

PUNITIVE LAWS AND PRACTICES AFFECTING HIV RESPONSES IN KENYA



Commonwealth
Foundation



KELIN
Reclaiming Rights, Rebuilding Lives

KELIN is a human rights NGO working to protect and promote HIV - related human rights in Kenya. We do this by: providing legal services and support, training professionals on human rights, engaging in advocacy campaigns that promote awareness of human rights issues, conducting research and influencing policy that promotes evidence - based change.

© 2014 KELIN

All rights reserved. No part of this book may be reproduced or utilized in any form or by any means without permission from the publisher.

A Publication of KELIN

P. O. Box 112 - 00202, KNH

Tel: +254 20 386 1596, 251 5790

Nairobi, Kenya

www.kelinkkenya.org

Foreword & Acknowledgements

This report was produced by KELIN with support from the Commonwealth Foundation from a grant whose main goal is to enhance the protection of the rights of people living with HIV through participatory governance. The report seeks to give an analysis of the laws and practices that are punitive and as a result hinder the effective delivery of services to Persons Living with HIV (PLHIV), and those at a risk of HIV infection. It identifies the laws and practices that violate the very rights that are guaranteed by the Constitution of Kenya 2010.

The report sets the basis of advocacy initiatives towards policy and legislative reform to ensure a rights based approach is used in service delivery to PLHIV. It is our hope that the report will serve as a basis for advocacy towards improving law enforcement practices and creating understanding of the legal and policy challenges among key stakeholders involved in their response.

The report was researched and written by Belice Odamna, with useful comments from Patrick Eba towards its development. The final report was edited by Kentice Tikolo and Allan Maleche. Regina Mwanza coordinated design, layout and production of the final report. To all of you I say thank you very much!

If you would like to discuss this report further, or if you have a matter you would like to bring to the attention of KELIN, please contact us by email at info@kelinkenya.org

A handwritten signature in black ink, appearing to read 'Allan Achesa Maleche', with a stylized flourish at the end.

Allan Achesa Maleche
Executive Director, KELIN

Table of Contents

1.0	Introduction and Background	
1.1	Background and Rationale	8
1.2	Outline of the report	10
1.3	Methodology	10
2.0	HIV, Law and Human Rights	
2.1	Understanding the Constitution in the context of HIV and Human Rights	12
2.2	Constitutional provisions and their relevance to the rights of PLHIV in Kenya	14
3.0	The punitive laws and practices with regard to HIV prevention, treatment and management	
3.1	The HIV and AIDS prevention and Control Act	18
3.2	The Sexual Offences Act	23
3.3	The Public Health Act	25
3.4	Narcotic drugs and Psychotropic substances control act	29
3.5	Defunct Municipal Council by-laws	31
3.6	Practice on mandatory HIV testing of pregnant women	35
3.7	Practice on mandatory pre-marital HIV testing	37
4.0	Conclusions and Recommendations	40

Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
ANC	Ante Natal Clinic
CAJ	Commission on Administrative Justice
CIC	Constitution for the Implementation of the Constitution
FIDA Kenya	Federation of Women Lawyers in Kenya
HAPCA	The HIV and AIDS Prevention and Control Act
HIV	Human Immuno-Deficiency Virus
IDU	Injecting Drug User
KELIN	Kenya Legal and Ethical Issues Network on HIV&AIDS
KLRC	Kenya Law Commission on the implementation of the Constitution
KNCHR	Kenya National Commission on Human Rights
MSM	Men having Sex with Men
NACC	National AIDS Control Council
NGEC	National Gender and Equality Commission
PLHIV	Persons Living with HIV
PMTCT	Prevention of mother to child transmission of HIV
SOA	Sexual Offences Act
TB	Tuberculosis
UNAIDS	The Joint United Nations Programme on HIV&AIDS
VCT	Voluntary Counselling and Testing

1

1 | Introduction and Background

1.1 Background and Rationale

According to the UNAIDS 2012 global report¹, an estimated 1.6 million Kenyans were living with HIV in 2011. This is approximately 6.2% of the adult population. Since the first AIDS cases were reported in the early 80's the epidemic has claimed the lives of at least 1.7 million people in Kenya. In 2011, an estimated 49,126 people in Kenya died of AIDS-related causes. TB remains the leading cause of death among people living with HIV. Each year, roughly 0.5% of the Kenyan adult population (or 1 out of every 200) is newly infected. In 2011, more than 91,000 Kenyan adults became infected with HIV.

The Kenyan epidemic is the fourth highest in the world in terms of the number of persons living with HIV after South Africa (5.6 million) out of a population of 50 million, Nigeria (3.3 million) out of a population of (163 million), India (2.6 million) out of a population of 1.2 billion and Kenya (1.5 million) out of a population of 41 million as at the year 2012.

Since 1984, when the first case of HIV was diagnosed in the country, Kenya has progressively developed its laws, policies and case law. The law and policies have evolved from the inclusion of a chapter on legal issues in Sessional Paper No. 4 of 1997, to the establishment of a task force on legal issues relating to HIV & AIDS in June 2001. The launch of the report of the task force in July 2002 consequently led to the drafting of the HIV & AIDS Prevention and Control Bill, 2002. The bill was passed into law in December, 2006 and became operational in February, 2009. The promulgation of the Constitution on 27 August, 2010 provided a new milestone in the field of HIV. Being the supreme law of the country, the Constitution sets standards that all other laws and policies must conform with.

In spite of the above positive developments, there have been reports that show widespread violations of the human rights of People Living with HIV (PLHIV). Sometimes, criminal charges have been brought against PLHIV for conduct that is perceived as risking transmission of HIV; they have been tested without consent and sex workers have been arrested for possession of condoms. Abusive and inappropriate law enforcement practices often affect programmatic responses to HIV by creating a barrier between the service providers and would be clients.

Punitive laws and practices are those that punish or cause unnecessary punishment and pain to the general or a particular population rather than restore law and order.

This report seeks to give an analysis of the laws and policies that are punitive and as a result hinder the effective delivery of services to PLHIV and those at risk of HIV infection. It will also flag out the laws and policies that violate the very rights that are guaranteed by the Constitution.

This report will set the basis of advocacy initiatives towards policy and legislative reform to ensure a rights based approach is used in service delivery to PLHIV. It will also serve as a basis for advocacy towards improving law enforcement practices and creating understanding of the legal and policy challenges among key stakeholders involved in the HIV response.

1.2 Outline of the report

This report is organized into four sections as shown in the table below:

No	Section	Overview
1	Introduction, background and methodology	<p>This section provides a background and the history of the HIV epidemic, including statistics. It also provides a justification for the development of this paper.</p> <p>A desk review considered several reports, publications, interviews and studies by organizations and international bodies.</p>
2	HIV, law and Human Rights	This section outlines the relevant Articles of the Constitution of Kenya (2010) and how they relate to HIV. It sets out the role of the Constitutional provisions in the prevention and control of HIV.
3	The punitive laws and practices with regard to HIV prevention, treatment and management	This section discusses the laws, policies and practices that are considered punitive and hinder the effective management and control of HIV.
4	Conclusion and Recommendations	This section discusses the actions and steps different stakeholders must take to create an enabling legal and policy environment for PLHIV

1.3 Methodology

The criteria used to identify the punitive laws and practices was guided by KELIN's experience in provision of legal and litigation support to PLHIV, especially the key populations. We also took into account media (print and electronic) reports of the numerous human rights violations that have occurred based on the continued existence of these punitive laws and practices.

