

The Court dismissed the claim that the plaintiffs were discriminated against on the basis of their HIV status. A question that may be asked is whether it was coincidence that all the women who were forced to be sterilised were also HIV positive. Though the plaintiffs did mention in their testimonies that health providers indicated their HIV status was one of the reasons for the sterilisation, this alone was appreciably unconvincing to the Court as demonstration that the hospital had a deliberate policy, written or unwritten. Yet courts need not require plaintiffs to prove that hospitals have a written or unwritten policy around sterilization of women living with HIV. The pattern presented in the Namibia case should have been adequate to demonstrate discriminatory intent.

The Court's decision to dismiss the claim of discrimination was unfortunate since in 2009, the International Community of Women Living with HIV/AIDS reported evidence that health providers in Namibia pressured and forced HIV positive women to undergo sterilisation.¹⁰² It is perhaps unfair to expect the Court to have been more active to pursue the question of discrimination when it was given little reason to do so. Counsel could have tried to be more persuasive, but perhaps this was understandably difficult since there was no written policy, nor was it likely that the health providers would volunteer the information if such discriminatory practices existed. It is therefore plausible that discriminatory sterilisation, based on HIV status, was present in this case. Nevertheless, this case is important, because it sent the message that informed consent is a high threshold and a woman's autonomy in making reproductive choices should be taken seriously.

Government of the Republic of Namibia v. L.M. & 2 Others
[2014] Case No. SA 49/2012, NASC 19
Namibia, Supreme Court

COURT HOLDING

The Appellant's agents had performed the sterilisation without having properly obtained informed consent from the respondents.

Summary of Facts

This was an appeal against a decision of the High Court, discussed immediately above,¹⁰³ that found the Appellant government liable for the sterilisation of the respondents without their informed consent.

Issues

The Supreme Court isolated one issue: Whether the agents for whose conduct the Appellant was responsible had performed sterilisation procedures without obtaining informed consent from the respondents.

Court's Analysis

One thing that was notably different from the decision of the High Court was that the Supreme Court related informed consent to the rights recognised in the Namibian Constitution, especially the rights to dignity, to physical integrity and to found a family. Further the Court recognised that it was the woman's choice to decide to bear children or not, and that the decision must be made freely and voluntarily.

The analysis of the evidence was very similar to that conducted by the High Court. The Supreme Court assessed whether it could be said that the respondents had the intellectual and emotional capacity to give informed consent. It held that the circumstances under which the Appellant's agents purported to have obtained informed consent from the respondents - that is, during labour - would not support the claim that the respondents had the requisite intellectual and emotional capacity to give independent and free consent. Further, the Court relied on the absence of any clinical record that indicated that the health providers had discussed the nature and risks of the sterilisation procedure with the respondents, to find that on the balance of probabilities, the health providers had not properly obtained informed consent.

Conclusion

The appeal was dismissed.

Significance

In contrast to the High Court decision, the Supreme Court acknowledged the human rights aspect of the case. However, it could have expounded more on how human rights governed the relationship between health providers and women in matters of reproductive health care, and especially in this case since it was then well-known that women living with HIV were vulnerable to pressure from health providers to undergo sterilisation. The Supreme Court determined it would not address the discrimination question because of a lack of evidentiary support for the respondents' claim that the forced sterilization occurred due to their HIV status. This decision has been celebrated as being important, however, in affirming the reproductive rights of women. Despite the Court's failure to engage with the discrimination aspect, there is no reason to doubt that its judgment does affirm all women's reproductive rights, including for those women living with HIV.