REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

PETITION NO. 97 OF 2010

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER SECTION 22(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 50(3) AND SECTION 31 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTION 24 AND SECTION 22 OF THE HIV AND AIDS PREVENTION AND CONTROL ACT, NO. 14 OF 2006

BETWEEN

AIDS LAW PROJECT .....PETITIONER/ APPLICANT

AND

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

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

RULING

The applicant's application dated 14th December, 2010 by way of chamber summons seeks the following prayers:

"1. That this matter be certified urgent and service of summons be dispensed with in the first instance.

2. That, pending the hearing of this application, this Honourable court be pleased to issue a conservatory relief in terms of stay of Legal Notice no. 180 of 5th November, 2010 and section 24 of the HIV and AIDS Prevention and Control Act, Act No. 14 of 2006 as relates to its penal provisions and penal consequences herein.

3. That pending the hearing of this application this honourable court be pleased to issue an injunction restraining respondents, jointly and severally, their employees, agents or any person acting on their behalf from enforcing section 24 of the HIV and AIDS Prevention and Control Act, Act No. 14 of 2006 as relates to penal provisions and penal consequences therein.

4. That pending the hearing and determination of the petition herein, this Honourable court be pleased to issue conservatory relief of stay of Legal Notice No. 180 of 5th November, 2010 section 24 of the HIV and AIDS Prevention and Control Act, Act No. 14 of 2006 as relates to penal provisions and penal consequences therein.

5. That the costs of this application be costs in the petition."

The application was made on the following grounds:

"(a) The Government of Kenya, through the Minister of State for Special Programmes has through a Legal Notice No. 180 published on 5th November 2010 issued a commencement date, 1st December 2010, for operationalisation of section 24 of the HIV and AID Prevention and Control Act;

(b) That the provisions of section 24 (3) states that, a person who contravenes the provisions of sub-sections (1) or (2) commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(c) The provisions of the section 24 of the Act are worded in a vague and overbroad manner incapable of giving the ordinary citizen sufficient notice of the criminalized act or omission and the intended objective its (sic) meant to achieve.

(d) Section 24 of the Act fails to adhere to the principles of legality that; the law must be precise, clear and capable of giving sufficient notice to the ordinary citizen of what is the forbidden act or omission.

(e) The provisions of section 24 is (sic) unconstitutional because it fails to conform that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body and information to be given to a person, should be given in a language that the person understands; and

(f) The wording of section 24 of the Act puts the liberty of persons infected or carrying the HIV and AIDS virus in jeopardy in the sense that the said liberty can be deprived arbitrarily without just cause and on the basis of a vague and imprecise law lacking in due notice and it has therefore become necessary for the application to be made in court."

The application was supported by an affidavit sworn by **Jacinta Nyachae**, the Executive Director of the applicant, a registered Non-Governmental Organization. According to the Constitution of the applicant, its objectives are, *inter alia*, to promote the quality of life to people living with HIV/AIDS through legal advice, advocacy, research and education.

In paragraphs 7, 8 and 9 of the said affidavit the deponent deposes as hereunder:

"7. That on 5th November, 2010 the Minister of State for Special Programmes published Legal Notice No. 80 in which he appointed the commencement date of section 24 of the Act as 1st December, 2010.

8. That I am aware and have read Section 24 of the HIV and AIDS Prevention and Control Act

2006 which provides inter alia,
"… that, a person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall –

(a) take all reasonable measures and precautions to prevent the transmission of HIV to others; and

(b) inform, in advance, any sexual contact or a person with whom needles are shared of that fact.

(2) A person who is and is aware of being infected with HIV or who is carrying and is aware of carrying HIV shall not, knowingly and recklessly place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.

9. That the fact that an offence may arise, under section 24(1) as read with section 24(3) of HIV and AIDS Prevention and Control Act, No. 14 of 2006, from a failure to disclose information to a "sexual contact" who is largely undefined, means that there is a risk to the realization of the rights to a fair hearing under section 50 of the Constitution of the Republic of Kenya.

Particulars of unconstitutionality

(a) The law does not say what 'any sexual contact' is for instance is it holding hands? Kissing? Or only more intimate forms of exploratory contact? Or does it apply only to; penetrative intercourse?

