508**, it was held that:

27. In applying these principles to the constitutional provisions on the Bill of Rights against the jurisdiction of the Tribunal, I will start by considering constitutional provisions with respect to the exercise of power, as well as the constitutional provisions with respect to the exercise of jurisdiction with regard to the enforcement of the Bill of Rights.

28. Article 2 of the Constitution provides as follows:

***2.(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***

***(2) No person may claim or exercise State authority except as authorised under this Constitution.***

29. With respect to the enforcement of the Bill of Rights, the Constitution provides at Article 22 that:

***22.(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

30. With respect to the determination of proceedings brought under Article 22, the Constitution provides as follows with respect to jurisdiction:

***23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

31. Thus, Article 22 of the Constitution, which is titled ***“Implementation of Rights and Fundamental Freedoms”*** must be read with Article 23 titled ***“Authority of Courts to uphold and enforce the Bill of Rights.”*** Article 23 makes reference to the jurisdiction of the High Court under Article 165 in providing that the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom.

32. At Article 165(3), the Constitution states as follows with respect to the jurisdiction of the High Court:

***(3) Subject to clause (5), the High Court shall have—***

***(a) unlimited original jurisdiction in criminal and civil matters;***

***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***

***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

*(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

*(iv) a question relating to conflict of laws under Article 191; and*

*(e) any other jurisdiction, original or appellate, conferred on it by legislation.*

*(4)...*

*(5) The High Court shall not have jurisdiction in respect of matters—*

*(a) reserved for the exclusive jurisdiction of the Supreme Court*

*under this Constitution; or*

*(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).*

*(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

33. The petitioner and the AG take the position that these provisions confer jurisdiction on the High Court and such other Courts as Parliament may, by legislation, confer appropriate jurisdiction under Article 23(2), which states that:

***(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. (Emphasis added)***

34. In my view, the use of the phrase “...*to give original jurisdiction in appropriate cases*...” is instructive. It is a recognition that the Constitution as it currently stands, and in the absence of legislation under Article 23(2), has vested original jurisdiction in the High Court (and, as determined in the **United States International University** case (supra), courts of equal status to the High Court) to determine applications for redress of violation or threatened violation of fundamental rights. While, as the 2<sup>nd</sup> respondent argued in its ruling, such jurisdiction is not exclusive, it cannot, in my view, be exercised by any subordinate court or tribunal in the absence of enabling legislation.

35. I am fortified in this view by the provisions of Article 23(3), which states as follows:

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(a) a declaration of rights;**

**(b) an injunction;**

**(c) a conservatory order;**

**(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**(e) an order for compensation; and**

**(f) an order of judicial review.**

36. Logically, if the 2<sup>nd</sup> respondent has jurisdiction under Article 23(1) even in the absence of legislation, then it should follow that it would have jurisdiction to grant the reliefs set out under Article 23(3). Yet, I have not heard either the 2<sup>nd</sup> respondent or the 3<sup>rd</sup> and 4<sup>th</sup> interested parties claim that the Tribunal has all the jurisdiction and powers set out in Article 23. If they did, that would clearly be an unconstitutional arrogation or assumption of jurisdiction that it does not have. In my view, the assumption of jurisdiction in respect of fundamental rights is in the same league.

37. The 3<sup>rd</sup> and 4<sup>th</sup> interested parties, as well as the 2<sup>nd</sup> respondent, take the provisions of Article 20 as vesting on the 2<sup>nd</sup> respondent jurisdiction to determine questions relating to whether or not a right or fundamental freedom in the Bill of Rights have been violated.

38. Article 20, which is titled “**Application of the Bill of Rights**” states as follows:

**20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.**

**(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.**

**(3) In applying a provision of the Bill of Rights, a court shall—**

**(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and**

**(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.**

**(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—**

**(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and**

**(b) the spirit, purport and objects of the Bill of Rights.**

**(5)...**

39. Should the argument taken in the ruling dated 30<sup>th</sup> May 2014 be the correct position, then the provisions of Article 20 imply, as submitted by the petitioner, that virtually everyone has the jurisdiction to interpret the Bill of Rights, and to determine whether there has been a violation thereof, and to grant redress. Article 20 relates to the application of the Bill of Rights. It binds all state organs and all persons. It must be at the forefront of all actions taken by all state organs, including courts, tribunals and **“other authorities”**. This Article does not, however, relate to the upholding and enforcement of the Bill of Rights, which is currently vested by Article 22, 23 and 165 in the High Court. In appropriate cases, in accordance with legislation, Parliament may vest jurisdiction to uphold and enforce the Bill of Rights on subordinate courts. That is not the case currently.

