



JUDICIAL DIALOGUE OF HIV, HUMAN RIGHTS AND THE LAW

2-3 DECEMBER 2014 JUDICARY TRAINING INSTITUTE NAIROBI KENYA



*Empowered lives.
Resilient nations.*



Table of Contents

Acronyms	3
Executive Summary	4
Introduction and Background	7
Session One – HIV, the Law and the Judiciary: Introducing the Issues	10
Session Two – Using the law to end HIV-related discrimination and other human rights violations.....	15
Sessions Three - Enabling legal environment in the context of Women.....	21
Session Four - Enabling legal environment in the context of Children and Youth	22
Session Five – The Role of Criminal Law in the Epidemic	26
Session Six – Enabling legal environment in the context of Key and Affected Populations	31
Session Seven – Access to life saving treatment	34
Wrap up and Closing	39
Annexure one.....	41
Annexure two	49

Acronyms

AIDS	Acquired Immune Deficiency Syndrome
ARV	Antiretroviral
CSO	Civil Society Organisation
ESA	East and Southern Africa
GBV	Gender based violence
HAPCA	HIV and AIDS Prevention Control Act, 2006
HIV	Human Immunodeficiency Virus
ICW	International Community of Women living with HIV
IDU	Injecting Drug User
ILO	International Labour Organisation
IP	Intellectual Property
KASF	Kenya AIDS Strategic Framework
KP	Key Population
MSM	Men who have sex with men
NACC	National AIDS Control Council
NHRI	National Human Rights Institution
PLHIV	People living with HIV
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
SGBV	Sexual and gender based violence
SOA	Sexual Offences Act, 2006
TB	Tuberculosis
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WLHIV	Women living with HIV
WHO	World Health Organization
WTO	World Trade Organization
YPLHIV	Young person living with HIV

Executive Summary

In 1984, the first case of HIV was diagnosed in Kenya. More than three decades on, the HIV epidemic remains one of the leading causes of death, according to the World Health Organization (WHO). Recognizing the magnitude of this epidemic globally and nationally, the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat), the United Nations Development Programme (UNDP), the Judiciary Training Institute (JTI) and KELIN organized a Judicial Dialogue on HIV, Human Rights and the Law in October 2013. Building on the success of the first dialogue the partners convened a second dialogue in December 2014 in a bid to reach more judicial officers in the process of creating an enabling legal environment.

The Judicial dialogue was an opportunity for hands on experience-sharing between members of the Judiciary comprising of both Judges and Magistrates and representatives of judicial departments from countries across Eastern Africa on the multifaceted legal and human rights issues raised by the HIV epidemic in Africa. The judicial dialogue uniquely benefited from the perspectives of young people born with HIV, a woman living with HIV (WLHIV) and key populations living with HIV, who included representatives of sex workers, men who have sex with men and injecting drug users.

The objectives of the dialogue were:

- a) A critical opportunity for discussion and experience-sharing between Judges and magistrates from Kenya and those from other African Countries on the complex legal and human rights issues posed by the HIV epidemic.
- b) An opportunity for judges and magistrates to discuss effective strategies and programmes for judicial education and training so as to ensure they make informed decisions on HIV-related human rights issues.
- c) Enhancing the partnership between the Judiciary, the National HIV response and the community at large.

This report therefore presents a summary of the presentations, discussions and engagements as well as lessons from the workshop under thematic areas as described below:

- i. HIV, the Law and the Judiciary: Introducing the issues;
- ii. Using the law to end HIV-related discrimination and other human rights violations;
- iii. Enabling legal environment in the context of women;
- iv. Enabling legal environment in the context of the context of children and youth;
- v. The role of criminal law in the epidemic
- vi. Enabling legal environment in the context of key and affected populations
- vii. Access to life saving treatment;

The dialogue was opened by introductory remarks by the JTI Director the Hon. Judge (Prof) Joel Ngugi who began by introducing the concept of intersectionality which describes interlocking systems of oppression that may affect individuals. With this he brought context into the discussion and the need to look at the context with which these issues exist. This was a theme that was maintained throughout the dialogue with emphasis being placed on looking beyond the law to address societal issues. Dr. Jantine Jacobi, the UNAIDS Country Director while delivering the keynote address emphasised that HIV and AIDS are more than an infection or a disease for medical practitioners; there is a clear link between health human rights and the law. She added that it is necessary to look at the context within which HIV exists in order to successfully tackle the epidemic Mr. Gurumurthy Rangayan, Senior Adviser on HIV emphasised the need to end stigma and discrimination stating that the epidemic will not be defeated if we continue to perpetuate stigma and discrimination. Remarks from Dr. Nduku Kilonzo shed light on statistics pertaining to HIV in Kenya and the HIV burden on Kenya. She shared the country's programmes that are being used to tackle HIV but admitted that despite efforts there has been difficulty in tackling issues of stigma and discrimination. Commissioner Catherine Mumma then took the opportunity to discuss the rights based approach emphasising that this should inform all aspects of adjudication and life in Kenya. Finally the session was closed by Mr. Ambrose Rachier who took the opportunity to introduce key issues and considerations for the judiciary.

Session two focused the discussion on discrimination with Ms. Ludfine Bunde sharing the findings of the Global Commission on Law and HIV and emphasising the necessity of creating an enabling legal environment free of stigma and discrimination to fight the epidemic. Following this, Ms. Juliana Odindo shared her experience as a person living with HIV and concerns that are raised by legislation that do not assist in creating an enabling legal environment. Justice Monica Mbaaru and Justice David Majanja enriched this session from the judiciary perspective by being able to shed light to other judicial officers on experiences they have encountered and that can be encountered when adjudicating HIV related issues.

The following sessions saw discussions on young people, women, children and key populations. The participants benefitted from addresses from members of these groups living with HIV who gave renditions of their experiences living with the virus and what they hoped could be done by the Judiciary. In these discussions particularly in the issues of stigma and discrimination that lead to human rights violations came out strongly with participants agreeing that it is an issue that needs to be addressed.

The session focused on the role of criminal law in the epidemic was significant with discussions on disclosure, confidentiality, forced testing and criminalisation of transmission. Justice Byram Ongaya opened the session discussing issues of testing, confidentiality and disclosure. Prof. Walter Jaoko then explained the science of HIV transmission giving the necessary background for Mr. Allan Maleche's discussion on ending overly broad criminalisation. The session was closed by Commissioner Catherine Mumma who then summarised the discussions and provided the participants with food for thought on what may inform their decisions.

The final session was particularly significant in terms of the wealth of information received in a particularly technical area - intellectual property. The presentations by Ms. Maureen Murenga, Mr. Sisule Musungu and Mr. Allan Maleche gave both personal and legal accounts on access to life saving treatment. Ms. Murenga provided a personal account while the latter two provided the legal background to ensure that persons are able to access essential medication to ensure that they can realise their right to health. The Judicial Dialogue was closed with remarks from Justice Ruth Sitati.

Introduction and Background

The HIV epidemic remains one of the leading causes of death globally.¹ The UNAIDS 2013 global report specifies that an estimated 35.3 million people were living with HIV (PLHIV) in 2012; there were 2.3 million new infections; and 1.6 million AIDS related deaths in the same year.² Sub Saharan Africa accounts for 69% of the 35.3 million people estimated to be living with HIV globally.

According to the Kenya HIV Estimates, there are approximately 1.6 million People Living with HIV (PLHIV) of whom 191,840 were children while an estimated 101,560 new HIV infections occurred in the year 2013. HIV related deaths have significantly reduced over the years due to the increase of number of people accessing treatment. Despite the reduction, 58,465 lives were lost in 2013. Sexual transmission accounts for 93.7% of all new HIV infections. Overall, there are marked gender disparities which characterize the HIV epidemic with higher prevalence amongst women at 7.6% compared to men at 5.6%. There is a treatment gap of over 99,500 women and 64,900 men, in need of ART but not currently receiving treatment. ART coverage is 77% in eligible women compared to 80% in men.³

The HIV epidemic continues to raise new and complex legal and human rights issues and challenges that have confronted all arms of government. The judiciary is in a unique position ultimately, as the warden of the constitution and constitutional rights of citizens and residents. The Constitution of Kenya, 2010 is the supreme law of the country and the judiciary is tasked with its interpretation and protection. The fundamental rights espoused in the Constitution such as equality, human dignity and health must permeate in the judgments of those tasked with their protection. The most vulnerable are the most affected, women,

¹ HIV is the 6th leading cause of death in the world with 1.5 million deaths considered to be due to AIDS-related illnesses in 2012. See WHO "The top 10 causes of death" Fact sheet No 310, updated in May 2014, available at <http://www.who.int/mediacentre/factsheets/fs310/en/index.html>

² Available at

http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/unaids_global_report_2013_en.pdf

³ Kenya HIV Estimates, 2014. Available at

http://www.nacc.or.ke/attachments/article/428/HIV%20estimates%20report%20Kenya%202014_print.pdf

children who are either infected or left orphaned due to the epidemic and it is these people that the judiciary must seek to protect within the confines of the law.

