

# TRENDS IN HIV & TB HUMAN RIGHTS VIOLATIONS AND INTERVENTIONS



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REPORT | July 2018

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# Table of Contents

ABBREVIATIONS.....	ii
EXECUTIVE SUMMARY.....	1
1. INTRODUCTION.....	3
1.1 Background.....	3
1.2 An overview of the legal environment in Kenya.....	4
2.. PROJECT DESCRIPTION.....	13
2.1 Objective.....	13
2.2 Project locations and beneficiaries.....	13
2.3 Expected results.....	13
3. PURPOSE OF THE REPORT AND METHODOLOGY.....	14
4. TRENDS IN HUMAN RIGHTS VIOLATIONS.....	14
4.1 Inadequate access to information.....	15
4.2 Stigma and discrimination in the provision of health services.....	16
4.3 Disclosure and breach of confidentiality.....	16
4.4 Forced or coerced HIV testing.....	17
4.5 Verbal, physical and sexual abuse.....	17
4.6 Harmful cultural practices.....	18
4.7 Discrimination in the ownership and inheritance of family property.....	19
4.8 Discrimination in employment.....	19
4.9 Limited access to justice.....	19
5.0 Failure to observe the human rights of incarcerated persons.....	20
5. STRATEGIES TO ENHANCE THE LEGAL ENVIRONMENT FOR AN EFFECTIVE HIV RESPONSE.....	21
5.1 Strengthen the capacity of duty bearers to cultivate an enabling legal environment.....	22
5.2 Influence the integration of rights based approaches in HIV and TB service delivery.....	25
5.3 Scale up HIV related legal services.....	26
5.4 Strengthen advocacy through direct engagement between rights holders and duty bearer.....	28
5.5 Challenge laws, policies and practices that negatively impact human rights.....	30
5.6 Information dissemination and knowledge sharing.....	34
6. BEST PRACTICES AND LESSONS LEARNED.....	31
6.1 GIPA centred project design and implementation.....	31
6.2 Engage formal and informal justice systems.....	32
6.3 Engage government institutions to improve the formulation and implementation laws.....	35
6.4 Deploy information, education and communication tools.....	36
6.5 Strengthen institutional capacity.....	36
7. CHALLENGES.....	38
7.1 Social challenges.....	38
7.2 Legal challenges.....	38
7.3 Institutional challenges.....	39
8. RECOMMENDATIONS.....	39
8.1 On Law Reform.....	39
8.2 To KELIN and CSOs working on HIV related rights.....	39
8.3 To Development Partners.....	40
8.4 To Local (Community) Partners.....	40
8.5 To National Government.....	40
8.6 To County Governments.....	41
8.7 To Constitutional and Justice Institutions.....	41
Publications Referenced.....	42
Case Laws.....	43
National Laws and Policies.....	43

## ABBREVIATIONS

CSO	Civil Society Organisation
CUC	Court Users Committee
GIPA	Greater Involvement of People Living with HIV and AIDS
HAPCA	HIV & AIDS Prevention and Control Act
HIV	Human Immunodeficiency Virus
JTI	Judicial Training Institute
KASF	Kenya AIDS Strategic Framework
KELIN	Kenya Legal and Ethical Issues Network on HIV and AIDS
KP	Key Population
LGBT	Lesbian, Gay, Bisexual and Transgender
MSM	Men who have sex with Men
NACC	National AIDS Control Council
NASCOP	National AIDS and STI Control Programme
NGO	Non- governmental Organisation
PLHIV	People Living with HIV
PWID	People who Inject Drugs
SRHR	Sexual Reproductive Health Rights
STD	Sexually Transmitted Disease
TB	Tuberculosis
UNAIDS	United Nations Programme on HIV and AIDS
UNDP	United Nations Development Programme

## EXECUTIVE SUMMARY

This report captures trends in human rights violations and relevant interventions over the period of implementation of “*Enhancing the Legal Environment for an Effective HIV Response in Kenya*” (2012–2017). The project was implemented by KELIN with financial and technical support from the United Nations Development Programme.

Prior to initiation of the project, various trends in human rights violations were identified and the project employed various strategies in implementing its goals as outlined below.

TRENDS	STRATEGY
<b>Inadequate access to information</b>	
During the project period, it became apparent that most of the HIV related human rights violations resulted from a lack of adequate knowledge about the law or about human rights, both on the part of the victims and perpetrators.	Generating strategic information and building solid evidence are key tools for building knowledge. To share this knowledge, KELIN developed a compendium of cases determined by the HIV and AIDS Tribunal. A training manual to enhance the understanding of civil society organisations of their roles was also produced. Project beneficiaries were provided with useful information customised to each target group, an important step to ensure that the right people were equipped with the right information for adapting and applying their new knowledge.
<b>Stigma and discrimination in the provision of health services</b>	
Due to the perceived criminality of some behaviours associated with key populations, these groups experience stigma and shame from society at large and from health care providers, attitudes which push them to avoid seeking health care and thus increase their vulnerability to health risks.	KELIN conducted trainings for health care workers to strengthen their capacity to understand human rights. Health care workers identified the systematic and structural barriers to improving health outcomes for key affected populations.
<b>Forced or coerced HIV testing</b>	
Numerous cases of unlawful, compulsory testing have been imposed on sex workers and suspected members of key populations in the course of police investigations and arrests.	KELIN has used strategic litigation as an advocacy tool to challenge negative policies and advance HIV related human rights. Dialogue forums encouraged interaction between duty bearers and rights holders. Both duty bearers and rights holders addressed the attitudes of judiciary members and law enforcement officers in their handling of cases involving key populations.
<b>Harmful cultural practices</b>	
Traditional cultural practices reflect values and beliefs held by members of particular communities. Some of these practices are detrimental to the health of women and girls, particularly those that fuel the spread of HIV. Many of these practices continue to persist.	KELIN organized a series of community dialogues. Engagement between key affected populations and other community members and local leaders enabled communities to appreciate their respective roles in addressing stigma, human rights violations and harmful cultural practices.
<b>Discrimination in the ownership and inheritance of family property</b>	
The economic opportunities of women living with HIV, widows and orphans are limited when family members disinherit them by disposing of the property of their deceased husbands or fathers.	Working with customary legal structures, KELIN helped rebuild community-based justice systems to better adhere to human rights. KELIN sought to understand various cultural practices and interacted with community elders to educate them on the legal implications of widow disinheritance and other discriminatory practices.

TRENDS	STRATEGY
<b>Limited access to justice</b>	
<p>Access to legal services is limited by the physical location of service providers relative to potential clients, by lack of knowledge on where to get quality, affordable legal representation and by the cost of legal fees. Corruption further frustrates efforts to access justice. Whatever the reality may be in any particular case, key affected populations often feel that those who violate their rights often bribe their way out of investigations.</p>	<p>Legal aid clinics organised in each project county ensured that qualified advocates were on hand to provide direct legal assistance to individuals. Under this strategy, the project also identified and referred cases for alternative dispute resolution using cultural structures. KELIN has established a database of pro-bono lawyers in all project counties, with specialised training in HIV related legal issues.</p>

The project was primarily implemented through direct engagement between rights holders and duty bearers, a strategy that encouraged experience sharing and provided opportunities for both sides to express their concerns and recommendations for creating an enabling legal environment. The project was implemented between July 2012 and June 2017 in the counties of Nairobi, Kisumu, Homa Bay, Kakamega, Bungoma, Mombasa, and Kilifi.

Best practices and success stories from the project were documented and shared at national stakeholders' forum. Best practices include the following:

- Creating functional, collaborative partnerships with local organisations serving key affected populations
- Working alongside national government institutions to improve the formulation, interpretation and implementation of HIV related laws
- Engaging formal and informal justice structures
- Using strategic litigation
- Maintaining a consistent, up-to-date database of active pro bono lawyers to readily provide HIV related legal services for PLHIV and key populations.

Enhancing the legal environment will contribute to Kenya's achievement of Sustainable Development Goal 3, which seeks to ensure healthy lives and promote well-being for all, at all ages. The project has successfully addressed and will continue to address legal and social barriers that hinder effective HIV prevention and treatment, through the established community networks. KELIN remains committed to ensuring the implementation of laws and policies grounded in evidence and human rights.

# 1. INTRODUCTION

## 1.1 Background

The legal environment, law enforcement and justice systems have immense potential to better the lives of people living with HIV (PLHIV).<sup>1</sup> The legal environment plays a powerful role in the well-being of people living with HIV and those vulnerable to it. Good laws, fully resourced and rigorously enforced, can widen access to prevention and health care services, improve the quality of treatment, enhance social support, protect the dignity of affected persons, safeguard vital human rights and save public monies.<sup>2</sup> But the law can also perpetuate discrimination and isolate those most vulnerable from programmes that would help them avoid or cope with the virus. By dividing people into criminals and victims or labelling them sinful or innocent, the legal environment can undermine the social, political and economic solidarity necessary to overcome the global epidemic.

HIV-related discrimination is often deeply interwoven with other forms of discrimination based on gender and gender identity, sexual orientation, race, disability, drug use and immigration status. Sex workers, prisoners or formerly incarcerated persons also face compounded discrimination. Access to justice for human rights violations remains a challenge, particularly for key affected populations. This is largely due to low levels of awareness on legal rights, inefficiencies within law enforcement institutions and underutilisation of available avenues for dispute resolution.

According to WHO, key populations are groups that have a disproportionate burden of HIV. These groups frequently face barriers to accessing HIV prevention and treatment, as well as other legal and social hurdles that increase their vulnerability to the virus. Key populations include (1) men who have sex with men, (2) people who inject drugs, (3) people in prisons and closed settings, (4) sex workers and (5) transgender people.<sup>3</sup> The Global Fund defines key populations in the context of HIV, TB and malaria as those that experience a high epidemiological impact from one of the diseases combined with reduced access to services and/or being criminalised or otherwise marginalised. The Global Fund's definition of key populations also includes sex workers, transgender people and other groups who are criminalised or otherwise marginalised.<sup>4</sup> Key populations play a major role in HIV transmission. These constituents should therefore be essential partners in an effective response to HIV. Indeed, people living with HIV are considered a key population across all epidemics.<sup>5</sup>

The Joint United Nations Programme on HIV and AIDS (UNAIDS) 2011–2015 strategy outlined efforts countries should take to ensure the advancement of human rights in their HIV response. These measures include working to eliminate punitive laws and practices around sex work, drug use and homosexuality – laws and practices that block national HIV responses by encouraging discrimination and maintaining the structural conditions that leave people without access to HIV services.<sup>6</sup> The current UNAIDS strategy (2016–2022) acknowledges that these challenges persist. A result area of the 2016–2022 strategy is to ensure that punitive laws, policies, practices, stigma and discrimination are removed.<sup>7</sup> In order to achieve United Nations Sustainable Development Goal 3, which seeks to ensure healthy lives and promote well-being at all ages, there is a need to (1) address the legal barriers that hinder effective HIV prevention and treatment intervention, (2) address discrimination against key affected populations and (3) ensure the implementation of laws and policies grounded in evidence and human rights.

1 Global Commission on HIV and the Law (2012) *Risks, Rights and Health*, UNDP, New York, July 2012; available at <http://www.undp.org/content/dam/undp/library/HIV-AIDS/Governance%20of%20HIV%20Responses/Commissions%20report%20final-EN.pdf> (accessed 23/3/2018).

2 *Risks, Rights and Health*, *ibid.*

3 WHO (2016) *Updated consolidated guidelines on the use of antiretroviral drugs for treating and preventing HIV infection*, available at [http://apps.who.int/iris/bitstream/handle/10665/208825/9789241549684\\_eng.pdf;jsessionid=FFFF47ACF2C37F58268CC57C8AF36D05?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/208825/9789241549684_eng.pdf;jsessionid=FFFF47ACF2C37F58268CC57C8AF36D05?sequence=1) (accessed 23/3/2018).

4 See Global Fund (2015) "Factsheet - Key Populations: A Definition," available at [https://www.theglobalfund.org/media/1289/core\\_keypopulationsdefinition\\_infonote\\_en.pdf](https://www.theglobalfund.org/media/1289/core_keypopulationsdefinition_infonote_en.pdf) (accessed 23/3/2018).

5. See WHO (2016), *ibid.*

6. UNAIDS (2010) *Getting to Zero: UNAIDS 2011–2015 Strategy*, available at [http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/20101221\\_JC2034E\\_UNAIDS-Strategy\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2010/20101221_JC2034E_UNAIDS-Strategy_en.pdf) (accessed 23/3/2018).

7. UNAIDS (2015) *On the Fast-Track to end AIDS: UNAIDS 2016–2021 Strategy*, available at [http://www.unaids.org/sites/default/files/media\\_asset/20151027\\_UNAIDS\\_PCB37\\_15\\_18\\_EN\\_rev1.pdf](http://www.unaids.org/sites/default/files/media_asset/20151027_UNAIDS_PCB37_15_18_EN_rev1.pdf) (accessed 23/3/2018).

The Kenya AIDS Strategic Framework (KASF) recognised the following as some of the primary gaps and challenges in the HIV response in Kenya:<sup>8</sup>

- i. Poor enforcement of policy and legislative frameworks and generally national governance of prevention programmes.
- ii. Lack of specific policy and legal enforcement tools to address the explicit needs of key populations and persons with disabilities (PWD).
- iii. Insufficient dissemination, uptake and implementation of guidelines for mainstreaming human rights, gender, youth, children, PLHIV, PWD, key populations and vulnerable groups into HIV and AIDS programming across sectors.

The KASF, under Strategic Direction 3, proposes using a human rights approach to facilitate access to services for PLHIV, key populations and other priority groups in all sectors. The framework proposes the following intervention areas:

- i. Remove barriers to access of HIV, sexual and reproductive health and rights information and services in public and private entities.
- ii. Improve the legal and policy environment for protection and promotion of the rights of key populations and people living with HIV at national and county levels.
- iii. Reduce and monitor stigma and discrimination, social exclusion and gender-based violence.
- iv. Improve access to legal and social justice as well as access to protection from stigma and discrimination in the public and private sectors.

## 1.2 An overview of the legal environment in Kenya

Since 1984, when the first case of HIV was diagnosed in the country, Kenya has progressively developed its laws, policies and case law which lacked before 1997. The laws 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 and AIDS in June 2001.<sup>9</sup> A July 2002 report by the task force consequently led to the drafting of the HIV and AIDS Prevention and Control Bill that same year. 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 tremendous gains in the field of HIV. All existing laws are required to comply with the Constitution. Human rights are specifically but broadly provided for under the Constitution's Bill of Rights (Chapter 4), which is regarded as highly progressive. The Bill of Rights guarantees fundamental rights for all persons, including those living with and at risk of HIV. Generally, Kenya's national laws and policies provide a robust supportive framework for HIV programming. However, there still exist a few criminal provisions that hinder the effectiveness of the HIV response, particularly affecting interventions for key and vulnerable populations.

