

Strategies to protect vulnerable litigants – persons with disabilities

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1. INTRODUCTION

Persons with disabilities have been facing challenges in seeking the protection of their rights and fundamental freedoms through strategic litigation. These challenges are several. The challenges range from personal perceptions persons with disabilities have as vulnerable people; unaffordable legal fees; fear of the justice system and so on.

This paper attempts to address matters around the protection of persons with disabilities in the process of their quest to litigate. The paper will address the rights persons with disabilities hold; the challenges they face both in health and litigation, and provide recommendations to resolve such matters. The paper is a contribution to the panel discussion whose objective is to equip participants with strategies to ensure that the interests, dignity and safety of vulnerable clients with disabilities are protected in litigations.

2. CHALLENGES PERSONS WITH DISABILITIES FACE IN ACCESSING HEALTH SERVICES INCLUDING HIV SERVICES

Persons with disabilities face challenges in accessing health services, including HIV services on an equal basis with other people without disabilities. Some of the challenges include the following:

- a. Absence of confidentiality especially for persons who are deaf. The fact that persons who are deaf require sign language interpreters compromises the needed confidentiality, especially when accessing VCT services. Confidentiality is also limited for persons who are blind and can not independently get to the HIV centres or read any documentation on their own.

- b. Inaccessible infrastructure: some of the buildings providing HIV services are not physically accessible making it difficult for persons with disabilities, especially those with physical disabilities to access services.
 - c. Negative perception: in some sections of society, persons with disabilities are viewed as people who are not sexually active. This keeps them away from the HIV centres in fear of stigma and discrimination.
 - d. Inadequate accessible IEC materials: persons with disabilities have got little access to HIV IEC materials. This is especially so for those who are blind and need to use Braille.
 - e. Long distance: persons with disabilities find it difficult to access health facilities due to long distance from their homes, especially in rural areas. In towns, they may be limited by funds and the discomfort of inaccessible public transport.
 - f. Persons with multiple, intellectual and mental disabilities find it difficult to make informed consent in VCT. This is so because of the difficulty they have in communicating in ways that will be easily understood by the service providers. Some of the service providers may deny those services. In extreme circumstances they may be exposed to forced or involuntary testing and treatment.
3. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

a. Background

This section of the paper will focus on the United Nations Convention on the Rights of Persons with Disabilities. This is the Convention upon which DPOs are basing their strategic advocacy. In all common law countries, the UNCRPD must be used as a tool for persuasion or legal reform.

The United Nations Convention on the Rights of Persons with Disabilities was adopted by the UN General Assembly in December, 2006. It was adopted at the same time with its Optional Protocol. The Convention came into force on 3rd May, 2008. According to paragraph (y) of the preamble of the UNCRPD States Parties adopted the Convention after being “convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities...”. If we need to deliberately address the matter of protection on persons with disabilities in litigation, then we need to deliberately uphold this condition.

The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The adoption of the Conventions confirms the position of many disability rights activists that

disability is perfectly a human rights issue. It therefore affects all development issues.

It should be noted here, by the legal practitioners and all other judicial officials, that the UNCRPD does not in any way represent a new set of human rights for persons with disabilities. It adopts the same human rights outlined in the UN Declaration of Human Rights, and as affirmed by the two International Covenants on Human Rights. What the UNCRPD does is simply to focus on the same rights using a disability magnifier. Equal access to quality legal representation is one of the key human rights issues the Convention focuses on.

The UNCRPD carries “heavy human rights implications” on the lives of persons with disabilities and their families. Before we dwell on the provisions of the Convention, it is essential to understand the medical and social model of perceiving disability. The medical model of perceiving disability focuses on the impairment a person has as being the cause of the difficulties a person with the impairments faces in their life. It looks at the impairment as being the problem that needs to be ‘fixed’ or ‘repaired’ or maybe ‘corrected’ in order for the person having the impairment to function in a manner desirable to the rest of society. So, the medical model blames the person and the impairment they have as being responsible for all their limitations in life. The model is shaped in such a way that it calls for the changing of the person with the impairment so that they fit in society.

On the other hand, the social model focuses on the environment as having barriers that hinder the person with impairment from participating effectively in the affairs of the society. The social model looks at society as having attitudinal and environmental barriers that limit the effective involvement and participation of persons with impairments in economic, social, cultural, political and civil affairs of their society. So, the social model apparently blames the society as being responsible for the inadequacies in the effective inclusion of persons with impairments. The model seems to say, “Change the society by removing all the barriers so that persons with impairments would participate on an equal basis with other citizens of the world”.

