

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

HIGHLIGHT continued...

and services to prevent HIV exposure during pregnancy, delivery, or breastfeeding. Further, non-voluntary partner disclosure exposes women to violence and discrimination by their partners, families, and communities.

Whereas the *AIDS Law Project* judgment is remarkable in finding the criminalisation of HIV transmission as unconstitutional and a violation of Kenyans' fundamental human rights, it is crucial to follow through with the amendments of Section 24 and review this law, as proposed in the judgment.

Namubiru's case, on the other hand, brings to light the dangers of media sensationalism and violations that health care providers go through with regard to HIV criminalization. *Namubiru's* case attracted sensationalised media coverage, confirming the treatment and human rights violations that PLWH's face. She was found guilty of professional negligence and sentenced to 3 years in jail despite the fact that the incident was accidental, contrary to widely-held suspicion that she had intentionally exposed the baby to HIV. Although Namubiru was set free on appeal, the case creates a dangerous precedent on HIV criminalisation.

These two cases highlight the impact of HIV criminalisation. There is need to amend, repeal or withdraw laws that criminalise HIV transmission. It is clear that what has made a difference in reducing the number of new infections is mainly awareness raising and provision of services, as well as establishing a conducive legal environment that is free of stigma and discrimination. The criminal justice system should advance a more just and rational response to HIV that integrates public health and human rights.