Kenya has progressively developed its laws, policies and legal jurisprudence in reaction to the epidemic.⁴ These developments, coupled with the complex legal and human issues that face the judiciary, necessitated the highly successful Judicial Dialogue on HIV, Human Rights and the Law held Nairobi in October 2013. A number of aspirations emanated from this dialogue, significantly the need to expand the knowledge on the laws surrounding HIV and Human Rights and to learn more about judicial interventions in relation to access and sustainability of health rights in HIV.

A number of cases were discussed in the 2013 Judicial Dialogue as illustrations of the judiciary's progressive attitude regarding the rights of PLHIV. The illustrations below serve as an update of the development of the jurisprudence of the rights of PLHIV, since the judicial dialogue:

- a) **Non-discrimination:** In [Republic v Non-Governmental Organisations Co-ordination Board & Another ex parte Transgender Education and Advocacy and 3 others \[2014\] eKLR](#) the respondent refused to register Transgender Education and Advocacy as an NGO despite the fact that it met all the requirements for registration. The Court held that the applicant in terms of the Constitution has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The respondent's actions in refusing to register the applicant were not consonant with the Constitution and the claim was upheld.
- b) **Testing, autonomy and confidentiality:** In the case of [Amm v Slip Knit Ltd \[2013\] eKLR](#) the Court upheld the petitioner's claim that his right to

⁴ The development of laws and policy in relation to HIV and AIDS related issues can be tracked to the inclusion of a chapter in Sessional Paper No. 4 of 1997 to the establishment of the Taskforce on Legal Issues Relating to HIV and AIDS in June 2001. This led to the drafting of the HIV and AIDS Prevention Control Bill, 2002. The Bill was enacted in 2006 and became operational in February 2009. The promulgation of the Constitution was a major milestone backing the provisions of the HIV and AIDS Prevention Control Act.

- privacy had been violated after his employer sought to have him undergo a mandatory HIV test. The Court further upheld his claim that he had been unfairly dismissed.
- c) **Employment:** In [VMK v CUEA \[2013\] eKLR](#) the complainant VMK underwent a medical examination for a position she had seemingly already received. She was found to be HIV positive. However, she had not consented to an HIV test; neither had she been informed this test was being undertaken. She also faced discrimination on the basis of her HIV status and pregnancy. The court found that VMK's rights to privacy, dignity, equality and fair labour practices had been violated and this went on for seven years.
- d) **The Right to Dignity and Privacy:** [JLN and 2 Others v The Director of Medical Services and 4 Others \[2014\] eKLR](#)- The petitioners entered into a surrogacy agreement which resulted in the birth of twins. A dispute arose as to who were to be registered as the parents, and whom they were to be released to. The judgment held that the Director of Medical Services (DMS) violated the petitioners' fundamental rights to dignity and privacy. The Court also held that the DMS did not act in the best interest of the children by having them placed in a children's home in circumstances that did not warrant such intervention. Additionally he violated other fundamental rights of the children, including health and parentage.

The above cases demonstrate willingness by the Kenyan judiciary to build upon the jurisprudence discussed in the previous judicial dialogue. There have been progressive decisions from [Botswana](#), [Uganda](#) and [Zambia](#) post the judicial dialogue.

Beyond the courts, members of the judiciary are leaders in their communities and societies. Their stance, attitudes and behaviour towards HIV-related issues, PLHIV and members of key populations at higher risk of HIV infection can help shape social attitudes towards these populations. Members of the judiciary can challenge stigma and discriminatory practices against people living with HIV and members of key populations inside the court and within the community.

Session One – HIV, the Law and the Judiciary: Introducing the Issues

The first session was chaired by the Hon. Judge (Prof) Joel Ngugi who asked the participants to think of a time when they had experienced discrimination. He then shared a story of a time when he had faced discrimination.

He challenged the participants to take this workshop as an invitation and forum to consider all those things in the context of a very particular group of people i.e. PLHIV. He described the term intersectionality, a word coined by critical race theorists to bring out the idea that often systems of oppression are interlocking in nature and are experienced simultaneously by the same persons who often belong to a group of marginalised people. This can be described such that one person can experience oppression on a number of different fronts and if one only tries to address one aspect they will have missed the point.

Judge (Prof) Ngugi explained that the law as it is taught somewhat excludes context in that it teaches students to create formulas, identify issues, apply rules to the issues. Students are constantly taught to erase context and therefore consciously teach them to avoid intersectionality and avoid the interlocking systems.

When we consider what we consider great judgments, these are usually clear judgments that state the issue and avoid the clutter. He then challenged the participants to bring back the clutter and the context.

Keynote Address: Dr Jantine Jacobi, UNAIDS Country Director, Kenya

Dr Jantine Jacobi stated that without reflecting on the context we cannot meet the AIDS epidemic. The key is to know your epidemic in order to know your response, however, it is important to know the context because not doing so will render your cause ineffective. A critical element of an HIV response must include a human rights element.

This dialogue happened at a time when the world has made tremendous advancements in meeting the AIDS epidemic however, AIDS remains one of the leading causes of death. Approximately 55% of people eligible for treatment have access to treatment and globally millions of lives have been saved. With more extensive research we could possibly take the turning point in the AIDS

epidemic. Reaching this point will not be possible unless we remove stigma and discrimination.

The Global Commission on HIV and the Law suggests that increased interventions for enhanced legal and policy environments could cut new adult HIV infections by about 50%. The AIDS epidemic cannot be tackled without the law and the courts as support. New interventions will not be possible without addressing the legal and social environment within which people live. Key to an effective HIV response is an enabling and protecting legal environment. Creating this will include the executive, Legislator and the Judiciary. The members of the Judiciary were gathered as custodians of the law to discuss the role the judiciary must play.

The law can improve women's lives and empower them, the situation is a parody there is a lot of discrimination encountered by women and they are not yet equal when regarded in public life. The last resort for persons subjected to human rights violations is the courts, and courts through-out the region have been seized with a wide variety of HIV related discrimination and have in many instances met the challenge.

The role of the judiciary is also that of leaders in a community and will be important in shaping both individual and community attitudes. The importance of the dialogue is that offered a platform for knowledge sharing between custodians of justice. She finally reiterated the UN's commitment to support the work being done to make zero discrimination a reality.

Remarks - Dr Nduku Kilonzo, Director of National AIDS Control Council (NACC)

Dr Kilonzo started by asking the participants why it was important to have the conversation on HIV and the Law? She answered stating that Kenya as a country needs to discuss where we want to go with the HIV response.

She then discussed the HIV burden in Kenya stating that there have been positives in Kenya, in the last five years there has been an increase in the number of people who know their HIV status with over 72% of Kenyans having been tested. Kenya has made a lot of progress, the prevalence in the early 2000s was very high and has significantly dropped. That is both good and bad. We have

made great progress in reducing incidence, but we are at a place in the last seven years where the number of new infections are over 100000. The number of new infections is higher than the number of people who need treatment, the cost is eventually be unsustainable.

From the statistics around new infections it has been discovered that 30% of new infections come from sex workers, IDUs, prison populations, MSMs amongst others. There is a need to take a different approach because these populations are stigmatised and their behaviour is criminalised. We need to recognise that while their behaviour is against the law the issues created are beyond the law, this is context in which the conversation should be had.

Young women also account for a large number of the new infections. This is caused by skewed gender norms and violence against women. In fact 33% of women are raped by the time they are 18 years old. Violence has a part to play in it and has to be addressed.

An important aspect of this conversation is the number of PLHIV on treatment today and the cost of such treatment. The cost as it stands is unsustainable and if the country continues to have the same rate of new infections, Kenya will be unable to treat a large number of PLHIV. The cost is unsustainable and this can only be addressed by addressing new infections.

Going forward NACC has launched the Kenya AIDS Strategic Framework (KASF) which assigns some responsibility to the Judiciary. One of the strategies is to reduce HIV related stigma by 50% and utilising a human rights approach in addressing HIV and the Judiciary has a role in attaining this.

Other priority interventions referred to in KASF are to ensure that the legal and policy environment protect key and priority populations and improve access to medicine particularly by addressing stigma in the public and private sectors. People who are socially excluded and vulnerable are unlikely to benefit from treatment. Stigma and discrimination have to be addressed because in as much as Kenya has made progress with HIV very little progress has been made in addressing stigma and discrimination.

NACC would like to offer support to the Judiciary in sensitising members on HIV matters. NACC states a commitment to facilitate and support the Judiciary

is achieving its mandate on HIV. The Judiciary as an institution and as individuals have the opportunity to be able to change the narratives of society and the norms that affect women and girls.

The HIV epidemic in Eastern and Southern Africa – Gurumurthy Rangaiyan- Senior Advisor on HIV UNAIDS

Dr. Rangaiyan provided the participants with the context of the HIV epidemic in East and Southern Africa (ESA). The HIV epidemic Sub-Saharan Africa accounts for 72% of the global HIV burden and the ESA region accounts for 50% of the global burden. Africa is the most affected region by HIV globally. The number of PLHIV in Africa is 18.5 million and 2 million of these are children.

There has been significant progress made in tackling the epidemic with 7.7 million people on ARVs which has translated to significant reduction in AIDS related deaths and new infections (reduced by 32%); PMTCT services have increased; and new infection among children have declined dramatically. However, such progress must be viewed in light of the fact that only 45% of PLHIV are aware of their status living a substantial amount at risk.