8. National AIDS Control Council (NACC) (2014) *Kenya AIDS Strategic Framework (KASF) 2014/15-2018/19*, available at [http://nacc.or.ke/wp-content/uploads/2015/09/KASF\\_Final.pdf](http://nacc.or.ke/wp-content/uploads/2015/09/KASF_Final.pdf) (accessed 23/3/2018).

9 KELIN (2014) *Punitive Laws and Practices Affecting HIV Responses in Kenya*, available at <http://kelinkenya.org/wp-content/uploads/2010/10/punitive-laws-practices-affecting-HIV-responses-in-Kenya.pdf> (accessed 23/3/2018).



## 1.2.1 Legal provisions that facilitate the creation of a supportive environment for HIV interventions

### i. The Constitution of Kenya 2010

The Constitution of Kenya brought about far reaching changes to Kenya's legal framework, with an advanced Bill of Rights that reinforces and expands protections relating to HIV.<sup>10</sup> Some of the most significant gains following from the Constitution are discussed in this section.

Article 2(4) prohibits customary law that is inconsistent with the Constitution. Legally enforceable efforts can now be made to address cultural practices that increase the risk of HIV infection or make people more vulnerable to infection. Articles 2(5) and 2(6) make the general rules of international law and any treaty or convention ratified by Kenya part of the law of Kenya. Therefore, these would be relied upon for the protection of rights, and support where a lacuna exists in the local context.

Article 6 provides for a devolved structure of governance and for the transfer of power to 47 county governments. Health governance is among the services that have been devolved.<sup>11</sup> Devolution presents an opportunity for individual counties to understand their HIV epidemic and tailor their responses to their unique social, cultural, economic and political contexts. It also presents a good opportunity for increased community participation in efforts to ensure that HIV remains a health care priority at county level. County-specific health sector strategic plans and HIV strategies are now being developed.

According to Article 22, everyone has a right to go to court seeking protection of his or her human rights. The Constitution removes strict legal requirements, (especially on *locus standi*) that had previously been provided for before the filing of human rights cases. This has provided an opportunity for any person to institute a case relating to human rights violation, either on their own behalf or for others.

Article 27 promotes equal treatment of all persons. It prohibits discrimination on numerous grounds, including age, sex, dress, health and marital status, among others. From the perspective of the law, all Kenyans should be able to access opportunities and services without discrimination, including discrimination on the basis of known or suspected HIV status.

Article 31 guarantees the right to privacy. This includes the right not to have information relating to family or private affairs — such as information about one's HIV status and care — unnecessarily required or revealed. Assuring the privacy of patients is instrumental to the uptake of HIV related services and commodities by key affected populations.

Article 35 provides the right of access to information. Access to appropriate HIV information is important for maximising the acceptance of HIV interventions among key affected populations. Informed decision making based on accurate information can contribute to improved health and overall well-being. Access to information is also critical to ensuring accountability on the part of duty bearers for the proper use of public resources in the HIV response.

The protection of the rights to freedom of expression (Article 33) and freedom of association (Articles 36) has enabled key populations to better organise and collectively advance their issues.

Among the economic and social rights articulated in the Constitution is the right of every person to the highest attainable standard of health care services, including reproductive health care Article 43(1). This provision promotes the delivery of HIV related services and commodities without restrictions. In this way key affected populations are also legally able to enjoy proportionate access to HIV prevention, treatment and care services. The recognition of reproductive health care has contributed to better health outcomes. Examples are increased HIV testing, a reduction in the risk of mother-to-child HIV transmission and improved treatment adherence.

<sup>10</sup> Kenya AIDS NGOs Consortium (KANCO) (2012) *Study on human rights violations against people living with HIV in Kenya*, available at <http://kelinkkenya.org/wp-content/uploads/2010/10/Human-Violation-book-final.pdf> (accessed 23/3/2018).

<sup>11</sup> Korongo, A., D. Mwai, A. Chen, N. Judice, and T. Oneko (2014) "Analysis of the Social Feasibility of HIV and AIDS Programs in Kenya: Sociocultural Barriers and Facilitators and the Impact of Devolution," Health Policy Project, Futures Group: Washington, DC; available at [https://www.healthpolicyproject.com/pubs/535\\_KenyasocialfeasibilityreportFINAL.pdf](https://www.healthpolicyproject.com/pubs/535_KenyasocialfeasibilityreportFINAL.pdf) (accessed 23/3/2018).

In guaranteeing everyone's right to access emergency medical care, Article 43(2) mitigates the risk of HIV infection among key populations and other vulnerable groups who experience a high vulnerability to sexual violence by facilitating the provision of post-rape care, which includes the administration of pre-exposure prophylaxis for HIV prevention.

Articles 47 provides for fair administrative practice. Key populations can challenge unfair and unlawful administrative actions, such as unlawful searches and forced testing by police officers during raids.

The majority of key populations may have little or no understanding of the justice system. This lack of awareness exposes them to the likelihood of wrongful conviction. The Constitution obligates the state under Article 48 to ensure access to justice for all persons and to ensure that they have a fair trial and legal representation (Article 50). This provision advances access to courts, affordable legal representation, and reasonable professional and court fees. The Legal Aid Act of 2016 encourages legal practitioners to offer appropriate, structured support and incentives. Following the passing of this Act, the government launched the National Legal Aid and Awareness Programme, as well as its National Action Plan. The plan provides a mechanism to coordinate the implementation of legal aid interventions, carried out by the government and other actors. The objective is to improve the quality of legal services, as well as access to them, especially among the poor and vulnerable.

The Constitution guarantees an arrested person certain rights and provides proper procedure for conducting an arrest. The provisions of Article 49 are extremely important for criminalised populations, who are vulnerable to non-procedural arrests and unlawful detentions. For example, Article 49 ensures that any arrested person is arraigned in court as soon as reasonably possible but not later than twenty-four hours after being arrested.

Prisons are high-risk environments for HIV transmission. Harmful prison-based practices include drug use and needle sharing, tattooing with unsterile equipment, unprotected sex and sexual violence. Overcrowding, malnutrition, and general violence also weaken the immune system, increasing vulnerability of PLHIV to opportunistic infections. Article 51 ensures that persons who are detained, held in custody or imprisoned retain most of the rights and fundamental freedoms guaranteed by the Bill of Rights. Among these is the right to health. Workplace policies and programmes on HIV facilitate the provision of HIV interventions for prisoners and other incarcerated persons. These include HIV counselling and testing, harm reduction interventions, as well as treatment, care and support.

## **ii. International laws**

International human rights treaties, conventions or other formal instruments impose a duty on states to follow and ensure respect for human rights. Prior to the 2010 Constitution, treaties had little significance — they had no binding effect unless an Act of Parliament was passed, incorporating them into domestic law. Today, international laws that have been signed and ratified by Kenya are binding and must be observed, just as any law that was passed within the country.<sup>12</sup> Some of the international instruments ratified by Kenya include:

- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of Discrimination Against Women
- The Convention Against Torture

The recognition of international human rights standards in Kenya has provided a framework for the formulation and interpretation of national laws and policies that has been extremely supportive to the national HIV response. International rights standards have formed the basis for monitoring the implementation of HIV interventions. They have also informed action for redress when public health policies violate the rights of key affected populations.

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<sup>12</sup> Article 2 the Constitution 2010.

Moreover, international compacts have enabled the meaningful involvement of these populations in the design and implementation of effective HIV policies, programmes and interventions.

### **iii. East Africa Community HIV and AIDS Prevention Management Act, 2012**

The East Africa Community HIV and AIDS Prevention Management Act codify commitments by EAC member states to prevent and manage HIV and AIDS. A rights-based response to HIV, the Act provides for a range of measures to both protect rights and promote access to HIV related health care for all populations, including those at higher risk of exposure.

The law also provides for the protection of vulnerable and at-risk populations, such as children, women, adolescents, youth, persons living with disabilities and key affected populations. Unlike some of the laws in the region's individual member states, this statute does not criminalise the deliberate transmission of HIV.

This law is an important step towards harmonising and strengthening the HIV response in the region. Member countries, such as Kenya, whose HIV legislation contains criminalisation clauses, will be hard-pressed to amend their national laws to reflect the spirit of the regional law.<sup>13</sup>

### **iv. The Health Act, 2017**

The Health Act puts important Constitutional provisions for health services into operation. Formalising collaboration between national and county governments, the law represents a positive step in the country's continued commitment to devolution. The law obliges the government to address the health needs of vulnerable groups, safeguards their access to services, and mandates the provision of emergency and specialised care.

This law in fact requires that the government establish a national referral hospital in every county to increase access to specialised care. In another progressive step, the Health Act also instructs the national government to expand free maternity care and childhood immunisations. It proposes funding that these services be funded through ring-fenced, conditional grants – grants that are earmarked for a specific activity and must meet certain conditions. Employers and all formal workplaces will now be required to provide breastfeeding facilities to promote the well-being of infants, and health facilities must provide emergency care or face punitive measures.<sup>14</sup>

The new law benefits the HIV response by providing better protection of the right to privacy. It demands that the confidentiality of health status be maintained<sup>15</sup> and requires informed consent for the provision of specified health services.<sup>16</sup> Finally, the law guarantees reproductive health rights for all persons, including the right to safe, effective, affordable and acceptable family planning services.<sup>17</sup>

### **v. HIV and AIDS Prevention and Control Act, 2006**

This HIV and AIDS Prevention and Control Act (HAPCA) provide the legal framework for addressing HIV in Kenya. HAPCA protects and promotes appropriate treatment, counselling, support and care for persons infected with HIV or at risk of infection.

Under HAPCA Part II, the government is obligated to provide HIV and AIDS education. This provision is the basis for the increased awareness on HIV among the general public. HAPCA has also led to targeted, comprehensive education for populations at higher risk. Part III of the statute addresses the issue of safe practices and procedures to in health care facilities. Part IV deals with screening and access to health care services.

<sup>13</sup> See IRIN (2012) "Regional HIV Bill passed without criminalization clause," available at <http://www.irinnews.org/report/95371/east-africa-regional-hiv-bill-passed-without-criminalization-clause> (accessed 23/3/2018).

<sup>14</sup> See Health Policy Plus (2017) "New Kenya Law Ensures Access to Health Services," available at <http://www.healthpolicyplus.com/kenyaHealthRights.cfm> (accessed 23/3/2018).

<sup>15</sup> Section 11 the Health Act, 2017.

<sup>16</sup> Section 9 the Health Act, 2017.

<sup>17</sup> Section 6 the Health Act, 2017.

The law prohibits compulsory HIV testing for the enjoyment of basic rights such as employment, marriage, education, movement and basic health services. Informed consent from an individual prior to HIV testing is mandatory. Pre- and post-test counselling is also mandatory under the law. Part V upholds the confidentiality of patients' HIV status and information.

The establishment of the HIV and AIDS Tribunal has ensured the protection of human rights in the context of HIV as provided under the HAPCA Act. The tribunal is the first and only HIV-specific judicial body in the world. Its seven members comprise legal experts, medical practitioners and social experts with specialised skills and knowledge on HIV (this requirement guarantees representation of PLHIV within the tribunal). Tribunal procedures have been simplified, allowing individuals to submit their own cases, even without legal representation. This has made access to justice easier and more affordable for PLHIV. Since its establishment in 2009, the tribunal has reviewed about 600 cases wherein people have been discriminated against for being HIV positive.

However, this law had a shortcoming. Section 24(1) of the Act requires persons who are aware of being HIV positive to "take all reasonable measures and precautions to prevent the transmission of HIV to others" and to "inform, in advance, any sexual contact or persons with whom needles are shared [sic]" of their HIV positive status. Subsection (2) prohibits "knowingly and recklessly, placing another person at risk of becoming infected with HIV." Contravention of these provisions is a crime punishable by imprisonment of up to seven years, and/or a fine. Under Section 24(7), a medical practitioner who becomes aware of a patient's HIV status may inform anyone who has sexual contact with that patient of his or her HIV status.

Section 24 creates barriers to engagement and retention in HIV care. The provision may discourage some from being tested due to fears of legal repercussions. Criminalisation also compromises uptake and retention of health care by raising concerns that confidential medical information will be exposed. A case, *Petition 97 of 2010*, was filed to challenge Section 24 in 2010.<sup>18</sup> The result was the High Court's declaration that this section unconstitutional, along with its directive to Parliament to reconsider the provision. The court in its decision focused solely on the absence of a definition for "sexual contact." It found that, based on the provision's wording, it was impossible to determine which acts are prohibited. The court, however, failed to appreciate an issue advanced by experts during the litigation: the risks associated with criminalising non-disclosure more broadly, particularly for vulnerable groups.<sup>19</sup>

Civil society and affected communities therefore need to insist that any process to formally reconsider the provision be founded in evidence.<sup>20</sup>

## **vi. HIV and AIDS policies, guidelines and strategies for key populations**

The core mandate of the National AIDS Control Council (NACC) is to develop strategies, policies and guidelines for the prevention and control of HIV and AIDS in Kenya. NACC has to date led the national response by coordinating and implementing strategic plans. Another entity, the National AIDS and STI Control Programme (NAS COP), was established to spearhead the Ministry of Health's interventions in the fight against HIV and AIDS. NAS COP operates as a unit within the Ministry of Health and is mainly involved with provision of HIV and AIDS services. NAS COP's remit includes the formulation of guidelines to spearhead implementation and control the provision of medical interventions.

Kenya has demonstrated its commitment to providing an enabling legal, social and policy environment at national and county levels to reduce barriers to health services for people living HIV. Both NACC and NAS COP have invested in developing policies, guidelines and strategies informed by emerging research on new sources of HIV infection and by scientific developments in HIV prevention, treatment and management.

<sup>18</sup> *Petition 97 of 2010: Aids Law Project v. Attorney General & 3 others* [2015] eKLR.

<sup>19</sup> See Annabel Raw (2015) "Kenyan High Court Declares Law Criminalizing HIV Transmission Unconstitutional," *Oxford Human Rights Hub*, April 2015; available at <http://ohrh.law.ox.ac.uk/kenyan-high-court-declares-law-criminalizing-hiv-transmission-unconstitutional/> (accessed 23/3/2018).

<sup>20</sup> Evidence from scientific and social research on HIV transmission largely disputes the effectiveness of criminalisation in reducing HIV infection rates.

Data from the *Stigma Index Survey*, the *Kenya Demographic and Health Surveys*, and the *Second National Behavioural Assessment of Key Populations in Kenya: Polling Booth Survey Report*<sup>21</sup> has informed policies, guidelines and strategies targeting key populations at various levels. A brief summary of important policies and guidelines is provided below.

- ***Kenya AIDS Strategic Framework (KASF) 2014/2015–2018/2019***

The Kenya AIDS Strategic Framework<sup>22</sup> lays out a vision for “a Kenya Free of HIV infections, stigma and AIDS related deaths.” The KASF is the strategic guidance for the country’s response to HIV at both national and county levels. As such, it addresses the drivers of the HIV epidemic and builds on the achievements of previous strategic plans.

