
IS THE DECISION BY THE CONSTITUTIONAL COURT OF UGANDA IN **UGANET & 2 OTHERS V. ATTORNEY GENERAL** IN TANDEM WITH GLOBAL DECISIONS ON CRIMINALIZATION OF HIV/AIDS TRANSMISSION?

By:
Dr. Henry Onoria
Mr. Paul Mukibi

Contributor:
Aziz Kitaka



Foreword

1st December 2022 was commemoration of the International World AIDS Day. The theme this year was “EQUALISE”. The “Equalize” slogan is a call to action. It is a prompt for all of us to work for the proven practical actions needed to address inequalities and help end AIDS. These among others include: Reform laws, policies and practices to tackle the stigma and exclusion faced by people living with HIV and by key and marginalized populations, so that everyone is shown respect and is welcomed. On **8th November 2022**, slightly less than a month before the commemoration, the Constitutional Court of Uganda handed down a decision that has been perceived as contrary to the above said theme, as the provisions of the HIV and AIDS Prevention and Control Act, 2015 that were being challenged in the petition, perceived as discriminatory, criminalising HIV/AIDS transmission, among others, were maintained by the Court as being constitutional. ULS LEGAL INSIGHT brings you an analysis of this petition and its implications on the global approaches to fight against criminalisation of HIV/AIDS transmission.



Headnotes

Criminalization of HIV/AIDS transmission—Overbreadth, vagueness and subjectivity in provisions—Discrimination by singling out persons living with HIV/AIDS for punishment—Undermining of public health objectives of HIV/AIDS prevention and control.

- Is Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act, No. 1/2015, overboard, vague and subjective in character?
- Does Section 18(2) (e) of the HIV and AIDS Prevention and Control Act, No. 1/2015, permits the disclosure and/or release of results of an HIV test without consent to a broad range of undefined persons
- Does Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act, No. 1/2015, permits disclosure of results of an HIV test without informed consent to unauthorized persons thereby exposing women, who are usually the first to know their HIV status, to stigmatization and gender based violence?
- Does Section 43(1) of the HIV and AIDS Prevention and Control Act, No. 1/2015 criminalizes intentional spread of HIV and AIDS?
- Is Section 41 of the HIV and AIDS Prevention and Control Act, No. 1/2015, overboard, vague and subjective in character?
- Does Section 43(1) of the HIV and AIDS Prevention and Control Act, No. 1/2015, criminalizes HIV transmission by singling out persons living with HIV/AIDS for punishment?
- Is Section 44 of the HIV and AIDS Prevention and Control Act, No. 1/2015, overboard and vague?
- Does Section 18(2) (e) and (h), 41 and 43(1) of the HIV and AIDS Prevention and Control Act, No. 1/2015, undermine the public health objectives of HIV/AIDS prevention and control?

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On November 8, 2022, in *Uganda Network on Law, Ethics & HIV/AIDS (UGANET) & 2 Others v. Attorney General, Constitutional Petition No. 24/2016*, the Constitutional Court of Uganda (in the lead judgment of Musota, JA/JCC, which was unanimously agreed to by other justices on the coram, to wit, Buteera, DCJ/JCC, Kibeedi, JA/JCC, Mulyagonja, JA/JCC and Mugenyi, JA/JCC) pronounced itself on the constitutionality of several provisions of the HIV and AIDS Prevention and Control Act, 2015.

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Introduction and Background to the Petition

This was a constitutional petition brought under Article 137(1), (3)(a) (b) and (4) of the Constitution of the Republic of Uganda 1995 (as amended) and the Constitutional Court (Petitions and References) Rules S.I 91/2005 seeking declarations and other orders referred to herein later. The petition was supported by the affidavits of *Ms. Doro Kiconco Musinguzi (then Executive Director of the 1st petitioner), Prof. Ben K. Twinomugisha (2nd petitioner), Ms. Lillian Mworeko (Executive Director of the 3rd petitioner), Dr. Stephen Watiti, Prof. Grover Anand and Dr. Paula Catherine Auberson-Munderi* who swore supplementary affidavits. The petition challenged *sections 18(2) (e) and (h), 41, 43(1) and 44 of the HIV and AIDS Prevention and Control Act, 2015* as being inconsistent with and/or in contravention of Objective XIV(b) of the *National Guiding Principles of State Policy and Articles 2(1)& (2), 8A, 21, 24, 27, 28(12), 33(1) 8 (3), 44 (c), 45 and 287 of the Constitution.*

