



Litigation on FCS of WLHIV

Petitions 605 and 606 of 2014

# Genesis



REPORTS OF WOMEN LIVING WITH  
HIV ATTENDING CLINICS – MAINLY  
IN REMOTE AREAS FOR FAMILY  
PLANNING



REPORTS OF NO CONSENT,  
COERCION AND INDUCEMENT

# Factual Background

- Two cases challenging the forced and coerced sterilization of women living with HIV between 2005 and 2010
  - four women were receiving food and medical supplements from a clinic.
    - Told that they would not receive aid if they did not undergo permanent family planning
    - Two were forcefully sterilized during delivery.  
Two coerced into going for family planning drives after delivery
  - One woman was looking to have CS to prevent vertical transmission and was sterilized without knowledge at the facility

- stigma against WLHIV and misinformation about PMTC infections.
- GEM Report – Robbed of Choice
- Sterilisations happening at both public and private health facilities to facilitate aid
- At the time government did not have policies on sterilization of women

# Who was sued

- Health facilities
  - Those who were providing the aid
  - Those who performed the procedures
- County government
  - Calling out the supervisory role
- National government
  - Policies and enforcement

# Our Theory of Change

- Recognise intersectional and multiple forms of discrimination by WLHIV in maternal care and A2J
- Build state accountability around provision of care to vulnerable women (HIV) particularly where facilities are private

# Framing of Legal Issues Arising

- Was there informed consent?
  - Women had signed consent forms
  - Women had presented themselves at health facilities
- Were there rights violations?
- Were the claims time barred?
- Was there state responsibility?

# Framing.../2



## Intersection of:

Health, socio-economic status, gender

- Receiving medical aid and food supplements and coercion – what other feeding options



**Lack of knowledge of how to pursue A2J even after they realized what had happened to them**



## Evidence

Hospitals have the medical records

# Determination

- Serious constitutional issues raised
- Continuing nature of the violations
- While:
  - The social and economic rights under article 43 of the Constitution were positive rights
  - obligations on the State to do as much as it could to secure for its citizens a core minimum of the social and economic rights.

- right to reproductive health called upon the State to *inter alia*
  - develop health policies,
  - legislate on health,
  - building and equipping hospitals,
  - employing qualified health professionals and facilitate their training from time to time among other things.

## 5

# What was the Court's decision?

The Court said that health care providers are required by law to obtain a patient's **informed consent** before any procedure is performed on that person.



*It was unfair discrimination that served no rational purpose and cannot be justified in a liberal well-functioning constitutional democracy*



## What is "informed consent"?

The Court said informed consent is a process, a "**cumulative product of the steps involved in which permission is obtained before conducting a health care procedure**".

Healthcare providers must ensure that information about the sterilisation is broken down and communicated to patients in a language that they understand. This includes a duty to explain alternative forms of contraception.

The Court said the law places individual responsibility on healthcare providers to obtain informed consent. It said that the Nursing Home failed to do so and that this discriminated against L.A.W. on the basis of her HIV status.

The Court was satisfied that, since the events that took place, the government had passed the Health Act and policies that protected the right to informed consent.



A healthcare provider was the custodian of the information that facilitated a patient's informed consent.



That information was always not readily available to patients.



It was indeed a fact that in most cases **there was a grave imbalance of knowledge and information** between the healthcare provider and the person receiving the professional services.

# Rights Violated

**27**

The right to equality & freedom from discrimination.

**43**

The right to the highest attainable standard of healthcare, including reproductive healthcare

**28**

The right to human dignity.

**45**

The right to a family.

## Findings on discrimination

- Multiple and intersecting forms of discrimination: Health status: Socio-economic status: sex

## The continuing nature of the violation

- One of the women was 20 years old
- Continued ostracisation
- Inability to give birth and failure to obtain informed consent– violation of reproductive health

## Gaps

- Strict proof of violations
- State obligation to prevent violence

# Challenges

Legal frameworks

Time:

- Judgments after 9 years since beginning litigation
- Evidence
- Litigants have been patient but lengthy draining process

Lack of documentary evidence

- Many women didn't have documentation
- Documentation may be required in court



**Lack of knowledge of  
the manifestations of  
OV**



**Difficulties in  
implementing esp.  
since policies are in  
place**



**Lack of Knowledge of  
Manifestations:**

delayed maternity care  
Unwanted and unnecessary  
procedures



**Who to hold  
accountable – HCPs,  
HCFs, State?**

THANK YOU!