

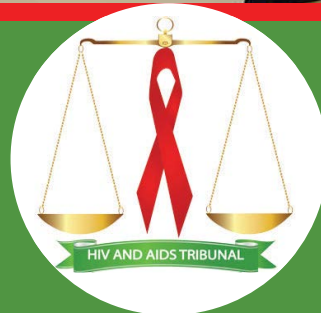
LAUNCH OF THE COMPENDIUM OF CASES DECIDED BY THE HIV AND AIDS TRIBUNAL

Sarova Panafric Hotel, Nairobi County

30 November 2016



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REPORT

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Table of Contents

Acronyms	4
Executive Summary	5
Background and Introduction.....	5
Welcome Remarks and Introductions.....	5
Overview of the Compendium – Key Highlights	6
Remarks by KELIN Board Chair & Former Chair of the HIV & AIDS Tribunal....	6
Remarks by NEPHAK.....	7
Reflections from Beneficiaries of the Tribunal.....	7
Remarks by Country Director-UNDP Kenya	8
Remarks by Deputy Director of the Judiciary Training Institute	8
Remarks by HIV & AIDS Tribunal Chair	9
Remarks by Director of NACC	10
Launch of Compendium	10
Next Steps.....	10
Conclusion and Closing Remarks	10
Annexure One	11
Annexure Two	14

Acronyms

AIDS	Acquired Immune Deficiency Syndrome
ARV	Antiretroviral
CSO	Civil Society Organisation
HAPCA	HIV and AIDS Prevention Control Act, 2006
HIV	Human Immunodeficiency Virus
JTI	Judiciary Training Institute
KELINKenya	Legal and Ethical Issues Network on HIV/AIDS
MoH	Ministry of Health
NEPHAK	National Empowerment Network of People living with HIV/AIDS in Kenya
NGO	Non-governmental Organisation
PLHIV	People living with HIV
UNAIDS	The Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
TB	Tuberculosis
WLHIV	Women living with HIV

Executive Summary

HIV remains the world's most serious public health challenge. Globally, an estimated 36.7 million people were living with HIV as at the end of 2015. Since the first case of the epidemic was reported, it is estimated that HIV has claimed the lives of at least 1.7 million people in Kenya. In 2014, an estimated 33,000 people died of AIDS-related causes in Kenya.

The HIV & AIDS Tribunal was established in 2006 by the HIV and AIDS Prevention and Control Act (HAPCA) 2009. The enactment of the Act was part of the Government's response to the devastating impact of HIV and AIDS pandemic on the cultural, social, economic and political sphere of our nation.

Kenya's jurisprudence on issues of HIV and human rights is not very expansive despite the country having one of the most progressive sections of the Bill of rights in the Constitution. This is therefore the first edition of the Compendium of selected cases decided by the HIV and AIDS Tribunal in Kenya from 2012 to date and it contains some of the decisions that have been made by the HIV and AIDS Tribunal.

The objectives of the launch of the compendium were: To bring together stakeholders to discuss the compendium and its significance to the HIV response; To provide stakeholders with an understanding of the cases decided by the HIV and AIDS tribunal and enable advocates to use such decisions as persuasive authorities before the tribunal; and To sensitize the general public on the need to safeguard the rights of PLHIV as well as share redress mechanisms for violations of such rights.

Background and Introduction

Section 25(1) of HAPCA establishes the HIV and AIDS Tribunal. The Tribunal hears and determines cases on: discrimination on the basis of HIV status, breach of confidentiality, unsafe practices and procedures around confidentiality of HIV status, compulsory testing, among other issues covered under HAPCA. The constitutional safeguards on human rights enshrined in the bill of rights of the constitution have, through the tribunal, extensively been used in the protection and promotion of rights of PLHIV.

Welcome Remarks and Introductions

Mr. Allan Maleche, Executive Director, KELIN

Mr. Maleche began by welcoming the attendees to the launch. He stressed the importance of the occasion particularly because it took place on the eve of the World AIDS Day, 2016. He noted that HIV has been addressed through the medical lens for a long time meaning that aspects of human rights were not considered and did not play a significant part in the HIV response. He emphasized that the law has a role to play with regard to HIV and can go a long way in creating an enabling legal environment to address the challenges of living with HIV.