The Petitioners' case/Allegations

The petitioners alleged the following, that:

- Section 18(2)(e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in and contravention of Articles 28(12), 44(c), 287 and 2(1) & (2) of the being Constitution of the Republic of Uganda, 1995 for being overboard, vague and subjective in character;
- Section 18(2)(e) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 27, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 for it permits the disclosure and/ or release of results of an HIV test without

consent to a broad range of undefined persons;

- Section 18(2)(e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 33(1) and (3), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 for it permits disclosure of results of an HIV test without informed consent to unauthorized persons thereby exposing women, who are usually the first to know their HIV status, to stigmatization and gender based violence;
- Section 41 of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 28(12), 44(c), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 for being overboard, vague and subjective in character;
- Section 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 21, 45, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 for it specifically criminalizes HIV transmission by singling out persons living with HIV/AIDS for punishment;
- Section 44 of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 28(12), 44, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 for being overbroad and vague; and
- Section 18(2) (e) and (h), 41 and 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015 are inconsistent with and in contravention of Objective XIV (b) of National Guiding Principles of Public Policy and Articles 8(A), 45, 287 and 2(1) & (2) of the

Constitution of the Republic of Uganda, 1995 for undermining the public health objectives of HIV prevention and control.

Declarations sought

The Petitioners sought for the following declarations;

- Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015, in permitting disclosure or release of results of an HIV test in broadly worded circumstances, is inconsistent with and in contravention of Articles 28(12), 44(a), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda 1995 and is thus null and void;
- Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015, in permitting disclosure or release of results of an HIV test to any other undefined persons, is consistent with and in contravention of Articles 27, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda 1995 and is thus null and void;
- Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015, in exposing women to stigmatization and gender-based violence, is inconsistent with and in contravention of Articles 33(1) & (3), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 and is thus null and void;
- Section 41 of the HIV and AIDS Prevention and Control Act No. 1/2015, in criminalizing attempted transmission of HIV, is inconsistent with and in contravention of Articles 28(12), 44(c), 287 and 2(1) & (2) and is thus null and void;
- Section 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015, in

criminalizing attempted transmission of HIV, is inconsistent with and in contravention of Articles 28(12), 44(c), 287 and 2(1) & (2) and is thus null and void.

- Section 44 of the HIV and AIDS Prevention and Control Act No. 1/2015, in penalizing specified actions in broadly-worded terms, is inconsistent with and in contravention of Articles 28(12), 44(c), 287, 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 and is thus null and void; and
- Sections 18(2) (e) and (h), 41 and 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015, in undermining the public health objectives of HIV prevention and control, are inconsistent with and in contravention of Objective XIV (b) of National Guiding Principles of Public Policy and Articles 8(A), 45, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995 and are thus null and void.

Orders sought in the petition

- The petitioners sought the following orders from the court:
- Permanently staying the operationalization of the impugned provisions of the HIV and AIDS Prevention and Control Act No. 1/2015.
- Any other reliefs that this Honourable Court may deem fit.

Respondent's answer to the petition

The respondent filed an answer to petition on 07/09/2021, supported by an affidavit of Mr. Jimmy Oburu Odoi of the Attorney General's Chambers. The respondent disputed that the impugned sections of the HIV and AIDS Prevention Act, 2015 are in contravention of the Constitution and contended that the impugned sections are limitations on the rights

and freedoms under Article 43(1) & (2) of the Constitution.