(b) The law does not place a corresponding duty of confidentiality on the 'sexual contact' nor does it say what "in advance" means.

(c) No transmission is required and no intent is required making it extremely difficult for the average person to determine precisely what behaviour is subject to prosecution.

(d) The concept of sexual contact is of a very broad scope that is extremely difficult to define, and could mean almost anything, and its definition would be dependent upon the subjective views of the particular judge trying the case.

(e) The definition lacks (of) sufficient precision by Parliament in the means used to accomplish an objective of criminal law and therefore violates article 24 of the constitution."

The applicant further stated that criminalization of HIV transmission is ineffective at preventing transmission and is also unconstitutional.

The respondent filed grounds of opposition and stated that:

"1. The applicant has not set out a prima facie case with a probability of success.

2. Sections 24 and 22 of the HIV and AIDS Prevention and Control Act No. 14 of 2006 are not vague or ambiguous.

3. The rules of statutory interpretation militate against the grant of orders sought."

Mr. Omwanza for the applicant submitted about the unconstitutionality of **Section 24(1)** as read with **Section 24(3)** of the Act. He added that **Section 24** discriminates against people living with HIV, women

and members of vulnerable groups. He further submitted that Article 31 of the Constitution provides that every person has the right to privacy which includes the right not to have information relating to one's family or private affairs unnecessarily required or revealed or the privacy of their communications infringed.

Regarding criminalization of HIV transmission, counsel submitted that there are various provisions in other laws like the **Sexual Offences Act** that prohibit wilful infection of HIV. He cited **Section 26** of the **Sexual Offences Act** which provides that any person, having actual knowledge that he/she is infected with HIV or any other life threatening disease and who sexually transmits the disease intentionally knowingly and wilfully is guilty of an offence and is liable to imprisonment for a term of not less than 15 years but which sentence may be imprisonment for life. He therefore argued that in view of the unconstitutionality of **Section 24** of the **HIV and AIDS Prevention and Control Act** and in view of the fact that there is already in existence other provisions of the law dealing with deliberate and wilful transmission of HIV, the orders sought in the application ought to be granted pending hearing and determination of the petition. He cited several decisions to buttress his submissions.

Regarding criminalization of HIV transmission, Mr. Omwanza referred to an article by **Scott Burris** and **Edwin Cameron** entitled **"THE CASE AGAINST CRIMINALIZATION OF HIV TRANSMISSION**" published by Indiana University School of Medicine, wherein the learned authors state, *inter alia*:

"Criminal law has been invoked throughout the HIV epidemic to deter and punish transmission. The public health community has not favoured its use but neither has it taken a vigorous stand against it. Meanwhile, governments continue to adopt HIV specific criminal laws, and individuals with HIV continue to be prosecuted under general criminal law. Criminal law cannot in this area draw reasonable lines between criminal and non-criminal behaviour, nor prevent HIV transmission. For women, it is a poor substitute for policies that go to the roots of subordination and gender based violence. The use of criminal law to address HIV infection is inappropriate except in rare cases in which a person acts with conscious intent to transmit HIV and does so ….

Regulation of sex implicates rights of privacy, autonomy and self expression, not to be abridged without a compelling justification. Although protecting individuals from a significant risk or harm is a sufficient justification in general, there is after more than 25 years no credible evidence that HIV criminalization protects individuals or society."

Responding to the applicant's submissions, Mr. Onyiso submitted that the court should not lose sight of the good intentions of the Act and specifically **Section 24** thereof. In interpreting statutes, the intention of the legislature is always a primary consideration as was stated in **MBUZI vs. OMAR & 2 OTHERS (2008) 2KLR (EP) 614**. He further submitted that **Section 24** of the said Act is not unconstitutional. He added that the applicant had not demonstrated the irreparable damage that HIV/AIDS infected persons would suffer if conservatory orders are not granted as sought. On the other hand, it is the general society that will suffer if the conservatory orders sought are granted. The court should therefore balance between the interests of those who are infected with HIV/AIDS condition against those of the larger unaffected members of the public.

Lastly, Mr. Onyiso submitted that the HIV and AIDS Prevention and Control Act is already in operation and staying any part thereof at this stage is improper and may raise issues regarding separation of powers between the three arms of the government. He therefore urged the court to dismiss the application.