The review process was done by way of desk top analysis of laws and policies relating to HIV. This involved a critical analysis of the laws and policies while linking them to the relevant best practices of HIV management and control recommended by UNAIDS and the Global Commission on HIV and the law.

2

2 | HIV, Law and Human Rights

2.1 Understanding the Law and the Constitution of Kenya (2010) in the context of HIV

The role of the law and human rights in the HIV response was first considered by the 1989 International Consultation on AIDS and Human Rights organized jointly by the then United Nations Centre for Human Rights and the World Health Organization. Increasingly the international community recognized the need for elaborating how the existing human rights principles apply in the context of HIV and how governments can protect human rights and public health in the context of HIV. International guidelines on HIV and human rights² to guide governments were developed. The issue was further emphasized at the June 2011 High Level Meeting on AIDS, held in New York, which commemorated 30 years since the emergence of the global AIDS epidemic, where world leaders reiterated their commitment to achieving universal access to HIV prevention, treatment, care and support by 2015 and eliminating discrimination against people living with HIV. In the 2011 *Political Declaration on HIV&AIDS*, adopted at this meeting, governments including Kenya committed specifically to address laws and policies that *"adversely affect the successful, effective and equitable delivery of HIV services and consider their review"*.³

The findings of the Global Commission on HIV and the Law, in its July 2012 report *'Risks, Rights & Health'*⁴ identify that the law alone cannot stop AIDS; nor can the law alone be blamed when HIV responses are inadequate. But the legal environment can play a powerful role in the well being of people living with HIV and those vulnerable to HIV. The Global Commission further noted that ".....good laws, fully resourced and rigorously enforced, can widen access to prevention and health care services, improve the quality of treatment, enhance social support for people affected by the epidemic, and protect human rights that are vital to survival and save the public money."⁵

Addressing legal barriers to effective HIV responses is a critical part of prevention, treatment and management of HIV. According to the UNAIDS 2013 global report⁶, it is recommended that countries should eliminate laws, regulations and policies which present obstacles to effective HIV prevention, treatment, care and support for key populations and vulnerable groups. UNAIDS further notes that the frequent lack of accessible legal services means that many instances of HIV-related discrimination are never addressed.

The promulgation of the Constitution of Kenya on 27 August, 2010 provided a new milestone in the field of HIV. Being the supreme law of the country, it sets out standards that all laws and policies must conform with. It has made provisions for a more expansive bill of rights which can be relied on by all including PLHIV. The Constitution at Article 2(6) provides for the reliance on provisions of treaties that Kenya has ratified and it has also outlawed all customary practices that contravene the provisions of the bill of rights.



2.2 Constitutional provisions and their relevance to the rights of PLHIV in Kenya

The following are the relevant articles of the Constitution that safeguard the rights of PLHIV:

No	Article	Provision	Relevance to HIV
1	2 (4)	Any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency , and any act or omission in contravention of the Constitution is invalid	Cultural practices that increase the risk of HIV infection or increase vulnerability to infection are unconstitutional.
2	2 (6)	Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution	Any treaty or convention which relates to HIV and has been signed by Kenya forms part of the laws of Kenya.
3	19 (3)	The rights and fundamental freedoms in the bill of rights belong to each individual and are not granted by the state	PLHIV have the right to the fundamental freedoms detailed in the Bill of Rights.
4	21(1)	It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of rights	PLHIV can hold the government accountable when it fails to honor any of its obligations regarding human rights.
5	24	A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity , equality and freedom	Ensures that government does not limit rights without justification.
6	26(1)	Every person has the right to life	Ensures that people are not denied the right to life through unjust laws, policies and practices.

No	Article	Provision	Relevance to HIV
7	27(1)	Every person is equal before the law and has the right to equal protection and equal benefit of the law	Prevents discrimination against PLHIV because of their HIV status and recognizes the rights of PLHIV to own property, to inherit, marry and even found a family.
8	28	Every person has inherent dignity and the right to have dignity, respected and protected	Calls for everyone including PLHIV to be treated with respect and dignity
9	29	Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause	Empowers PLHIV to make their own decisions about medical treatment and protects them from being treated in a cruel or inhumane manner
10	31	Every person has the right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed	Relevant in ensuring that information about a person's HIV status is kept confidential and is not released without his/her consent
11	39	Every person has the right to freedom of movement	The government cannot impose restrictive measures on the movement of anyone, including PLHIV
12	40	Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property in Kenya	A person cannot be denied the right to inherit or own property on the basis of their HIV status
13	41	Every person has the right to fair labour practices	Ensure that PLHIV are reasonably accommodated in their place of work and that their working conditions are fair; it also ensures adequate remuneration irrespective of HIV status

No	Article	Provision	Relevance to HIV
14	43	Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; accessible and adequate housing and reasonable standards of sanitation; to be free from hunger and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security and education	The right to health, education, social security, housing , water and food are all important- and these factors can prolong the life of PLHIV
15	45 (2)	Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties	PLHIV cannot be denied their right to marry on the basis of their HIV status
16	46	Consumers have the right to goods and services of reasonable quality	PLHIV are entitled to adequate drugs and quality services for the protection of their health
17	47	Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair	If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, then that person has the right to be given written reasons for the action
18	48	The state shall ensure access to justice for all persons and, if appropriate, an independent and impartial tribunal; and promote efficient administration	Many PLHIV face human rights violations and have difficulty accessing justice

It is important to note that the above mentioned articles of the Constitution can be relied on by PLHIV and those affected by HIV to assert their rights and to protect those rights.

3

3 | The punitive laws and practices with regard to HIV prevention, treatment and management

This section examines specific laws and practices that do not support the effective prevention, management, control and treatment of HIV. Recommendations will then be made to different stakeholders including the executive, legislature, county governments and development partners.

3.1 The HIV and AIDS Prevention and Control Act, 2006

In Kenya, the law and policy regarding HIV & AIDS has evolved over time from the development of Sessional Paper No. 4 of 1997 to provide a policy framework within which HIV & AIDS prevention and control would be undertaken. A task force on Legal issues relating to HIV & AIDS was established and its report launched in July 2002⁷, which consequently led to the drafting of the HIV & AIDS Prevention and Control Bill. The bill was passed into law, and became operational in February, 2009 and is known as the HIV & AIDS Prevention and Control Act (2006) (HAPCA).

This is an act of parliament which provides for the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection. Below we discuss how the provision of Section 24 of the HAPCA hinders effective HIV responses.

Section 24

(1) A person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall-

(a) Take all reasonable measures and precautions to prevent the transmission of HIV to others; and

(b) Inform, in advance, any sexual contact or person with whom needles are shared of that fact

(2) A person who is and is aware of being infected with HIV or who is carrying and is aware of carrying HIV shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.

(3) A person who contravenes the provisions of subsection (1) and (2) commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment.

(4) A person referred to in subsection (1) or (2) may request any medical practitioner or any person approved by the Minister under section 16 to inform and counsel a sexual contact of the HIV status of that person.

(5) A request under subsection (4) shall be in the prescribed form.

(6) On receipt of a request made under subsection (4), the medical practitioner or approved person shall, whenever possible, comply with that request in person.