The KASF identifies stigma and discrimination as major barriers to HIV prevention and to uptake of care and treatment services. It recognises that socially excluded, poor and vulnerable people living with HIV are unlikely to take up services, and that this is hindering the country’s ability to reach public health goals. The framework also acknowledges the role that poor enforcement of anti-discrimination laws and weak social and legal protections play in driving new HIV infections. The strategy also incorporates human rights interventions, recognising the role of human rights violations in perpetuating vulnerability to HIV. Strategic Direction 3 of the strategy recommends interventions for protecting the rights of people living with HIV and key populations to facilitate access to services.<sup>23</sup>

- ***Public Sector Workplace Policy on HIV and AIDS Revised, 2010***

The *Public Sector Workplace Policy on HIV and AIDS* charges each ministry to formulate a sector-specific workplace policy to provide guidance in dealing with the day-to-day HIV and AIDS related issues that arise within the workplace. The policy also outlines employee’s rights, responsibilities and expected workplace behaviour. Both public and private sector employers have workplace policies in operation. The broad set of human rights guaranteed in the progressive 2010 Constitution’s Bill of Rights has significantly enhanced the working environment for PLHIV.

- ***National guidelines for HIV/STI programming with Key populations 2014***

The objective of the *Policy for the Prevention of HIV Infections Among Key Populations* is to enhance access to HIV prevention and treatment. The policy emphasises the need for programmes particularly targeted toward vulnerable groups to promote, protect and respect the human rights of these persons. It also calls for equality in the delivery of prevention, treatment and support services. Moreover, the policy demands the active and meaningful involvement of key populations, including PLHIV, at all levels of planning, programming and implementation.

The policy builds on existing operational documents targeting specific key populations, namely:

- The National Guidelines for HIV/STI Programmes for Sex Workers
- Standard Operating Procedures for Medically Assisted Therapy for People Who Use Drugs
- Kenya National Guidelines for the Comprehensive Management of the Health Risks and Consequences of Drug Use

This policy allows implementers to run programmes with key populations without fear of discrimination or violence. It has ensured that key populations are reached with programmes and services.

21. National AIDS & STI Control Programme (NAS COP) (2016), “Second National Behavioural Assessment of Key Populations in Kenya: Polling Booth Survey Report,” Nairobi.

22. *Kenya AIDS Strategic Framework (KASF) 2014/15–2018/19*, *ibid*.

23. NEPHAK, BHESP, KESWA, GNP+ (2015) *Speaking out: Personal testimonies of rights violations experienced by sex workers in Kenya*, available at <http://www.nswp.org/sites/nswp.org/files/Speaking%20Out%20Kenya%2C%20GNP%2B%2C%20KESWA%20-%202015.pdf> (accessed 23/3/2018).

- *Kenya's Fast-track Plan to End HIV and AIDS Among Adolescents and Young People*

The Fast-track Plan addresses the stigma and discrimination that discourage young people (aged 15–24) from seeking HIV preventive care and treatment. Targeted engagement has provided young people with comprehensive HIV information and encouraged more of them to get tested for HIV.

- *Guidelines on Use of Antiretroviral Drugs for Treating and Preventing HIV Infection in Kenya, 2016*

The 2016 guidelines are in accordance with international standards and WHO recommendations. The guidelines stipulate that all people living with HIV be put on life-saving antiretroviral treatment (ART) provided free of charge at all public health facilities. Under the new guidelines, ART is also recommended for use as a pre-exposure prophylaxis for persons testing HIV-negative to minimise chances of getting infected. Populations at higher risk of acquiring HIV are given priority for this latter intervention.

## **1.2.2 Legal provisions that impede the establishment of a supportive environment for HIV interventions serving key populations**

### **i. Public Health Act, 2012**

Section 27 of the Public Health Act touches on the treatment, care and prevention of tuberculosis (TB), a public health challenge that greatly affects PLHIV. This law gives public health officers the authority to remove and isolate persons who have been exposed to infection or who may be in the incubation stage of an infectious disease. The next section, Section 28, stipulates the penalty for exposing others to infectious substances. The two provisions have in the past been used to unconstitutionally incarcerate TB patients for “failure to adhere” to TB treatment. The manner and conditions of incarceration has endangered not only TB patients themselves but also other prisoners. Kenyan prisons lack isolation or medical facilities where proper care and treatment of TB patients can be provided.

The case of *Daniel Ng'etich & Another v. The Attorney General & Others*<sup>24</sup> challenged the implementation of these provisions. In this case two men were imprisoned for failing to take their medication for TB. The court ruled that their imprisonment was unconstitutional and not in compliance with the Public Health Act, which purportedly served as the basis for their incarceration. Similarly, in the case of *Simon Maregwa Githiru v. Republic*,<sup>25</sup> the applicant was convicted for wilfully exposing and spreading an infectious disease — tuberculosis — in violation of Section 28 of the Public Health Act. The court, in ordering the release of the applicant, noted that the lower court should have instead considered the wide range of non-custodial sentences provided by law.

The Public Health Act has also been used to compel forced medical examinations, including coerced HIV testing of sex workers. Sections 43 and 44 make it mandatory for any person suffering from any venereal disease to consult a medical practitioner and be treated until completely cured. Non-compliance with these provisions is criminalised. A recent example is the arrest and forced testing of 26 adult female sex workers in Kisii,<sup>26</sup> whose charges included these offences under the provisions of the Public Health Act.

In a constitutional petition, *Teresia Kwamboka & 27 Others v. Officer Commanding Police Station, (OCS) Kisii Police Station & 5 others*<sup>27</sup> was filed challenging the constitutionality of the manner in which Sections 43 and 44 were enforced against sex workers in Kisii County. Unfortunately, an application to prevent the use of medical examination reports arising from the forced testing of sex workers was unsuccessful. In its determination the court declined to make a finding on the legality of the arrest, the medical examination and the arraignment of the petitioners.

<sup>24</sup> Petition No. 329 of 2014.

<sup>25</sup> Miscellaneous Criminal Application No. 24 of 2011.

<sup>26</sup> CMCC Nos 3116 to 3141 of 2015

<sup>27</sup> Petition 54 of 2015.

On the basis that sex work posed a threat to public health, the court also declined to issue any orders interfering with the criminal proceedings at the Magistrates' Court. Judge J.R. Karanjah, one of the deciding magistrates, wrote:

*"In the meantime, it would be in the public interest for the petition and indeed the proceedings in the Magistrates' Court to continue without any hindrance or obstacle by way of a conservatory order. It cannot be gainsaid that the activity for which the first to the twenty-sixth petitioners were arrested poses great risk and danger to the health of the public within the County of Kisii. As such it behoves upon the relevant state organs to contain it as by law established if only for public good and interest. It is without doubt that in the present circumstances the interest of the public far outweighs the interest of the so-called "sex workers" or commercial sex-workers."*

## ii. Sexual Offences Act No. 3, 2006

The Sexual Offences Act (SOA) penalises the acts of third parties and generally outlaws the "exploitation of prostitution." This means that it is illegal to encourage sex work or benefit from another person engaging in sex work. The SOA also focuses on such actions compelling anyone, including a child or person with mental disabilities, to perform sexual intercourse for gainful purposes.

Section 26 of the SOA criminalises the transmission of a life-threatening sexually transmitted disease (STD) by doing or permitting the doing of anything the perpetrator knows is likely to transmit the disease. Additionally, it gives the court the power to authorise compulsory testing of a person accused of transmitting an STD in order to ascertain whether they are infected with the disease.

In June 2012 a Magistrates' Court in the town of Lodwar convicted a person under Section 26 of the SOA. The case, *Republic versus Peter Erukudi and Mary Itoot Ebenyo* (unreported),<sup>28</sup> had to do with an accused person who was involved in a gang rape incident. During the proceedings it was revealed by Mary Itoot Ebenyo that she knew Peter Erukudi was HIV-positive, and medical records submitted to the court indicated that the complainant was HIV-positive and infected with syphilis. On the basis of this evidence the court convicted Erukudi to a life sentence under the provisions of SOA Section 26(1), in addition to a conviction for gang rape.<sup>29</sup>

Because knowledge of one's HIV-positive status forms the basis of HIV-specific offences, there is a real risk that with increased legal awareness, populations at higher risk will not seek voluntary HIV testing. Under the SOA, it appears that if one is unaware of their HIV status, this can be a defence. This law is likely to frustrate on-going efforts to scale up access of key populations to prevention, care, and treatment in line with the UNAIDS 90-90-90 treatment goals.

## iii. The Narcotic Drugs and Psychotropic Substances Act, 1994

Sections 5(1)(b) and 5(1)(d) of the drug law criminalises anyone found on any premises used for drug use. Possession of appliances used in the administration of drugs is also illegal. The provisions hinder effective implementation of the plan to address HIV prevention and treatment as part of the comprehensive programme of care and treatment for injecting drug users (IDUs) in Kenya. Law enforcement officers, for instance, arrest and charge outreach workers assigned to provide IDUs with clean syringes and needles. These not only scares the outreach workers but the IDUs respond by steering clear of centres providing essential HIV services that they may need.<sup>30</sup>

<sup>28</sup> Criminal case number 99 of 2011.

<sup>29</sup> *Punitive Laws and Practices Affecting HIV Responses in Kenya*, *ibid.*

<sup>30</sup> *Punitive Laws and Practices affecting the HIV response in Kenya*, *ibid.*

#### iv. The Penal Code, 2009

The Penal Code contains provisions that outlaw activities relating to sex work, with a particular focus on third parties who benefit from or promote sex work. The law touches on the following:

- Detention of females for immoral purposes (Section 151)
- Male person living on the earnings of prostitution or soliciting (Section 153)
- Woman living on earnings of prostitution or aiding, abetting or compelling an individual to engage in sex work (Section 154)
- Procedure for entry and search of premises used for prostitution (Section 155) and
- Running a brothel (Section 156)

In addition, the Penal Code criminalises “unnatural offences,” defined under Section 162 as having carnal knowledge with another against the order of nature. Section 165 additionally penalises “indecent” acts between males.

While there have only been a few documented cases where key populations have been criminally prosecuted based on these Penal Code provisions, the law nevertheless fosters a state-sanctioned culture of stigma, discrimination, exploitation and extortion of these vulnerable groups. This social exclusion leads many individuals in these groups “underground,” making it hard to reach them with HIV services. The above provisions effectively constitute a denial of legal protection, making the lives of key populations less safe and far riskier in terms of HIV.

#### v. County laws

Section 21 of the County Governments Act (2012), as read together with Article 185 of the Constitution, gives County Assemblies legislative power to pass bills into law. The County Model Laws initiative was created to support county governments and the public in general to develop, adapt and effect legislation that aligned with national laws, adhered to best practice standards and conformed to the Constitution.<sup>31</sup> Despite an overall harmonisation of county laws with national laws, those that harm key populations, such as sex workers, have not been harmonised. Most sex workers are still arrested based on earlier bylaws that were adopted by counties. Some counties, such as Nairobi and Mombasa, adopted provisions that criminalise “loitering, importuning for purposes of prostitution or attempting to procure a female/male for prostitution purpose.” Like the Sexual Offences Act, these laws also provide police officers with broad justification to arrest and harass sex workers.

Despite a robust set of laws that codify the right of people living with and affected by HIV to legal protection, the virus is still highly criminalised and stigmatised. An enabling legal environment must exist in order for affected people to access the services they are entitled to under the Constitution. For various reasons, including ignorance of these legal protections, rights holders are often not able to effectively demand their rights. Additionally, duty bearers frequently fail in their obligations to ensure that the human rights of key affected populations are realised.

Human rights violations arising from stigma, discrimination and criminalisation have had an adverse impact on HIV prevention, care and treatment interventions. These measures and attitudes dissuade affected persons from accessing HIV-related services, making it more difficult to combat the epidemic. Criminal sanctions affect those at risk of TB and HIV and those using drugs. These legal provisions impose regimes of surveillance and punishment on consenting adults, not only in their intimate relations and reproductive and maternal lives, but also in their attempts to earn a living.

<sup>31</sup> Kenya Law Reform Commission (2015) “A summary of County Model laws, available at <http://www.klrc.go.ke/images/images/downloads/KLRC-BOOKLET-ON-REVISED-MODEL-LAWS.pdf> (accessed 23/3/2018).



Respect and advancement of human rights is a national value that binds all state organs and institutions in the application of laws and implementation of policies. The incorporation of a rights-based approach into the national HIV response is aimed at widening access to justice by transforming relations of power relations among rights holders (who do not experience full enjoyment of rights) and duty bearers (the institutions obligated to fulfil those rights). Guided by a rights-based approach, *Enhancing the Legal Environment for an Effective HIV Response in Kenya* sought to educate and empower rights holders, on the one hand, and strengthen the legal capacities of duty bearers, on the other. A centrepiece of the project strategy was a set of structured dialogues designed to advance engagement among all actors towards the actualisation of health and related rights.

## 2. PROJECT DESCRIPTION

There is a need to focus on law and human rights in HIV programming. Doing so is necessary in order if we are to develop the conceptual and analytical tools needed to challenge the structures that propel HIV and aggravate its consequences.

Building on previous work on the negative impact of social and institutionalised human rights violations in Kenya, KELIN this time around sought to promote the benefits of rights-based approaches in HIV treatment and prevention. The five-year project, *Enhancing the Legal Environment for an Effective HIV Response in Kenya* (2013–2017), sought to enhance the capacity of the national HIV response programme to reach key affected populations.

### 2.1 Objective

The main objective of this project was to increase awareness and knowledge on (1) the fundamental rights of every individual and on (2) mechanisms for legal redress. For Kenya's HIV response to be effective, both rights holders and duty bearers must be adequately exposed to these knowledge areas.

The project focused on four major components:

1. **Strengthen the capacity** of communities to access justice and influence laws.
2. **Improve access** to justice and legal services for people living with HIV.
3. **Advocate** for reforms to laws, policies and practices that affect PLHIV and key affected populations.
4. **Document and share** experiences and best practices on how to use the law to create an enabling environment for a robust HIV response.

### 2.2 Project locations and beneficiaries

The project was to cover the counties of Nairobi, Kisumu, Homa Bay, Kakamega, Bungoma, Mombasa, and Kilifi. The targeted beneficiaries people living with HIV and their networks, key affected populations, county officials, law enforcement officers, health care workers, lawyers and advocates, judicial officers and members of the HIV Tribunal.

### 2.3 Expected results

The expected project outcomes were as follows:

- Capacities of infected and affected communities to influence better laws and policies strengthened
- Capacities of legal professionals to address HIV through quality services strengthened
- Legal aid and litigation services provided
- Capacity of judicial officers to address HIV through quality judgments improved
- Capacities of law enforcement officers on HIV, human rights and the law strengthened
- Dialogue forums conducted at regional, national and county levels
- Advocacy materials on law reforms produced and disseminated
- Capacities of the media on HIV, human rights and the law strengthened
- Best practices documentation on HIV, human rights and the law published

### 3. PURPOSE OF THE REPORT AND METHODOLOGY

This report seeks to demonstrate how the *Enhancing the Legal Environment for an Effective HIV Response in Kenya* project contributed to the overall body of knowledge around programming on HIV and the law. This report documents the trends in human rights violations that gave rise to the project. It outlines the project approach and reviews the project implementation process, outcomes of project activities and overall impact on project beneficiaries before closing with a summary of lessons learned and recommendations to inform future work in this area. The report meets KELIN's organisational objectives of institutional strengthening and knowledge sharing.