In order to fight the epidemic must focus on geographical location and population groups e.g. key populations, migrant workers, and pregnant women amongst others. UNAIDS has launched the “90% 90% 90%” with the target of achieving universal coverage. This will be achieved by building momentum across the countries and ensuring that the HIV response does not leave anyone behind. Ending AIDS epidemic by 2030 is not possible without a people centric approach. Too many people have been left behind in the HIV response and it is necessary to focus on those groups.

He concluded by stating that the HIV epidemic will not end if we continue to perpetuate stigma and discrimination. There may be services to address the epidemic across the countries but they must be provided in a quality manner and without discrimination.

Why a rights based approach in dealing with HIV issues – Commissioner Catherine Muyeka Mumma, Commission on Implementation of the Constitution

Commissioner Mumma's presentation was focused on answering the question of why we need a rights based approach. The Commissioner explained that we need a rights based approach in dealing with everything however, for the session she focused on HIV issues. A rights based approach is an implementation format that is functionally driven by respect, protection and delivery of human rights both in substance, operational systems and processes.

The key ingredients for a rights based approach include: Policies, laws and standards as the general guiding tools; functional care systems- structures, competent human resources, financial investment, access to quality preventive and other relevant drugs and commodities, access good information systems, functional strategic partnerships; and an operational culture that may be driven by certain values and principles.

The Judiciary is both the custodian and champion of human rights and the Constitution. In this role there is a need to ensure that in their professional capacities when adjudicating and in their personal capacities as leaders of community they are required to exercise a rights based approach.

HIV and the law: Key issues and considerations for the judiciary – Mr Ambrose Rachier, Chairperson KELIN and former chairperson of the HIV Tribunal

Mr Ambrose Rachier began his session indicating that HIV has had profound interpersonal, social and legal impact around the world. Due to the impact HIV as had there is a need for the Judiciary to be attune to key issues and considerations that may arise when they are faced with HIV. HIV related issues arise in a wide variety of legal proceedings and courts in different jurisdictions have had mixed records in their response to HIV.

Some of the key considerations for judicial officers he discussed are: an accurate understanding of HIV including the modes of transmission and treatment; familiarity with substantive areas where HIV is frequently a significant factor; drug laws, harm reduction and the rights of people who use drugs; women's

rights with respect to family and property; HIV treatment and healthcare; and human rights and the criminalisation of key populations at higher risk of HIV exposure.

He concluded stating that the role of the judiciary as interpreter of the law and protector of human rights is critical in interpreting an enabling legal environment that supports the response to HIV.

Remarks: Mr. Nelson Otwoma – Executive Director of (put the correct acronymy of NEPHAK)

His discussion was centred on the concerns of PLHIV on legislation that criminalises transmission of the virus. In particular he raised concerns with the HIV and AIDS Prevention and Control Act, 2006 which in section 26 places responsibility on PLHIV to ensure that they do not infect other persons. He stated that this places an unequal burden on PLHIV to protect others from infection while not placing a responsibility on such persons to protect themselves. He cautioned against such legislation and others that discriminate against PLHIV by imposing higher sentences for the mere fact of their status.

Session Two – Using the law to end HIV-related discrimination and other human rights violations

This session was chaired by the Hon. Justice Ferdinand Wambali a member of the Tanzanian Judiciary. He opened the session by reminding the participants that sometimes the Judiciary is part and parcel of the discrimination in society especially in their own courts where hierarchies are created.

Experience of PLHIV facing discrimination - Ms Juliana Odindo

Ms Juliana Odindo is a member of NEPHAK and is also a young person living with HIV (YPLHIV). She is 23 years old and was born with HIV she has faced stigma and discrimination for her entire life in both public and private spaces. She in particular focused on the unique needs of adolescents who are neither children nor adults and who must be addressed specifically given the precarious position of them with a large number of persons becoming sexually active at this stage.

She noted that the Constitution of Kenya makes no mention of adolescents and fails to recognise them as a unique group with unique needs. This has in turn set the tone for laws, policies and programming which continually ignores the needs of adolescents by grouping them with children or adults.

The biggest barriers faced by YPLHIV are the law, culture and religion. The law does not communicate what the needs of YPLHIV are and they are left behind because of this. There is a large number of young people dying and this is a result of stigma and discrimination which causes them to reject treatment. Such stigma exists even in places of safety such as schools and homes. Such persons do not have proper and existing support systems to enable that they can live with the disease and enjoy fruitful lives.

Religion and culture are a barrier in their inability to accept that adolescents are engaging in sexual activity. Given this failure these systems cannot engage with young people on these issues and educate them on their sexual and reproductive health.

HIV affects everyone and it must be recognised as problem that exists for Kenya. The environment for PLHIV must be made conducive free of stigma discrimination.

The Findings of the Report of the Global Commission on Law and HIV-Ms Ludfine Bunde, Programme Analyst HIV & AIDS, UNDP-Kenya

Ms Ludfine Bunde began by asking the participants to ask themselves: why the law when we talk about HIV response? Scientific studies have shown where there is an enabling environment there has been a reduction in the HIV epidemic. From the bio-medical perspective there have been strides in tackling HIV but there has been a failure in creating an enabling legal environment to ensure that people can access treatment.

The Global Commission on HIV & The Law was constituted in 2010, it consisted of 14 persons with high competence on issues of public health and was chaired by the former president of Brazil, Mr Fernando Henrique Cardoso. Kenya was represented in the commission by the former director of NACC, Dr Miriam Were. The commission visited every country and region in the world holding

regional dialogues where submissions were made by each country to articulate how the law derails HIV response.

The commission's key messages were:

- The epidemic of bad laws is fuelling HIV, resulting in human rights violations and costing lives;
- The epidemic of bad laws is limiting the effectiveness and efficiency of HIV and health investments; and
- Good laws and practices that protect human rights and build on public health already exist – the strengthen the global AIDS response and the must be replicated; and
- Scientific tools are not sufficient to halt and reverse AIDS. Enabling legal environments are essential to a successful AIDS response.

There a number of countries that have taken advantage of their laws to ensure that treatment is available to their populations e.g. India with the production of generic medicines. Other countries who have taken strides include Ecuador; Thailand; Brazil; Indonesia all have laws that enable an access to and an increase of treatment. Good laws grounded in evidence and rights exist and must be replicated. Further, the enforcement and the assertion of such laws is necessary and a key recommendation in addressing this is increasing the availability of legal aid.

Countries are being encouraged to work with the judiciary, law enforcement officers, the legal fraternity to ensure that formal laws are being used to enhance the lives of the affected and infected. Countries must invest in evidence and rights based laws and policies because Antiretroviral drugs (ARVs) can be available but if stigma and discrimination continue such will not be effective.

The message today is that we need enabling environments to allow the UNDP to partner with the Judiciary in this journey.

Discrimination in the workplace and the role of the Judiciary: Judge Monica Mbaaruru

Justice Mbaaruru began by stating that the law is a very powerful tool that can enable the protection of the rights of people. When the law is not framed in terms

of a rights based approach it ceases to focus on the right holder. Everyone has a role to play in the discussion on HIV and AIDS.

She then explained that discrimination is the end result of a long process known as stigma. Stigma is difficult to define or quantify because it has so many facets and can be informed by a number of various aspects. The right to employment can be severely affected by HIV status and PLHIV are faced with various challenges at the workplace (this is particularly more prevalent amongst key populations and young people). When one is limited from working well due to their status and they are unable to access the necessary tools to allow them to perform they are not working or living in an enabling environment.

The Constitution of Kenya enshrines a number of rights and liberties however, these cannot be enjoyed in an environment that is not conducive. A majority of human rights violations occur at the hands of third parties who are normally responsible for the protection of the rights they violate.

A number of rights are affected by people in the workplace who are HIV positive and possibly facing discrimination: their right to life, equality and non-discrimination, dignity, access to information, health and consumer rights. Therefore when adjudicating on discrimination cases one has to consider the bevy rights that are possibly affected.

The Employment Act, 2007 prohibits discrimination and the Industrial Court has a specific mandate to articulate fair labour standards. The industrial court is placed squarely within the context of the Bill of Rights to be able to adjudicate on issues of unfair labour practices recognising that many persons suffer from unfair labour practices. Direct and indirect discrimination provisions in the Act empowers both employees and job seekers and it also specifically prohibits the discrimination on the basis of HIV status. An added advantage of approaching the Industrial Court is that it is not necessary that one is represented.

Adjudicating discrimination on the basis of health status in the workplace is difficult because in most instances the actual reason for the termination or unfair labour practice is not communicated to the employee. In most instances the employee is unaware of the actual reason for their termination from employment. Another difficulty is the unwillingness of medical practitioners to

participate in the Court process. Judicial officers are limited to the cases before them where employers have superior legal team and the employee alleging discrimination might be unable to meet the evidentiary burden. Therefore while the judiciary may want to be more progressive they are at all times limited to the facts of the case.

As guidance in adjudicating such cases she advised the participants to consult the core work of the International Labour Organisation (ILO) which has invested a lot in articulating the issues. And while the ILO codes are not part of our law directly, they have persuasive authority and can serve as a guidance.