(7) A medical practitioner who is responsible for the treatment of a person and who becomes aware that the person has not, after reasonable opportunity to do so-

a. Complied with subsection (1) or (2); or

b. Made a request under subsection (4),

May inform any sexual contact of that person of the HIV status of that person.

(8) Any medical practitioner or approved person who informs a sexual contact as provided under subsection (6) or (7) shall not, by reason only of that action, be in breach of the provisions of this Act.

KELIN in an advisory note⁸ dated 30 November, 2010 to the then Minister for Special Programs and the Attorney General outlined seven points as to why this section has a negative effect. They are summarized as follows:

- (1) The section undermines already existing HIV prevention methods as it discourages people from getting tested and finding out their status as lack of knowledge of one's status can be used as a defense in criminal cases.
- (2) The section allows medical practitioners to disclose the HIV status of their patients to other sexual contacts; this will interfere with the delivery of health care and will frustrate the efforts of people from coming forward for testing as they may fear that information regarding their HIV status may be used against them in the criminal justice system.
- (3) The section promotes fear and stigma as it imposes a stereotype that PLHIV are immoral and dangerous criminals.
- (4) HIV prevention efforts are better advanced by information and education at the community level and the willingness to confront issues that contribute to high HIV prevalence and incidence among vulnerable and key populations rather than by the prosecution of suspected violators of Section 24.
- (5) In cases when individuals purposely or maliciously transmit the virus with the intent to harm others, they should face the law. However, in these extreme cases, best practice now indicates that the appropriate framework for processing such cases is the general criminal law rather than the HIV law.
- (6) Placing a legal responsibility exclusively on the PLHIV for preventing transmission of the virus undermines the public health message that everyone should practice safe behaviors regardless of their HIV status.

- (7) The application of the section oppresses women as the law is likely to be used to prosecute women more often than men as women are more likely to know their HIV status before their partners due to the HIV testing policy that compels all pregnant women to undergo HIV tests. The women are likely to be blamed by their intimate partners, families and communities for "bringing HIV into the home". This will increase the HIV related violence against women, increase evictions, ostracism, loss of property and inheritance and loss of child custody by women living with HIV.

Further to the seven points above, UNAIDS in their 2013 publication "Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations"⁹ recommends that any application of criminal law to HIV non-disclosure, exposure or transmission should take into account the following among others:

- 1) In the absence of the actual HIV transmission of HIV, the harm of HIV non-disclosure or exposure is not significant enough to warrant criminal prosecution. Non-disclosure of HIV-positive status and HIV exposure should therefore not be criminalized.¹⁰
- 2) Where criminal liability is extended to cases that do not involve actual transmission of HIV, such liability should be limited to acts involving a "significant risk" of HIV transmission.¹¹
- 3) Proof of intent to transmit HIV in the context of HIV non-disclosure, exposure or transmission should at least involve (i) knowledge of HIV positive status, (ii) deliberate action that poses a significant risk of transmission, and (iii) proof that the action is done for the purpose of infecting someone else.¹²

Man who spread Aids gets 15 years

BY NATION CORRESPONDENT

A middle-aged man has been imprisoned for 15 years for deliberately transmitting HIV.

Gilbert Kiptoo Barbos infected a woman he had intercourse with with Aids.

He faced three charges, among them intentionally and wilfully having unprotected sex with the complainant aware that he was HIV positive and that doing so was likely to lead to her being infected with the deadly virus.

Rape and theft

The offence happened on September 2, 2013, at Chelemetio Bar and Lodging in Iten Town.

Barbos was further charged before Iten senior resident magistrate Rose Ndombi with rape and theft.

The accusation was that he raped the complainant promising to secure her employment.

Run concurrently

The accused was acquitted of the rape charge but convicted of theft and jailed for six months.

The sentences will run concurrently.

He has 14 days to appeal against the sentences.

- 4) Disclosure of HIV positive status and/or informed consent by the sexual partner of the HIV positive person should be recognized as defenses to charges of HIV exposure or transmission.¹³
- 5) Scientific and medical experts called in HIV-related criminal matters should be properly qualified and trained to highlight accurately the merits and limitations of data and evidence relating to the risk, harm and proof of HIV transmission (among other issues).¹⁴
- 6) Any penalties for HIV non-disclosure, exposure and transmission should be proportionate to the state of mind, the nature of the conduct, and the actual harm caused in the particular case, with mitigating and aggravating factors duly taken into account.¹⁵
- 7) Police and prosecutorial guidelines that address key issues – including intent, risk, harm and proof – should be developed in every jurisdiction where criminal law is applied to HIV non-disclosure, exposure or transmission.
- 8) Given the fact that HIV and other sexually transmitted infections involve complex human behaviour – as well as scientific and medical considerations – police, prosecutors and judges should receive appropriate training that is based on the most up-to-date science and medicine to ensure that they have adequate knowledge and understanding of HIV.

On 7 April, 2011 the High Court sitting in Nairobi delivered a ruling on an application filed by AIDS Law Project in Nairobi HC Petition No. 97 of 2010, AIDS Law Project v The Attorney General & Another (2011)¹⁶ seeking to stop the enforcement of Legal Notice No. 180 of 5 November, 2010 which sought to operationalize Section 24 of HAPCA. The court declined to grant the orders sought reasoning that granting the orders or failing to do so would likely cause prejudice. The court advised that the main petition be set down for hearing to deal with the issue conclusively. The matter is still in court.

3.2 The Sexual Offences Act (2006)

The Sexual Offences Act (SOA) makes provisions about sexual offences, their definition, prevention and the protection of all persons from harm and unlawful sexual acts. Below we discuss Section 26 of the SOA and its effects on proper HIV responses.

Section 26 (1) provides:

Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—

- a) will infect another person with HIV or any other life threatening sexually transmitted disease;*
- b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;*
- c) will infect another person with any other sexually transmitted disease,*

Shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.

Section 26 (1) if read together with Section 43 (3) (c) which provides

(3) False pretenses or fraudulent means, referred to in subsection (1) (b), include circumstances where a person—

- c) Intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmittable disease.*

Section 26 (2) provides

Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct, for the purpose of ascertaining whether or not he or she is infected with HIV or any other life threatening sexually transmitted disease.

In this section, even where one takes precaution like use of a condom, to reduce the chances of infecting another person, and does not actually infect the other party one is still likely to be prosecuted under section 26 (1) (b). This section not only talks of HIV infection but also mentions other sexually transmitted diseases and one can be prosecuted for transmitting or attempting to transmit a sexually transmitted disease.

Further, it brings in the aspect of marriage by stating that one can be prosecuted under section 26 (1) whether or not they are married to the sexual contact.

Unlike Section 24 of the HAPCA which requires the person who is living with HIV to take reasonable measures and precautions to prevent transmission, and inform their sexual contacts of their status in advance, section 26 of the SOA does not give such options. The emphasis on section 26 is the commission of the act of putting one at a risk of getting infected, not taking into account whether ones gets infected or not.

Section 26 (7) provides

Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

- a) The state*
- b) any Minister; or*
- c) any medical practitioner or designated persons,*

The effect of this section is that a person who feels aggrieved by the application of Section 26 (2) to their person cannot institute a claim against the state, minister or the medical practitioner for the damages suffered as a result of the application of that section.