I will start with the last submission by Mr. Onyiso. I do not think that any conflict between the three arms of government can arise where the judiciary performs its constitutional role of interpreting the Constitution or any other law. **Article 165 (d)** of **the Constitution of Kenya, 2010** grants the High Court –

"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."

Even under the repealed Constitution, the High Court exercised that role. In **GACHIENGO vs. REPUBLIC [2000] 1EA 67**, the High Court declared the Kenya Anti-Corruption Authority and its enabling statute as unconstitutional. In **RUTURI & ANOTHER vs. MINISTER FOR FINANCE & ANOTHER [2001] 1EA 257,** the High Court declared the implementation provision of the **Central Bank of Kenya (Amendment) Act** unconstitutional.
In appropriate cases, the court will not shy away from exercising its constitutional mandate as aforesaid.

In the petition, the petitioner urges the court to make two important findings as hereunder:

(a) A declaration that **Section 24** of the **HIV and AIDS Prevention and Control Act, No. 14 of 2006** is unconstitutional.

(b) A declaration that the offence created by **Section 24** of the aforesaid Act is very wide and vague and discriminatory as against people with HIV/AIDS and is unconstitutional.

The applicants now want conservatory orders as earlier stated pending hearing and determination of the said petition.

Under **Article 165 (4)** of the **Constitution of Kenya, 2010**, any matter certified by court as raising a substantial question of law should be heard by at least three judges assigned by the Chief Justice. The issues raised in the application and in the petition are weighty. They relate to the health of the entire populace of this nation. They affect not only those who are HIV positive and/or have contracted AIDS but also those who are not infected. It is therefore vitally important that an appropriate balance be struck by the court. I am of the view that the petition ought to be heard by a three judge bench.

The provisions of the impugned section of the Act have already come into effect. The court was not told of any specific person that has already been adversely affected by the implementation of the said section of the law.

In an application of this nature the court must endeavour to uphold and protect the rights of the applicant as guaranteed by the Constitution. But on the other hand, the enjoyment of those rights must be within the confines of the law and in particular, subject to the limitations set out under **Article 24** of the **Constitution of Kenya, 2010**, which provides as follows:

"24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant

factors, including –

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are restrictive means to achieve the purpose."

In **CHARLES ONYANGO OBO & ANOTHER vs. ATTORNEY-GENERAL, Constitutional Appeal No. 2 of 2002,** Justice Mulenga of the Supreme Court of Uganda stated, *inter alia*:

"The co-existence in the same Constitution, of protection and limitation of the rights, necessarily generates two competing interests. On the one hand, there is the interest to uphold and protect the rights guaranteed by the Constitution. On the other hand, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the Constitution. Where there is conflict between the two interests, the court resolves it having regard to the different objectives of the Constitution.

As I said earlier in this Judgment, protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to the protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective".

In interlocutory proceedings where conservatory orders are sought, except in very clear cases or where it is conceded by a party that a given act, decision, a section of a statute or the entire statute is unconstitutional, the court should proceed with great caution before granting a conservatory order which has the effect of halting enforcement or further enforcement of an existing law. This is because there is presumption that in debating a bill and eventually enacting the same into law, the legislature considered all the relevant factors. The legislature had a specific objective that it wanted to achieve through the specified Act or section thereof.

If at the interlocutory stage the court suspends enforcement of a part of a statute and that order brings about undesirable consequences to the general public, in the event that upon hearing of the petition the interlocutory orders are not confirmed, the undesirable effects of the earlier order may never be undone. On the other hand, it may also be argued that if the conservatory orders are not granted as sought and at the conclusion of the hearing the orders sought in the petition are granted, the applicant may have suffered irreparable loss in the interim period. That may be so, either way some prejudice is likely to occur.

In this application, having weighed the competing interests of the applicant and the persons they represent against those of the wider public, the latter must prevail. The interlocutory orders sought ought not to be granted. Instead, an early hearing date for the petition should be set so that the issues raised are comprehensively dealt with. I therefore decline to grant the orders sought by the applicant.

This being public interest litigation I will not make any order regarding costs as against the applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF APRIL, 2011.

D. MUSINGA

JUDGE

In the presence of:
Nazi – court clerk
Mr. Omwanza for the petitioner
No appearance for the respondent