

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.

Issues

1. Whether the petitioners were subjected to mandatory and compulsory HIV tests, and if so whether it violated their right to personal liberty under Article 13 of the Constitution, their right to protection from inhuman and degrading treatment under Article 15, their right to privacy under Article 17, or their right to adequate medical and health facilities and to equal and adequate educational opportunities in all fields at all levels under Article 112(d) and (e).
2. Whether the petitioners were discharged on account of their HIV status and, if so, whether it violated their fundamental rights and freedom under Article 11, rights to freely associate under Article 21, rights to protection from discrimination under Article 23, or rights to secure an adequate means of livelihood and opportunity to obtain employment under Article 112(c).

Court's Analysis

The Court found that the petitioners were subjected to mandatory and compulsory HIV tests. The Court noted that if any testing is done without someone's consent then the testing is by definition mandatory. To support this, the Court cited *Lewanika v. Frederick Chiluba* (1998) Z.R. 79, where the Supreme Court of Zambia held that extracting a blood sample from any person without his or her consent infringed individual rights. Citing *Airedale NHS Trust v. Bland* (1993) 1 All E R 821, the Court further noted that the petitioners did not lack the capacity to give consent, and that they were in the best position to make their own decision whether or not to have an HIV test.

In the Court's opinion, the absence of informed consent by the petitioners was an affront to their fundamental rights and freedoms and the preservation of their dignity and integrity, which are rights contemplated in both the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. Therefore, the Court held that the compulsory HIV tests similarly violated Articles 15 and 17 of the Constitution, which state, respectively, that "a person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment" and that "except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises."

The Court was not persuaded by the evidence before it that the petitioners were discharged on account of their HIV. The Court noted extensive evidence in the record of the petitioners' deteriorating health prior to their Medical Board Inquiries and HIV tests. Based on this history, which included severe infections that restricted mobility, doctors recommended to the Medical Board that both petitioners be found unfit for all forms of military duty. The Court found that the HIV tests were performed *after* the Medical Board had already accepted the doctors' recommendations, and that their decision was therefore based only on the petitioners' prior medical history and not their HIV diagnoses. The Court explained that under Regulation 9 of the Defence Force Regulations of the Defence Act, a soldier may be discharged if he is medically unfit for any form of service and is likely to remain so permanently. The Court accepted the defendant's argument that the doctors reasonably believed that the petitioners' health problems were likely to remain permanent based on their medical history.

The Court found that the petitioners were not discharged on account of their HIV, and therefore held that the petitioners' discharges were not in violation of their rights.

Conclusion

The petition succeeded in part, and the Court awarded the petitioners K10,000,000 each as compensation for having been subjected to mandatory HIV testing without their consent.

Significance

Doctors in the army realised that army personnel were becoming ill and some were becoming unfit for duties. They suspected HIV. They took the initiative to get sick personnel tested for HIV and put those who tested positive on a treatment. For some, this was life-transforming. They got better, and were able to maintain good health following this intervention. It was a good initiative by the doctors because they saved lives; however, the manner in which they intervened was paternalistic and misaligned with human rights principles.

Human rights demand that persons make decisions for themselves on all health interventions. The doctor only facilitates the process of identifying the medical issue and enables the client to make their decisions based on the available options for addressing the issue.

One of the special challenges with sexual and reproductive health services in Africa is this paternalistic attitude of health providers. Paternalism may be subtly manifested by the health provider's failure to provide all the information that is necessary for the client to understand their situation. Paternalism in health services is sometimes so entrenched that clients have come to believe, mistakenly, that their fate rests in the hands of the health provider. Yet, in human rights terms, no one should decide for another person. Every competent person has the "right" to decide for themselves.