A magistrate's court sitting in Lowdar on 30 June, 2012, convicted a person under the provisions of Section 26 of the SOA. This happened in criminal case number 99 of 2011 Republic versus Peter Erukudi and Mary Itoot Ebenyo (un reported). The case involved and accused person who was involved in a gang rape incident. During the proceedings it was revealed by the co-accused that she knew that the first accused was HIV positive. Medical records submitted to the court indicated

that the complaint was HIV positive and infected with syphilis. The test were done after the rape incident by a government doctor. It's on the basis of this that the court convicted the 1st accused to a life sentence under the provisions of Section 26(1)a of the SOA in addition to a conviction for gang rape. The accused persons have filed an appeal against this decision before the high court sitting in Lodwar. The appeal is scheduled to be heard on the 24 September, 2014.

In view of the arguments against Section 24 of HAPCA and Section 26 of the SOA and their possible effects to the population, KELIN recommends that:

- (1) Creation of an HIV specific offence increases HIV related stigma as PLHIV are seen as potential criminals and the population would not go out for testing in fear of being branded as criminals.
- (2) If HIV related provisions criminalizing the transmission of HIV are necessary, they should be based on principles of proportionality, foreseeability, intent, causality and non-discrimination. The same should be informed by the most-up-to-date HIV related science and medical information.
- (3) The development of the law on willful transmission should be left to develop from practice by the courts, based on a case-to-case basis.
- (4) Civil Society Organizations should challenge the constitutionality of the provisions of sections 24 and 26 of the HAPCA and SOA provisions respectively in court.
- (5) The Kenyan Parliament should repeal Section 24 of the HAPCA and Section 26 of the SOA.

3.3 The Public Health Act

It is an act of parliament to make provisions for securing and maintaining health. The act has been in force since 6 September, 1921 and has undergone numerous amendments since it came into force. Below we discuss Section 27 of the Public Health Act and its effects on TB treatment, care and prevention.

Section 27 of the act provides:

Where, in the opinion of the medical officer of health, any person has recently been exposed to the infection, and may be in the incubation stage, of any notifiable infectious disease and is not accommodated in such manner as adequately to guard against the spread of the disease, such person may, on a certificate signed by the medical officer of health, be removed, by order of a magistrate and at the cost of the local authority of the district where such person is found, to a place of isolation and there detained until, in the opinion of the medical officer of health, he is free from infection or able to be discharged without danger to the public health, or until the magistrate cancels the order.

Section 28 of the act provides:

Any person who—

- (a) while suffering from any infectious disease, willfully exposes himself without proper precautions against spreading the said disease in any street, public place, shop, inn or public conveyance, or enters any public conveyance without previously notifying the owner, conductor or driver thereof that he is so suffering; or*
- (b) being in charge of any person so suffering, so exposes such sufferer; or*
- (c) gives, lends, sells, transmits or exposes, without previous disinfection, any bedding, clothing, rags or other things which have been exposed to infection from any such disease, shall be guilty of an offence and liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding three years or to both; and a person who, while suffering from any such disease, enters any public conveyance without previously notifying the owner or driver that he is so suffering shall in addition be ordered by the court to pay such owner and driver the amount of any loss and expenses they may incur in carrying into effect the provisions of this Act with respect to disinfection of the conveyance:*

Provided that no proceedings under this section shall be taken against persons transmitting with proper precautions any bedding, clothing, rags or other things for the purpose of having the same disinfected.

Section 27 of the Public Health Act gives the public health officer the authority to remove and request for the isolation of persons who have been exposed to infection or may be in the incubation stage of an infectious disease while section 28 provides for the penalty for exposure to infectious substance.

According to court documents and media reports, the two sections have in the past been used to unconstitutionally incarcerate tuberculosis "TB" patients for "failure to adhere" to TB treatment. The patients are arraigned in court and convicted for up to seven or eight months or until the satisfactory completion of their TB treatment.¹⁷

The manner and conditions of the incarceration endanger the patients' and prison population health. In any event, the prison conditions are ideal for the rapid transmission of TB, thereby placing the public, including the prisoners, at extremely high risk of infection. Further, the Kenyan prisons do not have isolation or medical facilities where proper care and treatment of TB patients can be done.

¹⁸

According to the TB Human Rights Task force which was established by the Stop TB Partnership in a working document¹⁹ on TB and Human Rights, TB is a leading killer among people living with HIV, accounting for 26% of HIV associated deaths worldwide. They further document that the leading cause of death amongst prisoners across the world is TB and that poor prison conditions including overcrowding, poor ventilation, hygiene and poor nutrition fuel TB transmission and reactivation. Based on the above it's evident that prison would not be the ideal place to isolate TB patients for treatment purposes.

In responding to TB from a human rights perspective, KELIN has secured the release of TB patients from prison. The High Court sitting in Eldoret in Petition No. 3 of 2010 Daniel Ng'etich & Another v The Attorney General & Others (Unreported)²⁰ while giving an order for the release of the petitioners, observed that the action to have them imprisoned was unconstitutional and not in compliance with the Public Health Act that it was purportedly grounded on. Similarly, in the High Court sitting in Embu in Miscellaneous Criminal Application No. 24 of 2011 Simon Maregwa

Githiru v Republic (unreported)²¹ where the applicant was convicted for willfully exposing and spreading infectious disease (tuberculosis) contrary to section 28 of the Public Health Act. The Court in ordering the release of the applicant wondered why the lower court did not empathize with the applicant who was a TB patient and considered the wide range of non-custodial sentences provided in law.

KELIN in response to the numerous reports of conviction and incarceration of TB patients both in print and electronic media²² has intervened to have some patients released from prison and isolated for the duration they are infectious, either at home or in health facilities for purpose of treatment. In addition, on 8 September, 2010 KELIN together with other civil society organizations wrote an advisory note²³ to the Government of Kenya through select Cabinet Ministers and made recommendations on the subject. The recommendations can be summarized as:

1. Public health policy makers and officers need to combine medical and socio- cultural aspects of TB patient empowerment and community mobilization to ensure effective behaviours in the management of infectious and other diseases.
2. It is important to use a patient and community centered approach, as clearly spelt out in the Stop TB Strategy²⁴, which calls for empowering TB patients and communities in the management, control and treatment of TB.
3. Government ministries should ensure the prudent utilization of resources availed to the country to help improve the standard of care of persons who have infectious diseases.
4. There is evidence that community based programmes for TB care work, and the government should adopt programming that upholds both public health and human rights since they are not mutually exclusive.

3.4 The Narcotic Drugs and Psychotropic Substances Act

This Act was assented into law on 8 July, 1994 and commenced operation on 26 August, 1994. The objective of the act is to make provisions with respect to the control of the possession of, and trafficking in, narcotic drugs and psychotropic substances and cultivation of certain plants; to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances.

According to Open Society Foundations, in their recent publication *Bringing Justice to Health*²⁵, the Coastal towns of Lamu, Malindi and Mombasa are the epicenters of Kenya's injection drug use epidemic. The National AIDS Control Council (NACC) estimates that people who use drugs account for 3.8 percent of new HIV infections in the country. The Kenyan government has favoured criminalization over treatment in dealing with the drug using population.