Justice Mbaaru concluded by stating that a major part of discrimination in the workplace becomes an issue of access to justice. It is necessary to ensure that structural and procedural objects that exist when one approaches a court are removed so as to ensure that people who face discrimination have their day in Court.

Adjudicating HIV Related Discrimination Cases: Factors to Consider-Hon. Justice David Majanja

Justice Majanja began his presentation stating that what is important for judicial officers is to have knowledge. It is necessary to know what HIV is and what it is about. HIV is a reality and it is necessary to know how to deal with it so that one can articulate the necessary interventions. Therefore, judicial officers must look at the problems they face in court from a different set of eyes.

The pillar of the Judiciary is that it is people focused in the delivery of justice. In order to adjudicate issues it is necessary to understand the context in which those issues arise. A particular example is in succession cases where the parents of children could die and it is persons outside of the nuclear family who engage in the succession and completely leave out the children. It is necessary in such cases to interrogate the papers and the persons in order to ensure that such children get the necessary protection. As a judiciary they are not only dealing with adjudication in court also dealing with social interventions.

Another aspect to consider is that 90% of cases that they deal with are defilement cases. This signifies that it is necessary to go into communities and address the issue of defilement.

Another factor that may affect the judiciary is the age group of people (16-18) who are actively engaged in sexual activity. A number of these persons are HIV positive and imprisoned and it is necessary to ensure that their needs are catered for and their rights protected.

Finally, it is necessary to remember that HIV issues may not be referred to but may exist and may impact on the judicial process. He gave an example of a murder case where a son killed his father, however, his mother was reluctant to testify and on further investigation it transpired all her other sons had died from AIDS related causes. HIV issues are real and they are continuously seen in the justice system therefore, interventions made must extend beyond the Court system.

Discussion

Five issues came out clearly in the discussion the role of the Sexual Offences Act, 2006 (SOA); the provision of condoms in prisons; how to tackle workplace discrimination; how to address stigma and discrimination; and including advocates and legal practitioners in such trainings.

On the role of the SOA the dilemma that arises is that the Act requires that additional penalties are imposed on a PLHIV who commits a sexual offence. The penalties in this Act are already stiff and the additional punishment may seem burdensome but it is justified by a need to protect children and victims of sexual violence. How can judicial officers balance the conflicting interests? Another significant aspect is that of the age group 16-18 who mostly fall through the cracks this is an issue that needs to be revisited because most of the activities engaged in are usually consensual. Forums such as the dialogue must be used to engage on the above issues because the law at present guides that hands of Judges.

The question of men who have sex with men (MSMs) was also discussed with the judicial officers' querying on the availability of condoms in prison to reduce the risk of HIV prevention. A representative of the Kenya Prisons Service (KPS) indicated that it was the official policy of the prisons not to encourage criminal behaviour and given that MSMs were engaging in criminal behaviour prisons are unable to provide condoms.

On tackling workplace discrimination it emerged that one of the biggest concerns is that employers seem to have an upper hand. More often than not persons are terminated because of their status but such will not be indicated and the discrimination is hidden. How can the Judiciary address such issues? A secondary aspect is the confidentiality of the judicial process. People affected by discrimination may be reluctant to approach the courts for fear of their HIV status being revealed. Is there a mechanism to encourage such persons the Court and guarantee that their status will remain confidential?

It was agreed that there is a need to address stigma through civic education. Entire families are stigmatised and such stigma can prevent them from living their lives fully. Another aspect of stigma is the necessity on agreeing on how the conversation should begin so that the necessary knowledge can be given to everyone.

Finally, on training advocates, KELIN indicated that legal practitioners have a role to play it is trying its best to bring lawyers into such trainings and to take discrimination cases to courts to increase awareness and jurisprudence. The challenge faces is the difficulty in retaining lawyers in this field of work because of the stigma attached to it.

Sessions Three - Enabling legal environment in the context of Women

This session was chaired by Prof. Lady Justice Lilian Tibatemwa Ekirikubinnza a member of the Ugandan Judiciary.

Perspectives from the Women Living with HIV in the Community with a Focus on Sexual and Gender Based Violence – Ms Teresia Otieno

Ms Teresia Njoki is a member of the International Community of Women Living with HIV (ICW) and this is the only network that focuses specifically on women living with HIV (WLHIV). She indicated that the network has not been able to measure how gender based violence (GBV) affects HIV however, GBV can be both a cause and effect of HIV. GBV can result in HIV infection and conversely HIV can result in GBV. Because of these issues women might be reluctant to test for HIV and in turn unknowingly infect others for fear of experiencing violence.

WLHIV face various challenges including violence when trying to access treatment and support; stigmatisation in health facilities when trying to access treatment; disinheritance on the basis of HIV status this is an issue especially in the former Nyanza province where wife inheritance is practised; failure to realise their sexual and reproductive health rights; and forced sterilisation. This is not a closed list and just examples used to articulate some of the challenges faced.

A large number of WLHIV are not aware of their rights and therefore when they are faced with violations they are unable to articulate this because they are unaware that it is a violation. It is necessary to ensure that women have the psychosocial and legal support to fight with HIV emotionally and to tackle violation of their rights.

Session Four - Enabling legal environment in the context of Children and Youth

This session was chaired by Prof. Lady Justice Lilian Tibatembwa Ekirikubinza a member of the Ugandan Judiciary.

Perspectives from a Youth Living with and Affected by HIV- Ms. Consolata Opiyo (ICW)

Ms Consolata Opiyo is a member of ICW she is also a 23 year old student, pursuing her tertiary education who was born with and has lived with HIV. She shared her personal experience both as a child born with HIV and an YPLHIV. Her story included many instances of stigma and discrimination experienced both within her family, at school and in her public life. Her experience in primary school forced her to want to keep her status to herself and it was only until she had been in high school for a few years that she chose to tackle the stigma she was facing and create awareness on HIV. At present not only does she study but she also provides guidance to other young people from different institutions by sharing her story and encouraging them.

She concluded stating that young people need an enabling environment, schools should be a place for them to be open. Teachers are supposed to create and encourage the necessary support systems but are often parties to and instigators of stigma. She appealed to the judicial officers to be champions for young people

living with HIV because every child has a right to education and the manner in which these children are treated severely hampers their ability to realise that right.

Perspectives from NGOs working with Children and Youth Living with and Affected by HIV: Discrimination in Services-Sr Mary Owens

Sister Mary Owens is the Executive Director of Nyumbani: Watoto wa Mungu. She began her presentation honing in on the two contexts in which the discussion on access to services takes place: the first aspect is the constitutional aspect more specifically the right to equality and non-discrimination enshrined by Article 27 and the right to administrative action in terms of Article 47. The second aspect is that of stigma which is underlying in accessing services.

When dealing with the constitutional context the starting point is the rights enshrined by the Constitution and on the basis of these rights certain expectations are created for our children. However, orphans infected or affected by HIV find themselves unable to access basic services that are usually readily available to children who do not have a similar status. Specific examples is in accessing birth certificates and identification documents. All children and young people have a constitutional right to these documents. However, because of the vetting process that these orphans are required to go through the process takes much longer and in some instances there are children as old as 10 without birth certificates.

Another aspect whereby inequality is faced in access to education, in 2004 there was a landmark case which ensured access to free basic education in government schools for all children. However, despite this the children from Nyumbani are not getting the full benefit of this education their performances are hampered for a number of reasons and they are thus unable to access scholarships to attend secondary school. Nyumbani recognises that it may be necessary to ask for special considerations in order to give their children a fair chance however, they are reluctant to do so because of the stigma they the children may face if their status is known.

The children's right to basic health which includes the highest attainable health is also not realised. Only 43% of children living with HIV have access to ART.

Additionally, their right to inheritance is hampered because the home faces challenges in tracing the extended families and even when such relatives are known there is a tendency to disinherit the children.

Sr. Owens made reference to the actions needed to ensure that these children can be treated equally and achieve their potential the first is clear user friendly legal processes should be put in place for children infected and affected by HIV. The second is the creation of public awareness of the rights of these children to their property. Thirdly, protection from abuse this includes perinatal infection of HIV, it is necessary to ensure the prevention of transmission from parents to children. Fourthly, the de-stigmatisation of HIV is crucial for the sake of our children. Finally, considering affirmative action programmes to ensure youth find a place in employment will HIV status play a role and if it does how will privacy and confidentiality be ensured.

She concluded by appealing to all participants on the need to de-stigmatise HIV it is necessary to ensure that the rights of children with HIV are ensured. She also noted that Schedule 4 of the Constitution makes no reference to children in terms of the function of the county government as a point of concern. Also there is a need for judicial officers to take action both professionally and individually to ensure that the rights of marginalised children affected and infected by HIV are met.

Discussion

For convenience sessions three and four were combined and the discussion of these sessions was chaired by Mr. Jotham Arwa, chairperson of the HIV and Equity Tribunal. He opened the discussion by stating that there are a number of issues that judicial officers have to bear in mind especially when looking at children and youth. In the context of children they are vulnerable in that their rights can and usually are violated and very little intervention takes place. Many children do not have the ability or the means to vindicate their rights when they are violated but they suffer the same effects as adults. Adolescents suffer a similar situation, adolescents are least understood and ignored by the law. They occupy the space between childhood and adulthood never fully belonging to either. He then shared some of his experiences with cases he has been faced with.