In simple terms, the medical model targets to fix the person with impairment while the social model targets to fix the barriers in the society. This is the model upon which the principles of the UNCRPD are premised. This is the same model upon which efforts to remove legal barriers in accessing quality health on an equal basis with other people should be premised.

It is obvious now that the UNCRPD focuses on addressing the barriers and obstacles persons with disabilities face in their day-to-day life as they attempt to enjoy and exercise their economic, social, cultural, political and civil rights, including the rights to equal access to quality

health through the use of litigation. Arguably, this means that focus should be on breaking the legal barriers and obstacles that hinder persons with disabilities to litigate for the purpose of accessing quality health on an equal basis with other people.

This brings us to the point of understanding the term 'disability'. Although the UNCRPD does not explicitly define 'disability', it views 'disability' as resulting from the interaction of impairments with various barriers which hinders full and active participation in society on an equal basis with the non-disabled majority. This tends to place the Convention within the context of the social model which is rights-based. So, all efforts and strategies to protect litigants with disabilities should be based on the social model which is right-based.

Furthermore, what the UNCRPD brings with it is the spirit of equality, non-discrimination, dignity and independent living. These addresses the discrimination persons with disabilities have been suffering without any protection from a binding international human rights law. The Convention seeks to promote and protect the rights of persons with disabilities and further promotes the respect for their inherent dignity.

b. Relevant provisions of the UNCRPD

As already observed above, the UNCRPD does not explicitly define the term "disability". However, in its preamble, the Convention recognises "disability" as "an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". In view of this, the UNCRPD states that "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

This on its own signifies the importance of viewing persons with impairments as being disabled by the barriers they meet as they interact with the environment. These barriers include attitudinal, environmental and institutional barriers.

For the purpose of this paper which is on breaking legal barriers faced by persons with disabilities when litigating, it is important to look at some of the definitions provided by the Convention. Language and communication are some of the major barriers persons with disabilities face.

The UNCRPD says that "Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology. It further says that "Language" includes spoken and signed languages and other forms of non spoken languages. In the effort to break legal barriers, the above perceptions of communication and language should

be adopted. The failure to allow the use of the above modes of communication and language are a form of discrimination on the basis of disability.

In many instances, persons with disabilities are classed under the umbrella of “vulnerable people”. This is correct only when it is related to discrimination. The UNCRPD states that "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The Convention says discrimination on the basis of disability includes denial of reasonable accommodation. It further says that "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

The justice system should get rid of discrimination on the basis of disability. This is the largest barrier hindering persons with disabilities seeking justice in the health sector through litigation. Provision of reasonable accommodation. In protecting persons with disabilities from discrimination on the basis of their disabilities, the UNCRPD provides some general principles upon which any measures to be taken should be based.

Article 3 of the Convention provides the general principles. These general principles are respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

It is clear that the above principles provide a basis for effective protection of persons with disabilities when seeking justice in the health sector through litigation. The principles provide a ground for which legal practitioners can break the legal barriers throughout the litigation process. The principles also provide a base upon which they can frame their arguments in the efforts to address barriers in the health care system.

Equality and non-discrimination is a key principle which should always be carried by every practitioner in the quest to protect persons with disabilities who choose litigation as a tool to redress discrimination in the health care system. Article 5 of

the UNCRPD provides for equality and non-discrimination. Article 5 (1) states that “States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law”. Legal practitioners should ensure they uphold this provision.

Paragraph 2 of Article 5 of the UNCRPD states that “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds:.. This provision strengthens the legal protection of persons with disabilities and it equally needs to be upheld by the legal practitioners.

The UNCRPD further says that “in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided”. Remember, reasonable accommodation is defined above. In this instance, reasonable accommodation includes the provision of sign language for those who are deaf; Braille materials for those who are blind; easy to understand language for those with intellectual disabilities; support persons to enhance supported decision making for those who have mental disabilities; large print for persons with visual impairments; language interpreters for those who can not speak English or any official language being used. The institutions delivering justice should at all times be physically accessible to allow all categories of persons with disabilities, especially those with physical disabilities move independently for the purpose of respecting their dignity.

The UNCRPD recognises girls and women with disabilities as a more vulnerable group in its Article 6. It says that States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. This is essential for legal practitioners. While viewing persons with disabilities as being vulnerable due to discrimination, it is essential to note that girls and women are particularly facing multiple discrimination on the basis of their gender and low economic status. Furthermore, girls and women with multiple, intellectual and mental disabilities face more discrimination than other girls and women on the basis of the nature of their impairments. It therefore needs specific measures to address their protection.