Overview of the Compendium – Highlights

Mr. Maleche in giving an overview of the Compendium noted that the HIV and AIDS Tribunal (the Tribunal) was established in 2009 through Section 25(1) of the HIV and AIDS Prevention and Control Act, 2006 (HAPCA) and it is empowered to listen to matters addressing any breach of the HAPCA but does not have criminal jurisdiction.

The Tribunal is composed of seven members comprising persons with different backgrounds and expertise such as medical professionals, lawyers and a person living with HIV (PLHIV). Mr. Maleche noted that the Tribunal has dealt with a variety of cases touching on discrimination, testing without consent, breach of confidentiality, termination of employment on the basis of one's HIV status and jurisdiction of the tribunal.

He highlighted the reasons why some cases arose such as the lack of regulations around privacy, which had led to issues of breach of confidentiality. The Tribunal has faced a challenge regarding its jurisdiction to handle human rights violations outlined in the bill of rights of the constitution. This is due to the fact that some breaches of HAPCA (for example right to privacy) have constitutional implications.

In analysing the persons who approach the tribunal, Mr. Maleche noted that it is encouraging that PLHIV have been at the forefront of filing cases. Worryingly, Civil Society Organisations (CSOs) and Non-Governmental Organisations (NGOs) have not been prominent in interacting with the tribunal. He further noted that the Compendium shows that cases have been filed against: medical facilities, employers, associations of PLHIV, religious institutions, NGOs and County Governments.

The primary remedy awarded by the tribunal has been monetary compensation.

Remarks by KELIN Board Chair & former chair of the HIV & AIDS Tribunal

Mr. Ambrose Rachier

In giving his remarks, Mr. Rachier noted that the HIV virus was first identified in Kenya in 1984. Mr. Rachier was at the time practising law in Nairobi and his first reaction was to advocate for the imprisonment of PLHIV. However, since 1984, he has taken the time to imbue into his legal practice issues of HIV and AIDS.

Mr. Rachier noted that the legal framework for the establishment of the Tribunal was laid in 2006 with the enactment of HAPCA. The process to enacting HAPCA was lengthy and still after enactment it took at least 3 years before it became operational. The Tribunal faced resistance in its establishment resulting in very little being accomplished and difficulties in getting the Tribunal working.

The Tribunal was part of the multi-sectoral response to HIV and was criticised for fuelling HIV & AIDS related stigma. But the proponents of the Tribunal viewed it as a specialised institution with the expertise to properly address legal issues arising out of the HIV pandemic.

The Tribunal faced a few other challenges at its inception notably; it did not have designated offices, it lacked adequate staff, the members of the Tribunal had no judicial training; there was no public awareness about the Tribunal, there was stigma and discrimination that arose from being associated with the Tribunal, and there was lack of operational regulations and procedural rules. He concluded noting that there have been gains made towards the response through the Tribunal but there is still work to be done.

Remarks my NEPHAK

Mr. Nelson Otwoma, Executive Director NEPHAK and Member of the Tribunal

Mr. Otwoma began by expressing that the Compendium is both important and timely, and while the cases that the Tribunal has engaged with are not numerous, the Tribunal is working to fast track the on going cases.

He noted that the theme of World AIDS Day 2016 is the reduction of new infections with a focus on young people. The question that arises is: since Kenya has treatment available why do young people still die, get excluded from school and employment opportunities?

In relation to stigma and discrimination, Mr Otwoma noted that when Kenya ends stigma and discrimination, the Tribunal could be disbanded since there would be no cases.

One of the reasons the Tribunal is under-utilised is because of stigma, which leads to a fear of exposure. Mr. Otwoma added that in reducing new infections among young people we must consider the effect stigma has on the treatment and quality of lives of young people in Kenya.

