

- Countries should develop and implement prosecutorial and police guidelines to clarify, limit, and harmonise any application of criminal law to HIV.

Should the State Law Office not address the issues highlighted by the Petitioner and the Friend of the Court, the Court's determination has left open the opportunity for further litigation to challenge the Act, including the extent of the criminalisation of HIV transmission.

Rosemary Namubiru v. Uganda
(2014), HCT-00-CR-CN -- 0050-2014
Uganda, High Court

COURT HOLDING

The Appellant, who was living with HIV, was not justified in her contention that she was prejudiced in her defence because of the double charge against her i.e., that giving a patient an injection with a needle that she had inadvertently pricked herself with was not only unlawful but also negligent. The Court held that the burden of proof was on the prosecution, so the defence was not prejudiced.

The trial court had correctly found that the prosecution had proved beyond a reasonable doubt the ingredients of the offence charged, based on the evaluation of the evidence before it.

However, the circumstances of the case required a lighter sentence than meted out by the trial court.

Summary of Facts

The Appellant worked as a nurse at Victoria Medical Centre in Kampala District. One day she was administering intravenous antibiotics to a child. Due to the child's struggles when she tried to insert the needle in the child's arm, the Appellant pricked herself with the needle. However, instead of replacing it with a sterile needle, she continued to use the contaminated needle on the child. The incident was reported to the hospital's management. It was later discovered that the Appellant was living with HIV. The Appellant was charged before the Magistrate Court with the one count of doing a negligent act likely to spread infection of disease. According to the Magistrate Court, the prosecution had to prove that (1) the Appellant unlawfully and negligently infected the toddler, and (2) that she knew or had reason to believe that this could likely cause the spread of the infection of HIV.

The Magistrate Court found that the Appellant's actions were unlawful and negligent in contravention to the relevant penal law. It also found that the Appellant had reason to believe that her act exposed the child to the risk of HIV. She was therefore convicted on the offence charged. She was sentenced to 3 years' imprisonment.

The Appellant appealed to the High Court and raised the following grounds for appeal:

1. The lower court erred in finding the Appellant guilty.
2. The lower court failed to properly evaluate the evidence on record.

3. The lower court erred in convicting the Appellant on a “duplex charge.”
4. The lower court erred in shifting the burden of proof to the Appellant.
5. The lower court erred by not considering inconsistencies in the prosecution’s case.
6. The lower court erred by imposing a sentence disproportionate to the facts and circumstances of the case.

Issues

The Court consolidated the issues for determination as follows:

1. Whether the Appellant was prejudiced in her defence because of the duplex charge, i.e., that the act complained of was both unlawful *and* negligent;
2. Whether the trial court failed to properly evaluate the evidence before it; and
3. Whether the sentence was excessive, taking into account the circumstances of the case.

Court’s Analysis

The Court dismissed the first ground for appeal because it was the reason for the appeal, rather than grounds for it. It then turned to the third ground for appeal which was the issue regarding a duplex charge. The charge sheet alleged that Appellant acted “unlawfully and negligently,” while the applicable penal code read “unlawfully or negligently.” The Appellant argued that the penal code set out two different offences: an unlawful act and a negligent act. Adding the two offences together on the charge sheet, the Appellant argued, made the charges duplex and therefore defective, such that the Appellant could not properly prepare her defence. The Court held that there was no prejudice to the Appellant in this case; that the Appellant was charged with committing an unlawful and negligent act, all in one transaction; and that *Uganda v. Guster Nsubuga & 3 Others*, HC Session Case No. 84 of 2012, supported this conclusion.

Next the Court addressed the second, fourth, and fifth grounds together, as they concerned the issue of evaluation of the evidence. The mother’s testimony in the lower court was that, after noticing that her son had been stuck with a contaminated needle, she shouted, which caused the second nurse to enter the room. In her first statement to police, however, the mother did not mention having shouted. The Appellant argued that this inconsistency cast doubt on the mother’s reliability as a witness. Because the mother was the only witness to the incident, the Appellant argued, if her testimony was not credible, the case should be dismissed. The Appellant further pointed to the fact that the second nurse had not been called as a witness, so the mother’s story could not be verified. The Court found these arguments unavailing, stating that the reason the second nurse entered the room was immaterial, and did not detract from the mother’s testimony.

The Appellant next argued that because the needle was not brought as an exhibit, the Appellee had failed to prove it was contaminated. The Court noted that the mother testified that the Appellant used a contaminated needle, and that the Appellant herself testified she did not remember whether she had used a new needle or a contaminated needle. The Court found the testimony of the mother

sufficient to prove the toddler was injected with a contaminated needle, noting testimony from expert witnesses that a needle is considered contaminated once it pierces the skin. The Court further noted that the Appellant knew her HIV status and had been receiving treatment for the same.