Report chapters cover four main topics:

- 1) Assessing **the trends in human rights violations against key affected populations**. The trends analysis is premised on a project baseline study report and on cases reported to and documented by KELIN staff and project beneficiaries during the five-year project period. The assessment will also draw on relevant documentation published during the project period.
- 2) Reviewing **the project strategies to enhance the legal environment for an effective HIV response**. This section analyses the extent to which the project addressed violations human of rights, challenges presented by the legal environment and gaps in policies and practices that affect the delivery of HIV related services to key affected populations.
- 3) Documenting **good practices and lessons learned**. These were determined mainly through feedback from partners who worked with KELIN on this project and documented beneficiary success stories.
- 4) Identifying **challenges and recommendations**. The hope is that this discussion will be useful for future project management and technical teams attempting to build on and carry forward this work.

Our methodology was qualitative in nature. Data collection and analysis were derived from the following

- 1) Analysis of project documents and progress reports
- 2) Review of primary and secondary information
- 3) In-depth interviews with identified project staff, beneficiaries, partners and other concerned stakeholders, including duty bearers

### 4. TRENDS IN HUMAN RIGHTS VIOLATIONS

Failure by the state to respect, protect and fulfil its obligations often results in violations of human rights. In order to effectively address human rights, it has become increasingly important to not only monitor violations but also identify why protective laws have failed to adequately limit HIV related stigma and discrimination.

Understanding this dynamic in the context of HIV requires an in-depth look at programmes for increasing awareness, programmes for providing access to legal support services, and mechanisms for monitoring human rights violations and seeking redress. This chapter highlights the trends in human rights violations against key affected populations documented in Kenya between 2012 and 2017. These results of this assessment informed the various project interventions and the targeting of beneficiaries.

The analysis of trends was based on the following:

1. A 2012 KELIN study of human rights violations against PLHIV in Kenya
2. A 2014 KELIN baseline survey conducted in Kakamega County
3. Cases of human rights violations reported, documented and addressed by KELIN staff and project beneficiaries during the project period
4. Interviews with project beneficiaries
5. Other relevant publications, reports and media accounts on HIV related rights released during the project period

The general findings are that although HIV related human rights violations are generally trending downward, the numbers remain high. Violations against key affected populations continue despite the country's commitment to an enhanced legal and policy environment.

*"You realise that our rights are being infringed and we do not know that our rights have been infringed unless maybe someone comes and tries to help you understand," Douglas Masinde of Tamba Pwani*

Notably, efforts to empower key populations to know their rights, identify violations and report them increased, with both mainstream and social media providing useful tools for information sharing.

The following are the major trends in human rights violations against key affected populations identified during the project period.

#### **4.1 Inadequate access to information**

The right of access to official information is protected by the Constitution of Kenya.<sup>32</sup> This right imposes an obligation on the state to make information available to the public. The 2016 Access to Information Act outlines the process of accessing information from any institution exercising a public function. The statute also stipulates penalties for failure to comply. The HIV and AIDS Prevention and Control Act specifically require the government to provide HIV and AIDS education both at national and county levels.

During implementation of the project it became apparent that most HIV related human rights violations were the result of a lack of adequate legal knowledge or human rights knowledge, on the part of both victims and perpetrators. In particular, the research showed that knowledge on HIV related human rights was very general.<sup>33</sup> An excerpt from a report entitled *HIV, Human Rights and the Law for Health Care workers in Nakuru and Uasin Gishu Counties* showed that while there were ongoing human rights violations in health care facilities, health care workers were not aware some of their behaviours amounted to violations.<sup>34</sup> To the degree that health workers had any knowledge on human rights and the law, that knowledge tended to reside among those who had attained higher levels of education.<sup>35</sup> However, their knowledge was not being applied in practice.

Public information relating to HIV largely deals with transmission, testing and management of the virus. However, this information is not complemented by resources or education on legal protections and human rights. Knowledge on specific legal provisions that would advance the rights of PLHIV and key affected populations is limited.

<sup>32</sup> Article 35 the Constitution 2010.

<sup>33</sup> KANCO (2012) *Study on human rights violations against people living with HIV in Kenya*, *ibid*.

<sup>34</sup> KELIN (2014) *Report on HIV, Human Rights and the Law For Health Care Workers in Nakuru And Uasin Gishu Counties 25<sup>th</sup>–27<sup>th</sup> February, 2014*, available at <http://kelinkenya.org/wp-content/uploads/2010/10/HIV-Human-Rights-the-Law-for-Health-Care-Workers-in-Nakuru-and-Uashin-Gishu-Counties.pdf> (accessed 23/3/2018).

<sup>35</sup> KELIN (2014) *Enhancing the Legal Environment for Effective HIV Response Project in Kenya, KELIN Baseline Survey, July 2014*, available at <http://kelinkenya.org/wp-content/uploads/2010/10/Enhancing-the-Legal-Environment-for-Effective-HIV-REsponse-Project-in-Kenya-Kakamega-Baseline-Report.pdf> (accessed 23/3/2018).

Access to justice for key affected populations is also limited by low awareness of avenues for legal redress, such as court-based litigation and Kenya's progressive HIV Tribunal.

#### 4.2 Stigma and discrimination in the provision of health services

Despite numerous national campaigns, stigma and discrimination are still persistent and harmful barriers for people living with HIV and for key affected populations. *The Stigma Index Survey* and the *Kenya Demographic and Health Surveys* have shown high stigma levels, of above 45 percent. These have affected demand and utilisation of HIV related services. The findings of the *National HIV and AIDS Stigma and Discrimination Report* show that key populations, who include sex workers, men who have sex with men and drug users, experience double stigma associated with their sexual behaviours, practices and HIV status. Stigmatisation and shaming by society and health care providers cause key population groups to avoid seeking health care when in need.

Access to health services for key populations greatly depends on the degree to which frontline health care workers and facilities welcome them and safeguard their rights. The treatment offered at most health centres is discriminatory, unfair and generally propagates stigmatisation at community level. At times, HIV treatment is denied. Several reported and litigated cases involved a breach of the confidentiality of those accessing health care services.<sup>36</sup>

Some violations may occur in implementation of programmes, for example where colour coding (that is generally known) is used to identify files of HIV-positive clients; or there is segregation of PLHIV from other patients or staff.<sup>37</sup>

*"In the community, on the other hand, sex workers are considered and treated as AIDS carriers who do not deserve to be treated with respect and should be subjected to intense violence, discrimination rejection and trauma until they quit the trade. As a result, sex workers are less likely to come out and access health services whether for HIV, sexually transmitted infections or even sexual assault."* — A sex worker representative from Kakamega County

There have also been claims of PLHIV being transferred to remote areas of the country where antiretroviral treatment, medication for opportunistic infections and HIV prevention services and commodities cannot be readily accessed.<sup>38</sup>

#### 4.3 Disclosure and breach of confidentiality

According to KELIN's baseline survey report,<sup>39</sup> the right to privacy is recognised selectively when it comes to PLHIV and key populations. For example, both persons whose rights have been violated and the perpetrators reported being uncertain about the legal provisions governing disclosure of one's HIV status, yet disclosure is routinely promoted as a public health measure to prevent transmission and enhance support for adhering to treatment. The majority of PLHIV have had their status disclosed without their consent. Although the law is clear on which circumstances permit disclosure by health care workers, this provision is not well understood and hence not lawfully applied. Some people have been compelled to move out of their communities in order to flee censure following from disclosure. Most are not aware that they can actually seek redress for unlawful disclosure of their HIV status; most of those who are aware avoid using this mechanism because they fear doing so would lead to further abuse.

<sup>36</sup> *B.O v. Meridian Equatorial Hospital* Case No. HAT 005 of 2013.

<sup>37</sup> KELIN Baseline Survey (July 2014), *ibid.*

<sup>38</sup> KELIN Baseline Survey, July 2014, *ibid.*

<sup>39</sup> KELIN Baseline Survey, July 2014, *ibid.*

#### 4.4 Forced or coerced HIV testing

The requirement by some government and private institutions for compulsory HIV testing as a prerequisite for receiving essential medical services was reported by high numbers of PLHIV. A “Know Your Status” policy now requires anyone who visits a health centre or hospital for treatment to undergo an HIV test as part of the routine package of health services. Despite assurances that the policy does not promote compulsory testing, poor implementation had some health service clients to believe they have no choice but to submit to testing.

Many criminal cases feature the unlawful imposition of compulsory testing on and arrest, with intent to prosecute, of sex workers by law enforcement. A recent example is the arrest and forced testing of 26 adult female sex workers in Kisii County.<sup>40</sup>

Another, more tragic incident of forced testing formed the subject of a case brought by two men who challenged the police’s use of rectal inspections as part of their investigation of these men for homosexuality in Kwale County. A 2016 KELIN report summarised the case as follows:

*On the morning of 18 February 2015...police arrested two young men while at a restaurant in Msambweni, Kwale County. The men were swiftly presented before a magistrate whom upon prompting by the police gave a court order requiring the young men to undergo medical tests to prove that they had engaged in anal sex. The prosecution’s case was based on Section 36 (1) of the Sexual Offences Act which provides that the court may direct that an appropriate sample or samples be taken from the accused person, for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence. It was also in response to public outcry and backlash after pornographic photos were circulated on social media platforms featuring men from the coastal town engaging in sexual acts.*

*The young men were consequently presented at the government-run Coast General Hospital in Mombasa, where doctors ran blood tests to test them for HIV and Hepatitis B. The health care workers thereafter reportedly subjected them to anal examinations with the aim of proving their sexuality.*

*This violation was a first of its kind against the community in Kenya. Various pro-Lesbian Gay Bi-sexual Transgender and Intersex (LGBTI) advocacy groups (led by the National Gay and Lesbian Human Rights Commission) filed an urgent petition in court to halt the criminal case and ask the High Court to declare that the anal tests performed on the two gentlemen were unconstitutional and amounted to inhumane and degrading treatment. The court consequently pronounced itself on 16 June 2016, upholding the veracity of the anal examinations and dismissing the petition on the basis that the medical examinations as conducted were in accordance with the Sexual Offences Act.<sup>41</sup>*

The attitude of some judiciary members towards key populations was the subject of intense deliberations during judicial dialogue forums carried out in the implementation of this project. Key population representatives questioned the ability of courts to adjudicate with impartiality and open mindedness.

#### 4.5 Verbal, physical and sexual abuse

People living with HIV experience high levels of violence — psychological violence through verbal abuse by the people around them, physical abuse, especially within the family setting, and sexual assault or the threat of sexual assault. The perpetrators of such incidences are commonly family or community members. Sexual and physical abuse is common among infected couples, who may blame one another as the cause of infection and suffer feelings of betrayal.

<sup>40</sup> CMCC Nos 3116 to 3141 of 2015

<sup>41</sup> Ted Wandera (2016) “Burden of Proof: Kenya’s decision to uphold anal testing exposes the LGBTI community to grave injustice,” available at <http://www.kelinkenya.org/burden-proof-kenyasn-decision-uphold-anal-testing-exposes-lgbti-community-grave-injustice/> (accessed 23/3/2018).

Sexual rights among discordant married couples are mostly denied after one partner finds out the status of the other; some spouses go to the extent of denying food to their partners.<sup>42</sup> Members of key populations are frequent, easy targets for harassment and violence, as they are considered immoral and deserving of punishment. Particularly among sex workers, violence is considered 'normal or part of' their job. Most do not know their rights and are often reluctant to report violence against them. Even when reported, these incidents often go unaddressed.<sup>43</sup> In at least six incidents between 2008 and 2015, groups of lesbian, gay, bisexual and transgender (LGBT) people in the coastal counties of Kilifi, Kwale and Mombasa have been threatened or attacked in episodes of mob violence.<sup>44</sup>

*Major Findings of the Polling Booth Survey on violence against key populations:*<sup>45</sup> Some of the main findings brought to light by the survey are:

- Overall, 20 percent of female sex workers (FSW) reported having been beaten or otherwise physically forced to have sexual intercourse in the six months preceding the study. FSWs experiencing violence by law enforcement officers rose from 44 percent in 2014 to 48 percent in 2015.
- On average, sexual violence was experienced by 13 percent of all men who have sex with men (MSM) in the survey, down from 17 percent in 2014. The proportion of MSM who reported violence committed against them by law enforcement actors increased from 24 percent in 2014 to 26 percent in 2015.
- The percentage of people who inject drugs who experienced violence from police in the preceding six months decreased from 57 percent in 2014 to 43 percent in 2015.

#### 4.6 Harmful cultural practices

States are obligated to take action against the social causes of inequality, eliminating the causes of laws, stereotypes, practices and prejudices that impair the well-being of women and PLHIV. Some traditional cultural practices are detrimental to the health of women and girls, particularly those customs that fuel the spread of HIV.

Risky sexual behaviour persists in burial ceremonies '*disco matanga*' (burial parties) and in areas where wife inheritance is still practiced. Discriminatory practices favouring boys still persist, especially in rural settings. Neglect of and discrimination against daughters, especially in such societies, also contributes to early marriage. Harmful practices against PLHIV include being denied the right to marry, early child marriage and, in some instances, separation of parents from their HIV-negative children.

*Rhoda shared that she is a widow living with HIV, having lost her husband in 2002. Upon her husband's demise, her in-laws immediately turned against her and demanded that she be inherited by one of her in-laws (likely a brother of her deceased husband). She resisted the same as she didn't want to infect any other person having known of her status. One day she found her house demolished for reasons that she was a bad omen - she was forced to go rent a place elsewhere. She opted to go back home to her own parents but was told that she needed to return her children, therefore decided to stay in the rented place. — Excerpted from a Judicial Dialogue Forum Report*

42 KELIN Baseline Survey July 2014, *ibid*.

43 *Speaking out: Personal testimonies of rights violations experienced by sex workers in Kenya*, *ibid*.

44 Human Rights Watch and PEMA Kenya (2015) *The Issue is Violence: Attacks on LGBT People on Kenya's Coast*, available at [https://www.hrw.org/sites/default/files/report\\_pdf/kenya0915\\_4upr.pdf](https://www.hrw.org/sites/default/files/report_pdf/kenya0915_4upr.pdf) (accessed 23/3/2018).

