

Petition

606

of 2014

Court protects reproductive rights of

WOMEN LIVING WITH HIV

What was the case about?

The case was about the right of women living with HIV to make informed decisions about their reproductive health. On 16 December 2022, Justice AC Mrima for the Nairobi High Court delivered the judgment.

① Who were the parties?

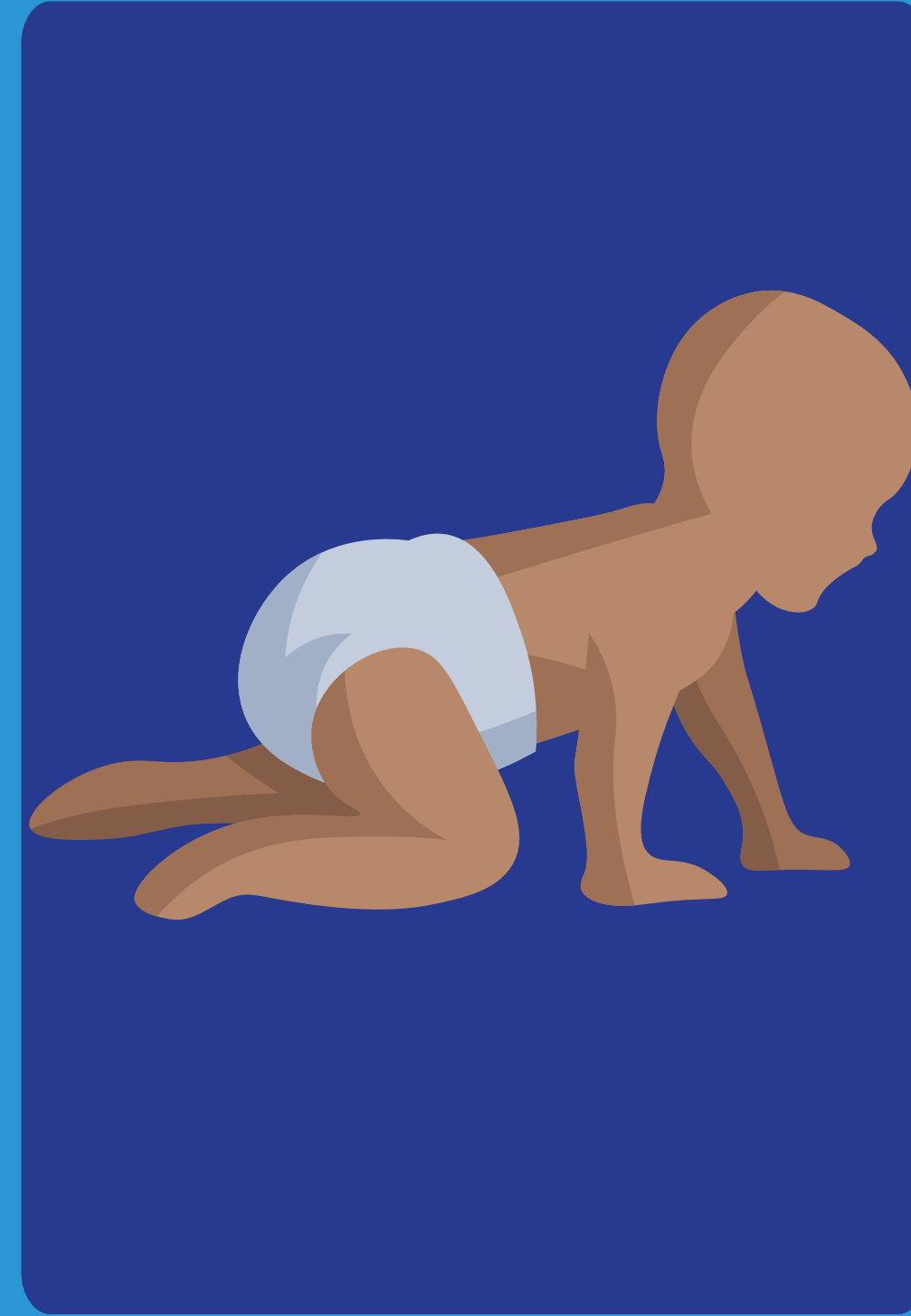
- The **petitioners** were L.A.W., a woman living with HIV, the Kenya Legal and Ethical Issues Network on HIV & AIDS (“**KELIN**”), and the African Gender and Media Initiative Trust.
- The **respondents** were the Marura Maternity & Nursing Home (“**the Nursing Home**”), the County Executive Committee Member in Charge of Health Services in Nairobi County, the Cabinet Secretary for the Ministry of Health, and the Attorney General.
- The **interested party** was the International Community of Women Living with HIV (“**ICW-Global**”).
- The **amici curiae** were UNAIDS, Prof Alicia Yamin, and the National Gender and Equality Commission.