Issues for Determination

The following issues were framed for determination of the petition:

- Whether Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of the principle of legality guaranteed under Articles 28(12), 44(c), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995?
- Whether Section 18(2) (e) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 27, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995?
- Whether Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 33(1) and (3), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995?
- Whether Section 41 of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 28(12), 44(c), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995?
- Whether Section 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of Articles 21, 45, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995?
- Whether Section 44 of the HIV and AIDS Prevention and Control Act No. 1/2015 is inconsistent with and in contravention of

of Articles 28(12), 44, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995?

- Whether Section 18(2) (e) and (h), 41 and 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015 are inconsistent with and in contravention of Objective XIV (b) of National Guiding Principles of Public Policy and Articles 8(A), 45, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995?
- What reliefs are available to the parties?

Determination of Issues

The Court determined the following Issues together or jointly: Issues 1, 4 and 6; Issues 2, 3 and 8; and Issues 5 and 7.

Consideration of Issues 1, 4 and 6

The Court was of the view that Article 28(12) of the Constitution requires a criminal offence to be defined by law. It does not require every word used in the law to be defined but for the offence to be ascertainable from its definition in the statute. (See *Attorney General v. Salvatori Abuki* [1997] UGSC 7). It is essential for the offences to be defined so that people can know what is and what is not prohibited. The description of the prohibited conduct should be precise and rationally connected with the harm targeted by the law. In light of the above, section 18(2) relates to disclosure or release of HIV test results with subsections (e) and (h) authorizing disclosure of test results to any other person that has been exposed to blood or bodily fluids of an HIV infected person.

Whereas the Act does not define the phrases “close and continuous contact”, “nature of contact”, “exposure to bodily fluids” and “bodily fluids”, the phrases do not defy interpretation by the courts because proof of these circumstances depends on evidence.

Circumstances cannot be placed in a statute to obviate the risk of wrong interpretation because they are not always the same. To that extent, Sections 41, 44, 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act are not inconsistent with Articles 28(12), 44(c), 21(1), (2) and (3), 24, 25, 45, 287, 2(1) and (2) of the Constitution. As such, issues 1, 4 and 6 are decided in the negative.

Consideration of Issues 2, 3 and 8

The Court was of the view that the right to privacy extends to medical information which is central to confidentiality. The impugned section allows disclosure of HIV test results to any person with whom the infected person has close contact with or is exposed to blood or fluid of an infected person. The right to privacy however is not absolute. Article 43 of the Constitution states:

43. General limitation on fundamental and other human rights and freedoms.

(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit-

- (a) political persecution;*
- (b) detention without trial;*
- (c) any limitation of the enjoyment of rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*

In addition, the HIV and AIDS Prevention and Control Act, according to the long title, was enacted as:

“An Act to provide for the prevention and control of HIV and AIDS, including protection, counselling, testing, care of persons living with and affected by HIV and AIDS, rights and obligations of persons living with and affected by HIV and AIDS; to establish the HIV and AIDS Trust Fund; and for other related matters.”

The disclosure to any person with whom the infected person has close contact with or is exposed to blood or fluid of an infected person is a preventive measure to avoid further spread of the virus and as such cannot be said to contravene Articles 24, 27 and 45 of the Constitution but also seeks to protect the people in close contact with the infected person. As such, issues 2, 3 and 8 are decided in the negative.

Consideration of Issues 5 and 7

In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purposes and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. The long title to the Act is as set out above. The purpose of the Act is particularly for HIV and AIDS and this court disagrees with the petitioners that section 43(1) of the Act criminalizes intentional spread of HIV and AIDS and is unconstitutional in that respect. Parliament enacted the HIV and AIDS Prevention and Control Act particularly for the HIV and AIDS disease and this Act cannot criminalize spread of any other disease for

instance COVID-19. It is the view of the Court, in public interest to implement measures to prevent and control the spread of an infectious disease.

