

CASE SUMMARY: MANDATORY HIV TESTING IN MALAWI

S v Mwanza Police, Mwanza District Hospital, Ministries of Justice, Internal Affairs, Health, Attorney-General and Ex parte: HB, JM (o.b.o 9 others)

Background

On 10 March 2011, eleven women from Mwanza, Malawi, filed an application in the Blantyre High Court challenging their subjection to mandatory HIV tests, the admission of the HIV test results as evidence in criminal cases against them, and the public disclosure of their HIV status in open court. The women argue that these actions by government officials violated their constitutional rights. The Blantyre High Court heard submissions in this case on 25 February 2014 and judgment is expected on 20 May 2015. The applicants' legal representative in this matter is Chrispine Sibande, with support from the Southern Africa Litigation Centre.

The Facts

The applicants were arbitrarily arrested in Mwanza on two separate occasions in September and November 2009 during sweeping exercises conducted by the police. On both occasions, a number of women were detained overnight at the Mwanza Police Station. The women were then taken to the Mwanza District Hospital. At the hospital, the women were subjected to blood tests without their informed consent. The medical officers noted the women's names and test results on pieces of paper and handed these over to the police. Thereafter, the women were taken to the Magistrate's Court where some were charged with spreading venereal diseases in contravention of section 192 of the Penal Code. In the courtroom, the particulars of the offence were read out loud including the fact that the women were HIV positive. This was the first time some of the women became aware of their HIV status.

Legal Issues

The applicants argue that subjecting them to mandatory HIV tests was unreasonable and arbitrary. They further argue that the mandatory HIV tests violated their constitutional rights, including:

- Their right to privacy and liberty of a person [section 21];
- Their right to non-discrimination [section 20];
- Their right to freedom from cruel, inhuman and degrading treatment [section 19(3)]; and
- Their right to dignity of the person [section 19(1)].

In challenging the admission of the illegally-obtained HIV test results in each applicant's criminal case, the applicants argue that this violated their constitutional right to a fair trial. Finally, the applicants argue that the public disclosure of their HIV status in court violated their constitutional rights to privacy and dignity.

Importance of the Case

The case is important for a number of reasons:

- The case shows that it is possible for vulnerable groups to hold the government accountable when their rights have been violated.
- The judgment will set an important precedent in Malawi and the region if it recognizes the right not to be subjected to mandatory HIV testing by the State.
- The case highlights the human rights violations caused by mandatory HIV testing and the importance of having legislation which prohibits this. This is important as the Malawi government is in the process of final deliberations of the proposed HIV and AIDS (Prevention and Management) Bill.