The other more vulnerable group is children with disabilities. The UNCRPD emphasizes the recognition of children with disabilities in Article 7. Apart from stating that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration, Article 7 (2) states that “States Parties shall

ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”.

This requires that in all matters affecting children with disabilities who wish or whose representative wishes to take the route of litigation, the best interest of that child should be of primary consideration. Furthermore, the interests of the child with a disabilities should be based on what the child has expressed. The impairment of the child should not be in any way being a ground not to litigate or participate in the litigation process. Age and disability appropriate measures should be taken to reasonably accommodate that child with a disability. Such measures include the respect and protection of the dignity of that specific child at the time of litigation and in the future of the child. Professional support persons or probation officers should always be available to provide age and disability related assistance and protection to the child with a disability. Specialised assistance and protection should be provided for children with deafblindness, intellectual, mental and developmental disabilities. It is recommended not to have such child related cases heard in public throughout the legal process at all levels.

The principle of accessibility is another important principle in protecting persons with disabilities in litigation processes. Article 9 of the UNCRPD outlines provisions on accessibility. Paragraph 1 of the Convention demands that “To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public...”. The key phrase here is “in all aspects of life”. This includes the field of justice delivery. Of course justice delivery includes equal access to legal representation. Truly, access to justice includes access to the physical environment, transport and communication.

Article 9, paragraph 2 (b) requires that State Parties take appropriate measures to “ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities”. Provision of accessibility here then affects the private law firms that are

to represent persons with disabilities. Accessibility should begin from the chambers of law firms. If the chambers of the law firms are not accessible in terms of physical environment, communication, language and transport, they create a huge barrier for persons with disabilities to equally access justice in their quest to access quality health care on an equal basis with other people.

Article 12 of the UNCRPD is one of the most interesting but challenging item of the UNCRPD. Article 12 is on equal recognition of persons with disabilities as persons before the law. The UNCRPD recognises persons with disabilities as persons everywhere before the law. The Convention also holds the reality that persons with disabilities have got the right to enjoy their right to legal capacity on an equal basis with others in all aspects of life. The Convention further states that “State Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. The Article requires State Parties to ensure that safeguards are provided to avoid abuse. It further says that “such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person...and apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body”.

This provision of the Convention is essential in the quest to protect persons with disabilities who choose the litigation route in championing their right to quality health care services on an equal basis with others. Although it covers all persons with disabilities, it touches more on persons with mental and intellectual disabilities who are legally declared as ‘incompetent’ or ‘of unsound mind’. In the spirit of substantive equality, the UNCRPD upholds equal access to justice for all categories of persons with disabilities while taking into considerations their different disability related circumstances.

The right to legal capacity includes access to support one may require in exercising their legal capacity. This may be in circumstances where the decision making capability of a person with a disability is restricted, but it should not in any way be interpreted as a test for legal capacity. Mental capacity is not related to legal capacity! Legal capacity is an inherent right. Rationally, persons with disabilities should access the support they may require in exercising their legal capacity in the process of litigation.

In simple terms, legal capacity refers to the right of a person with disability to make their own decision and be able to exercise those decisions. Legal capacity means the right of persons with disabilities to self-determination in life. It means persons with disabilities' ability to control their lives. Legal capacity includes the right to supported decision making in self-determination and making own choices. It includes the right to own property and manage one's financial affairs.

The rights to legal capacity are an essential aspect of the legal system and legal practitioners should carry out further reading on this subject. If not well understood, it may negatively affect the rights of persons with disabilities in their quest to seek legal protection. This is so, especially for persons with intellectual and mental disabilities.

In the process of protecting persons with disabilities in the litigation process, the issue of equal access to justice arises. The protection of persons with disabilities in litigation includes the necessity to uphold equal access to justice. Equal access to justice begins from the time the persons with disabilities raise a complaint of human rights violation or any matter, either civil or criminal, to the relevant authority in the justice system. The issue of legal capacity also applies at this early stage. Article 13 of the UNCRPD is on access to justice. Paragraph 1 of the Article states that "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages". This is interesting!

