

Conclusion

The appeal was dismissed. The orders of the lower courts were set aside, and replaced with an order setting aside the decision of the authorities to withhold free HIV/AIDS treatment from foreign prisoners, and an order compelling the authorities to comply with the Prisons Act and Regulations to provide the same HIV care to all prisoners.

Significance

This is a celebrated case in prisoners' rights, and indeed it should be. However, the Court was asked to determine on the narrow issue of whether non-citizen prisoners should have access to HIV medicines. In fact, the Court of Appeal was of the view that the lower courts should not have spent a great deal of time examining constitutional provisions, and referencing international and regional treaties, because the matter could be resolved by interpreting pertinent legislation.

Over and beyond inmates' access to HIV/AIDS drugs in prison, conditions found in many prisons contribute toward exacerbation of the burden of HIV/AIDS and related diseases. Such conditions include overcrowding, poor nutrition, stress, and sexual violence. Though these issues were not raised in the court case, these unmentioned issues are critically important in ensuring that the rights of prisoners are respected.

P.A.O. and 2 Others v. The Attorney General & Another
(2012), Petition No. 409 of 2009
Kenya, High Court

COURT HOLDING

Sections 2, 32, and 34 of the Anti-Counterfeit Act, relating to counterfeit medicines, threatened to violate the right to life of the petitioners as protected by Article 26 (1), the right to human dignity guaranteed under Article 28, and the right to the highest attainable standard of health guaranteed under Article 43(1) of the Constitution of Kenya, 2010, and are accordingly unconstitutional.

Summary of Facts

The petitioners were persons living with HIV/AIDS, who benefited from the passing of the Industrial Property Act, 2001 (Industrial Property Act), which allowed importation of generic medicines, and were therefore able to have a regular supply of affordable HIV/AIDS medicines. They filed their petition to challenge the passing of the Anti-Counterfeit Act, 2008 (the Act), especially the implementation of Sections 2, 32, and 34 of the Act, which would, in their view, threaten their access to low-cost and essential HIV/AIDS medicines.

The petitioners argued that Section 2 of the Act defines counterfeit medicines ambiguously and broadly to include legitimately manufactured and distributed generic medicines. Sections 32 and 34 of the Act vest enforcement authorities with powers to seize counterfeit goods, which would mean that they

could also seize legitimately manufactured generic medicines, therefore threatening or restricting the petitioners' access to low-cost generic HIV/AIDS medicines on which their health and life depended. The petitioners submitted that if the Act was enforced, their rights to life, human dignity, and health as guaranteed under Articles 26(1), 28, and 43 of the Constitution were likely to be infringed.

The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR on Health), who joined the petitioners as a Friend of the Court, submitted that the definition of counterfeiting by Section 2 of the Act conflates generic medicines with medicines produced in violation of intellectual property rights. This would affect access to medicines as argued by the petitioners.

The petitioners also argued that pursuant to the HIV and AIDS Prevention and Control Act, 2006, the Kenyan Government is required to take measures necessary, to the maximum of its available resources, to ensure access to healthcare services including access to essential medicines at affordable prices by persons with HIV or AIDS and those exposed to the risk of HIV infection. Enforcement of the Anti-Counterfeit Act would contravene this obligation.

Issues

The Court addressed two issues:

1. Whether by passing and implementing the Anti-Counterfeit Act, the Government was in violation of the duty to ensure conditions necessary for citizens to enjoy a healthy life; and
2. Whether provisions of the Act would deny the petitioners access to essential medicines and thereby violate their rights under Articles 26(1), 28, and 43(1), as well as Article 53 with regard to the rights of children.

Court's Analysis

The Court noted that the Government recognises that HIV/AIDS is a serious threat to the health and life of the petitioners and other members in the society, and constitutes a major challenge to the socio-economic development of the country. The Court also found that the Government also recognises the importance of anti-retroviral therapy in addressing the challenge posed by HIV/AIDS.

The Court noted the importance of low-cost HIV/AIDS medicines which are necessary to mitigate the impact of HIV/AIDS. It also noted the efforts of the Government to ensure access to and supply of low-cost HIV/AIDS medicines by passing the Industrial Property Act that allows the manufacture and distribution of generic medicines.

The Court then expressed the view that any legislative measures that have the effect of restricting access to essential medicines constitute a threat to the life and health of persons who depend on them, and would be in violation of rights guaranteed under the Constitution.

The Court affirmed the constitutionally protected human rights, including the rights to life and health. It also affirmed that the Constitution recognises application of international human rights in Kenya through the operation of Article 2.