In February, 2011, NACC announced a plan to address HIV prevention and treatment as part of a comprehensive national program of care and treatment of injecting drug users. This plan was endorsed during a national stakeholders meeting for government, civil society and key bilateral and international organizations. An action plan to address HIV prevention was adopted. The comprehensive package for HIV prevention was endorsed by a workshop for members of parliament, also convened by NACC.²⁶

Despite the endorsement of the plan, which included provision of clean and sterile needles and syringes to those who inject drugs and the roll out of the same, law enforcement officers have continued to arrest and charge outreach workers who have been assigned the duty of providing the IDUs with the clean syringes and needles. This was clear and evident during the Regional Capacity Building workshop for senior law enforcement officers on HIV, Human Rights and the Law held in Nairobi from 17th -19th July, 2013. The workshop was co-organized by KELIN with support from UNDP and the UN Joint Programme on HIV in Kenya. From the testimony of a former IDU²⁷ and now an outreach worker, it was clear that police raids and arrests of outreach centers and workers affect the delivery of services to IDUs. Those raids keep interveners away from the drug dens and

also keep the IDUs away from the centers; the IDUs then share contaminated needles and syringes. This was corroborated by the Executive Director of Reach Out Centre, an organization that works on harm reduction and HIV programmes for IDUs. He noted that police raids and arrests frequently hamper intervention efforts.²⁸

Section 5 (1) (b) & (d) reads:

1) *Subject to this Act, any person who—*

b.) without lawful and reasonable excuse, is found in any house, room or place to which persons resort for the purpose of smoking, inhaling, sniffing or otherwise using any narcotic drug or psychotropic substance; or

d.) has in his possession any pipe or other utensil for use in connection with the smoking, inhaling or sniffing or otherwise using of opium, cannabis, heroin or cocaine or any utensil used in connection with the preparation of opium or any other narcotic drug or psychotropic substance for smoking,

Shall be guilty of an offence and liable to a fine of two hundred and fifty thousand shillings or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

Section 5 (1) (b) & (d) have been and can be used to bring criminal charges against people giving services aimed at reducing the harm caused to the health of injecting drug users.

The danger in the implementation of this section is that while harm reduction practices like provision of clean syringes and needles to the injecting drug users is encouraged, many a times police arrest and charge those providing these services under the above named sections.

According to UNAIDS 2013 Global Report²⁹, amongst the recommended services for prevention of new HIV infections among people who inject drugs are HIV testing and counselling, sterile injecting equipment (through needle and syringe programmes) opioid substitution therapy, antiretroviral therapy and other health and social services.

KELIN recommends that the government should invest in programmes that promote safe practices for people who inject drugs including harm reduction, counselling, education, behavioural interventions and access to condoms to prevent sexual transmission. At the same time, when such programmes are rolled out, the law should protect those who provide the services as well as their clients.

3.5 Defunct Municipal Council by-laws

Section 21 of the County Governments Act (2012) as read together with Article 185 of the Constitution of Kenya gives County Assemblies legislative power to pass bills into law which bills shall be assented to by the Governor.

Before the Constitution of Kenya (2010) that created the county governments, there existed municipalities which had powers to come up with by laws. Schedule Six of the Constitution of Kenya (2010) at Part 2 on existing obligations, laws and rights provides that all laws that were in force immediately before the effective date of the Constitution shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. It follows then that the County assemblies shall either create their own laws or adopt the by-laws that were used by the defunct Municipal Councils.

Most of the Municipal by laws outlawed "loitering for the purposes of prostitution", "importuning" for the purpose of prostitution and "indecent exposure", therefore criminalizing sex work. FIDA Kenya in a report³⁰ entitled "Documenting the violations of sex workers in Kenya" reported that one of the major violations faced was lack of access to health services and support. They noted that sex workers are not provided with even the most basic forms of peer education and HIV prevention.

The following by laws illustrate how the law was and has continued to be used to prevent the implementation of programs that provide HIV prevention and treatment services to sex workers.

HIV/AIDS Report on new infection trends

Study reveals major drivers of Aids pandemic

Continental Times PT

Macharia, had released preliminary findings of the Kenya AIDS Indicator Survey, 2012, promising a detailed public report by December.

But to what looks to be a disappointment from the past, the ministry with assistance from UN agencies is to publish the detailed scholarly report through a special supplement in the May issue of the *Journal of Acquired Immune Deficiency Syndromes*.

The 137-page report from 18 districts studies is primarily in agreement with the earlier announcement by Mr Macharia indicating the national HIV prevalence rates have declined from 7.2 per cent in 2007 to 5.8 per cent in 2012.

The report also confirms that the disease has declined in Mombasa, Nairobi and parts of Rift Valley, as had been reported by Macharia in September.

The preliminary report had been criticised for not explaining what was driving these changes, especially in Mombasa.

The rise of infections in Mombasa to twice the national prevalence rate was confounding because the region has some of the highest and most aggressive control programmes including male circumcision.

In addition, many of the respondents live at the possibility that the

survey will also be promising to find out certain in the public sector.

"We are pleased to present this special supplement highlighting the key findings of KASIS 2012, which coincides with the release of the Kenya Ministry of Health's definitive report for the survey," says the three top doctors behind the supplement.

The three are Dr Kevin M De Cock of the US Centers for Disease Control and Prevention (Atlanta), Dr George W Rutherford, University of California and Dr Wella Alimwani of the Ministry of Health.

The report says well-known risk groups such as male and female prostitutes and drug injectors are still a major risk factor in the spread of HIV. "Prevalence among female sex workers has been estimated to range from 28.1 per cent in Nairobi to 36.3 per cent in Kisumu."

To reduce the harm living with these groups in the spread of the disease, the authors suggest they be given financial incentives to abstain from trade.

Such incentives should include engaging them in small-scale businesses as well as giving them cash handouts to wear them from the streets," recommends one of the papers.

The detailed report of the study that cost \$792.7 million attributes declines in Nairobi, Rift Valley and the Coast to lower infections among



REASONS BEHIND HIV SPREAD IN CENTRAL

The study attributes a spike in Central Kenya to middle-aged and older women, 35 years and above.

The study also found to be high among widowers, separated persons and divorced women.

Widowers, in emerging, are having badly and present a significant threat in spreading the Aids causing virus.

The report says prostitutes are still a major risk factor in the spread of HIV. (PHOTO FILE/UNISOURCE)

"HIV prevalence, however, increased significantly among women residing in Central region, from 3.1 per cent in 2007 to 8.3 per cent 2012," says the authors without explaining why this is happening.

Infection was also found to be high among widowers, separated persons and divorced women.

SERIAL SEXWORK

It is suggested that widowers are having badly and present a significant threat in spreading the Aids causing virus. The report depicts this group of men as having a party after the death of their spouses and in the meantime thereby sharing the virus.

"We have also demonstrated that widowers are more likely to engage in high-risk sexual behaviour after the death of their spouses and contribute significantly to new HIV infections in the population."

Prostitution, severely made worse for

men through the Marriage Bill, was turned out to be counterproductive for all parties promising multiple times of HIV infections.

While data shows more per cent of those in non-monogamous relationships to be HIV-positive, this jumps to 1.1 per cent among those in polygamous relationships. About 1.8 million are those who are living in polygamous marriages or unions compared to about 700,000 households in similar unions.

Even in Kisumu where the authors say data circumstances have taken off considerably, the study fails to show a direct link between the practice and a slowing down of infections.

The team wants more money to be put into scaled-up risk reduction programmes to cover areas, young men entering into adulthood as well as seeking better education, a more prudent in maternal and child health care.