The next matter considered was whether the Appellant acted negligently. The Appellant noted that in criminal matters, a higher level of proof is necessary to show negligence than is necessary in civil matters, citing several cases. The Court also noted that the Appellant was a fully and properly qualified nurse with over 30 years of experience, and that the mother was a regular client at the clinic. The Court recited expert testimony outlining the procedure to be followed when a medical professional is pricked and there is a flow of blood, which is to discard the contaminated needle, wash and bandage the pricked area, and begin again with a new needle. The experts testified that this was standard procedure and well-known to all healthcare professionals. There was further evidence from the clinic that they always had a surplus of needles, so finding a clean needle would not have been an issue. There was also evidence that the Appellant did in fact know that she had pricked her finger. In light of all the evidence, the Court concluded that the nurse had acted negligently. The Court further concluded that the lower court had not improperly shifted the burden of proof to the Appellant and that it had properly considered all evidence on record. The Court therefore dismissed the second, fourth, and fifth grounds of appeal.

The sixth and last ground of appeal was the sentence. The Court noted that, contrary to the Appellee's argument that the Appellant was convicted on two counts, she was actually convicted on only one count. The Court noted that the Appellant was "an elderly person aged 64 years," that she was a mother and grandmother, and that she was "sickly" and "HIV positive." The Court further noted that the toddler remained HIV-free, and that the Appellant had no intention of harming the toddler. The Court acknowledged that an appellate court should only reduce sentences if the sentence is illegal, inadequate, or "manifestly excessive." There were no arguments that the sentence was inadequate, and the Court stated that it was not illegal. By way of explaining that the sentence was "manifestly excessive," the Court stated that "medical practitioners need some degree of protection." Without saying much more, the Court held that three years was an excessive sentence and reduced the sentence to time served, which had been 5 months.

Conclusion

The Court upheld the lower court on all counts, but nonetheless reduced Appellant's sentence from 3 years to time served (five months).

Significance

Transmission of HIV is a public health concern, and this case revolves around exposure to HIV due to an act of professional negligence. Countries have used the law to protect the public from HIV transmission and the risk of transmission or exposure to HIV by criminalising acts and behaviour that expose others to HIV. Sometimes the criminal provisions are overbroad and result in penal sanctions that are disproportionate to the aim of preventing transmission. The Joint United Nations Program on HIV/AIDS (UNAIDS) suggests that criminal law as a tool for prevention of transmission of HIV be used with circumspection. It recommends that generally, criminalisation only be limited to intentional

acts of transmission, i.e., that the person knows he is living with HIV, and acts with the intention to transmit it, and he or she in fact transmits it.¹⁰⁰ This is to avoid situations in which punishment is excessive and disproportionate to the act or behaviour.

The significance of this case was whether the punishment was excessive for the reason that it was about HIV transmission even though the actual transmission did not happen. The fact that the child was not infected probably influenced the Court to reduce the sentence though this was not stated explicitly in the judgment. Another reason might have been the fact that the nurse had been on remand for some 5 months. This was certainly harsh if the only reason she had to be on remand for that long was to do with the supposed “seriousness” of the negligent act. Criminal laws should not merely reflect anxiety to curb the spread of HIV transmission, as this may have unjust consequences, as was probably the case against the Appellant.

HIGHLIGHT

CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE, AND TRANSMISSION

The overly broad application of criminal law to HIV non-disclosure, exposure, and transmission raises serious human rights and public health concerns. Many countries have adopted HIV-specific legislation with the aim of protecting the rights of people living with HIV (PLWH), yet most of these laws have punitive and coercive provisions that are contrary to globally recognised best practices.

Proponents of criminalization claim that they are promoting public health and morality and safeguarding the rights and health of women. However, the scope, generality, and vagueness of the laws permit the criminalisation of women for non-disclosure, exposure, or transmission to not only their sexual partners, but also to their children.

The decision in *AIDS Law Project v. Attorney General & 3 others* declared Section 24 of the HIV and AIDS Prevention and Control Act, 2006, unconstitutional as the provision was vague, overbroad, and lacking in legal certainty particularly in respect to the term “sexual contact.” Further, the section violated the rights to privacy and confidentiality and discriminated against PLWH, especially pregnant women. As a result, it instilled fear and stigma and violated the right to privacy. It also undermined public health initiatives that have been successful in encouraging disclosure and exposed individuals to stigma, discrimination, and rejection.

Broad criminalisation of HIV exposure and transmission particularly raises questions in the context of vertical transmission, yet it is well known that most women lack the information