45 NASCOP (2016) *Polling Booth Survey Report*, *ibid*.

## 4.7 Discrimination in the ownership and inheritance of family property

Stigma and discrimination not only exacerbate vulnerability to HIV but also aggravates the burden of HIV infection. Some PLHIV and other key affected populations are still shunned by family, peers and the wider community, although this practice has significantly lessened. This issue particularly surfaces in relation to the right to access, own and inherit property. Women living with HIV, widows and orphans have been disinherited by immediate family members who dispose of the property of the deceased husband on the basis of the actual or suspected HIV related status of his widow. Disinheritance is another form of discrimination that further limits economic opportunity for those affected by it.

Caroline Oyumbo, a widow and activist in Mfangano Island, Homa Bay, who attended a paralegal training by KELIN in Mbita, shared her story on how her father-in-law spearheaded efforts to have her disinherited few weeks after her husband's death. On objecting, she was branded an antagonist of "important" rituals of the Suba people. Guided by a lawyer, she used alternative dispute resolution mechanisms to reclaim her land. The lawyer's counsel enabled Mrs Oyumbo to successfully engage local administrators in seeking justice for her family. Mrs Oyumbo now works with widows, empowering them with information about their rights. She has helped women in her area reclaim land amicably.

## 4.8 Discrimination in employment

The law explicitly protects people living with HIV from workplace discrimination. Despite this, PLHIV live in fear that their status will be found out by employers — there have been numerous cases of rights violations against PLHIV in the workplace: firings, rejection for employment opportunities for which they are qualified, stigmatisation and inappropriate disclosure of HIV status. Together with a 'don't ask, don't tell' workplace culture, these prejudices and systemic disadvantages force many PLHIV not to reveal their status. Employers reportedly avoid employing PLHIV due to fears they will prove to be a burdensome medical expense.

An alarmingly high number of legal disputes now involve workplace discrimination. Many of the cases documented in the HIV and Aids Tribunal *Compendium of Cases (collection of cases)*<sup>46</sup> involved complainants who claimed that the nature of their termination amounted to discrimination on the basis of their HIV status.

## 4.9 Limited access to justice

To address discrimination and other human rights violations, people living with HIV must have clear pathways for accessing justice. Access to legal services is limited by the physical location of service providers relative to potential clients, by lack of information on where to get quality, affordable legal representation and by the cost of legal fees. Corruption further frustrates efforts to access justice. Whatever the reality may be in any particular case, key affected populations often feel that those who violate their rights often bribe their way out of investigations.

The complexity, costs and time spent pursuing court cases prevent many people from reporting and following up on violations. The majority of those whose rights were violated did not report the offense because they lacked financial resources, on the one hand, and faith in the legal system, on the other.

The court process is viewed by most PLHIV and key populations as unfriendly; hence, most are reluctant to follow through with cases to the point of prosecution. The court process is often lengthy. This is another reason people refrain from reporting — they believe that by the time a case is resolved, the extent of damage will be greater than if they had tried to resolve the matter through a less formal process. Where victims do pursue court cases, witnesses are usually unwilling to testify, causing further emotional distress to those who have been victimized. In some instances, perpetrators are not arrested even after a warrant has been issued. Of those who followed the procedures for redress to the end, most were not satisfied with the outcome.

<sup>46</sup> The compendium is discussed in further detail in Chapter 5, Section 5.6.

## **5.0 Failure to observe the human rights of incarcerated persons**

The national values articulated in the Constitution bind together all state organs, state officers, public officers and citizens. Social justice, human rights and non-discrimination are among these national values. Where public health intersects with justice, these values are often neglected or inadequately incorporated, particularly when it comes to HIV and TB. Criminalisation of same-sex acts, defaulting in one's TB drug regimen and other behaviours that increase the likelihood of transmission makes it more difficult to deliver appropriate HIV and TB services. Injecting drug users and TB drug defaulters often find themselves in prison for violating the law. Like other vulnerable populations, prisoners do not usually have equitable access to health services. This is particularly true for those needing HIV and TB prevention, treatment, and care and support services.

There has been limited opportunity for law enforcement officers to access what achievement has been made in HIV management and of the evolving roles of the law and law enforcement in the response to HIV. In the public health, the moral and societal role of law enforcement officers as protectors of human rights is yet to be fully explored.



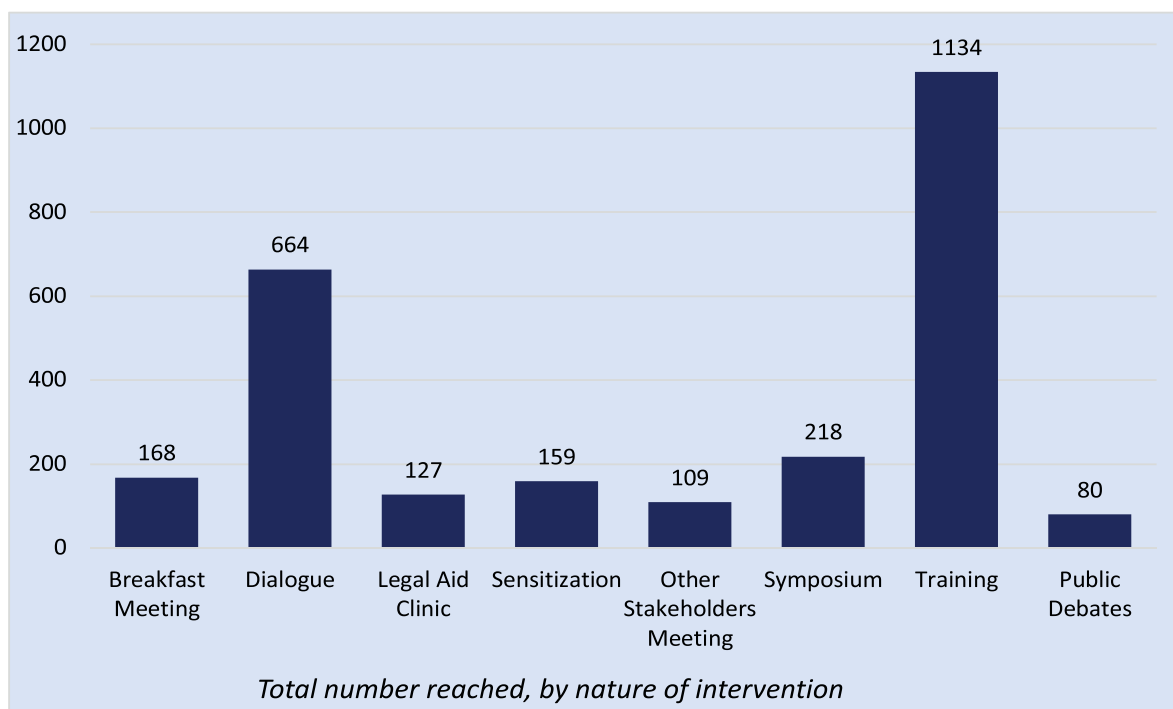
## 5. STRATEGIES TO ENHANCE THE LEGAL ENVIRONMENT FOR AN EFFECTIVE HIV RESPONSE

Chapter 5 reviews the strategies adopted by the project implementers to enhance the legal environment for an effective HIV response. The review is based on an analysis of the extent to which the project addressed the trends in human rights violations outlined in Chapter 4. This chapter also highlights the results of project activities. The project sought to empower PLHIV and key affected populations at community, county and national levels in order to improve HIV related laws and policies. Duty bearers and rights holders discussed the problems posed by punitive laws. They also interrogated opportunities for ensuring full implementation of legal provisions that support vulnerable populations. Project beneficiaries also explored the various responsibilities of each set of stakeholders to effectively advance HIV related rights. Overall, the project reached approximately 2,695 people, 63 percent of whom were female and 37 percent male.

The major strategies are outlined below.

	Category	# of Participants
1	Widows, orphaned and vulnerable children, and adolescents	350
2	CSO activities including PLHIV, key affected populations (sex workers, MSM, MSW, TB survivors etc.)	294
3	Lawyers and advocates	283
4	Law enforcement (police, prison officers etc.)	352
5	Representatives from UN agencies	15
6	Members of the court users committee	112
7	Judges and magistrates (nationals and internationals)	91
	Other judicial officers	112
8	Healthcare professional (medical practitioners, dentists, lab, nurse, pharmacy etc.)	166
	Other health workers (HTC Counsellors, trauma Counsellor, CHVs and CHAs)	43
9	Elders	127
10	Members of the country coordinating mechanisms, CCM& GF	8
11	Legislators (national and county governments, senate)	47
12	PEPFAR	8
13	Representatives of national human rights institutions	10
14	Media members	34
15	Others	643
	<b>Total</b>	<b>2695</b>

*Table 1: Total number reached, by profession and/or affiliation*



*Fig 1: Total number reached, by nature of intervention*

## 5.1 Strengthen the capacity of duty bearers to cultivate an enabling legal environment

The conduct and attitude of public servants can affect the degree to which key affected populations are able to access HIV related services. Public servants also impact the extent to which key populations' human rights are protected, particularly when they experience violence and HIV related discrimination.

Activities that targeted duty bearers engaged in the interpretation, application and enforcement of laws strengthened these stakeholders understanding about the role the law plays in ensuring the full enjoyment of TB and HIV related rights. Duty bearers that appreciate the disparities between legal provisions and HIV policies are better equipped to provide practical solutions. This enhanced capacity in turn improves the accessibility, uptake and efficiency of HIV services for key populations.

Actors with a direct role in influencing the legal framework were engaged in the project as follows:

### vii. Training legal professionals

The project sought to increase the pool of legal practitioners equipped to offer HIV related legal services and advocate for legal reforms. Training forums, which clarified the role of legal professionals in promoting HIV related human rights, helped lawyers better understand the link between HIV and human rights. Those who participated in the trainings committed to join KELIN's team of pro bono lawyers. This group of 233 attorneys — 12 more than the total number trained (221) — not only offer specialised HIV related legal services but also participate in legal aid clinics and awareness forums. Fifty-four percent of these attorneys are female and 46 percent are male.



Fig 2: Number of Lawyers Trained by County, 2012–2017

**Results:**

- Improved access to quality, affordable legal services to enforce rights for key affected populations
- Increased number of cases litigated on HIV related rights

**viii. Judicial dialogue forums**

Judicial officers have a responsibility to make evidence-informed findings and to apply the highest principles of the law to adjudicate cases involving HIV related issues. Recognizing its success in the field of HIV education, KELIN adopted a peer-intervention methodology to involve judicial officers in the project. KELIN organised a number of judicial dialogue forums to provide a platform for critical discussions and to give judicial officers from Kenya other African countries an opportunity to share experiences. Participants were provided with material to inform deliberations on the complex legal and human rights issues posed by the HIV epidemic.

Altogether the project targeted judges and magistrates from 12 countries across Eastern and Southern Africa. Participants committed to applying their enhanced knowledge to better interpret the law and to make use of expert evidence to ensure that judicial decisions uphold the dignity of PLHIV and key affected populations at all times. Judiciary participants also pledged to adopt a human rights approach in their work.

**Results:**

- Ninety one (91) judges and magistrates and one hundred and twelve (112) other judicial officers from various countries, among them Kenya, Burundi, Tanzania, Botswana, Zambia, Lesotho, Uganda and Malawi, were reached through the project.
- A number of favourable decisions by the court have safeguarded HIV and TB related rights, improving interventions for key affected populations:
- On 24 March 2016 the High Court in Nairobi declared that the practice of detaining persons with tuberculosis in prison was both unlawful and unconstitutional. This decision has put a stop to the arrest and imprisonment of TB patients. It ensured that future isolation is handled in a patient-centred manner that respects human rights.<sup>47</sup> This case is described in further detail in Chapter 6.2, Section ii.

<sup>47</sup> Petition 329 of 2014: *Daniel Ng'etich v. Attorney General*.

- The High Court in Nairobi on 7 December 2016 declared unconstitutional a presidential directive requiring collection of HIV related data on school-going children. The court found that disclosure of identities and HIV status is a violation of the law and against the provisions of the HIV and AIDS law.<sup>48</sup>
- Judicial officers are more actively involved in influencing the legal and policy environment on HIV.

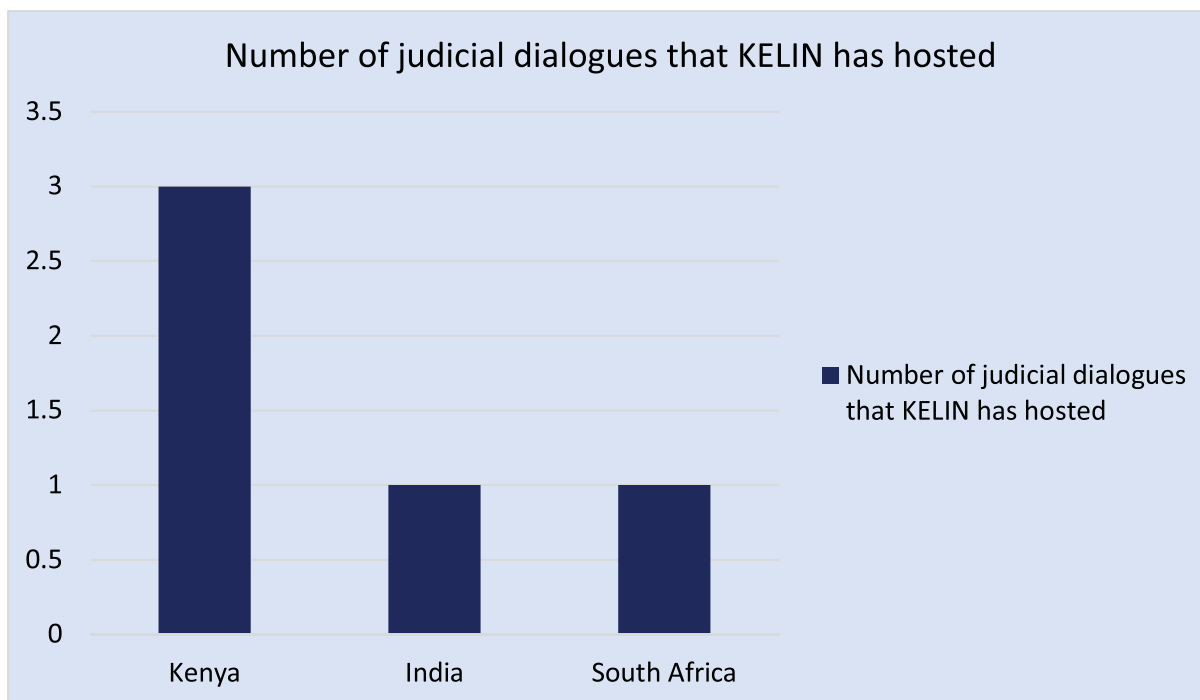


Fig 3: Number of judicial dialogues that KELIN has hosted

#### ix. Sensitising senior law enforcement officers

The important role of law enforcement in protecting and promoting health — especially the health of vulnerable and key affected populations — is being increasingly recognized globally. By virtue of mandate to uphold law and order, promote community safety and protect human rights, law enforcement officers are often in frequent contact with vulnerable populations.