22nd April, 2014 - The East African Standard

Section 258 (m) and (n) of the then Mombasa Municipal Council by laws (2003) provided:

Any person who shall in any street or public place

m) Loiter or importune for the purposes of prostitution

n) Procure or attempt to procure a female or male for the purposes of prostitution or homosexuality Shall be guilty of an offence

Part VIII of the then Kisumu Municipal Council by laws deals with public health concerns and describes "nuisances" as offences in the following two categories:

m) Molest, solicit or importune any person for the purposes of prostitution or loiter on any street or public place for such purposes; or

n) Willfully and indecently expose his person in view of any street or public place.

The Kisumu by laws introduce the offence of "molesting for purposes of prostitution" in the same section that covers "soliciting for prostitution". Sections of the by law, specifically (n) concerning "indecent exposure" are vague and are used to arrest sex workers for the way they dress.

Offences relating to sex work in municipal by laws provide police officers with broad justification to arrest sex workers for 'loitering for purposes of prostitution'. These vague laws were often left to the imagination and discretion of the arresting officers for interpretation.

These provisions and actions of police officers have in the past hindered strategic interventions like moonlight VCTs and HIV health care services targeting sex workers in various towns with the same provisions in Kenya. According to the Open Society Foundations, in their publication titled '10 reasons to decriminalize sex work'³⁷, the repeal or amendment of these laws that are punitive and criminalize sex work would ensure the following:

1. Respect for human rights and personal dignity
2. Reduction in police abuse and violence on sex workers
3. Increase in sex workers' access to justice
4. Increase in access to health services
5. Reduces sex workers' risk of HIV infection
6. Challenges stigma and discrimination and the consequences of having a criminal record
7. Facilitates effective responses to trafficking of persons
8. Challenges state control over bodies and sexuality

Criminal laws contribute to social marginalization through the imposition of legal penalties on sex workers prosecuted for specific acts, but also through the assignment of criminal status to all sex workers, regardless of any particular arrest, charge or prosecution.³² The condemnation brings in widespread discrimination, stigma and ill treatment in social institutions and services by health providers, police and the general public.

These sections of the by laws as read together with Sections 153³³ and 154³⁴ of the Penal Code have been wrongly applied and interpreted by police officers to mean that sex work is criminalized.

UNAIDS recommends that ensuring universal access to comprehensive HIV services for sex workers should be a central component of policies related to sex work.³⁵

In the report, based on the findings, FIDA gave a recommendation that the government should support appropriate and quality health programs, including HIV prevention, for sex workers using evidence-based and human-rights based approaches.

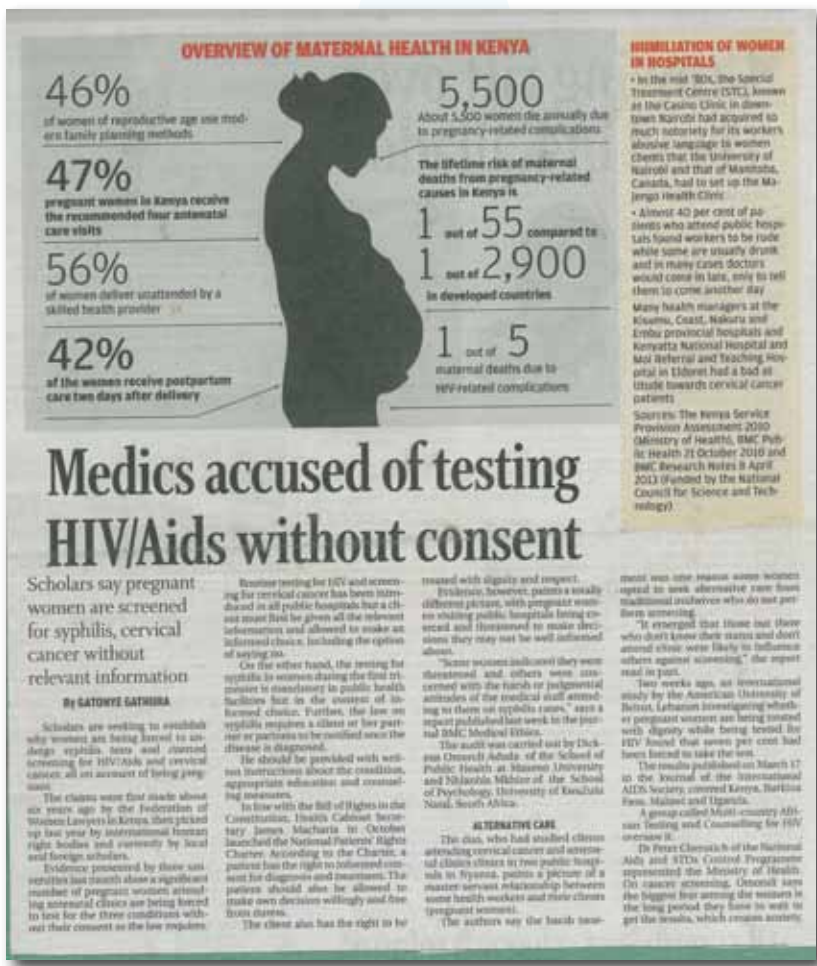
On 4 June, 2009 two ladies filed a case in the High Court at Mombasa HC Petition No. 286 of 2009 Lucy Nyambura & Another v Town Clerk, Municipal Council of Mombasa & 2 others (2011)³⁶. The Petition sought to declare Section 258 (m) and (n) of the Mombasa Municipal by-laws (as above) unconstitutional. The Court declined to grant the order citing lack of jurisdiction and the principal of separation of powers saying that the court cannot issue orders directing the State Law Office on how to advise the Local Government Minister regarding making the making of by – laws in municipalities.

It is our recommendation that while legislating on public order, the county governments should avoid laws and policies that violate the human rights of sex workers and prevent them from accessing HIV prevention and control services.

3.6 Practice of mandatory HIV testing of pregnant women

HIV infection emerged in Kenya as a serious health risk factor for mothers and their children.

The Kenyan government through its Guidelines for the prevention of mother to child transmission (PMTCT) of HIV/AIDS in Kenya, 4th Edition³⁷, encourages all pregnant women to know their HIV status.



2 April, 2014 - The East African Standard

It has been proven that it is only when the status of pregnant women is known that an opportunity is created for preventing new paediatric HIV infections. The government has given guidelines³⁸ on how HIV testing and counselling should be carried out during pregnancy. The guidelines are as follows:

1. All pregnant women of unknown HIV status should be offered opt-out testing at the first ANC visit.
2. Women who decline HIV testing at the first antenatal visit should have follow up counseling at subsequent visits, and offered HIV testing.
3. Women presenting in labor without documented HIV testing should have opt-out testing done urgently.
4. All facilities providing antenatal and maternity care must have capability for providing HIV testing at all hours of operation.
5. Postnatal HIV counseling and testing should be offered to all women with unknown HIV status.

From the above provisions, it is clear that the guidelines envision a situation where the informed consent of the pregnant women is sought before the HIV tests are done. However, in recent reports in the print media³⁹ after an audit was carried out, medical professionals have been accused of testing pregnant women for HIV, syphilis and cervical cancer without their informed consent.

It is our recommendation that medical professionals adhere to the provisions of Article 31 of the Constitution of Kenya (2010), the National Patients Charter⁴⁰ and Section 14 of HAPCA which gives the patient the right to informed consent for diagnosis and treatment: they should be allowed to make decisions willingly and free from duress.