While Section 24 of HAPCA has been found to be unconstitutional, there are laws that remain in force that have the effect of heightening discrimination against PLHIV including: Section 26 of the Sexual Offences Act, 2004 and the Public Health Act, Chapter 242 of the Laws of Kenya, which unfairly impacts the lives of people with communicable diseases.

In concluding, he emphasized that the Tribunal should present in all 47 counties so as to achieve the national goal of eliminating HIV before 2030. He acknowledged that this would be difficult given the Tribunal's limited resources.

Reflections from Beneficiaries of the Tribunal

Ms. Mildred Macharia

Ms. Macharia currently has a case pending at the Tribunal. She was impressed by the exceptional hospitality at the. She observed that the Tribunal was user-friendly and did not require a claimant to file documents to institute proceedings. The staff of the Tribunal guided her through the process of instituting a claim. Further, she was provided with psychosocial support throughout the proceedings through a counsellor. Finally, the Tribunal took the time in assigning her pro bono lawyer to her.

She recommended that a PLHIV also be represented at the Secretariat of the Tribunal and these services be extended beyond Nairobi County.

Mr. Cosmas Ogeri

Mr. Ogeri, also a beneficiary of the Tribunal, described it as a mechanism of enforcing HIV related human rights and a platform to protect PLHIV and hear their cases. Through his training in advocacy he became acquainted with the Tribunal and how it impacts on the lives of PLHIV. His case was filed in August 2013 and concluded in August 2015 and he was provided with monetary compensation.

He stated that the Tribunal is unique for a number of reasons: the Secretariat engages in constant communication with their clients, there is a high level of professionalism and expertise, integrity, friendly staff and speedy justice.

Remarks by Country Director-UNDP Kenya

Ms Ludfine Bunde on behalf of Ms. Amanda Serumaga. UNDP Country Director

UNDP is the only UN agency mandated to deal with human rights, HIV and the Law. Ms. Bunde intimated that Kenya needs to create an enabling legal environment for the HIV response and this includes a functioning Tribunal. She shared her personal experience living with HIV and being a mother and her inability to get insurance coverage and investment opportunities only on the basis of her HIV status.

She then read the statement prepared by the UNDP Country Director – Ms. Amanda Serumanga:

“HIV continues to be one of the greatest health challenges of our time. As noted in the landmark report, The Global Commission on HIV and the Law: Risks, Rights & Health, HIV is also a crisis of law, human rights and social justice. In the context of recent scientific breakthroughs on HIV prevention and treatment, and the growing epidemic of inequality confounding health and development across the globe, addressing the legal and human rights barriers to effective HIV responses is of increasing importance. Therefore, protecting the rights of people living with HIV and key populations is critical to ensure access to HIV prevention, treatment, care and support for all.

In 2015, the Sustainable Development Goals (SDGs) have rekindled global consensus and action to address access to HIV care and treatment, curtail new HIV infections, and end the HIV epidemic. The SDG framework presents an additional impetus for ‘leaving no one behind’ whether infected or affected by HIV. The philosophy behind this rallying call recognizes the associative discriminatory practices across society and by institutions that affects PLHIV, key populations and other excluded groups. The associated stigma and discrimination limits full enjoyment of social, economic, cultural and political constitutional guarantees.

The creation and operationalization of the HIV and AIDS Equity Tribunal in Kenya, an innovative local solution to the issue of rights of people living with, at risk of, and affected by HIV- as one and only of its kind globally presents an important opportunity for Kenya. Its ability to listen to and dispense of disputes in a manner that contributes to full enjoyment of the constitutional guarantees and fundamental freedoms, and document these deliberate achievements will build hope for those infected and affected and allow them to further contribute to Kenya’s overall development in the journey towards targets expressed in the Vision 2030. The compendium is a collation of progressive jurisprudence and presents user-friendly compilation of judgments on HIV-related matters that highlight how the law has been used to protect individual rights in Kenya. It presents an important reference for actors in the legal sector, development practitioners, members of the public sector in general and other stakeholder to inform their further action in safeguarding and promoting enjoyment of a quality of life by Kenyans infected and affected by HIV.”