The discussion was very well rounded focusing on a number of pertinent issues. Firstly, the role the courts can play was highlighted not just as adjudicators but as leaders in the community. Justice Martha Koome made reference to the Court Users Committee which can be utilised by senior judges in their communities to convene persons within their jurisdictions. She shared an example of when she used this to tackle the disinheritance issue within her community calling upon chiefs to ensure that the information they provide in succession matters is accurate. She urged all other officers to utilise this forum to engage with the community because the position that a judicial officer occupies places him/her in a position where they can champion constitutional rights. In line with this discussion Justice Majanja made mention of the Judiciary Transformation Programme which is focused on making justice people centred.

Another aspect discussed is the balancing of rights in cases of mandatory testing specifically how can the rights of women be balanced with those of unborn children and similarly how can health workers meet their duties without violation rights. The tune of this discussion was that if properly informed no woman would risk transmitting HIV to their child. The manner in which testing occurs severely hampers ensuring an HIV free generation because it removes the element of choice and significantly the counselling and support. Children born with HIV shall feel betrayed by a society that made it impossible for their mothers to seek treatment due to stigma and discrimination and there is a need to address proper testing, counselling and support procedures. The guidelines exist however, these are not always utilised by health workers to the detriment of PLHIV and children who will subsequently be born with HIV.

The role of the Constitution was also discussed with Justice Majanja opining that the Constitution provides answers for many of the issues the Judiciary is faced with. A majority of the issues are born out of a lack of knowledge but once officers are armed with knowledge they can make better decisions and tackle the problems. With knowledge and an appreciation and understanding of the Constitution and its value system officers will be able to craft solutions to HIV related issues.

Finally, the issue of disinheritance of children and women affected and infected by HIV was discussed with participants feeling that to some extent this was one that went beyond the law. There is a need to understand why communities and

people would be so greedy and uncaring. This is a question that goes beyond the law and it requires not only legislative and judicial intervention but a change of attitude.

Mr Arwa closed the session reminding the participants that there is a need to consider not just the meaning of the law as you conceptualise it but also its effect in relation to its intended purpose.

The session came to a close as did the programme for the day.

Wednesday, 3 December 2014

Session Five – The Role of Criminal Law in the Epidemic

Session five was chaired by Mr. Edward Okello, from the Commission for Administrative Justice (Ombudsman) who represented Commissioner Otiende Amollo. He opened the session with a brief discussion on the role that criminal law plays in the HIV epidemic.

HIV Testing, Counseling and Confidentiality, key considerations for the judiciary and the perspective on Criminalisation of HIV – Hon. Justice Byram Ongaya

Justice Ongaya is a judge of the Industrial Court of Kenya, currently based in Nyeri who has also previously worked in the Public Service and practiced in areas of governance. His discussion was centred on HIV testing, counselling and confidentiality (including criminalisation on the aspects of testing) with regard to testing particularly with regard to the provisions of the HIV and AIDS Prevention Control Act, 2006. After a discussion on what the act broadly provides for he found the primary ideas around the Act are around testing and criminalisation of certain conduct regarding to testing and confidentiality. He stated that the main purposes of the Act are to assist in access to services and to protect human rights.

After outlining the purpose of the Act he then discussed the individual sections enacted to meet that purpose and how they could be utilised to increase access to services while ensuring that human rights are protected. He discussed in detail the concept of informed consent with regard to testing and what it entailed especially with regard to children, he similarly discussed the instances where

testing could occur without consent. He continued the discussion on the rights espoused by the Act most importantly the rights to privacy and freedom from discrimination which are protected by the criminalisation of breach of confidentiality and unjustified disclosure. He urged the participants to be aware of the nuances that may present themselves in their court rooms because cases strictly about testing will not be frequent and clear cut and a majority will be around the consequences of testing and this is an area in which they should remain abreast. The Judiciary is expected to be alert to institutional and transactional frameworks and practices that have a bearing on the designed outcomes relating to criminalisation of HIV testing, counselling and confidentiality by directly enforcing the relevant statutory and constitutional provisions.

The Science on HIV & HIV transmission risk – Prof. Walter Jaoko, Deputy Programme Director, Kenya AIDS Vaccine Initiative

Prof. Walter Jaoko provided a necessary demystification of the science of the HIV virus and its mode of transmission in humans. In brief, he provided the following background on the science of the virus: HIV means Human Immunodeficiency Virus, meaning that it only affects humans naturally. Other animals have their version of the virus called the SIV. There are two main types of the virus: HIV-1 & HIV-2, but the most widely spread and aggressive type is HIV-1. HIV 1 is further divided into strain/subtypes A, B, C, D, F, G, with multiple strains found in every geographical area, with the most prevalent strains varying in regions. For example in North America/Europe the common strain is B, South Africa C, Kenya A, Russia A, and Ethiopia C. AIDS on the other hand means Acquired Immunodeficiency Syndrome. It is 'acquired' because it has to be transmitted from an outside source and is not genetically inherited.

HIV progresses into AIDS gradually and an early HIV infection would usually go undetected for some time, but even when it is eventually detected, the infected person can be asymptomatic for some time. When the virus levels in blood are very high, HIV destroys body defences leading to low immunity, measured by CD4 cell numbers which decrease with time. Low CD4 count then leads to weight loss, diarrhoea, skin infections, TB, meningitis and this then signifies the Acquired immunodeficiency syndrome.

With regard to proof of transmission for the purpose of criminal prosecution, Prof. Jaoko stated that if partners have different strains, then transmission cannot be said to be from one partner but, if the partners have the same HIV strain then it is possible infection is from one partner. However, this does not conclusively prove transmission. If partners have the same strain but there is no information on previous HIV status of each, it may be possible to make an intelligent guess of who transmitted infection but this cannot prove transmission within the confines of the law.

Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission; UNAIDS guidance book—Mr Allan Maleche, Executive Director
KELIN

Mr. Maleche used the UNAIDS guidance book to highlight the provisions that criminalise HIV transmission with specific mention to what these provisions contain stating that this is the context and the laws we would have to consider in such a discussion. He then quoted Justice Michael Kirby who stated: *“There will be calls for ‘law and order’ and a ‘war on AIDS’. Beware of those who cry out for simple solutions, for [in] combating HIV/AIDS there are none. In particular, do not put faith in the enlargement of criminal law.”*

Based on the above there have been difficult discussions in the legal fraternity in terms of the utility of these provisions in ensuring that there is prevention of HIV transmission by persons considered to be reckless or negligent. The guidelines attempt to provide guidance when applying provisions that criminalise HIV transmission. Firstly, the guidelines highlight problems with the current laws which are a: disregard for the science of HIV, disregard for legal and justice principles and the negative impact on the HIV response.

There is a need for clearer guidance on key and scientific and medical developments including: a recognition of the reduced harm of HIV transmission; an assessment on the actual risk of HIV transmission; and the proof of HIV transmission. Additionally, other aspects that ought to be considered are conflicting judicial decisions on criminalisation; legislative processes/changes;

prosecutorial guidelines in England and Wales; and growing activism by Civil Society Organisations (CSOs), PLHIV and the voice of criminalisation survivors.

The UNAIDS guidance note prescribes that there is a: restriction of criminal law to truly blameworthy cases; upholding criminal justice principles; and using the best scientific and medical evidence. Therefore, the criminal law should take stock of the current reality of HIV infection; given that HIV is manageable and treatable there should be no charges of murder or manslaughter; HIV non-disclosure should not be criminalised absent of transmission; criminal liability should only be attached if there is significant risk of HIV transmission; there should be proof of a culpable mental state and intent to harm should not be presumed. In conclusion the UNAIDS guidance note should not be used as a code but to stimulate further dialogue with other stakeholders and law reform.

Discussion

The discussion in the plenary session was broadly around the issues of possible re-infection, disclosure, criminalisation of transmission and other modes of prevention that can be utilised to prevent HIV contraction. On re-infection Prof. Jaoko indicated that it was not only possible to contract more than one strain of HIV, it is also possible that one of those strains becomes more dominant and aggressive and this is what is termed as a super infection.

On the issue of disclosure questions arose on the stand point of the judiciary on this matter. The discussion was on whether lack of disclosure could possibly have a negative impact on the fight against HIV. What came out from this discussion is that generally PLHIV are encouraged to disclose their status, however, due to the stigma that is attached to their HIV status they are reluctant to do so because of the backlash they face. It is necessary to create a stigma free environment where disclosure will be possible without the backlash. The principle is to begin by keeping the information confidential but during the counselling session encourage the PLHIV to disclose this information to their sexual partners. Disclosure is a process that cannot happen forcefully, it takes time for the PLHIV to come to terms with infection and get to a point where they are ready to disclose.