2 What were the facts of the case?



L.A.W. was pregnant. When she went for antenatal care, she tested positive for HIV. She was told at a clinic that she should not have any more children because her HIV status was dangerous to her babies.



L.A.W. was referred to the Nursing Home where she gave birth to a baby boy by caesarean section.

Her husband passed away the same year.

Four years later, L.A.W. remarried and wanted to have children with her new husband. She became concerned when she couldn't conceive.



On returning to her healthcare worker, L.A.W. was told that she had been sterilised, without her knowledge or consent, during her caesarean section by way of **bilateral tubal ligation**.



What is "bilateral tubal ligation"?

A surgical sterilisation procedure that involves blocking a woman's fallopian tubes to prevent the ovum (egg) from being fertilized.



L.A.W. was told that the sterilisation was irreversible. She will never be able to have children again.

Because of what happened to her, L.A.W.'s relationships and social life have suffered. Her sterilisation has caused friction with her husband, and she suffers from depression.



3 What was the petitioners' claim?

L.A.W. said that she was sterilised without her informed consent.

The petitioners asked the Court to declare this to be a violation of her Constitutional rights and to award her monetary damages. They also asked that the government be ordered to undertake certain policy reform and actions to ensure that it didn't happen to other women living with HIV in the future.

4 What was the Nursing Home's defence?

The Nursing Home said it was the responsibility of the clinic that referred L.A.W. to it to obtain her informed consent, not theirs. The Nursing Home said because L.A.W. had signed a form, she had consented.

5 What was the Court's decision?

The Court said that health care providers are required by law to obtain a patient's **informed consent** before any procedure is performed on that person.



What is "informed consent"?

The Court said informed consent is a process, a "**cumulative product of the steps involved in which permission is obtained before conducting a health care procedure**".

Healthcare providers must ensure that information about the sterilisation is broken down and communicated to patients in a language that they understand. This includes a duty to explain alternative forms of contraception.

The Court said the law places individual responsibility on healthcare providers to obtain informed consent. It said that the Nursing Home failed to do so and that this discriminated against L.A.W. on the basis of her HIV status.

The Court was satisfied that, since the events that took place, the government had passed the Health Act and policies that protected the right to informed consent.



It was unfair discrimination that served no rational purpose and cannot be justified in a liberal well-functioning constitutional democracy





6

How did the Court remedy the violation of L.A.W.'s rights?

The Court declared that *“it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when and how often to bear children”*.

The Court declared that referral medical institutions must obtain informed consent from patients when undertaking operations (except in cases of emergency).

The Court declared that L.A.W. was sterilised without informed consent and that this violated the following articles under the Constitution:

27

The right to equality & freedom from discrimination.

43

The right to the highest attainable standard of healthcare, including reproductive healthcare

28

The right to human dignity.

45

The right to a family.

The Court awarded L.A.W. damages in the sum of Ksh.3,000,000 (about US\$ 24,300).

7

What does the judgment mean for me?



As a woman living with HIV, if you are on antiretroviral treatment, it is safe to have a baby.

Women living with HIV have a right to make informed choices about our bodies, including to decide whether we want to have children.



As healthcare workers, it is your individual duty to ensure that your patients understand and agree freely to any medical procedure that is performed on them.