

## PETITION 605 OF 2014

# Court affirms reproductive rights of Women Living With HIV

## 1. What was the case about?

The case was about violation of reproductive rights of 4 women based on their HIV status. The women were living with HIV, of lower social-economic status, and receiving medicine and food rations for themselves and their children as part of a program to prevent mother-to-child transmission of the virus. They claimed that they were threatened with withdrawal of the medical and food assistance if they did not produce evidence of permanent family planning methods. Consequently, they were forced to undergo sterilization.

On 21<sup>st</sup> September 2023, Justice Mrima, delivered the judgment.



## 2. Who were the parties?



**The petitioners** were SWK, PAK, GWK, AMM, the Kenya Legal and Ethical Issues Network on HIV & AIDS ("KELIN"), and the African Gender and Media Initiative Trust.

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**The respondents** were 3 medical health service providers, county executive committee member in charge of health services – Nairobi County, cabinet secretary ministry of health and the attorney general.

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**The friends of the court** welcomed to provide expertise were: The Secretariat of the Joint United Nations Programme on HIV and AIDS (UNAIDS Secretariat), Professor Alicia Ely Yamin and the National Gender and Equality Commission (NGEC).

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**The interested parties** were the International Community of Women Living with HIV ("ICW-Global") and International Community Of Women Living With HIV (ICW -Kenya)

### 3. What were the facts of the case?



The petitioners were coerced into undergoing bilateral tubal ligation procedures with threats of withholding of food rations and medical support.

The petitioners were receiving food and medical support from and were coerced into attending secondary health facilities where they were forcefully sterilized.

In each of these secondary health facilities, the petitioners were subjected to sterilization without their informed consent.

The four women were then informed that because of the sterilization, they won't be able to have children again and that the procedure was irreversible.

The emotional toll of what happened to the four women has manifested in their relationships and social life. Some have been unable to get married or even realize their desire to have more children.



#### What is "bilateral tubal ligation"?

A surgical sterilisation procedure that involves blocking a woman's fallopian tubes to prevent the ovum (egg) from being fertilized.

### 4. What was the petitioners' claim?

**The petitioners argued that the four women were sterilized without their consent, depriving them of their ability to have children.**



Therefore, they wanted the court to declare this to be a violation of their fundamental rights under the constitution and the court to award them compensation.

### 5. What was the respondents' defence?



The Respondents said that the petitioners had not provided any oral or written proof of coercion, therefore they could not be held responsible. Additionally, the healthcare providers said that they had undertaken all the steps to ensure that the petitioners understood the nature of the procedure and got consent from them.

## 6. What was the court's decision?



- 1 The court held that the case raised constitutional issues relating to the right to health of women living with HIV.

Health care providers are required by law to obtain a patient's informed consent before any procedure is performed on that person.

### 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".

- 2 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.

- 3 The Court said the law places individual responsibility on healthcare providers to obtain informed consent; the health care providers who performed the bilateral tubal ligation on the Petitioners without their informed consent discriminated against them based on their HIV status and socio-economic 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.

## 7. How did the court remedy the violation of the petitioners' rights?



The Court declared that **"it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when and how often to bear children"**.

The Court declared **that referral medical institutions must obtain informed consent from patients when undertaking operations (except in cases of emergency).**



The Court declared **that four women were sterilised without informed consent and that this violated the following articles under the Constitution:**

- **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



The Court awarded the four women damages in the sum of **Ksh.3,000,000 (about US\$ 24,300) each.**

## 8. What does the judgment mean for women living with HIV?



As a woman living with HIV, if you are on antiretroviral treatment, it is safe to have a baby.

Women living with HIV have a right to make informed choices about our bodies, including to decide whether we want to have children.



As healthcare workers, it is your individual duty to ensure that your patients understand and agree freely to any medical procedure that is performed on them.



Women living with HIV have equal access to reproductive health rights, which if violated, can find remedy in court.