40. It has been argued that the provisions of the HIV Act, read with section 7 of the Sixth Schedule, confers on the 2<sup>nd</sup> respondent the jurisdiction with respect to interpretation and enforcement of the Bill of Rights. It is worthwhile to consider the provisions of the Act in considering this question.

41. The HIV and AIDS Prevention and Control Act, which was enacted in 2006 and revised in 2012, was enacted to provide for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes.

42. The object and purpose of the Act is stated under Section 3 to include:

- a. ***Promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS.***
- b. ***Extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by-***
  - i. ***Prohibiting compulsory HIV testing save as provided in this Act;***
  - ii. ***Guaranteeing the right to privacy of the individual.***
  - iii. ***Outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS;***
  - iv. ***Ensuring the provision of basic healthcare and social services for persons infected with HIV and AIDS;***
- c. ***Promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and***
- d. ***Positively address and seek to eradicate conditions that aggravate the spread of HIV infection.***  
(Emphasis added)

43. Section 25 of the Act establishes the HIV and AIDS Tribunal which consists of members appointed by the Attorney General as follows:

- a. ***A chairman who shall be an advocate of the High Court of not less than seven years standing;***
- b. ***Two advocates of the High Court of not less than five years standing;***
- c. ***Two medical practitioners recognized by the Medical Practitioners and Dentists Board as specialists under the Medical Practitioners and Dentists Act (Cap 253); and***
- d. ***Two persons having such specialized skill or knowledge necessary for the discharge of the***

***functions of the Tribunal.***

44. The jurisdiction of the Tribunal is set out at section 26 in the following terms:

1. ***The Tribunal shall have jurisdiction-***

- a. ***To hear and determine complaints arising out of any breach of the provisions of this Act;***
  - b. ***To hear and determine any matter or appeal as may be made to it pursuant to the provision of this Act; and***
  - c. ***To perform such other functions as may be conferred upon it by this Act or by any other written law being in force.***
2. ***The jurisdiction conferred upon the Tribunal under subsection (1) excludes criminal jurisdiction.*** (Emphasis added)

45. The Act was enacted in 2006, prior to the promulgation of the Constitution 2010 with its very expansive Bill of Rights. Section 7 of the Sixth Schedule provides that:

***7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***

***(2) If, with respect to any particular matter—***

***(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and***

***(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.***

46. The difficulty that I perceive with the interpretation of its jurisdiction by the Tribunal with respect to matters pertaining to the Bill of Rights is that it seems to seek to interpret the Constitution to make it accord with the provisions of the Act, rather than the reverse. As at 2006, when there were no clear provisions relating to discrimination on the basis of one's HIV status, the HIV Act was enacted to fill the gap. However, even then, it is not clear that the provisions would have extended its jurisdiction to determining the question of whether a particular act was a violation of the right to non-discrimination and privacy, the latter of which was introduced in the Bill of Rights by the 2010 Constitution.

47. However, the Constitution has now vested such jurisdiction in the High Court, unless Parliament vests such jurisdiction, in *appropriate cases*, in subordinate courts. I am unable to read in the provisions of Article 23(2) or 7 of the Sixth Schedule to the Constitution an intention to confer on the HIV Tribunal the jurisdiction to hear and determine questions of whether a right or fundamental freedom has been violated, infringed or threatened as provided under Article 22 of the Constitution. Indeed, there may be a need to re-consider the provisions of the HIV and Aids Control Act with respect to the rights of persons with HIV and Aids. The question may arise as to whether it is not a form of discrimination for matters related to their rights to be subjected to the Tribunal, while others are open to litigation before the High Court.

48. At any rate, in view of my findings above, I am satisfied that the petition has merit, and I therefore grant the following orders:

***(a) I hereby declare that only the High Court and courts of similar status currently have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the Bill of Rights.***

***(b) I hereby declare that in the absence of legislation enacted by Parliament to give subordinate courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedom in the Bill of Rights, subordinate courts and tribunals, including, the 2<sup>nd</sup> respondent, do not have jurisdiction to hear and determine matters arising from the Bill of Rights.***

***(c) I hereby issue an order of prohibition directed against the 2<sup>nd</sup> respondent prohibiting it from hearing and determining issues of violation of fundamental rights under Article 28 and 31 raised in Tribunal Case No. HAT 004 of 2013.***

49. With respect to costs, which are within the Court's discretion, I direct that each party bears its own costs of the petition.

**Dated, Delivered and Signed at Nairobi this 30<sup>th</sup> day of July 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Gacheru instructed by the firm of Kamau Kuria & Co. Advocates for the petitioner**

**Ms. Irari instructed by the State Law Office for the 1<sup>st</sup> respondent.**

**Ms. Ngige instructed by the firm of Mohammed Muigai & Co. Advocates for the 1<sup>st</sup> interested party.**