3.7 Practice of mandatory pre-marital HIV testing

The health guidelines in Kenya and HAPCA call for voluntary HIV testing. A number of churches and mosques have adopted mandatory pre-marital HIV testing practices. Most churches and mosques require couples to submit to pre-marital HIV tests and will discourage a marriage between an HIV positive person and an HIV negative partner.

The Constitution of Kenya (2010) at Article 45 guarantees the right to marry and does not impose any limitations to that right. Therefore, one's health or HIV status should not be used to deny them the right to marry. The right to marry encompasses the right of men and women of the age of majority, without any limitation and entitles them to equal rights during the marriage and at its dissolution.

The state has a duty to protect the family as the fundamental group unit of society. Therefore, it is clear that by imposing a rule requiring mandatory pre-marital testing and/or requirement of "AIDS Free Certificates" as a pre-condition for the grant of marriage licenses is unconstitutional. The right to privacy encompasses an obligation to respect physical privacy, including the obligation to seek informed consent to HIV testing and privacy of information.

Mandatory pre-marital HIV testing may have negative public health consequences by making couples feel deceptively secure if they both test negative before marrying. It also increases stigmatization of people living with HIV as those who test positive face increased stigmatization in nearly every aspect of life including employment, societal and family life. All these defeat the public health goals of mandatory pre-marital HIV testing and violate the most basic principles of human rights like the right to marry and found a family, right to privacy and bodily integrity.

According to the Open Society Foundations in a report titled "Mandatory pre-marital HIV testing: An overview"⁴¹ governments should identify and stop the practice and ensure that it is prohibited in law and policy. There is also need for advocacy and dialogue to the churches to take into account the provisions of Section 13 (2) of HAPCA which prohibits compulsory HIV testing as a precondition to or for the continued enjoyment of several rights, including marriage. It is our recommendation therefore that churches and religious institutions respect the law and shun the practice requiring a negative HIV status as a condition of marriage and guarantee access to voluntary HIV counselling and testing for couples intending to marry.



4

4 | Conclusions and Recommendation

The impact of the implementation of discriminative laws and policies cannot be overemphasized. It negates the key interventions put in place to effectively respond to HIV in Kenya.

In the preceding sections, this paper has given some recommendations and policy considerations that policy and law makers should bear in mind while making laws and policies that directly and indirectly affect HIV prevention, control and management. Additionally, policy and lawmakers should be guided by the following broad recommendations:

1. Protect against discrimination and protect privacy of the person.
2. Address underlying causes of vulnerability to HIV infection and risk activities.
3. Ensure access to HIV testing, counselling and support for risk reduction.
4. Support programmes that seek to reduce the harm for key populations⁴² including IDUs, MSMs and sex workers to HIV infection.
5. Ensure access to antiretroviral following exposure to the virus.
6. Ensure access to TB treatment for all.
7. Repeal and amend laws that impede HIV prevention, care, treatment and support.

The following areas are recommended as priority action points for different stakeholders.

4.1 National and County Governments

4.1.1 National and County Planning

1. The government should develop national and county specific plans to define priorities for creating an enabling legal environment for HIV responses.
2. People living with HIV and key populations should be represented at national and county planning processes related to HIV and legal environments.

4.1.2 Law Reform

1. Sensitization of the judiciary, religious leaders, legislators, law enforcement officers and key policy makers on HIV-related law reform and human rights issues using peer-based approaches.
2. Review and repeal laws that criminalize or discriminate against people living with HIV and key populations.
3. HIV specific laws that criminalize HIV transmission, exposure to HIV or failure to disclose HIV status should be reviewed and repealed and in the exceptional cases where criminal liability arises, cases of intentional transmission of HIV should be prosecuted under the general criminal law, not HAPCA or SOA.
4. Remove legal barriers to condoms, comprehensive and age appropriate sex education, sexual and reproductive health services, needle and syringe programmes, effective drug dependence treatment and other evidence based HIV prevention responses.
5. Drug control legislation should be amended to support a response to drug use as a health issue, rather than a criminal justice issue.

4.1.3 Law Enforcement and prisons

1. Police services should ensure that key populations are not targeted by police for harassment, abuse, blackmail or violence. Protocols should be developed between law enforcement agencies, HIV prevention and harm reduction programmes that require the police not to harass staff or clients.
2. The practice of confiscating condoms and syringes for use as evidence, or destroying condoms and information resources on safe sex and safe injecting should be prohibited.
3. Prosecuting authorities should be educated about the social and scientific dimensions of HIV transmission so that prosecution of PLHIV does not occur for acts where the risk of transmission is extremely low or negligible.

4.1.4 Capacity building of the legal sector

1. Government should ensure that police, judges, magistrates and prison officers have access to evidence-based information on HIV and the harmful public health impacts of punitive laws and law enforcement practices.
2. Judicial leadership programmes on HIV, law and human rights should be supported.
3. Human rights institutions such as the Kenya National Commission on Human Rights (KNCHR), Commission on Administrative Justice (CAJ), and National Gender and Equality Commission (NGEC) should be supported to provide leadership on HIV related issues.
4. HIV should be mainstreamed in policies related to operations of prisons, courts, police and legal aid services.

4.1.5 Legal literacy, legal aid and access to justice

1. Both national and county governments should support legal literacy trainings and campaigns for people living with HIV, sex workers, men having sex with men (MSMs) and IDUs and support community-based education regarding HIV related human rights.
2. Governments should provide access to legal aid for people living with HIV and those at a risk of contracting HIV including key populations who have experienced human rights violations.

4.2 Civil Society Organizations

1. Hold government accountable to their human rights commitments under the provisions of the Constitution and other relevant statutes in the context of HIV.
2. Develop and implement rights based HIV-related programs to ensure those living with and affected by HIV enjoy their rights.
3. Mobilize people living with HIV and key populations to be represented in law and policy reform processes.
4. Monitor and document human rights violations
5. Participate in law and policy reform

4.3 Constitutional Bodies (KNCHR, CAJ, NGEC, CIC, KLRC)

1. Promote respect for human rights and develop a culture of human rights.
2. Promote freedom from discrimination of PLHIV and key populations.

3. Monitor, facilitate and advise the government on the integration of principles of equality and freedom from discrimination in all national and county policies, laws and administrative regulations in all public and private institutions.
4. Investigate on their own initiatives, or on the basis of complaints, any violations of the rights of PLHIV and key populations.

4.4 Donors

1. Fund action on HIV related law reform, law enforcement and access to justice programmes.

4.5 Media

1. Provide forums and platforms to initiate discussions about the danger of the punitive laws in the HIV response.
2. Be responsible in reporting of cases related to HIV and TB in a manner that respects the right to confidentiality of PLHIV.