One of the more contentious issues was criminalisation of HIV transmission, this was discussed from the perspective of the SOA and the HAPCA. In terms of the SOA participants noted difficulties especially in defilement cases whereby a child was HIV positive after the assault and while they followed the legislation, the difficulty in proving transmission was apparent. Another prominent issue was the fact that HIV transmission is only one of a number of factors that may have aggravating consequences in a sexual assault case and as such it ought not be automatically assumed that because it is mentioned it amounts to discrimination. In terms of HAPCA the initial thinking in the legislation was to protect women hoping that if husbands and partners were forced to disclose this could prevent women getting infected. This unfortunately did not have the desired result because women are more likely to know their status first by virtue of being and maternal and reproductive clinics. Disclosure for women has been plagued with various issues and can be linked to GBV leading to fear amongst them to disclose their status. The challenge with HAPCA is if you do not disclose you run the risk of being convicted. It is possible to become infected with more than one strain of HIV or in some cases get a super infection where one strain becomes more aggressive than the other.

Finally other possible modes of prevention were discussed by Prof Jaoko and these include pre-exposure prophylaxis (PEP) which are ARVs taken before engaging in sexual intercourse and this lowers the risk of transmission. Additionally, there is post-exposure prophylaxis which is used in cases of rape advisably within 24 hours of the assault to reduce possible risk of transmission.

Adjudicating cases of HIV non-disclosure, HIV exposure and or transmission in a sexual context: factors to consider – Commissioner Catherine Muyeka Mumma, Commission on Implementation of the Constitution

When adjudicating cases of HIV non-disclosure, exposure or transmission Commissioner Mumma advised that judicial officers take note of all the different topics that had been discussed over the two days. It is necessary to take into account the history of HIV and that it is one of the diseases with high levels of stigma and because of this those infected and affected by HIV have suffered tremendous discrimination and violence. However, these factors do not mean

that judicial officers are somewhat barred from performing their duties fairly and justly. The purpose of the dialogue is not to ask judicial officers to reach a particular value but to avail the necessary information to allow them to make informed decisions when adjudicating these matters.

Another aspect that must be considered when making judgment is that there are some moral values belonging to the judicial officers that may play a part in the judgment and it is necessary to take cognisance of this and ask difficult questions. For instance on the question of disclosure if we are to insist on it why not impose mandatory testing on every person periodically, these are the questions that have to be asked. In making a decision or choosing an avenue it has to be one that will effectively prevent and manage HIV. Ultimately with HIV we are dealing with social issues and behaviours that may never be managed by law, therefore we must remove the moral judgment look at the issue as it is scientifically and make a decision within the particular context.

In conclusion when adjudicating a matter a number of things may be taken into account. Firstly, the science of HIV transmission because proving transmission is possible but it is not straightforward enough to be determined simply on the basis of oral evidence of parties. Secondly, the culpability of the person alleged to have transmitted the infection may play a role. Thirdly, the evidence and the defences that may be risen should be properly assessed and considered. Finally having taken all the above into account and having come to a decision the appropriate sentence will also be affected by all the various factors that led to the transmission.

Session Six – Enabling legal environment in the context of Key and Affected Populations

This session and the interactive panel within it were chaired by Mr. Allan Maleche.

Public health versus human rights the dilemma with key & affected populations – Prof. Walter Jaoko, Deputy Programme Director, Kenya AIDS Vaccine Initiative

Professor Jaoko's second presentation was focused on public health versus human right: the dilemma with key and affected populations. Public health is a

branch of medicine that aims to ensure health at a population level. For this reason public health creates a potential conflict between the individual and the community because public health has to focus on both those who infected and those who are not infected. Significantly for public health is “treatment for prevention” because studies have indicated that when under treatment the viral load is so low that chances of transmission are significantly lowered.

Key populations are populations or people who are at a disproportionately higher risk of contracting an HIV infection than the general population. Key populations include: sex workers; clients of sex workers; men who have sex with men (MSMs); injecting drug users (IDUs); transgender persons; and others such as fishing communities. Only focusing on sex workers, MSMs and IDUs Prof. Jaoko indicated that if we consider the World Health Organization’s (WHO) definition of health we can conclusively state that these populations do not enjoy their right to health.

The populations discussed are criminalised and this poses a problem he referred to the doctor’s dilemma is: how can the law be applied in a way that protects people from being HIV infected or infecting others? How can the law be applied without making those who need HIV preventive services most isolate themselves from the services? How can one practice HIV preventive medicine in the key populations without breaking the law? This is the doctor’s dilemma. What must be determined is if punishing behaviour that risks HIV transmission promotes public health. There is little evidence to support that it does and in fact it may undermine public health. Key populations account for 30% of new infections in Kenya they cannot be ignored. The future will not be ensured if HIV continues to spread.

Perspectives of members of key and affected populations: (Panel of MSM, Female Sex Worker and Injecting Drug User

Mr Allan Maleche moderated an interactive panel focuses on the impact of punitive and discriminatory laws, policies and practices on key populations at higher risk. The panel comprised of perspectives from male and female sex workers, IDUs and a Civil Society Organisation (CSO) working on Harm Reduction. The panel session consisted of posing questions to the panellists and

encouraging them to answer. Though the panellists were from different population groups those that were members of key populations could testify to the amount of stigma and discrimination that they have faced which has resulted in human rights violations. The violations ranged from harassment to murder with little or no regard to the impact these actions have on them.

The members of key populations each have HIV and while they showed a commitment to ensure that they adhere to their treatment for both them and their partners they face significant challenges in accessing treatment. Health officials stigmatise them and discriminate against them and this can risk their access to medicine as guaranteed by the Constitution. When asked what they efforts they would like the participants to make in ensuring their rights through an understanding that they are seeking for rights and not to be rescued, to achieve this they suggested the decriminalisation of sex work, the legalisation of same sex relationships and legalisation of harm reduction services because a number of the interventions they seek to use are severely hampered by legislation.

Discussion

The discussion on this session was very robust with judicial officers and participants becoming deeply engaged in the behavioural aspects of key populations more specifically sex workers and MSMs. There were calls to ensure that programmes are geared towards rehabilitations of IDUs and it was recognised that this is the ultimate result that is hoped for in the centres that also deal with harm reduction. However in terms of sex workers and MSMs the clear message was that they were not seeking for an intervention to their chosen work or their orientation they simply wanted to ensure that their rights are respected so as to allow them to successfully access medicine and prevent the spread of HIV. It was clearly stated continuously that the slogan is “rights not rescue”. There were concerns regarding the sustainability of sex work and finding creative solutions to ensure the protection of sex workers including targeting their clientele for legal prosecution but these suggestions were rebuffed with a statement that this is a path that has been wilfully chosen and the focus should be on allowing

An insightful aspect of this discussion was the contribution from the Mr. Samuel Lovoni a legal officer from the Kenyan Prisons Service. He indicated that many inmates who are incarcerated are neither MSMs nor drug users but by the time they leave prison they become MSMs and drug users and this includes individuals sentenced for short period of times. He wanted to impress upon the bench to use more non-custodial sentences especially in cases where crimes are non-serious and sentences are brief. Due to over population and over-crowding in prisons there are no rooms for segregation. This is significant particularly for persons imprisoned because of defaulting on tuberculosis medication, this is counter-productive and a non-custodial sentence might be more appropriate. On the issue of harm reduction for IDUs and the provision of condoms in prisons this has been subject to extensive discussion and the stance of the prisons is that they will not abet crime. The legislation on these issues is very clear and adopting such measures is contrary to the law. Unless directed to take a contrary position by law they maintain their position. Another aspect that has not been considered is that of conjugal rights_which has been adopted in other jurisdictions, this he felt might be an appropriate solution.

Session Seven – Access to life saving treatment

This session was chaired by Justice Ruth Sitati who shared a personal story of her experience with HIV and the devastating impact that a lack of information and treatment has had on her and her family.

Access to medicines, HIV and the law: perspective of persons living with HIV – Ms. Maureen Murenga, Petitioner in the Anti-counterfeit case

Ms. Murenga is a woman living with HIV and a member of NEPHAK, additionally she participated as a petitioner in the landmark case of *Patricia Asero Ochieng and 2 Others v the Attorney General and Another* [2012] eKLR (Anti-counterfeit case). She shared her personal experience with HIV recounting how she found out she was HIV positive in the course of her pregnancy and what ensued after. Due to limited medication at the time she was unable to prevent transmission to her child and their lives became increasingly difficult due to lack of medication. Fortunately, India begun to produce generic ARVs which were available in Kenya and which were affordable and greatly improved the health and quality of life of PLHIV. Ms. Murenga and her child benefitted greatly from the availability of this generic medicine, which is why in 2008 when the Anti-

Counterfeit Act was passed she and others recognised its wide definition as a threat to their ability to access medicines. This background is the reason why she petitioned the Court to ensure that she, her child and PLHIV are allowed access to affordable medicines that improve the quality of their lives and ensures they can live full meaningful lives.