Several project activities focused on law enforcement stakeholders. A regional workshop for senior law enforcement officers on HIV, human rights and the law was conducted in 2013. Participants were senior officers drawn from six countries in Eastern and Southern Africa where UNDP is currently supporting work focusing on HIV and the law, namely, Kenya, Lesotho, Zambia, Malawi, Tanzania and Swaziland. Taking forward recommendations from the training, KELIN the following year partnered with the Kenya Prisons Service – AIDS Control Unit to convene a high-level meeting with top ranking prison officials, government actors charged with Kenya’s TB and HIV response, and many representatives from the United Nations and non-governmental organisations. Meeting participants discussed more affective approaches to managing HIV and TB in Kenyan prisons, especially in view of constitutional guarantees for prisoners and persons in custody.

At the regional workshop, participants deliberated on the ways devolution has affected the complex task of delivering health services. Whereas correctional facilities are handled by the national security apparatus, health is a devolved function of county governments. The main priority action agreed at this meeting was to generate evidence on gaps and capacity needs relating to respect and protection of HIV and TB related human rights in prison.

<sup>48</sup> etition 250 of 2015 *KELIN & Others v. The Cabinet Secretary Ministry of Health & Others*.

*“We’re lifting up the standards for treatment and care for TB patients and people living with HIV and AIDS, a programme that is appreciated by both the staff and inmates.” — Angus Masoro, officer in charge of Kenya Prisons’ AIDS Control Unit*

**Results:**

- The workplace policy on HIV and TB for the Kenya Prisons Service has been revised in light of provisions in the Constitution.
- Challenges identified in the delivery of health services in prison were presented to policy makers during forums at national and county level, and strategies to improve on service delivery agreed upon. These included building capacity of more staff
- HIV programmes in prisons like HIV testing have improved as a result of proactive efforts by prison officers.
- Increased police partnerships to foster support for the health and well-being of sex workers and other key populations.

## **5.2 Influence the integration of rights based approaches in HIV and TB service delivery**

Human rights awareness and legal knowledge are very important to changing the way key affected populations and persons living with HIV access HIV services. Through human rights education, health care professionals can be empowered to protect and promote patients’ rights and advocate for changes in service delivery. Equipped with the right information, communities can better address long-standing practices that discriminate against them. Often, communities are unaware of the existence of services and processes that they are entitled to. Nor are communities generally aware of how to demand improvements in HIV services and commodities.

This component of the project sought to capacitate health care workers, networks of PLHIV and key affected populations to promote rights based health care delivery.

### **i. Strengthen the capacity of health care workers**

In trainings designed for health care workers, KELIN identified the systemic and structural barriers that stood in the way of improved health outcomes for key affected populations. Participants committed to ensuring quality, ethical service delivery, to collaborate with KELIN and other rights organisations to identify rights violations, and to advocate for the incorporation of human rights in staff training and service provision in order to combat discrimination. The following quote is representative of the feedback received from one participant, a health care worker that participated in the trainings:

*“My attitude was not so good. I had a negative attitude and was thinking that sex workers were undeserving. From the training I came to understand just how important they were in the HIV response. I also came to learn that we have also male sex workers within the society.” — Patrick Wafula, Kakamega County General Hospital’s deputy nursing officer*

### **Results:**

- One hundred sixty-six (166) health care professionals (doctors, clinical officers, lab technicians, nurses, pharmacists) and forty-three (43) other health workers (counsellors and community volunteers) benefited from the project activities.
- A human rights module was incorporated into the national training curriculum for both adult and paediatric HIV management.

### **ii. Empower CSOs to monitor implementation of the right to health**

The UNAIDS 90-90-90 goal requires that programmes track the access of key-population individuals to prevention, care, and treatment. The human right to health care means that the services provided must be accessible, available, equitable and of good quality. It is important that community actors ensure accountability in the design and delivery of health care systems, which must be guided by human rights standards. Specific tracking is needed to ensure that key populations can routinely access high quality, efficiently delivered outreach and clinical services.

The purpose of training civil society organisations was to provide communities with an understanding of the governance structures for implementing the right to health in Kenya. KELIN developed a training manual to help civil society organisations better understand and appreciate their role in protecting and promoting the right to health. The modules in the manual are designed to build the capacity of CSOs to monitor health governance and hold duty bearers accountable for effective and efficient health service delivery. The training ensured that evidence from grassroots organisations would inform the improvement of national service delivery strategies.

*“This training manual is intended to enhance the role of CSOs in promoting and protecting of the right to health under the Constitution. It will play an integral part in ensuring that civil society organisations have the knowledge and skills to hold duty bearers accountable to effective and efficient health service delivery.”— Allan Maleche, Executive Director, KELIN*

Participants prioritised the need to advocate for increased budgetary allocations for health, to monitor the availability of commodities and to monitor progress towards realising the right to health in their counties.

### **Result:**

*“I could say there’s more public participation. Now at least some members of the PLHIV and the community at large engage in oversight processes for projects. They ask questions and demand transparency. When they go to the hospital to undertake monitoring of donor funded projects they know what to look out for. They can flag out inconsistencies.” — Mwanakombo Said, an activist at Beyond the City Limit Health Care Support, a community based organisation in Mtwapa working to empower women living with HIV*

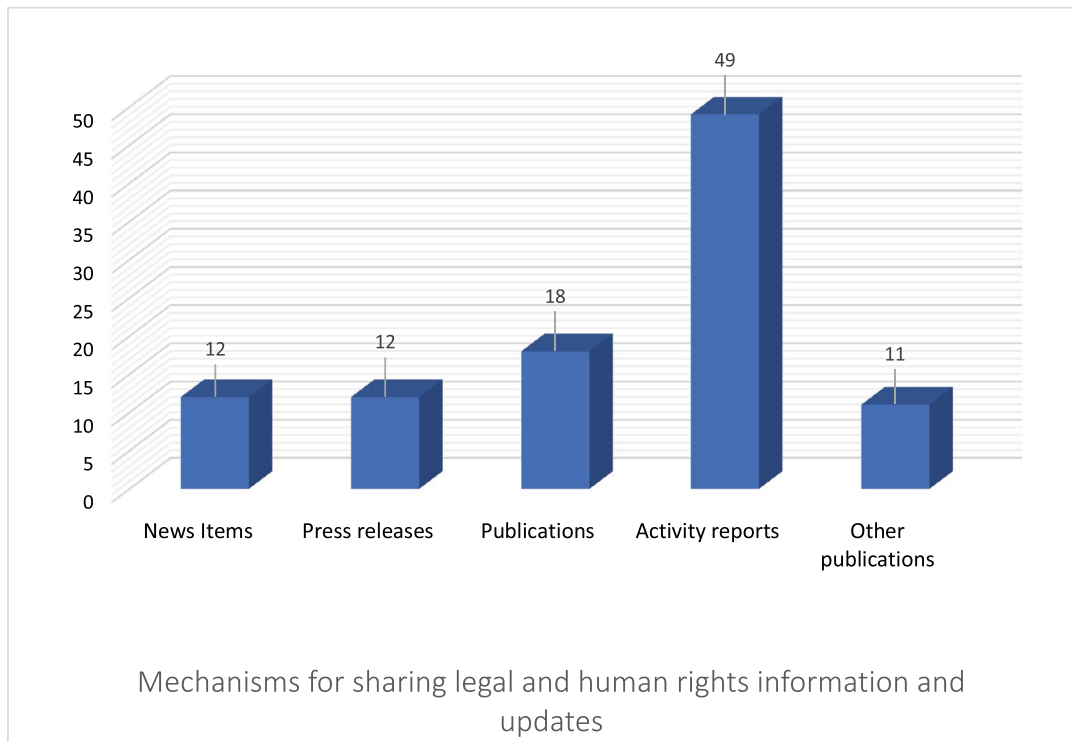
## **5.3 Scale up HIV related legal services**

### **x. Legal information and education**

With good legal information, key affected populations and general community members can become aware of and act on behalf of their rights. This project has utilised various communication channels to educate the general public about their rights in relation to their jobs, homes, social security entitlements, physical security, privacy and dignity. More organisations serving key populations have incorporated human rights activities within their work. On KELIN’s website, Facebook and Twitter pages, project beneficiaries are actively exchanging and sharing real-time information with each other, with KELIN and with key institutions.

With the recruitment of dedicated project staff to handle communication and advocacy, KELIN is able to engage directly with the public and respond to questions, concerns and requests in a timely and efficient manner. In the development of the interventions, KELIN involved Key affected populations. This ensured that legal issues that affected Key populations are taken to account and the programme caters for their needs.

**Results:**



*Fig 4: Mechanisms for sharing legal and human rights information and updates*

- Awareness on specific HIV related rights has increased, and stakeholder engagement on emerging issues has improved, including delivery of timely updates on upcoming and ongoing events. KELIN has established various social media platforms such as Facebook, where it has 1,712 followers, and Twitter (4,101 followers). These platforms have scaled up KELIN’s audience and generated more informed discussions among the public.
- The HIV.org website has been launched. The online platform provides information on initiatives and information related to HIV and TB and on human rights violations. It also provides resource material for people interested in law and HIV.

**xi. Legal advice and referrals**

Advice from legal experts helps key affected populations identify and document human rights violations so as to demand respect and protection. Direct legal assistance was provided to individuals through legal aid clinics, which were offered in each project county. Most of the cases pertained to civil disputes. A large number were on land and property ownership, custody and maintenance, discrimination and succession. After each clinic, KELIN reviewed the attendance forms completed by participating advocates in order to pinpoint cases requiring additional legal support and follow-up.

This particular strategy also allowed project implementers to identify and refer appropriate cases for alternative dispute resolution, using cultural rather than formal justice structures. Supporting the use of alternative approaches has facilitated more accessible, affordable and timely access to justice.

### **Results:**

- One hundred and twenty-seven (127) clients were given legal advice in seven (7) legal aid clinics over the 5- year project period.
- Participating attorneys identified and referred 253 cases for alternative dispute resolution during the project period. Of the referred cases, 191 have been resolved.

### **xii. Legal representation**

Through the establishment of a roster of pro-bono lawyers, the project has been able to help ensure that key affected populations can find quality, affordable, easily accessible legal representation. Lawyers listed in the database received specialised training in HIV related legal issues through this project and serve in all counties where project activities took place. Through an online platform,<sup>49</sup> individuals can directly search the database and select a participating attorney to help them with their case.

### **Results:**

- 16 complaints of human rights violations reported during the project were brought to court by specially trained attorneys.
- 9 cases were presented to the HIV and AIDS Tribunal.

Some of the cases are:

- The case of VM v. Governing Board Blesco Schools, which pertained to dismissal from workplace on the basis of HIV status.
- Two cases before the HIV Tribunal, both relating to breach of confidentiality.
- A case of wrongful dismissal from employment in Kakamega County.
- The case of CN v. Karen Hospital, relating to HIV testing of a patient without her written consent.
- A case in Kakamega relating to a land dispute between a widow living with HIV and her brother.

## **5.4 Strengthen advocacy through direct engagement between rights holders and duty bearers**

### **1. Community dialogues**

The following entities were brought together using community dialogue forums:

- The county executive (on health and youth matters)
- County assembly committee on health
- Judicial officers
- Law enforcement officers
- Health care workers
- Pro-bono lawyers
- Religious leaders
- People living with HIV
- Key populations
- Civil society organisations (with experience in using the law to protect rights)

Providing opportunities for more direct engagement for duty bearers and rights holders contributes to changing the way they work with and respond to each other. Community dialogues provide a platform for elected, nominated and appointed county officials to discuss HIV response challenges with relevant county stakeholders. The forums aimed to ensure that county decisions and actions do not prevent key affected populations from accessing essential HIV services. Participants were able to discuss their concerns and explore opportunities for collaborative action to address them.

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<sup>49</sup> [www.hivlaw.org](http://www.hivlaw.org)



## Results:

- Improved collaboration among organisations representing key populations, county officials responsible for coordinating the HIV response and senior law enforcement officials.

*“After that dialogue we have actually observed some change with the law enforcement. They are the first contact that a drug user has whenever is arrested for using drugs. As well as the chiefs, then the court and lastly is the prison. We had all of them in our workshop and we discussed. We also had the religious leaders, and all other concerned persons. Together we had a very good work plan because our work here is HIV prevention among people using drugs. We are using the AIDS control units at the police, which now makes us have easier access to the police stations. It is not easy for police from these stations to arrest an addict simply because he is using. This only happens now when a police officer is new and does not know the area very well.” — Mr Caleb Angira, chairman of the Kenya Harm Reduction Network,*

- Mr Peter Oduk, executive director of the Kenya Alliance for Rural Empowerment, participated in a county community dialogue in Kakamega. Since then, he has trained 7 staff members on the link between HIV, governance and the legislative process; sensitised 20 community volunteers on HIV and human rights; participated in the county budget making process by attending the public sessions and contributing to the debates; and sensitised organisations and the community during its public forums, reaching 1502 community members.

## 2. Capacitate key affected populations to participate in judicial processes

Over the last 5 years, Kenya has established court users committees (CUC) — forums that bring together justice actors and justice system users to identify and coordinate responses to problems in the judicial sector that leave vulnerable populations unable to access full and equal justice. The inclusion of PLHIV and key affected populations in these committees is necessary to sensitise the judiciary on the challenges these groups face when attempting to benefit from the formal court system. During the project implementation period a CUC dialogue forum was held in Homa Bay due to the county’s high HIV burden and the willingness of the judiciary to host it.

### Result:

- One hundred and twelve (112) members of the CUC were sensitised and resolved to familiarise with the HIV situation in their counties, to understand and identify HIV related human rights violations.

## 3. Advocate for human rights based legislative reforms

During the project period, KELIN staff and project beneficiaries engaged in various legislative and policy processes. The project beneficiaries were informed of important processes and, whenever required, KELIN mobilised and supported staff and beneficiaries to participate in national and county processes.

### Results:

- Both the *Kenya AIDS Strategic Framework 2014/15–2018/19* and the *National Strategic Plan for Tuberculosis, Leprosy and Lung Disease 2015–2018* have mainstreamed human rights in all aspects of response planning and service delivery. Both policies include human rights indicators for monitoring implementation. The adoption of a rights based approach presents a major paradigm shift in the governance of response to both HIV and TB in Kenya.
- Another progression in policy attributed to this project was recognition of the urgent need for a TB isolation policy. Such a policy would stipulate minimum standards, both institutional and structural, and clear procedures for isolating TB patients who experience challenges adhering to medication.

- A technical working group on human rights and the law has been established within the National AIDS Control Council (NACC) to guide programming for key populations.
- With other civil society organisations, KELIN staff actively participated in a joint advocacy process that reviewed and made several submissions on the health bill (now The Health Act 2017).
- On 5 October 2016 the National AIDS and STI Control Programme, at a consultative meeting, introduced the use of integrated bio-behavioural surveys to gather accurate, up-to-date data on key populations. At this meeting KELIN advocated for the need to develop privacy guidelines to protect the information collected in these surveys.
- In 2015 the President of Kenya issued a directive to collect data on children and expectant and breastfeeding mothers living with HIV. The data would directly link specific children and mothers with their HIV status. In December 2016 the Nairobi High Court declared that this directive was in breach of the Constitution. Following this decision the NACC initiated the development of privacy guidelines, as required under Section 20(1) of the HAPCA.<sup>50</sup>

### 5.5 Challenge laws, policies and practices that negatively impact human rights

KELIN has successfully used strategic litigation to overturn negative policies and advance HIV related human rights. During the project period KELIN and partners challenged several policy issues in court. These are described below.