Remarks by Deputy Director of the Judiciary Training Institute

Mr. Steve Ouma representing Justice Prof. James Otieno-Odek

Mr. Ouma shared a statement by the Deputy Director, which focused on the HIV and AIDS Tribunal: Strategic Plan, 2013-2017 and how the Compendium aligned with this Plan. The overall goal of the Tribunal’s Strategic Plan is to reduce stigma and discrimination. The strategy is three-fold: to deliver justice for people living with and affected by HIV in a judicially transformative environment; to build the institutional capacity of the Tribunal to enable it to effectively and efficiently discharge its mandate; and to network and build partnerships and collaborate with stakeholders to enhance access to justice.

The Tribunal provides a unique avenue for PLHIV and since most cases have been delivered for PLHIV it is important that this mandate is shared widely. Having read the Deputy Director's statement he offered few observations. First that there is need to diversify and enrich jurisprudence on the area of HIV and AIDS by making reference to decided cases. It would also be desirable to have a depth on analysis on matters of rights limitations, because these cases often times develop around the infringement of rights. While this is a very encouraging first step, but having regard to HAPCA, we should enrich the Tribunal decisions by making reference to the jurisprudence of countries such as South Africa, Uganda so that we can develop a commentary. As we conduct research to enrich jurisprudence a commentary on HAPCA will inform the empowerment of practitioners and PLHIV.

Remarks by HIV & AIDS Tribunal Chair

Mr. Jotham Arwa

Mr. Arwa begun by introducing the present and former members of the Tribunal. He then thanked the partners for collaborating with the Tribunal in the launch of the Compendium. One of the major impediments in the fight against HIV and AIDS is stigma and discrimination and its success is largely impeded by stigma, discrimination and rights violations. He stated, "we long for a day that people shall treat HIV like any other ailment."

Two main approaches have been adopted in the fight against stigma: advocacy and adjudication. Advocacy is principally administered through National AIDS Control Council (NACC) in the Ministry of Health while the Tribunal administers adjudication. Adjudication addresses rights violations while facilitating access to justice. There have been instances of pervasive violations and a targeted approach to stigma is required. Adjudication also assists in developing standard for how rights should be applied and provides a platform for dialogue in the public sphere. Adjudication is a form of advocacy because through it we highlight the issues and teach the public. It is in this regard that this comes as an important tool for the Tribunal and its users. It sets out the law on HIV related issues; resolves interpretational issues; may be used by legal practitioners; and shall be useful to other judicial bodies when dealing with similar issues.

He then thanked the organisations that have played a role in developing the Compendium: the Ministry of Health, United Nations Development Programme, KELIN and the National Empowerment Network of People living with HIV/AIDS in Kenya (NEPHAK).

He concluded his remarks by stating that the Tribunal has dealt with many cases and not all of them had been published in the Compendium. It should be appreciated that the Compendium does not contain the entire scope of the decisions, which would include the jurisprudential references.

Remarks by Director of NACC

Dr. Nduku Kilonzo on behalf of Cabinet Secretary for Health

The Sustainable Development Goals (SDGs) provide for the enactment of laws that address stigma and discrimination. Kenya has taken steps to meet this obligation such as the establishment of the Tribunal to adjudicate on cases of HIV related human rights. Kenya has made a lot of progress in the HIV response medically; there has been a reduction in prevalence, new infections and mother to child transmission. However, despite these gains Kenya still struggles with stigma and discrimination with devastating effects such as the number of infections among persons aged 15-24 years. Stigma has been cited as the reason why these young people are either unwilling to seek services; if they seek services they are unwilling to disclose their status and when they seek services they discontinue due to stigma they are faced with. HIV stigma and discrimination has been documented as one of the major reasons for the growing infections among young people.

Launch of Compendium

Members of the Executive (Dr. Nduku Kilonzo), Judiciary (Mr. Steve Ouma and Mr. Jotham Arwa), UN Family (Ludfine Bunde) and beneficiaries of the Tribunal launched the Compendium by jointly cutting the ribbon to officially launch the first edition of the HIV and AIDS Tribunal Compendium.