Using the law to ensure and sustain access to treatment: experience sharing from the Treatment Action Campaign case and the Anticounterfeit case – Mr. Allan Maleche, Executive Director, KELIN and Mr. Sisule Musungu, Senior Partner, Sisule, Munyi, Kilonzo and Associates

Mr. Musungu is a seasoned practitioner in intellectual property (IP) and international human rights, additionally he has a post-graduate degree in Human Rights and Democratisation in Africa. He introduced his presentation stating that while he focuses on intellectual property he recognises that this is not the only issue that may impede access to treatment. IP is important because it is well accepted and documented that due generic competition the cost of first-line HIV treatment regimen fell from approximately USD 15, 000 in the year 2000 to approximately USD 100 today. The intricate relationship between IP and pharmaceuticals has been central in the framing of the current global rules for IP.⁵

The history of IP is very long however, Ms. Musungu focused only on what he felt was the global consensus on this. IP, in particular patents laws and policies are significant in ensuring and sustaining access to HIV treatment and treatment for opportunistic infections. The provisions of the TRIPS are informative on how to frame patent laws and policies and some significant aspects ought to be considered. Firstly, the protection of patents has a dual purpose promoting technological innovation and promoting the transfer and dissemination. Secondly, WTO members can adopt IP related measures to protect public health and nutrition, and to promote public health in sectors of vital importance. Thirdly, appropriate measures may be granted to prevent the abuse of IP rights or to prevent practices which unreasonably restrain trade or adversely affects the transfer of technology. Finally, it is significant that the TRIPS Agreement does

⁵ This aspect has significantly framed the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

not and should not prevent countries from taking measures to protect public health.

The legal system does allow for intervention in the patenting stage so as to ensure access to medicine is not hampered. There are two stages in the patenting process the pre-grant stage and the post-grant stage and at either at these stages intervention is possible. Mr. Sisule identified the areas of intervention in the instance that an issue regarding patents was addressed in litigation. These areas are: ensuring continued research; ensuring availability, reasonable pricing and competition for products; registration of generic medicines; enforcement of IP rights, the manner in which the rights are enforced must be fair and equitable; border nations; and distinction between criminal IP infringement and civil infringement. These entry/intervention points are pre-grant and post-grant.

Turning HIV and AIDS from a death sentence to a chronic disease has been, particularly in Africa, one of the greatest public health achievements.

Mr. Allan Maleche's presentation was on the Anti-counterfeit case in terms of explaining the case and bringing the participants to the reality of access to medicine and the legal barriers and hurdles that may affect this. This case demonstrates how laws on IP can affect access to life saving treatment and while it was litigated in Kenya the case had an impact on other countries in the East African Community.

The presentation shared the facts of the case, parties, arguments and highlights. The starting point of this case was the Industrial Property Act which domesticated the principles discussed above and therefore ensured that ARVs could be available at a reasonable and affordable cost. This Act was passed in 2001 but in the following period there was an increased number of counterfeit/fake products being produced and this affected a large number of companies. Due to this manufacturers pushed for legislation that could deal with the products they considered to be counterfeit. In this push legislation was developed (Anti-Counterfeit Act) which classified generic medicines as counterfeit. CSOs discovered this and there were efforts made to speak to parliamentarians, the Ministry of Health and also to make comments that would remove generic medicines from this definition. Despite these efforts the legislation was passed.

At the time of approaching the Court to litigate the Constitution of Kenya, 2010 had not yet been passed and they had to rely on the previous Constitution more specifically on the right to life. The petitioners (3 persons) are PLHIV and their argument was that they had been utilising generic medicines and the legislation was likely to affect them. The problematic sections of the Anti-Counterfeit Act were sections 2, 32 and 34. The enforcement of these sections would affect their ability to access generic ARVs which they required for the rest of their lives. The respondents were the Attorney General and the Chairperson of the Anti-counterfeit Agency was later joined to the proceedings. Interested parties joined to the case were the AIDS Law Project and the UN Special Rapporteur for Health.

After the filing of the case the Constitution, 2010 was enacted and the rights which the petitioners could rely on substantially increased. The prayers sought by the petitioners were: a declaration that the fundamental rights of life, human dignity and health encompass access to affordable and essential medicines including generic medicines; a declaration that in so far as the Anti-Counterfeit Act severely limits access to affordable and essential medicines, it infringes upon the petitioners' rights to life, dignity and health; and a declaration that enforcement of the Anti-Counterfeit Act in so far as it affects access to affordable and essential medicines, it infringes upon the petitioners' rights to life, dignity and health.

The key arguments made by the petitioners were that: the definition of counterfeit in the Act was too broad; the enforcement of the Act would violate their rights to life, health and dignity, and the Act attempted to use IP laws to regulate sub-standard medicines while legislation for this purpose already existed. The respondents argued that the Act was not intended to bar generic drugs but to prohibit counterfeits; there was no need to specifically provide an exemption for generic drugs in the definition; and the intention of the Act was to protect the public from goods that may cause them harm.

The case was filed in March 2009, a temporary order was issued in April 2010 and this order restrained the enforcement of the contentious sections. In September 2010 pleadings were amended in light of the new Constitution. The petition was heard in January 2010 and in April 2010 judgment was delivered in favour of the petitioners.

Discussion

This discussion was very lively with the participants engaging on topics ranging from data exclusivity to access to essential medicines. The starting point and perhaps the most significant in terms of the Anti-Counterfeit Act and similar legislation is that this is not an issue that affects only PLHIV and it is essential to be abreast of this. Generic medicines account for a significant amount of medication in Kenya and their unavailability has the potential to affect a wide range of diseases including malaria which greatly affects our region. It is necessary to recognise that large firms have commercial interests to protect and as such their actions are not always in accordance with the needs of the people. This is beyond issues of medicine and there is the broader issue of the right to health as seen in both the Constitution and in International Covenant on Economic, Social and Cultural Rights (ICESCR). Judicial officers have a role in ensuring that this becomes a reality.

The second aspect discussed at length was the possibility of the judicial intervention in the patent registration process at the pre-grant stage. Mr. Musungu explained that the process of registering a patent could take up to 10 years and in this process when an application is filed it must be published. An application should contain all the information regarding the patent being sought including the use of that invention and so on. It is at this stage when this information is available to the public that judicial intervention is possible if an aggrieved party chooses to approach the judiciary. However, he cautioned that the availability of this mechanism does not prevent a challenge at the post-grant stage.

The discussion on data exclusivity was around its potential to prevent the registration of generic medicines. Mr. Musungu explained that it is not a requirement that one gives data of the original product to the generic manufacturer. Generic medicines in terms of standards and efficacy are exactly the same as branded medicines however, for them to be registered they have to be compared and this is only possible to do with the data on the original product. In Kenya the laws are flexible and therefore this does not pose a challenge however, interpretation may be problematic. There are however, more restrictive

countries whereby the patent officer is prohibited from receiving the data on the original product and because of this they will be unable to register a generic product.

The topic of new use of medicine was also discussed with participants raising questions around the possibility of registering a new use as a patent. The process of registration remains the same and it is possible to intervene in both the pre-grant and post-grant stage. What needs to be determined is if it is essentially the same drug being administered in the same way which incidentally treats another disease this does not qualify as an invention. It is however, a very technical area and it is necessary to understand the technical aspects and be able to convey them to judicial officers.

Finally, the participants discussed whether Kenya's newly acquired middle income status affects issues of IP in terms of multilateral agreements such as TRIPS. Encouragingly this status will not affect Kenya because the flexibilities awarded to Kenya in terms of TRIPS are applicable in every country therefore this shall continue. Kenya has changed status but in terms of IP the country maintains the benefits previously enjoyed because these are available to all members of TRIPS regardless of status. The only aspect that may raise concern is that the change of status may affect Kenya's ability to participate in voluntary schemes. However, an area that may be significantly affected by the changed status is the funding received for healthcare from the Global Fund. A change in economic status can raise the argument that with an improving economy Kenya should be able to invest more in healthcare.

Wrap up and Closing

The wrap up at the Judicial Dialogue Forum was given by Senior Magistrate Teresia Matheka who is a member of the Judiciary Training Institute. She began by thanking all the participants and speakers for their attendance and their participation in this very significant dialogue. She indicated that the two days had provided the judicial officers with a learning experience, an opportunity to engage and an opportunity to reflect. She urged them as they left to take the opportunity and what they have learnt into their court rooms.

Mr. Allan Maleche and Ms Ludfine Anyango also took time to thank the JTI for the continued fruitful partnerships. They took note of calls from the participants

to bring such trainings closer to them by visiting the different counties. They closed by urging all participants to always ensure that the communities represented in this forum will have access to justice.

Justice Sitati officially closed the dialogue on behalf of the JTI director Hon. Judge (Prof) Joel Ngugi. She stated that the dialogue had been very interactive that gave the participants an opportunity to engage with some of the harsh realities of HIV. It is necessary for judicial officers to think outside the box and develop creative solutions to tackle the epidemic. She thanked the development partners KELIN, UNDP and UNAIDS in the role they played in making the dialogue a reality. She also thanked the JTI and all the presenters for enabling the participants to acquire the information necessary for them to perform their duties.

She closed reminding all that we have to have these discussions because it is necessary to sacrifice today for a better tomorrow so that we may one day see an HIV free generation.

Annexure one

Judicial Dialogue on HIV, Human Rights and the Law Programme

AGENDA

JUDICIAL DIALOGUE ON HIV, HUMAN RIGHTS AND THE LAW

2-3 December, 2014

Judicial Training Institute

Nairobi, Kenya.