#### *Results:*

- Three (3) of the Six (6) strategic/public interest litigation cases were pursued. They include the following:
- A presidential directive requiring collection of HIV related data on school-going children was challenged. The data was to be collected in a prescribed matrix that would include identifiable data directly linking the individuals to their HIV status and thus violating their right to privacy.<sup>51</sup>

*"I totally agreed with what the President intended to do, it was the method that I couldn't comply with. Eventually we were forced to go to court!" — Sister Mary Owens, executive director, Nyumbani Children's Home*

- A case is being brought against sterilisation by way of tubal ligation of five women living with HIV without their informed consent. The hearing of this case is pending in court.<sup>52</sup>
- The practice of imprisoning TB patients who have difficulty adhering to medication was also challenged. This case sought a directive from the court to the Minister of Health requiring the development of a policy on the involuntary confinement of individuals with TB that complies with the Constitution and with international best practices.

### 5.6 Information dissemination and knowledge sharing

The generation of strategic information and documentation of solid evidence is another critical tool for enabling the legal environment for effective HIV and AIDS responses. One such resource is *The HIV and AIDS Tribunal Compendium of Cases*, is a first-of-its kind publication that documents all cases decided by the Kenyan HIV and AIDS Tribunal since its inception in 2009. Its goal is to create understanding and appreciation of how the law has been applied and interpreted to protect and promote the rights of PLHIV. The target audience includes judges, lawyers, legal researchers, students and the general public. The compendium provides general sensitisation on the need to safeguard the rights of PLHIV and equips advocates with a set of precedents to use when arguing cases before the tribunal.

<sup>50</sup> Petition 250 of 2015: *KELIN & Others v. The Cabinet Secretary Ministry of Health & Others*.

<sup>51</sup> Petition 250 of 2015: *KELIN & Others v. The Cabinet Secretary Ministry of Health & Others*.

<sup>52</sup> Petition 605 of 2014 *SWK & 5 Others v. MSF France & 10 Others*.

A training manual was developed to enhance the understanding of civil society organisations of their role in realising health rights. The modules in the manual are designed to build the capacity of CSOs to monitor health governance and hold duty bearers accountable for effective and efficient health service delivery. Civil society stakeholders were trained in how to use the manual to monitor the implementation of health rights and build strong alliances to realise this goal.

Finally, a flash disk housing targeted training materials and useful HIV related resources was prepared for each training undertaken under this project. In this way KELIN helped ensure that the right people were equipped with the right information to carry their work forward.

## 6 BEST PRACTICES AND LESSONS LEARNED

This chapter describes the effectiveness of project strategies and considers the extent to which the project tackled violations to human rights and barriers to accessing services. The analysis was based mainly on feedback from project stakeholders and partners and on success stories from project beneficiaries. The best practices and lessons learned are arranged into five main strategic sections.

### 6.1 Greater Involvement of People Living with HIV and AIDS (GIPA) centred project design and implementation

GIPA **tenet** of ‘nothing about us without us’ is a guiding principle in the campaign to end the global public health threat of HIV and AIDS. GIPA — Greater and meaningful involvement of persons living with and affected by HIV and AIDS — aims to ensure that PLHIV and their communities are fully involved in the design, implementation, monitoring and evaluation of policies and interventions that directly affect them.

#### i. Create collaborative partnerships with local organisations

GIPA-centred approaches reinforce the importance of and lend credibility to development programming. They also strengthen the impact of service delivery by empowering community groups to incorporate human rights into their work. In turn, community-based champions of human rights help ensure the sustainability of human rights projects. KELIN, recognising the skills and resources available within target communities, established mutually beneficial relationships with community organisations and groups already working with key populations. These partnerships helped build trust between hard-to-reach populations and programme implementers.

KELIN brought together rights holders and duty bearers, along with a diverse range of other stakeholders, in neutral, constructive settings to discuss shared concerns and develop productive relationships. Stakeholders included members of county assemblies, judicial officers, law enforcement officers, health care workers, pro bono lawyers, religious leaders, PLHIV, members of key affected populations and representatives of civil society organisations working on HIV and human rights. The constructive engagement fostered by these community dialogues led to productive working relationships among law enforcement, civil society groups and community members that had not existed before. Rights holders can now understand their human rights, recognise when they have been violated, and demand what is rightfully theirs.

#### *Lesson Learned:*

- Community-based partnerships with local organisations foster idea sharing, increase financial and other resources, and guarantee the sustainability of human rights interventions by reducing competition and fragmentation of services targeting similar beneficiaries.

#### ii. Fully engage individual members of key affected populations in programme interventions

Using a collaborative approach, KELIN mobilised and empowered members of key populations, providing them with knowledge, skills and opportunities to advocate for their own rights.

Safe spaces were provided for vulnerable populations to engage directly with other stakeholders. Key populations were involved in every intervention, sharing experiences and making direct recommendations to duty bearers with whom they would not ordinarily engage with ease.

In judicial dialogue forums, for example, judges and magistrates uniquely benefited from the perspectives of persons living with HIV, including sex workers, men who have sex with men and injecting drug users. Participating judicial stakeholders positively reviewed the forums, noting that the dialogue had impacted their opinions and challenged their prejudices regarding the “perceived criminal groups.” As more and more rights holders are trained, involvement in court user committees is increasing. Committee members air their views in CUC forums.

*Lessons learned:*

- Collaborating with key populations ensures greater success in programme interventions serving these communities and builds their capacity to address human rights violations and legal challenges.
- The meaningful involvement of key populations in sensitising duty bearers has a powerful influence on duty bearers’ attitudes, decisions and practices.
- Direct engagement between rights holders and duty bearers builds the capacity of key affected populations to advocate for improved HIV related laws, policies and practices.

**iii. Address cultural and social attitudes**

Dialogue forums focusing on cultural and social attitudes sought to demystify misconceptions about the behaviour of key populations for the wider community. Key population groups were able to speak on their own behalf to other community members and local leaders. As a result, community constituents developed a greater appreciation of their respective roles in addressing stigma, human rights violations and harmful cultural practices.

*Lesson Learned:*

- Promoting community based communication promotes the development of local solutions for key populations, who are themselves best qualified to identify, challenge and transform harmful practices and norms in the communities in which they live.

**6.2 Engage formal and informal justice systems**

**i. Engage justice structures for realising HIV related rights**

Informal systems such as alternative dispute resolution mechanisms are a critical tool for resolving some cases, especially for people who cannot afford legal representation. The fluidity and dynamism of informal justice systems can also open up opportunities for progressive reforms around HIV related rights. KELIN developed a step-by-step guide on how to leverage traditional community mechanisms to promote and protect the human rights of women and children affected by HIV, particularly those who had been disinherited.

Working with customary legal structures, KELIN used this tool to help rebuild community based justice systems to better respect both law and human rights. KELIN has referred numerous cases involving disinheritance to local elders for adjudication, the vast majority of which have been resolved with women and children back on their land. Cases adjudicated in this way take much less time and are more affordable than formal litigation. Furthermore, decisions made consultatively at community level tend to enjoy greater acceptance among families and communities.

Over the course of this project implementers have also continually challenged the notion that formal legal procedures are too complex and expensive. Extensive effort was made to educate communities about how legal structures work and to make legal services more accessible to them. The scale-up of HIV related legal services has seen an increase in cases brought before Kenya's HIV and AIDS Tribunal by PLHIV and those otherwise affected by the virus.

*Lessons Learned:*

- Community elders equipped with practical human rights knowledge help accelerate reforms in customary law and discriminatory social practices.
- Because elders are important agents of change, providing them with legal knowledge and human rights information results in the speedy dissemination of that knowledge throughout the community.
- Scaling up affordable, quality HIV related legal services helps key affected populations to fully benefit from formal justice mechanisms.

**ii. Use strategic litigation for legal reform**

Strategic litigation is a powerful tool to advance rights, hold governments accountable and ensure compliance with human rights obligations. KELIN has made concerted efforts to ensure that, in appropriate cases, justice is done through the courts. KELIN has used strategic litigation on HIV and TB related issues within this project to:

- ✓ Advocate and increase public awareness on HIV and TB related rights
- ✓ Provide a better interpretation and application of HIV and TB related provisions in law
- ✓ Challenge government policies that violate/threaten the human rights of PLHIV
- ✓ Set powerful precedents that will positively impact future HIV related litigation

*Case Study: Daniel Ng'etich and Another v. The Attorney General & Others*<sup>53</sup>

On 12 August 2010, Henry and Patrick, residents of Kenya's Nandi County, were arrested for default — not on a debt, but on a disease. They were charged with failing to maintain their prescribed medical treatment for tuberculosis. Daniel and Patrick were arraigned before the principal magistrate at Kapsabet Court. Henry, in poorer health, was admitted as a patient at Kapsabet District Hospital.

Daniel and Patrick were convicted and sentenced to eight months in prison. Behind bars, they slept on the floor without bedding for over a week, were closely confined with other inmates and weren't given the balanced diet required by TB patients on medication. They served 46 days of their prison terms before KELIN and other civil society groups intervened to have them released. The petitioners were incarcerated under Section 27 of the 1921 Public Health Act for interrupting their TB medication.

As outrageous as these cases may seem, they are far from isolated incidents. There have been many others, both reported and unreported, in which the Public Health Act was invoked to incarcerate TB patients who defaulted on their medications. Such arrests are in clear violation of the World Health Organization's guidelines, which state that when involuntary isolation or detention of a patient is absolutely essential, it must never be implemented as a form of punishment. KELIN was among the petitioners who launched a petition in the Constitutional and Human Rights Division of the High Court to challenge this practice. On 24 March 2016 the High Court in Nairobi declared that the practice of detaining persons with TB in prison was both unlawful and unconstitutional. The court ordered the government to issue a circular within 30 days to public health officials to the effect that such detention in prisons was not sanctioned by the law.

<sup>53</sup> Petition 329 of 2014.

This circular has since been issued. The court further ordered the government to develop a policy within 90 days on involuntary confinement of persons suffering from infectious diseases. There has been delays in implementing this order, however, KELIN is following up to confirm compliance with its orders.

The judge and the main petitioners (TB patients) in this matter participated in sensitisation workshops conducted at different times under this project. This judgment is a game-changer for Kenya. It will finally put a stop to the arrest and imprisonment of tuberculosis patients by ensuring that future isolations will be handled in a patient-centred manner that respects human rights. The judgment also opens a channel for dialogue on how to achieve a rights-based approach to TB prevention, treatment and management. Implemented successfully, Kenya's new policy could act as a model for the region and beyond.

*Case Study: KELIN & Others v. The Cabinet Secretary Ministry of Health & Others*<sup>54</sup>

KELIN spearheaded a petition challenging a 2015 presidential directive requiring collection of data on all school-going children who are HIV-positive and their guardians. Data was also to be gathered on expectant mothers living with HIV as well as on breastfeeding mothers who were HIV-positive. The data was to be collected in a prescribed matrix that would directly link persons with their HIV status, thus putting them at risk of being stigmatised and discriminated against.

In KELIN's opinion, this directive would not only violate the rights of PLHIV — including their rights to privacy, confidentiality and freedom from discrimination — but would also make them more likely to conceal their HIV status rather than risk exposure. The directive therefore posed a threat to the realisation and enjoyment of the constitutional right to health and impacted negatively on the gains made in the promotion and protection of the rights of PLHIV in Kenya.

The High Court in Nairobi on 7 December 2016 declared that the president's directive breached the petitioners' constitutional rights under Articles 31 and 53(2), which safeguard the right to privacy and the best interest of the child, respectively. The ruling noted that the type of data collected could be used to develop appropriate care and treatment, thus helping to fulfil the health rights of PLHIV. However, the method of data collection was declared unlawful, because it allowed people's identities and HIV status to be disclosed. The court thus sought to avoid infringement of personal rights while still retaining the general right to use the information in the fight against HIV and AIDS. In service of this goal the presiding justice ordered the government to anonymise, within 45 days, the names that had been collected and to store this data in a manner that did not link names with HIV status in a public document.

*Lessons Learned:*

- Strategic litigation can empower and mobilise ordinary people to organise and bring pressure on their governments to reform laws and policies.
- Effective strategic litigation, is likely to create a record that will be applicable in future cases of a similar nature. Targeted knowledge and skills development is crucial. Arguments should be widely consulted and pleadings expertly drafted to ensure that even in the event of a loss, the injustices that underlie the case remain on record as a foundation for future efforts to succeed.
- Communities may be reluctant to use court processes against government institutions for fear of backlash and victimisation. Existing, alternative methods of advocacy should be explored initially, to build support and lay a foundation for more formal justice approaches, if appropriate. The decision to use strategic litigation should be a last resort, especially where a case will have little direct impact on the affected community.

<sup>54</sup> Petition 250 of 2015.

### iii. Maintain an active roster of pro bono lawyers

HIV related legal services contribute directly to building an enabling environment for effective HIV programmes. Legal services enable people to claim and enforce their rights to access HIV services and in so doing increase the demand for access to such services.

KELIN's lawyer training targeted legal practitioners with interest or experience working with PLHIV in order to increase the pool of legal practitioners available to offer HIV related legal services. Trainings covered human rights, legal awareness on HIV and TB, legal advice and representation of HIV related matters. This initiative was part of the broader project goal to increase access to justice and facilitate reforms to the law. Participating attorneys committed to join the KELIN team of pro bono lawyers offering specialised HIV related legal services and participating in legal aid clinics. The HIV.org website developed under this programme provides the public with a direct link to these trained professionals.

#### *Lesson Learned:*

- Empowering key affected communities with legal knowledge and advice, together with providing quality legal services, encourages these communities to avail themselves of existing legal mechanisms.

## 6.3 Engage government institutions to improve the formulation and implementation laws

### i. Partner with national government institutions

Establishing good working relationships with relevant government institutions is obviously critical to improving the legal environment for an effective HIV response. KELIN has worked with various government institutions in the implementation of this project, including the Judicial Service Commission, the Kenya Prisons Service, the National AIDS Control Council and the National AIDS and STI Control Programme.

As one example, project implementers sought to support and facilitate the growth of jurisprudence and judicial practice on HIV through a partnership with Kenya's Judicial Training Institute, a government body mandated to build capacity of judges on various day to day issues. This partnership became the basis of a learning relationship between the judiciary, legal experts and key stakeholders involved in Kenya's HIV response. Under the umbrella of this project two judicial dialogues on HIV, human rights and the law were conducted. High profile judicial experts from across the globe served as facilitators. The involvement of JTI as the face of these forums and fellow judges as part of the facilitators was a good strategy of ensuring no conflict of interest arose in cases presented by KELIN before these judicial officers. A good indicator of this outcome is the positive judgments emanating from the courts on cases involving HIV and TB related issues.<sup>55</sup> Sound jurisprudence is slowly being built in this subject area, a positive trend that will not only benefit the country but also the greater region.