Next Steps

Mr. Allan Maleche

Mr. Maleche encouraged all to reach out to various partners for the extensive dissemination of the Compendium. He then thanked various persons in the room for the role they played in the development of the Compendium.

Conclusion and Closing Remarks

Mr. Anyumba Nyamwaya

He thanked his colleagues and seniors for elaborately explaining the role and purpose of the Tribunal. He thanked the first chair and the former members for the role they played in putting a structure in place once the Tribunal became operational. He thanked the former members for their tireless involvement in the enactment of HAPCA, which led to the HIV and AIDS Tribunal. He thanked Mr. Jotham Arwa for his work as chair, which led the Tribunal's first strategic plan. He thanked NACC for housing the Tribunal and enabling them to have a structure while providing them with support to become operational. He thanked UNDP for providing the resources that ensured the growth and operation of the Tribunal. Finally, he thanked the clients of the Tribunal who through their engagement have grown the jurisprudence of the Tribunal.

He reminded everyone that the Tribunal has liaison offices in other counties such as Kisumu, Homa Bay, Siaya, Migori, Nyamira, Kisii, Nyamweri, Machakos, Kitui, Kericho and Mombasa that can be utilised by persons who are not in Nairobi. The focus was initially in areas of prevalence but further support is needed to extend to other areas so as to sensitise the public on the existence and role of the Tribunal. He then urged organisations to cooperate with the Tribunal so that the people of this country can be able to access its services.

Annexure One: List of Participants

No	Name	Organisation
	Alice Wambugu	ICW/K
	Allan Maleche	KELIN
	Ambrose Rachier	KELIN
	Anne Ronoh	NEPHAK
	Anthony Irungu	Starlight
	Ayumba Nyamwaya	HIV and AIDS Tribunal (HAT)
	Barbara Akinyi	HAT
	Bernadette Ochieng	HAT
	Branice Nafula	Radio Citizen
	Brenda Kiboro	KBC TV
	Brian Keitamy	KASS TV
	Brian Keitany	KASS
	Brian Omondi	HAT
	C. Maringo	HAT
	Calleb Ogondo	HAT
	Caroline Oduor	NOW Advocates
	Cathertine Odhiambo	HAT
	Cecilia Muchiri	HAT
	Collins Atito	HAT
	Collins Kwetu	Star
	Damaris Nanjira	FAOKE
	David Bilo	HAT
	Deana Alosa	HAT
	Dennis Onsongo	Daily Nation
	Donald Ojiambo	CRJ-Africa
	Duncan Mbuya	Xinhua
	Ecadeli Ectoto	NEPHAK
	Edgar Makona	KELIN
	Elizabeth Njeru	Rescue Centre
	Elly Joy Kawini	TAPWHA
	Euncie Kilonzo	Daily Nation
	Eunice Lumumba	Rachier & Amollo Advocates
	Eunice Wandera	HAT
	Evelyne Ntinyari	HAT
	Fidalis Mwelelei	Kitui Plus
	Geoffrey Kubteh	Kenya Red Cross
	George Kebaso	People Daily
	George Mklambua	County of Makueni
	Gerald Omondi	HAT

No	Name	Organisation
	Grace Kamau	Sauti Sikika
	Grace Macheru	Kisala & Co. Advocates
	Hassan Abdi	HAT
	Henry Owino	KCA
	Henry Owino	KCA
	Henry Wahinya	People Daily
	Herton Musau	NEPHAK
	Hylinek Onsare	Njema
	Idris Hassan	NEPHAK
	Inviolata Mmbwavi	ICWK
	Isaac Rabari	NEPHAK
	Jackson Awele	KELIN
	Jane Aluo Njoki	FIDA-K Nairobi
	Jennifer Mulu	HAT
	Jeremiah Otieno	Standard
	Joe Mwikali	HAT
	Josephat Kariuki	ISHTAR
	Jotham Arwa	HAT
	Joyce Jurai	Radio Africa
	Joyce Kagai	HAT
	Judith Okute	HAT
	Julius Kibera	Jade Communication
	Ken Ambogia	HAT
	Kevin Mwangi	KELIN
	Kiprono Nge'tich	HAT
	Leah Aswani	ISHTAR
	Leah Kamau	NEPHAK
	Leah Kusah Anzani	NEPHAK
	Leah Mutimba	Radio Africa
	Lewis Nyaundi	Star
	Lisa Ligterink	UNAIDS
	Longet Terer	Kenya Law Resource Commission (KLRC)
	Lorraine Ombech	VM/CO
	Lucy Ghati	KELIN
	Lucy Wanjiku	NEPHAK
	Ludfine Bunde	UNDP
	Lugoa Andrew	KBC TV
	Lyla Latif	Rachier & Amollo Advocates
	Mackline Odhiambo	HAT