The Court then addressed the meaning and application of the right to life under the Constitution and other human rights instruments. The Court cited Article 43(1) of the Constitution which provides for the right to health, which is also recognised in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It highlighted the measures that states parties are obligated to take under Article 12(2) of the ICESCR, which include to prevent, treat, and control epidemic diseases, and create conditions that would assure to everyone care and treatment in the event of sickness. The Court also referenced the right to health recognised under Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and Article 24(1) of the Convention on the Rights of the Child (CRC), to emphasise the importance accorded to the right to health in the international human rights framework.

The Court highlighted how the right to health has been interpreted by the Committee on Economic, Social and Cultural Rights (ESCR Committee), in its General Comment No. 14 on the Right to Health. The ESCR Committee said that the right to health is indispensable for the exercise of other human rights. It also said that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead healthy lives. In the Court's view, this implies that people must have the medication they need in order to remain healthy. Failure to create such conditions would violate their right to health.

The Court also noted that in General Comment No. 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author, the ESCR Committee comments that states parties have a duty to prevent unreasonably high costs for access to essential medicines. Further, the Court referred to the decision of the South African Constitutional Court in *Minister of Health and Others v. Treatment Action Campaign and Others* ((1) 2002 (10) BCLR 1033 (CC)) to affirm the importance of access to medicines in the realisation of the right to health.

The Court expressed the view that the obligations of the state under the right to health encompass both a positive duty to ensure access to health services, and a negative duty not to do anything that would interfere with access to health care services and medicines. Therefore, any legislation that would imply inaccessibility to essential medicines would violate the right to health.

The Court then reviewed the Act and noted that it is intended to prohibit trade in counterfeit goods, and may be intended to protect holders of intellectual property rights to enjoy the benefits of their innovations. Section 2 of the Act defines the term "counterfeit" to mean "taking the ... actions without the authority of the owner of intellectual property right subsisting in Kenya or elsewhere in respect of protected goods." It includes the following language in subsection 2(d) which the Court highlighted:

... in relation to medicine, the deliberate and fraudulent mislabelling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging.

The Court then referred to the World Health Organisation (WHO) definition of a generic drug that it is a pharmaceutical product manufactured without a licence from the innovator company and marketed after patent or other exclusive rights had expired. The Court noted that the definition of

counterfeit includes medicines that have correct ingredients and sufficient active ingredients. It therefore agreed with the petitioners that there is ambiguity in the Act's definition of counterfeit to include generic medicines.

The Court rejected the respondent's argument that the Act exists to protect the rights of citizens from fake drugs. The Court was of the view that the Act was designed to protect intellectual property rights of individuals. It noted that the Act was not concerned about the standard and quality of drugs.

The Court found that the Act's conflation of counterfeit and generic drugs creates a possibility for misinterpretation by officials, who might seize legitimate generic drugs, which would have a disastrous impact on persons who rely upon them, such as the petitioners. It emphasised that such ambiguity is not permissible, especially where any misinterpretation would impact on the constitutionally guaranteed rights of individuals. It further said that the protection of individuals' right to health and access to medicines is more critical than the protection of intellectual property rights, and therefore protection of the petitioners' rights should take precedence. The Court buttressed its reasoning with General Comment No. 17, where the ESCR Committee said that states parties should prevent the use of scientific progress for purposes contrary to human rights, for instance by excluding patentability where commercialisation of innovations would jeopardise enjoyment of human rights.

The Court therefore concluded and held that Sections 2, 32, and 34 of the Anti-Counterfeit Act threatened to violate the right to life of the petitioners as protected by Article 26(1) of the Constitution, the right to human dignity guaranteed under Article 28, and the right to the highest attainable standard of health guaranteed under Article 43 (1).

Conclusion

The petition succeeded and the Court granted the declarations sought. The Court asked the Government to re-consider the impugned provisions of the Act in light of its obligations to ensure that citizens have the right to the highest attainable standard of health.

Significance

In crafting legislation, Governments may intentionally or unintentionally fail to act in the best interests of their citizens. In this case, the provisions of the Anti-Counterfeit Act were retrogressive of the Government's undertaking to advance the rights to life and health of its citizens, especially with regard to ensuring that low-cost HIV/AIDS medicines are available. Its unintended effect had the potential to be disastrous and could have meant loss of health and life in a context where a significant number of the population rely on the medicines that could have ceased to be available.

It is also significant that this case addressed how to resolve competing rights, constitutionally guaranteed fundamental rights on one hand, and rights to intellectual property on the other. By enacting the Anti-Counterfeit Act in the particular manner that it was passed, the Government may have inadvertently tipped the scale in favour of the intellectual property rights-holder. The Court reminded the Government that the fundamental rights of the individuals should always take precedence.