The first thing to observe is that "appropriate accommodations" should be provided. This arises from the principle of reasonable accommodation. It also touches on the principle of legal capacity in terms of supported decision making for adults with disabilities and age appropriate assistance for children with disabilities. Secondly, it covers for the "investigative and other preliminary stages" which touches on all levels of the justice system. The legal practitioners should take note of these two aspects of equal access to justice by persons with disabilities. It affects the families, communities, police and other law enforcement institutions, judiciary, law firms and quartz human rights institutions including Human Rights Commissions and the Office of the Public Protector where they exist.

Looking at the way the issue of access to justice affects different institutions at different levels, there is an obvious need to equip personnel working within the justice system on the human rights issues of persons with disabilities. Without training, it will be difficult to effectively protect persons with disabilities involved in strategic litigation. The UNCRPD demands that personnel in the justice system should be trained. Article 13 (2) requires that “In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff”. This includes lawyers, Judges, Magistrates, judicial clerks and health practitioners providing medical information as expert witnesses. The training and awareness raising should be spread across all levels including students of law and health practice. In many instances persons with disabilities, especially those with mental disabilities are always detained in police stations of prisons while seeking justice, but especially when they are suspects of criminal offences. In many instances they have been detained or imprisoned while waiting for medical or psychiatry assessment. Some have been imprisoned for more than 30 years without trial. Such imprisonment has been on the basis on their disability, the disability being mental disability.

Article 14 provides for the liberty and protection of the security of a person. The Article states that “States Parties shall ensure that persons with disabilities, on an equal basis with others: enjoy the right to liberty and security of person; are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty”. This means the existence of a mental disability shall not justify the deprivation of liberty. This is crucial in the process of protecting of persons with disabilities in the litigation process. In other words, no individual with a disability, including mental disability should be deprived of their liberty on the basis of their disability during the litigation process. In this discussion, it includes offenders with mental disabilities! But the UNCRPD is further progressive on this matter.

Paragraph (2) of Article 14 states that “States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation. This is the more reason that this paper emphasised Article 3 and Article 12 of the UNCRPD. In addition the aspect of reasonable accommodation has been stressed.

It is within the hands of legal practitioners to provide reasonable accommodation. It is within the powers of the legal representatives to demand for the protection of liberty and protection of person; legal capacity and respect for inherent dignity for all persons with disabilities. Positive reflection should be done in terms of protecting the rights of persons with intellectual and mental disabilities.

Article 21 (a) requires that State Parties ensure that persons with disabilities receive information on an equal basis with other people by “accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions...”. This Article is in support of Article 9 of the UNCRPD which covers accessibility.

During the process of protecting persons with disabilities who are litigating, the protection of their privacy is essential. This applies to all persons with disabilities especially those who are blind, deaf or have intellectual and mental disabilities. Article 22 (1) says that No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honor and reputation. The Article further says that persons with disabilities have the right to the protection of the law against such interference or attacks. Legal practitioners should ensure that the privacy of litigants with disabilities is protected throughout the litigation process.

Paragraph 2 of Article 22 further says that “States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others”. It is important to ensure all health information of persons with disabilities is protected.

Article 25 is specifically on health. The Article says that States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. The Article also states that the State shall provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health.

Article 25 requires health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.

The UNCRPD is very progressive in as far as promoting and protecting the rights of persons with disabilities seeking equal access to health care through litigation. It is the responsibility of the legal practitioners to ensure that that the provisions of the Convention are interpreted in such a way that all forms of discrimination are eliminated in the process of litigating.

4. PROTECTING THE RIGHTS OF LITIGANTS WITH DISABILITIES

a. Risks Persons with Disabilities May Face

As can be observed in the discussion above persons with disabilities face certain risks directly linked to their disabilities. Such risks include the following:

- i) Compromise of their privacy and confidentiality during the litigation process due the communication and language barriers especially for those who are blind, deaf and those with intellectual disabilities.
- ii) Loss of dignity due to inaccessible infrastructure where persons with physical disabilities are lifted up the stairs.
- iii) Denial of the right to informed consent when it comes to decision making in the litigation process due to mental and intellectual disability.
- iv) Compromise of the anonymity of children with disabilities thus creating fear in the child with a disability and their parents.
- v) Withdrawal of the court case by persons with disabilities due to pressures coming as a result of the length of court cases; poor or expensive transport and inaccessibility to the courts.
- vi) Withdrawal of cases by persons with disabilities due to high legal fees.

b. Measures to Protect Persons with Disabilities in Litigation – the Case of Zambia

In Zambia, there is a law titled “Persons with Disabilities Act of 2012). This Act protects the rights of persons with disabilities and it domesticates the UNCRPD. The Persons with Disabilities Act affirms the provisions of the UNCRPD Article 12 by providing in its paragraph 8 (1) that “A person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life”. Interestingly, this paragraph mirrors the provision of UNCRPD Article 12. The protection of the rights of persons with disabilities to participate in the process of litigation

without any form of discrimination is guaranteed in this paragraph. Informed consent both in litigation and in accessing health services is guaranteed here, including for those persons with mental and intellectual disabilities.