Remedies

The Court issued the following declarations:

- Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015, is not inconsistent with and in contravention of Articles 28(12), 44(a), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda 1995;
- Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015, is not inconsistent with and in contravention of Articles 27, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda 1995;
- Section 18(2) (e) and (h) of the HIV and AIDS Prevention and Control Act No. 1/2015, is not inconsistent with and in contravention of Articles 33(1) & (3), 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995;
- Section 41 of the HIV and AIDS Prevention and Control Act No. 1/2015, is not inconsistent with and (a) in contravention of Articles 28(12), 44(c), 287 and 2(1) & (2) of the Constitution;
- Section 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015, is not inconsistent with and in contravention of Articles 28(12), 44(c), 287 and 2(1) & (2) of the Constitution.
- Section 44 of HIV and AIDS Prevention and Control Act No. 1/2015, is not inconsistent with and in contravention of Articles 28(12), 44(c), 287, 2(1) & (2) of the Constitution of the Republic of Uganda, 1995; and

- Sections 18(2) (e) and (h), 41 and 43(1) of the HIV and AIDS Prevention and Control Act No. 1/2015, is not inconsistent and not in contravention of Articles 8(A), 45, 287 and 2(1) & (2) of the Constitution of the Republic of Uganda, 1995.

Note: The Court acknowledged the fact that the HIV and AIDS Prevention and Control Act No. 1/2015, does not define the phrases 'close and continuous contact', 'nature of the contact', 'exposure to bodily fluids' and 'bodily fluids'. The Court however, held that, the phrases do not defy interpretation by the courts because proof of these circumstances depends on evidence.

Conclusion/Final orders: The petition is void of any merit and is accordingly dismissed. Each party will bear its own costs.

Commentary

In 2008, before Parliament of Uganda enacting the HIV and AIDS Prevention and Control Act, 2015, UNAIDS came up with a policy brief on Criminalization of HIV transmission. The brief states that, in some countries, criminal law is being applied to those who transmit or expose others to HIV infection. It further suggests that there are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it. In other instances, the application of criminal law should be rejected by legislators, prosecutors and judges. In particular, criminal law should not be applied to cases where there is no significant risk of transmission or where the person: did not know that s/he was HIV positive; did not understand how HIV is transmitted; disclosed his or her HIV-positive status to the person at risk (or honestly believed the other person was aware of his/her status through some other means); did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences; took reasonable measures to reduce risk of transmission, such as practicing safer sex through using a condom or other precautions to avoid higher risk acts; or previously agreed on a level of mutually acceptable risk with the other person.

Further, the brief urged States to avoid introducing HIV-specific laws and instead apply general criminal law to cases of intentional transmission; issue guidelines to limit police and prosecutorial discretion in application of criminal law (e.g. by clearly and narrowly defining “intentional” transmission, by stipulating that an accused person’s responsibility for HIV transmission be clearly established beyond a reasonable doubt, and by clearly indicating those considerations and circumstances that should mitigate against criminal prosecution); and ensure any application of general criminal laws to HIV transmission is consistent with their international human rights obligations.

Additionally, the brief suggested that, where a violent offence (e.g. rape, other sexual assault or defilement) has also resulted in the transmission of HIV or created a significant risk of transmission, the HIV-positive status of the offender may legitimately be considered an aggravating factor in sentencing only if the person knew he or she was HIV positive at the time of committing the offence.

In 2020, 92 countries reported to UNAIDS that they criminalized HIV non-disclosure, exposure and transmission through either specific or general laws. Such laws are counterproductive because they undermine, rather than support, efforts to prevent new HIV infections. They also breach human rights, including the rights to equality and non-discrimination. (UNAIDS. Global AIDS update—seizing the moment: tackling entrenched inequalities to end epidemics Geneva: UNAIDS; 2020).

International Human Rights Bodies have recommended the removal of HIV-Specific Criminal Laws (UN General Assembly. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover (A/HRC/14/20), 2010). They argue that, HIV criminalization violates human rights, including the rights to health, privacy, equality and non-discrimination and impedes HIV treatment and prevention (UN Committee on the Elimination of Discrimination against Women. Concluding observations on the combined 8th and 9th periodic report of Canada (CEDAW/C/CAN/ CO/8-9), 2016) and (UNAIDS. International guidelines on HIV/AIDS and human rights, 2006 consolidated version. Geneva: UNAIDS; 2006, p 17).