END NOTES

1. The UNAIDS 2012 Global Report available at http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/UNAIDS_Global_Report_2013_en.pdf accessed on 3rd April, 2014
2. UNAIDS, International Guidelines on HIV & AIDS and Human Rights; Consolidated Version (2006) UN Publication. Available at http://data.unaids.org/publications/irc-pub07/jc1252-internguidelines_en.pdf Accessed on 22nd May, 2014.
3. UNAIDS, International Guidelines on HIV & AIDS and Human Rights; Consolidated Version (2006) UN Publication. Available at http://data.unaids.org/publications/irc-pub07/jc1252-internguidelines_en.pdf Accessed on 22nd May, 2014.
4. The Global Commission on HIV and the Law was launched in June 2010 to develop actionable, evidence-informed and human rights based recommendations for effective HIV responses that promote and protect the human rights of people living with and most vulnerable to HIV. The report is available at <http://kelinkkenya.org/wp-content/uploads/2010/10/FinalReport-RisksRightsHealth-EN.pdf> . Accessed on 3rd April, 2014
5. Ibid note 4 page 11
6. Supra note 1
7. The Taskforce on Legal Issues relating to HIV & AIDS established on 22nd June, 2001 Vide Gazette Notice No. 4015. This was done by the Attorney General after the declaration of HIV as a national disaster and the establishment of the National AIDS Control Council. It was also backdrop of the need to examine the legal and ethical questions that had arisen in the wake of HIV & AIDS.
8. Advisory Note to Minister for Special Programmes and Attorney General dated 30th November, 2010. Available at <http://kelinkkenya.org/wp-content/uploads/2010/12/Advisory-Note-on-Section-24-of-HAPCA.pdf> . Accessed on 3rd April, 2014
9. UNAIDS, Ending overly broad criminalization of HIV non- disclosure , exposure and transmission: Critical scientific , medical and legal considerations, 2008, Page 3
10. Ibid, Page 15
11. Ibid, Page 20
12. Ibid, Page 26

13. Ibid, Page 31
14. Ibid, Page 34
15. Ibid, Page 36
16. The ruling can be found at <http://kenyalaw.org/newsletter/20110422.html>. Accessed on 28th April, 2014.
17. AWW, Programme Assistant- Patrick Kang'ethe, Evidence Gathering Interview, King'ong'o GK Prison, Nyeri, May 2014.
18. PGM & EW, Programme Assistant- Patrick Kang'ethe, Evidence Gathering Interview , Kiambu GK Prison, Kiambu, May 2014
19. See , among others, TB Human Rights Task Force "Working Document on TB and Human Rights" available at <http://www.stoptb.org/global/hrtf/> accessed on 4th April, 2014
20. Ruling can be accessed at <http://kelinkenya.org/wp-content/uploads/2010/10/Ruling-on-Petition-No.-3-of-2010.pdf> last accessed on 8th May, 2014.
21. Ruling can be accessed at <http://kelinkenya.org/wp-content/uploads/2010/10/Misc-Criminal-App-No.-24-of-20111.pdf> last accessed on 8th May, 2014.
22. See, among others, Nyeri man jailed for failing to take TB medicine, 16th May, 2014 <http://www.nation.co.ke/lifestyle/health/Nyeri-Man-jailed-for-failing-to-take-TB-medicine/-/1954202/2317394/-/15048do/-/index.html> Accessed on 23 May, 2014
23. KELIN et al 'Advisory opinion on Arrest and imprisonment of Daniel Ng'etich and Patrick Kipng'etich Kirui in Kapsabet for defaulting in taking of their tuberculosis (TB) treatment – Misc. Criminal Case Number 46 of 2010. Available at <http://kelinkenya.org/wp-content/uploads/2010/10/Advisory-Note-on-Arrest-of-TB-Patients-in-Kapsabet.pdf> accessed on 4 April, 2014.
24. See among others the WHO, Stop TB Strategy (2006-2015) available at http://www.who.int/tb/strategy/stop_tb_strategy/en/ Accessed on 4th April, 2014.
25. Open Society Foundations. Bringing Justice to health: The impact of legal empowerment projects on public health (2013)
26. United Nations Office on Drugs and Crime, "Kenya government to provide HIV services for people who inject drugs" <https://www.unodc.org/unodc/en/hiv-aids/about-kenya.html> Accessed on 23 May, 2014
27. KELIN, Report on the "Regional capacity building workshop for senior law enforcement officers on HIV, Human Rights and the Law", 2013. Page 10 <http://kelinkenya.org/wp-content/uploads/2010/11/REGIONAL-CAPACITY-BUILDING-WORKSHOP.pdf> Accessed on 23rd May, 2014

28. Ibid Page 11
29. The UNAIDS 2013 Global Report available at http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/UNAIDS_Global_Report_2013_en.pdf accessed on 4 April, 2014
30. FIDA Kenya. Documenting human rights violations of sex workers in Kenya: A study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi (2008)31
31. Open Society Foundations, 10 Reasons to decriminalize sex work: A reference brief, New York.
32. Csete J and Cohen J (2010). Health benefits of legal services for criminalized populations: The case of people who use drugs, sex workers and sexual and gender minorities. *Journal of Law, Medicine and Ethics*, 38: 816 -828.
33.
 - (1) Every male person who
Knowingly lives wholly or in part on the earnings of prostitution ; or
In any public place persistently solicits or importunes for immoral purposes, is guilty of a felony
 - (2) Where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person, or generally, he shall unless he satisfies the court to the contrary be deemed to be knowingly living on the earnings of prostitution.
34. Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purposes of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, is guilty of a felony.
35. Joint United Nations Programme on HIV/AIDS (UNAIDS) Guidance note on HIV and sex work. Geneva, 2009. Available at http://data.unaids.org/pub/BaseDocument/2009/JC1696_guidance_note_hiv_and_sexwork_en.pdf Accessed on 10th April, 2014
36. The case can be found at <http://kenyalaw.org/caselaw/cases/view/74769/> Accessed on 28 April, 2014
37. NASCOP, Kenya, Guidelines for prevention of mother to child transmission of HIV in Kenya. 4th Edition, 2012 <http://nascop.or.ke/library/pmtct/Guidelines%20for%20PMTCT%20of%20HIVAIDS%20in%20Kenya-1.pdf> Accessed on 23rd May, 2014

38. Ibid Page 24
39. The Standard, 2nd April, 2014 Page 22, Medics Accused of testing HIV & AIDS without consent, available at <http://www.standardmedia.co.ke/health/article/2000108465/medics-accused-of-testing-hiv-aids-without-consent> Accessed on 23 April, 2014.
40. Ministry of Health, Kenya. The Kenya National Patients' Rights Charter, 2013. 1st Edition <http://integratepc.org/wp-content/uploads/2013/10/Kenya-Patients-Rights-Charter.pdf> Accessed on 23 May, 2014
41. Open Society Institute. Mandatory pre – marital HIV testing: An overview. Available at <http://kelinkkenya.org/wp-content/uploads/2010/10/mandatory-premarital-hiv-testing-20100513.pdf> Accessed on 4 April, 2014
42. Communities most likely to be living with HIV or those disproportionately affected by it when compared to the general population. Key populations defined in a particular setting will depend on the epidemic and social dynamics. In this case, we refer to sex workers, injecting drug users and men having sex with men.



NOTES



Nairobi Office

Kindaruma Road

P.O Box 112 - 00200 KNH Nrb

Tel: +254 20 386 1596, 251 5790

Mobile: +254 717 261 408

Kisumu Office

Aga Khan Road Milimani

Directly Opposite, Jalaram Academy

P. O. Box 7708 - 40100 Ksm

Tel: +254 57 253 2664 Mobile: +254 708 342 197

E-mail: info@kelinkenya.org | Website: www.kelinkenya.org



facebook.com/kelinkenya



[@KELINKenya](https://twitter.com/KELINKenya)



youtube.com/user/kelinkenya