No	Name	Organisation
	Margaret Mwangi	NEPHAK
	Marie Lang'at	KASS Media
	Maurine Murenga	ICW
	Mildred Mador	NEPHAK
	Millicent Bwire	LVCT Health
	Mohammed Norkuthur	HAT
	Mwawaisha Kadzo Khamisi	NEPHAK
	Mwendwa Kugora	UNDP
	Nancy Opiyo	NEPHAK
	Nduku Kilonzo	NACC
	Nelson Chirchir	KLRC
	Nelson Otwoma	NEPHAK
	Nelson Silas	NEMAC
	Nerima Were	KELIN
	Obura Michael Paul	LEXCO Africa
	Ongeri Cosmas	KELIN
	Osiemo N.W	Advocate
	Patricia Ochieng	ICW-K, DACASA
	Patrick Otieno	HAT
	Paul Achar	Jade Communications
	Peter Ouma Oyunga	NEPHAK
	Philip Nyakwana	NMAAK
	Polyne Olweny	Pamoja G
	Robert Mwangale	Mwangale & Co Advocates
	Robert Riitho	Rachier & Amollo Advocates
	Rodah Katalia	NEPHAK
	Rose Kaberia	ITPC-EA
	Rukia Ahmed	NMCK
	Sheilla Masasabi	UNDP
	Sospeter Ajula	HAT
	Steve Ouma	JTI
	Susan Kuria	KLRC
	Timothy Wafula	KELIN
	Titus Pkemoi	NEPHAK
	Victor Kariuki	Sauti Sikika
	Vincent Obwanda	KELIN
	Violet Awua	HAT

Annexure Two: Agenda

LAUNCH OF THE HIV AND AIDS TRIBUNAL COMPENDIUM OF CASES

Sarova Panafric Hotel, Nairobi County

30 November 2016

<i>Master of Ceremony- Allan Maleche – Executive Director KELIN</i>		
TIME	SESSION	FACILITATOR
07:00am-08:00 am	Arrival Registration and Breakfast	KELIN
08:00am-08:10 am	Welcome Remarks & Introductions	Mr Allan A. Maleche - KELIN
08:10am-08:30 am	Overview of the Compendium - Key highlights	Mr Jackson Awele - Consultant, Advocate
08:30am-08:40 am	Remarks by KELIN Board Chair & Former Chair of the HIV & AIDS Tribunal	Mr Ambrose Rachier -Advocate
08:40am-08:50 am	Remarks by NEPHAK	Nelson Otwoma - CEO NEPHAK
08:50am-09:00 am	Reflections from beneficiaries of the Tribunal	Mr. Cosmus Ongeru Ms. Mildred Macharia
09:00am-09:10 am	Remarks by Country Director UNDP- Kenya	Ms. Amanda Serumaga - UNDP
09:10am-09:20 am	Remarks by Director NACC	Dr. Nduku Kilonzo - NACC
09:20am-09:30 am	Remarks by HIV & AIDS Tribunal Chair	Mr Jotham Arwa - Advocate
09:30am-09:50 am	Launch of the Compendium by Chief Guests	Justice Prof. James Otieno-Odek - JTI
09:50am-10:00 am	Next steps	Mr Allan A. Maleche - KELIN
10:00am-10:10 am	Conclusion and Closing remarks	Mr Anyumba Nyamwamba – HAT CEO