It should be noted that legal capacity includes supported decision making. It also includes advance directives for persons with mental disabilities. Advance directive means, giving instructions on how a person with a mental disability should be treated by the justice institutions when they are in a crisis. This instruction may be formal or informal to a next of kin, a close friend or any attorney.

The Persons with Disabilities Act directly seeks protection of persons with disabilities in litigation by addressing the judiciary. Paragraph 8 (2) states that “The Judicature shall take necessary measures to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination”. This calls for the State to ensure that the justice system is fully accessible and promoting and protecting the principle of respect for inherent dignity, non-discrimination and independent living. This is a huge challenge to legal practice and the judicial officials.

Paragraph 8 (3) of the Persons with Disabilities Act places the burden of ensuring equal access to justice on the judiciary. This is one of the progressive provisions of the Persons with Disabilities Act when it comes to the protection of all categories of persons with disabilities to participate on an equal basis in the justice system. The Act states that “Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities to enable the person with disability to access justice and participate effectively in the proceedings”.

The Persons with Disabilities Act ensure the protection of the interests, will, preference and dignity of persons with disabilities in litigation. It protects the right of persons with disabilities to reasonable accommodation. Legal practitioners in Zambia should ensure that this part of the Act is enforced at all times when any person with a disability is litigating. It is essential to develop jurisprudence around this provision so that other common law countries may utilize the judgment.

In the Zambian courts a judgment was passed concerning liberty and access to justice for persons with mental disabilities detained while waiting for trial or psychiatry assessment. In the case of Situmbeko Anaenyi and others Vs. the Attorney General of Zambia, in which the five persons who remained detained in Chainama East Hospital petitioned the State in April, 2014, seeks the following reliefs:

- a) a declaration that their indefinite detention without trial was a violation of their rights to a fair hearing within reasonable time as provided under Articles 18 (1) of the constitution of Zambia.
- b) Declaration that their indefinite detention without trial constituted a violation of their right to liberty as enshrined in Article 11 and 13 (30) of the constitution of Zambia.
- c) A order that they be released then.

The Judge held that there was no evidence suggesting that the failure of any of the petitioners to appear before the court and take plea was on account of their own default. Even if they were found to be of unsound mind by reason of schizophrenia after being examined by psychiatrists and remained in the same state of mind since then, the law, as it was set out in the Mbaye case, required that they be sent back to court....

Consequently, the Judge held that the continued detention of all the petitioners at Chainama East Prison was illegal on account that they were not afforded a fair hearing within reasonable time as was guaranteed by Article 18 (1) of the constitution.

In view of the above the Judge ordered that Anaenyi Situmbeko, Yona Lungu, Emmanuel Mwape, Stephen Phiri and John Bwembya be released forthwith. The Judge found out that their detention taking into consideration their schizophrenic condition was unreasonable.

This was a landmark Judgment that stands to promote and protect the rights of persons with disabilities, especially those with mental disabilities, to equal access to justice. Their schizophrenic condition did not in any way require that they be detained for long periods of time without trial. The longest detention was for 35 years.

5. CONCLUSION AND RECOMMENDATIONS

a. Conclusion

It is obvious that persons with disabilities face a lot of challenges when taking their cases to court. Such challenges either stop persons with disabilities from litigation or withdraw their cases from court. The challenges are several. Most of the challenges are addressed by the UNCRPD. The case of the Persons with Disabilities Act of Zambia sets an example of how law should protect the rights of litigants with disabilities. It is very important for other jurisdiction to emulate the

case of Zambia. Strategic advocacy is required from Disabled People's Organisations whose governments have ratified the Convention to ensure the enactment of disability laws that domesticate it.

It is very important that legal practitioners take pro-active steps to ensure the protection of persons with disabilities in litigation. Persons with disabilities should also be encouraged and strengthened to use strategic litigation as a tool for advocacy to ensure the promotion and protection of their rights and fundamental freedoms.

b. Recommendations

In order to ensure that the interests, dignity and safety of persons with disabilities in litigation are protected the following recommendations are provided. These recommendations should be treated as strategies to enhance the protection of persons with disabilities in litigation.