Senior law enforcement officials who participated in the dialogues have shared their learning with junior officers and are influencing the actions of their peers. They have demonstrated a commitment to advancing rights based, evidence informed HIV and TB interventions and to protecting the rights of people living with and affected by HIV.

#### *Lesson learned:*

- Engaging high profile government peers in sensitisation and capacity building lends legitimacy to HIV related initiatives and fosters greater buy-in from government agents.

<sup>55</sup> Petition 250 of 2015.

## 6.4 Deploy information, education and communication tools

### i. Use accessible, easy-to-understand materials to share information

Adaptation of legal and scientific tools, information, and processes enabled content to be adjusted to the specific audience of the messages. Legal provisions were described in simplified language so that medical providers and key populations could understand and apply them. Similarly, complex scientific information on HIV and TB epidemiology was distilled for the benefit of legal practitioners. Local facilitators were used and the language used in facilitation was tailored to the different populations.

Specially, KELIN led the development of the IEC material that unpacks constitutional rights and explains their relevance to HIV, which is available both in English and Kiswahili, has been used widely for legal empowerment at community level. The tool also provides practical tips for exercising these rights in their everyday lives.

*Lesson Learned:*

- Develop and share communication materials that are easy to comprehend. Doing so will enable more people to understand and apply legal information to advance individual and collective human rights.

### ii. Raise awareness and disseminate information across multiple platforms

Peer education has proven to be an effective strategy in HIV and TB prevention. Both formal and informal teaching approaches were adopted to educate project beneficiaries at individual, group and community levels. Posters, policy briefs, banners and other materials featuring HIV and TB messaging amplified efforts to raise awareness.

The project was also able to harness the power of mass media. KELIN leveraged strategic partnerships with various media houses, including community radio stations, to enhance coverage on important human rights and legal issues. Most locally based media campaigns were conducted in the local language. Additionally, the use of social media platforms such as Facebook and Twitter has scaled up KELIN's audience and generated more informed discussions among the public.

*Lesson Learned:*

- Human interest stories on HIV related rights are an effective tool for reaching larger audiences. Local media should collaborate with community beneficiaries to identify potential stories.

## 6.5 Strengthen institutional capacity

### ii. Maintain good governance at project level

Implementation of this project was overseen by a project steering committee comprising programme officers, strategic community and development partners, and governmental agency representatives, all of whom provided technical guidance. The steering committee was critical to continuous monitoring of the project and contributed significantly to its success. Committee meetings provided a space to share implementation updates, flag emerging issues and align project work with regional and international frameworks pertaining to HIV, human rights and the law.

### iii. Track and monitor HIV related complaints and violations

Throughout the project, data on human rights violations was captured from project participants and entered into an organisational database for documentation and for monitoring of progress in cases where legal interventions were provided. Specific tools to report human rights violations were also used during legal aid forums, where advocates engaged one-on-one with clients.



#### **iv. Develop sound monitoring and evaluation plans**

Human rights indicators support the effective monitoring of key health outcomes and help to strengthen the compliance of duty bearers with human rights standards. Monitoring implementation of the right to health requires forging partnerships with professionals who have not traditionally been involved in human rights work. Good monitoring and evaluation also assesses the crucial link between implementers and beneficiaries on the ground. KELIN sought to develop a monitoring and evaluation plan that would contribute to building a strong evidence base to support human rights approaches in health. KELIN also monitored legislation and policies at both national and county level.

Monitoring of budgets is necessary so as to understand and know the budget cycle and identify accountability mechanisms that can ensure adequate levels of social investment and transparent use of resources. The consistent monitoring of human rights violations before and during the project aided in the identification of trends, which in turn informed the prioritisation of project interventions and the development of customised content and materials.

#### **v. Leverage the power of information and communications technology**

KELIN has effectively and fully exploited the advantages of information communication technologies to enhance the gathering and sharing of information. Staff at all levels has made significant contributions towards generating the content shared on KELIN's website, Facebook and Twitter pages. Regular use of ICT within the organisation has led not only to a greater appreciation of current technology among the staff but also improved internal and external communication on the project. Successful use of ICT in the project can generally be attributed to:

- Skills development on the use of social media for staff at all levels.
- Clearly defined roles and responsibilities for project staff with regard to the generation of information.
- Consistent external communication on the implementation of project interventions.
- Improved turnaround time for project related news items.
- Availability of technical personnel to support maintenance of ICT systems.

#### **vi. Apply evidence based recommendations from the global community**

The 2012 report of the Global Commission on HIV and the Law, *Risks, Rights and Health*, affirmed that the legal environment, law enforcement and justice systems all have immense potential to better the lives of people living with HIV. 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 HIV and protect vital human rights.

In view of these findings KELIN designed effective, targeted, human rights based action to promote enabling legal environments in Kenya, focusing on formal and informal law, law enforcement and access to justice. Engagement with county and national partners has resulted in greater overall recognition of the rights of PLHIV and greater sensitivity to the need for key affected populations to be included in planning and decision making.

Another international best practice is to expose project staff to international forums and conferences including AIDS conferences, harm reduction conferences among others. The resulting learning has had a positive impact on this project for example incorporation of lessons learnt into our projects. This learning is shared in part through travel reports, which highlight the knowledge gained and any lessons learned that would be relevant to KELIN's current and future work. These reports are produced by staff and circulated internally.

## **i. Develop tools that can be used to scale up or replicate the project**

Strengthening the technical capacities of partners extends the impact of an organisation's work and fosters deeper engagement and collaboration, thus contributing to more effective advocacy. To this end KELIN produced a training manual, *Monitoring the Implementation of the Right to Health Under the Constitution of Kenya*, to help civil society organisations better understand their role in promoting the right to health.

This resource will play an integral part in ensuring that CSOs have the technical capacity to play a more active role in holding duty bearers accountable for effective and efficient health service delivery. Where other CSOs can mobilise resources to support such efforts, KELIN's project partners will provide useful technical input.

In developing this tool KELIN ensured the inclusion of PLHIV and key affected populations in the matters regarding their health and policy. Key affected population representatives attended the manual's launch and took the opportunity to raise issues they wished their county government to address.

Knowledge sharing has proven a good strategy for attracting new donors and securing further support for KELIN's work.

## **7. CHALLENGES**

### **7.1 Social challenges**

- The general public has yet to accept key populations, such as sex workers and men who have sex with men. Facilitating dialogues between the community and these groups is therefore difficult, as most community members do not want to be associated with stigmatised people.
- Discrimination and stigma discourage people from disclosing their HIV-positive status. This makes it more difficult for duty bearers to reach them with the help they need.
- Advocacy for and by key populations is often equated with promoting criminality and moral decay. Many religious leaders in particular do not entertain the idea that it is a basic human right to associate oneself with whomever one wishes.

### **7.2 Legal challenges**

- The criminalisation of activities such as sex work, drug use and same sex relationships creates an environment in which key populations are driven underground, away from HIV and harm reduction programmes. This situation puts them at further risk and makes them harder to reach.
- Incarceration and compulsory detention exposes key populations to sexual assault and unsafe drug use practices. Moreover, in Kenyan prisons condoms are contraband and harm reduction measures are non-existent.
- When key affected populations report human rights violations, they usually do not follow the matter to completion because are often discouraged by the negative responses they receive from law enforcement officers. Moreover, their complaints are often not fully investigated.
- The lengthy process of administering justice compounds the suffering of those whose rights have already been violated.
- Various laws and policies have not yet been harmonised with human rights requirements, making it even more difficult to implement projects targeting key affected populations. In this category are county bylaws that are in use despite not having undergone the required assent process.

### 7.3 Institutional challenges

- Some duty bearers still have difficulty differentiating between promoting health care services for a certain population and promoting the behaviours of that population. Some have expressed the opinion that sensitisation forums targeting them seek to promote immorality. Most duty bearers are therefore reluctant to attend the sessions, whether to be trained or to deliver training.
- Some formal institutions have not embraced alternative dispute resolution measures when complaints are brought to them, and do not involve local elders in efforts to resolve matters that have a strong cultural component. This oversight leads elders to resent the legal process.
- Most institutions and community organisations do not have resources to pay for legal services for those who may need but cannot afford them.
- Most of the stories done by the mass media concerning key affected populations are diluted by the time they get to the public eye. Editors tend to take out information they think may offend members of the public, which can cause a story to be less impactful.

## 8. RECOMMENDATIONS

### 8.1 On Law Reform

1. The HIV and AIDS Prevention and Control Act (HAPCA) should contain specific provisions that recognise the need of key populations for special protection and targeted health care services.
2. All legal provisions currently being used as a basis to harass and arrest key populations in public places need to be reviewed.
3. Penalties for possessing small quantities of drugs for personal use should be revised to prioritise non-custodial sentences, with a preference for state supported rehabilitation.
4. Strategic involvement in cases involving wilful transmission will contribute to the development of technical guidance on the application of sound jurisprudence in this area.

### 8.2 To KELIN and CSOs working on HIV related rights

1. There is a need for programming, tools development and awareness raising to tackle HIV related stigma and discrimination in the workplace.
2. Interventions focusing on the legal empowerment of key populations should encompass programme audits. The resulting learning will provide practical guidance on how local organisations serving such populations can embed a human rights approach into their work and monitor its impact on programme outcomes.
3. KELIN should mentor programme officers working in local organisations to help build their capacity to document, report and follow up on rights violations cases.
4. KELIN should create functional linkages with locally trained advocates will address the increasing demand for individual legal services.
5. The capacity of local organisations working with key populations to pay for legal proceedings in cases where KELIN is unable to provide financial support needs to be enhanced. KELIN should consider establishing a branch to serve the larger coastal region.
6. There still remains a large unaddressed need for information on HIV related rights among legal and health professionals. KELIN should support and facilitate the inclusion of courses on HIV rights in the curricula of educational institutions.

7. In order to maintain their interest and commitment to reporting on HIV related rights, engagement with health reporters and journalists should be continuous. Involving at least one or two journalists in each programme intervention will likely improve the yield and quality of human interest stories on HIV
8. KELIN should proactively recruit trained paralegals to help prepare and handle court cases as a way of building the capacity of legal professionals to do health-rights advocacy.
9. KELIN should work with the National AIDS Control Council (NACC) and the National AIDS and STI Control Programme (NAS COP) to develop a plan of action with built-in indicators to guide and monitor progress towards the creation of a legal environment conducive to an effective HIV response.
10. KELIN and partners who refer clients to KELIN should develop a strong communication protocol to effectively manage cases of rights violations as well as partner expectations.

### **8.3 To Development Partners**

1. To meet Sustainable Development Goal 3, development partners should vigorously promote the inclusion of interventions designed to strengthen the legal environment into overall development programming.
2. There's a need for more stringent enforcement of non-discriminatory workplace policies in the private sector and for greater sensitisation on HIV related rights in the informal economic sector. Support should be provided for both of these activities.
3. Scaling up interventions designed to create an enabling legal environment requires solid data about the relative cost effectiveness of various programmatic approaches. Technical support from development partners will be necessary to accomplish this.
4. Interventions to strengthen the resource mobilization capacity of young organisations agitating for the rights of key populations should be supported to ensure their sustainability.

### **8.4 To Local (Community) Partners**

1. Local organisations benefiting from legal literacy and human rights education should hold themselves accountable for applying this knowledge to current and future work.
2. Community partners working with key affected populations should explore innovative ways to raise resources to support individual cases brought by community members (examples include loans and dedicated programme funds). In this way they can spearhead their own causes, encourage ownership and create a culture of commitment to legal processes.
3. Paralegal programmes should incorporate a long-term mentorship component to strengthen the impact of paralegals at community level.

### **8.5 To National Government**

1. Matters of policy still remain a mandate of the national government. NACC and NAS COP should play a more proactive role in auditing government policies relating to HIV and TB. They should advise on the legality and practical application of these policies with the ultimate goal of safeguarding the rights of key affected populations.
2. NACC should develop campaigns to fight stigma and discrimination on behalf of key populations.
3. NAS COP and other in-service training institutions should incorporate legal and ethical issues relating to key populations, including people living with or affected by HIV, into the national training curriculum.
4. The government should support the introduction of human rights modules into the curricula at the main training colleges for law enforcement to change the way law enforcement perceives and interacts with key populations.
5. Advocacy efforts should focus on professional bodies of health service providers, such as Kenya Medical Training College and the various schools of medicine to strengthen their role in protecting the rights of PLHIV and key affected populations.

## 8.6 To County Governments

1. Council of Governors, within its mandate of promoting best practices, should ensure accountability for human rights. Interventions within county HIV and TB strategic plans should be properly budgeted, resourced, implemented, monitored and evaluated.
2. County governments should ensure that human rights interventions that are part of county-level HIV response plans are costed and financed to facilitate proper implementation and monitoring of rights activities.
3. County Assemblies should guarantee public participation in the legislative process. To inform sound debate, they should also undertake exhaustive consultations with health and legal experts on the effectiveness of criminalisation in reducing HIV infection rates.
4. KELIN should support annual dialogue forums at county level (or identify existing county processes that can be leveraged) to create more space for engagement between county and national governments.
5. Partnerships between county institutions and civil society organisations should be strengthened to get the maximum benefit of their combined technical expertise on HIV related rights. Moreover, PLHIV and key populations should be included and involved in all county processes related to health.

## 8.7 To Constitutional and Justice Institutions

1. The HIV and AIDS Tribunal should operate within the circuit court system and ensure the availability of a permanent help desk in each county to enable easier access to the tribunal. County based help desks could furnish guidance on the admissibility of cases and make it more convenient to schedule a hearing, particularly in rural areas.
2. Dialogue among institutions mandated to protect human rights will strengthen their mutual role in advancing HIV related justice. These entities include the Kenya National Commission on Human Rights, the Commission on Administrative Justice, the National Gender and Equality Commission and the Independent Police Oversight Authority (IPOA). These will extend the array of timely options utilised for reporting of HIV rights violation cases and make response more effective.
3. The National Legal Aid Service Board should recognise and support already existing mechanisms access to justice at the HIV and AIDS tribunal for scaling up HIV related legal services to PLHIV and key affected populations. Support from this body would greatly scale up the availability and quality of government-provided legal aid for HIV and also reduce the chances of duplication and/or replication of interventions.
4. Prosecuting authorities (the Office of the Public Prosecutor) should be educated about the social and scientific dimensions of HIV transmission to help ensure that PLHIV are not prosecuted for engaging in behaviours where the risk of transmission is minimal or negligible.
5. The Director of public prosecution (DPP's) office should prosecute more cases of violence against key affected populations by linking up with the leadership of local organisations that work with these populations.

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