

# HIV CRIMINALISATION LITIGATION IN KENYA

Litigating Section 24 of the HIV Act in Kenya

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# Background

- ❑ Petition was provoked by the enactment of section 24 of the HIV & AIDS Prevention and Control Act, No. 14 of 2006 (the Act), which came into effect on 1st December 2010 pursuant to Legal Notice No. 180 of 2010.
- ❑ Purpose and objective; eliminate stigma and discrimination



# Section 24

Section 24(1) provides that,

- *“...a person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall-*
- *(a) take all reasonable measures and precautions to prevent the transmission of HIV to others; and*
- *(b) inform, in advance, any sexual contact or person with whom needles are shared of that fact.*
- *(2) A person who is and is aware of being infected with HIV or who is carrying and is aware of carrying HIV shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.”*



# Temporary relief

- ❑ Seeking for was an interlocutory (temporary relief) stopping the operation of section 24.
- ❑ Application to grant the injunction declined directions for main petition to be heard on merits before the questions raised are comprehensively determined
- ❑ Judge found that the petition raised "sufficiently weighty issues for consideration by the Court".
- ❑ The matter was sent to the Chief Justice to appoint a bench of three judges to hear the petition.



# Main Arguments

- ❑ Section 24 was vague and overbroad - the term 'sexual contact' has no generally accepted legal or social definition; lacks statutory definition thus leading to arbitrary interpretations.
- ❑ Section 24 fails to adhere to the principles of legality that the law must be clear and capable of giving sufficient notice to the ordinary citizen of what the forbidden act or omission is.
- ❑ Instills fear and stigma ,thus negating efforts being made to encourage people to live openly with their status.
- ❑ Violates right to privacy
- ❑ Fosters discrimination against PLHIV's
- ❑ Amicus - broad criminalization of HIV exposure and transmission raises questions in the context of vertical mother to child transmission. Most women lack information and services to prevent HIV exposure during pregnancy, delivery or breastfeeding. Further, non- voluntary partner disclosure exposes women to violence and discrimination by partners, family and community.



## Prayers sought:

- a That a declaration be made to the effect that **Section 24 of the HIV Act** be declared unconstitutional.
- b That a declaration be made that the offence created by **section 24** is so wide and vague.
- c) such other order(s) be made as the Honorable Court shall deem just.



# Judgment

- ❑ Sec 24 is vague, overbroad and lacks legal certainty particularly with respect to the term 'sexual contact'.
- ❑ Court reaffirmed 2 principles of legality:
  - 1) no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it;
  - 2) and no one should be punished for any act which was not clearly ascertainably punishable when the act was done.
- ❑ **Section 24** contravened **Article 31** of the Constitution in regard to the right to privacy of PLHIV who has disclosed their status to their 'sexual contacts'; yet there was no corresponding obligation in place on recipients of such sensitive medical information to keep it confidential.



# Moving Forward

- ❑ Continued work towards law reform and advocacy against criminalisation of transmission of HIV.
- ❑ A holistic approach that involves all stakeholders in dealing with the issue as opposed to a punitive approach which usually would discourage people from testing.
- ❑ To ensure that justice is upheld, it is important to maintain the already existing criminal law while observing high standards of evidence and proof.



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