- i) Persons with disabilities should be allowed to communicate in languages or communication modes of their own choices and such languages or communication modes should include sign language and Braille.
- ii) Persons with disabilities who require the support in exercising their legal capacity should be provided with that support by the State or they choose the support they require and if possible, provide their own support which should be accepted by the justice system throughout the litigation process. The support includes supported decision making, sign language interpretation, and human readers for blind persons, Braille and simplified language for those who require it.
- iii) The will and preference of persons with disabilities should always be recognised at all times in the process of litigation by persons with disabilities. The principle of "the best interest of..." should be replaced by the principle of "the best interpretation of the will and preference of..." which strongly reflects exercise of legal capacity. It also promotes the principle of free and informed consent in both the litigation process and health services decision making. Legal practitioners should never allow substituted decision making in both litigation processes and access to health processes.
- iv) All institutions in the delivery of justice should ensure that all their premises are physically accessible to all categories of persons with disabilities. Accessibility audits of such premises can be carried out by trained personnel from the DPOs with the provision of recommendations for relevant adjustments.
- v) Institutions in the delivery of justice should ensure that the right of children with disabilities to express themselves in the litigation process is upheld. This right should be accompanied with the provision of age and disability appropriate assistance. Where the dignity and future social standing of the child with a disability is compromised, anonymity of the child should be

upheld. The child should not be exposed to the public through public hearings and media coverage.

- vi) Legal practitioners representing persons with disabilities should always ensure that the respect for inherent dignity, autonomy and independence of persons with disabilities is upheld throughout the litigation process. This calls for the upholding of the other General Principles outlined in Article 3 of the UNCRPD throughout the litigation process.
- vii) Legal practitioners should always ensure that the issue of legal capacity, which includes supported decision making and recognition of the will and preference of the person with a disability, covers the aspect of free and informed consent in the whole litigation process. The aspect of free and informed consent should be upheld in decisions in the litigation process and decisions in consenting to any medical and health services including reproductive and HIV services.
- viii) Legal practitioners should at all times of the litigation process protect the rights of persons with disabilities to mental and physical integrity. As already indicated in the text of this paper, violation of the right to mental and physical integrity comes in many forms which legal practitioners should continuously guard against. This includes the avoidance of lifting persons using wheelchairs up the stairs into the chambers of both the law firms and courts.
- ix) Legal practitioners should observe at all times the multiplicity of discrimination faced by girls and women with disabilities. This occurs even in circumstances where girls and women with disabilities are seeking respect for the realisation of their rights through litigation. Violation occurs on men, including men with disabilities. Therefore, legal practitioners should always mix the gender and disability vulnerability when it comes to women with disabilities.
- x) Legal practitioners should take deliberate measures to learn and uphold the rights of those persons with disabilities who require intensive support. Such persons with disabilities may include persons with intellectual and mental disabilities.

The general recommendation is that legal practitioners from the common law countries should endeavour to develop jurisprudence around the right to equal access to medical and health services for persons with disabilities. Jurisprudence on the equal access to medical and health services for persons with disabilities will:

- a. Develop case law upon which legal practitioners will base their argument for redress on the matter of equal access to quality medical care and health for persons with disabilities.

- b. Strengthen and build the capacity of persons with disabilities and their representative organisations to demand for the protection of the rights of persons with disabilities in seeking judicial redress on discrimination cases in the health sector.
- c. Create awareness among both the general public and persons with disabilities on the inherent rights for persons with disabilities to seek quality health services on an equal basis with other citizens and that the violation of such rights can be appropriately be redressed through litigation.
- d. Establish case law to amend all other laws that limit, restrict or impede the exercise of persons with disabilities to equal and effective participation in the whole justice system including litigation by persons with disabilities and their representative organisations.
- e. Awareness raising is key. This will demand for awareness development and education of the judicial workers and other justice system workers on matters affecting persons with disabilities in accessing equal access to justice with the upholding of equality; respect to inherent dignity, including informed consent; non-discrimination; independent living and accessibility.

Further Resources

1. The United Nations Convention on the Rights of Persons with Disabilities
2. General Comment on Article 12 (2014) of the United Nations Committee on the Rights of Persons with Disabilities.
3. The Persons with Disabilities Act of 2012, Zambia.
4. Visit: www.disabilityrightswatch.net.