Prosecutions disproportionately affect people who are economically or socially vulnerable, and increase the risk of violence toward affected people, especially women, who are often the first in a relationship to be diagnosed as living with HIV because of antenatal HIV testing policies and practices. The law also fails to recognize that for many women, it is difficult to negotiate safer sex or disclose their status without fear of violence.

The application of general criminal law should be limited to cases of intentional HIV transmission (e.g. where a person knows their HIV status, acts with the intention to transmit HIV, and does in fact transmit the virus), informed by the best available scientific and medical evidence about HIV and modes of transmission, prevention and treatment. The harm of HIV non-disclosure or potential or perceived exposure, without actual transmission, is not sufficient to warrant prosecution and should not be criminalized. (UNAIDS. Ending overly broad Criminalisation of HIV non-disclosure, exposure, and transmission: critical scientific, medical and legal considerations. Geneva: UNAIDS; 2013).

The BMJ Global Health Report on Law, Criminalisation and HIV in the world, while addressing the question whether countries that criminalise achieved more or less successful pandemic response, came up with the following findings based on empirical evidence;

- Countries around the world, across economic and geographical boundaries, have taken different approaches to the application of criminal law to same sex sexual activity, sex work and drug use with most taking a partially or fully criminalising legal approach in one or more of these areas;
- Globally agreed HIV goals for 2020 focused on ensuring most people living with HIV were aware of their HIV status and had suppressed the HIV virus through effective antiperspirant treatment;
- AIDS pandemic response was less successful in countries that criminalised same-sex sexual acts, sex work and drug use individually and in combination than in those that did not—achieving significantly lower levels of HIV status knowledge and HIV viral suppression; and
- Countries with clear laws advancing non-discrimination, human rights institutions and gender-based violence response had significantly better knowledge of HIV status and viral suppression rates. (Kavanagh MM, Agbla SC, Joy M, et al. Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response? *BMJ Global Health* 2021;6:e006315. doi:10.1136/bmjgh-2021-006315).

This analysis suggests a new Global AIDS Strategy that includes a focus on law reform that may hold promise in achieving goals that were missed in 2020.

Instead of criminalization, states should act to create enabling social and legal environments that support safe and voluntary disclosure of HIV, free of stigma and discrimination. They should ensure access to available, acceptable, affordable HIV prevention, testing and treatment and empower individuals to be able to negotiate safe sex. The Constitutional Court of Colombia (Reference: Case File D-12883 Lawsuit challenging the constitutionality of Article 370 of Law 599 of 2000 “Whereby the Criminal Code is issued.” Plaintiff: Felipe Chica Duque Reporting Justice: CRISTINA PARDO SCHLESINGER Bogotá, D.C., June fifth (5) of two thousand nineteen (2019)), outlawed the section of the criminal code that criminalizes HIV and Hepatitis B transmission. According to the court, the provision was overly broad, discriminatory and did not support efforts to prevent new HIV infections. The Constitutional Court of Colombia further established that the law violated the principles of equality and non-discrimination, as it singled out people living with HIV, stigmatising them and limiting their rights. The Court established that the law created a differential treatment that is not reasonable and therefore constituted discrimination. The Court further established that such law violated the sexual rights of people living with HIV and it was ineffective to meet any public health objectives.

It appears that what the Constitutional Court of Uganda determined in Petition No. 24/2016 is not new at all, and has been a matter of global concern. The only difference is its findings which seem to be parallel to other jurisdictions on similar issues of law.

AUTHORED BY:



Dr. Henry Onoria

Eminent law scholar with over 30 years' experience. Knowledge Consultant at ALP Advocates.



Mr. Paul Mukiibi

Head, Department of Law Reporting, Research and Law Reform, LDC and practicing advocate of Courts of Judicature, Uganda.

CONTRIBUTOR:

ULS RESEARCH AND PUBLICATIONS COMMITTEE



Aziz Kitaka

Lawyer, ULS Scretariat