Tuesday, 2 December 2014

Judicial Training Institute

08:00 – 08:30 Registration

08:30 – 10:15 Session One – HIV, The Law and the Judiciary: Introducing The Issues

Chair: Hon. Justice Prof Joel Ngugi, Head of the Judicial Training Institute Kenya (JTI)(10mins)

Keynote address – Ms. Nardos Bekele–Thomas, UNDP Resident Representative / UN Resident Coordinator (10mins)

Remarks – Dr. Nduku Kilonzo, Director National AIDS Control Council (10mins)

The HIV epidemic in Eastern and Southern Africa – Dr. Jantine Jacobi, UNAIDS Country Director (15mins)

Why a rights based approach in dealing with HIV issues – Commissioner Catherine Muyeka Mumma, Commission on Implementation of the Constitution (15mins)

HIV and the law: Key issues and considerations for the judiciary – Mr Ambrose Rachier, Chairperson KELIN (15mins)

Discussion (20mins)

Group Photo

10:15 – 10:45 REFRESHMENTS

10:45 – 12:45 Session Two – Using the law to end HIV-related discrimination and other human rights violations

Chair: Hon. Justice Ferdinand Wambali (10mins)

Interactive panel:

Experience of PLHIV facing discrimination – Mr. Nelson Otwoma, Coordinator (NEPHAK) (15mins)

Legal protections against HIV-related human rights violations in Eastern and Southern Africa in line with the report of the Global Commission on Law and HIV – Ms. Ludfine Anyango, Programme Analyst HIV and AIDS, UNDP-Kenya (15mins)

Discrimination in workplace and role of the Judiciary – Hon. Lady Justice Monica Mbaaru (15mins)

Discussions (40mins)

Adjudicating HIV related discrimination cases: factors to consider – Hon. Justice David Majanja (15mins)

12:45 – 14:00 *LUNCH*

14:00 – 15:00 **Session Three – Enabling legal environment in the context of Women**

Chair: Prof. Lady Justice Lilian Tibatembwa Ekirikubinnza (10mins)

Interactive panel:

Perspectives from the Women Living with HIV in the community with a focus on sexual and gender based violence Ms Njoki Otieno, International Community of Women Living with HIV (ICW) (10mins)

Engaging the judiciary on the protection of women’s rights, key considerations – Commissioner Winnie Lichuma, Chairperson Gender & Equality Commission

(15mins)

Discussion (25mins)

15:00 – 15:30 REFRESHMENTS

15:30 – 16:30 Session Four – Enabling legal environment in the context of Children and Youth

Chair: Mr. Jotham Arwa (Chair of HIV and AIDS Tribunal) (10mins)

Interactive panel:

Perspectives from a youth living with and affected by HIV – Ms. Consolata Opiyo, International Community of Women Living with HIV (15mins)

Perspectives from NGOs working with children and youth living with and affected by HIV. (Discrimination in services) - Sr. Mary Owens, Executive Director, Children of God Relief Institute -Nyumbani (15mins)

Discussion (20min)

Wednesday, 3 December, 2014

08:30 – 10:00 **Session Five – The Role Of Criminal Law In The Epidemic**

Chair: Commissioner Otiende Amollo (Chairperson Commission on Administrative Justice- Kenya) (10mins)

The Science on HIV & HIV transmission risk – Prof. Walter Jaoko, Deputy Programme Director, Kenya AIDS Vaccine Initiative (15mins)

HIV Testing, Counseling and Confidentiality, key considerations for the judiciary and the perspective on Criminalisation of HIV – Hon. Justice Byram Ongaya (20mins)

Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission; UNAIDS guidance book–Mr Bechir Ndaw, Legal Advisor, UNAIDS Regional Office (15mins)

Discussion (30mins)

Adjudicating cases of HIV non-disclosure, HIV exposure and or transmission in a sexual context: factors to consider – Commissioner Catherine Muyeka Mumma, Commission on Implementation of the Constitution (15mins)

10:15 – 10:45: REFRESHMENTS

10:45 – 12:30 Session Six – Enabling legal environment in the context of key and affected populations

Chair: Mr. Allan Maleche, Executive Director, KELIN (10mins)

Public health versus human rights the dilemma with key & affected populations – Prof. Walter Jaoko, Deputy Programme Director, Kenya AIDS Vaccine Initiative (15mins)

Perspectives of members of key and affected populations: (Panel of MSM, Female Sexworker and Injecting Drug User – Mr. Allan Maleche, Executive Director, KELIN(40mins)

Discussion (30mins)

12:45 – 14:00: LUNCH

14:00 – 15:40 Session Seven – Access to life saving treatment

Chair: Hon. Lady Justice Ruth Sitai (10mins)

Access to medicines, HIV and the law: perspective of persons living with HIV –
Ms. Maureen Murenga, Petitioner in the Anti-counterfeit case (10mins)

**Using the law to ensure and sustain access to treatment: experience sharing
from the Treatment Action Campaign case and the Anticounterfeit case –** Mr.
Allan Maleche, Executive Director, KELIN and Mr. Sisule Musungu, Senior
Partner, Sisule, Munyi, Kilonzo and Associates (30mins)

Discussion (30mins)

**Adjudicating cases involving access to HIV and AIDS related treatment and
care some factors to consider –** Hon. Lady Justice Mumbi Ngugi, High Court of
Kenya (15mins)

Wrap up and Closing

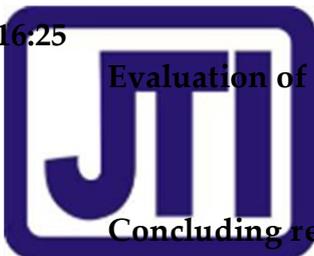


Summary of the two day session, key highlights and way forward - Hon Justice
Prof Joel Ngugi, Director of JTI (15mins)

*Empowered lives.
Resilient nations.*



15:40 – 16:25



Evaluation of the Judicial Dialogue (10mins) – KELIN

Concluding remarks – Dr. Jantine Jacob UNAIDS Country Director (10mins)

Annexure two

List of Participants: The Judicial Dialogue on HIV, Human Rights and the Law

No	Name	Sex	Institution	Country
1.	Abbas Abdullaziz	M	NOSET	Kenya
2.	Allan Maleche	M	KELIN	Kenya
3.	Ambrose Rachier		KELIN	Kenya
4.	Atyang Mitullah	M	Judiciary	Kenya
5.	Ben Mararo	M	Judiciary	Kenya
6.	Byram Ongaya	M	Judiciary	Kenya
7.	Catherine Mumma	F	CIC	Kenya
8.	Consolata Opiyo		ICW	Kenya
9.	Cosmus Maina	M	Teenswatch	Kenya
10.	David Majanja		Judiciary	Kenya
11.	Dorah Chepkwony	F	Judiciary	Kenya
12.	Edward Okello	M	Commission of Administrative Justice	Kenya
13.	Ferninand Wambali	M	Institute of Judicial Administration-Tanzania	Tanzania
14.	Grace Kamau	F	Kenya Sexworkers Alliance	Kenya
15.	Gurumurthy Rangaiyan	M	UNAIDS	Kenya
16.	Hedwig Ongudi	F	Judiciary	Kenya
17.	Hellen Magutu	F	ILO	Kenya
18.	Jantine Jacobi	F	UNAIDS	Kenya
19.	Joel Ngugi		JTI	Kenya
20.	John Mathenge	M	Hoymas	Kenya
21.	Judy Muthiani	F	Judiciary	Kenya
22.	Juliana Odindo	F	NEPHAK	Kenya
23.	Juliet Kasam	F	Judiciary	Kenya
24.	Layla Ahmed	F	CIC	Kenya
25.	Lillian Tibatembwa	F	Court of Appeal, Uganda	Uganda
26.	Lomali Charles	F	LWF	Kenya
27.	Ludfine Bunde	F	UNDP	Kenya
28.	Martha Koome	F	Judiciary	Kenya
29.	Mary Owens	F	COERI-Nyumbani	Kenya
30.	Maureen Murenga	F	NEPHAK	Kenya
31.	Mercy Mwongeli	F	UNAIDS	Kenya

32.	Minani Edouard	M	Judiciary	Burundi
33.	Monica Mbaaru	F	Judiciary	Kenya
34.	Nduku Kilonzo	F	NACC	Kenya
35.	Nelson Otwoma	M	NEPHAK	Kenya
36.	Nerima Were	F	KELIN	Kenya
37.	Njoki Otieno	F	PIPE	Kenya
38.	Pamela Achieng	F	Judiciary	Kenya
39.	Patricia Asero	F	NEPHAK	Kenya
40.	Patrick Kangethe	M	KELIN	Kenya
41.	Regina Mwanza	F	KELIN	Kenya
42.	Ruth Laibon Masha		UNAIDS	Kenya
43.	Ruth Sitati		Judiciary	Kenya
44.	Samuel Lovoni	M	Kenya Prisons Service	Kenya
45.	Sheilla Masasabi	F	UNDP	Kenya
46.	Sisule Musung	M	Sisule, Munyi, Kilonzo & Associates	Kenya
47.	Ted Wandera	M	KELIN	Kenya
48.	Walter Jaoko	M	Kenya AIDS Vaccine Initiative	Kenya
49.	Wilson Edung	M	Kenya Police Service	Kenya