

Georgina Ahamefule v. Imperial Medical Centre & Dr. Alex Molokwu
[2012] Suit No. ID/1627/2000
Nigeria, High Court

COURT HOLDING

The dismissal of the Applicant from her job was unlawful and constituted a wrongful termination because the 2nd Defendant acted out of malice and extreme bad faith. The Court further held that the 2nd Defendant's performance of a HIV test on the Claimant without obtaining informed consent amounted to battery; the failure to provide pre-and post-test counseling constituted negligence of a professional duty that was owed to the Applicant; and denying medical care to the Applicant based on her status was a violation of her right to health.

Summary of Facts

The Applicant, Georgina Ahamefule, started working as an auxiliary nurse at Imperial Medical Centre, the 1st Defendant, in 1989, when it was established by the 2nd Defendant, Dr. Alex Molokwu. In 1995, while pregnant, the Applicant developed some boils and sought treatment from the 2nd Defendant who conducted diagnostic tests without informing her about the nature of the tests, their outcome, or providing any counseling before and after the tests were conducted. Thereafter, the 2nd Defendant required that the Applicant take a two-week medical leave and also referred her to a physician at Lagos State University Teaching Hospital with a sealed note which she hand-delivered. The physician requested that she return with her husband and took blood samples from both without providing any information about what tests the samples would be used for or any counseling. Subsequently, the physician informed the Applicant and her husband that the HIV test he had conducted on them showed that the Applicant's HIV status was positive while her husband's was negative. No post-testing counselling was provided following these results. The Applicant returned to the 1st Defendant hospital to meet with the 2nd Defendant who directed her to collect a letter of termination of employment. The Applicant, soon after, had a miscarriage and, at the 1st Defendant hospital where she sought medical care, she was denied a medically-necessary surgical procedure due to her HIV status. She filed this case against the Defendants in 2000.

Issues

1. Whether conducting a HIV test on the Applicant without obtaining informed consent and providing pre-and post-testing counseling constituted battery and professional negligence.
2. Whether terminating the Applicant's employment based on her HIV-positive status violated her right to non-discrimination under Articles 2, 18(3) and 28 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and the Laws of the Federation of Nigeria (African Charter) and were thereby unlawful.
3. Whether refusing to provide the required medical care following a miscarriage to the Applicant due to her HIV-positive status violated her right to health under Article 6 of the African Charter and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

Court's Analysis

The Court first considered whether it had jurisdiction over this matter in response to the Defendants' assertion that Section 254c (1) (third alteration) Act 2010 of the Constitution had conferred exclusive jurisdiction over employment-related cases to the National Industrial Court. The Court determined that jurisdiction is governed by the law in effect at the time a suit is filed and trial begins and that the laws that were in effect in 2000, when the case was filed, provided it with jurisdiction over this matter. It then considered whether the Applicant's employment was wrongfully terminated and determined that the applicable law in this instance was the Common law, which provides that an employer can hire and fire an employee at will and without giving a reason, but where one is given it must be justified. The Court determined that the Applicant, who worked as an auxiliary nurse, ran errands for healthcare providers and did not participate in the provision of medical services, nor did she handle blood or any sharp objects. Consequently, it decided that the reason the Defendants gave for terminating the Applicant's employment, which was that the Applicant posed a risk to patients and other staff, was not justifiable.

Conclusion

The Court found that the termination of the Applicant's employment was based on malice and extreme bad faith and was unlawful. It further determined that the performance of an HIV test without the Applicant's informed consent constituted battery while the failure to provide pre- and post-test counselling amounted to professional negligence. It issued a declaration that the Defendant's refusal to provide required medical care to the Applicant following her miscarriage amounted to a violation of the right to health. The Applicant was awarded 5 million Naira (approximately 25,000 USD) as general damages for the termination of her employment and two million Naira (approximately 10,000 USD) for the testing which was done without consent and for the resulting professional negligence.

Significance

In 2000, when this case was filed, it was the first to address rights violations against a person living with HIV in Nigeria and one of the earliest cases in the region. The issues it raised exposed the continuum of human rights violations experienced by people living with HIV and AIDS and its consequences. These violations include lack of pre- and post-HIV test counselling at healthcare facilities; HIV testing and disclosure of results without informed consent; termination of employment due to an employee's HIV status; and denial of access to healthcare services, including emergency obstetric care, due to an individual's HIV status. The Applicant combined human rights and tort claims to increase the likelihood of obtaining a remedy because of the absence of precedents on the human rights claims at the time of filing. However, during the twelve-year period that the case was litigated, robust human rights standards were established on these issues by international and regional human rights instruments and the treaty monitoring bodies charged with their interpretation.

Yet, some challenges remain at the national level. HIV testing without informed consent continues to occur in Nigeria and other countries and is typically a pre-condition for employment. The emergence of HIV laws that contain provisions which place those living with HIV at increased risk of human rights violations remains a concern in some countries, such as Kenya and Uganda. These laws contain

provisions that provide for testing and disclosure of results without consent, with potentially negative consequences for women, who are more likely to experience violence and stigma once their status is made known. Its negative implications are increased for certain groups such as pregnant women who are typically subjected to routine HIV tests while receiving maternity care. The provisions in these HIV laws, which criminalise HIV exposure and transmission in language that is so broad it could be interpreted to apply to transmission in-utero, during delivery, or while breastfeeding, also hold serious implications for people living with HIV. African courts have a seminal role to play in addressing such violations and this decision can be persuasive in many other jurisdictions.

Stanley Kingaipe & Another v. The Attorney General
[2010] 2009/HL/86
Zambia, High Court

COURT HOLDING

The petitioners were subjected to mandatory HIV testing without their consent and put on antiretroviral (ARV) drugs unknowingly. This was a violation of their right to protection from inhuman and degrading treatment under Article 15 of the Constitution of Zambia, 1991 (the “Constitution”) and their right to privacy under Article 17.

The Court held that petitioners’ rights to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels under Article 112(d) was not violated.

The Court found that petitioners were not discharged from the Zambia Air Force (the “ZAF”) because they were HIV positive, and therefore held that the petitioners’ discharge did not violate Articles 11, 21, 23, or 112(c) of the Constitution, the Universal Declaration of Human Rights, the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights, or the Government Policy and Guidelines on HIV/AIDS.

Summary of Facts

The two petitioners had formerly served in the ZAF. While in service, they were asked to appear before a Medical Board of Inquiry to assess their illnesses and determine their fitness to serve. They were later required to undergo compulsory medical checkups where blood samples were taken. Neither petitioner was informed that an HIV test would be conducted. They were later prescribed drugs, but were not informed that they were being treated for HIV. Each petitioner was subsequently discharged from the ZAF as unfit for service but was never informed that they had HIV. They only discovered that they had HIV after receiving counseling and blood tests from other health centers following their discharge.

The petitioners alleged that they were subjected to mandatory and compulsory HIV tests without their express or informed consent and that they were discharged as a result of these tests. They therefore claimed violations of Articles 11, 13, 15, 17, 21, 23, and 112(c)-(e) of the Constitution and of the Government Policy and Guidelines on HIV/AIDS.