

Recent developments

So sweet, so sour: A commentary on the Nigerian High Court's decision in *Georgina Ahamefule v Imperial Hospital & Another* relating to the rights of persons living with HIV

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Summary

The purpose of this article is to assess the decision of the Nigerian High Court in the Ahamefule case. While the case would seem to be a victory for people living with HIV in the country, it left some important questions unanswered. First, the article gives the facts of the case and the Court's decision. It then questions the reasoning of the Court in this case. The article argues that the decision merely gives people living with HIV false hope in realising their rights. It argues further that, apart from the fact that the decision lacks in-depth analysis, it also misses a great opportunity to address an important issue relating to the right to non-discrimination of people living with HIV. The article concludes by arguing that the supposed 'sweet victory' in the Ahamefule case has left 'a sour taste' in our mouths, since it does not in the true sense advance the rights of people living with HIV in the country.

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1 Introduction

In September 2012, a Lagos High Court, after more than a decade since the case was first instituted, handed down judgment in the case of *Georgina Ahamefule v Imperial Hospital & Another*.¹ The case summarises the nature of the challenges people living with HIV encounter in Nigeria. Since 1986, when the first reported case of HIV/AIDS was made public in Nigeria, the HIV pandemic has continued to pose serious health and development challenges for the country. The HIV epidemic in Nigeria would seem to have stabilised from a peak of a 5,8 per cent prevalence in 2001 to 4,4 per cent in 2005 and 4,6 per cent in 2008.² Currently, it is estimated that 4,1 per cent of the population is infected with HIV, translating to about 3,1 million people living with HIV,³ thus making the country home to the second-largest number of people living with HIV in sub-Saharan Africa (South Africa has the largest number) and the largest in West Africa. The major mode of HIV transmission in Nigeria is through unsafe heterosexual sexual intercourse. Of late, however, there seems to have been an increase in the infection rate through homosexual activities.⁴ Other modes of transmission include blood transfusions, unsafe injections and mother-to-child transmission. It is estimated that AIDS has claimed 2 million lives in the country since 1986.⁵ Also, annually an estimated 215 000 HIV-related deaths and 281 000 new infections occur in the country.⁶

More importantly, people living with HIV have continued to experience different forms of human rights violations. These range from mandatory testing before employment, marriage or uptake of health care services; eviction from accommodation; denial of employment or other benefits; and rejection or ostracism by family or community members based on one's HIV status. It should be noted that the Nigerian government has taken various steps, including the establishment of a multi-sectoral body, the National Agency for the Control of AIDS (NACA), to co-ordinate government's response to the epidemic. This includes developing strategies and programmes to address the epidemic. It would seem that these efforts are beginning to yield fruits as the HIV prevalence in the country is stabilising. Moreover, access to life-saving medication has improved considerably

1 Unreported suit ID/1627/2000, judgment delivered by the Lagos High Court on 27 September 2012.

2 National Agency for the Control of AIDS (NACA) *Update on HIV/AIDS epidemic and response in Nigeria* (2011).

3 Federal Ministry of Health *Report of the National HIV/Syphilis Sentinel Sero prevalence survey* (Abuja: FMOH 2010).

4 VA Owuliri & OM Jolayemi 'Reaching vulnerable and high risk groups in Nigeria' in O Adeyi *et al* (eds) *AIDS in Nigeria: A nation in threshold* (2006) 310.

5 NACA (n 2 above).

6 As above.

and the number of treatment centres across the country has increased greatly.

Despite the various efforts by the government to tame the epidemic, HIV-related stigma and discrimination remain serious barriers to government's commitment to achieving zero HIV infection. Studies have shown that people living with HIV in the country encounter human rights violations on a daily basis in relation to housing, employment, health care services and other services.⁷ In most cases, these violations occur without redress as many people living with HIV either lack knowledge about their rights or cannot afford litigation. In addition, institutional and structural factors, including an undue delay in resolving cases, often act as barriers to access to justice for people living with HIV and other vulnerable groups. These challenges came to the fore in the *Ahamefule* case.⁸ This case has had a chequered history and at one point one of the trial judges handling the case had ruled that, unless expert evidence was provided that the courtroom would not be contaminated with HIV, the plaintiff would not be allowed to testify in her case. More than ten years after the case was first instituted, the Court finally delivered judgment in September 2012 in favour of the plaintiff. The Court found that the termination of the plaintiff's employment was unlawful and actuated by malice. Understandably, the decision has elicited joyous celebration among civil society groups and people living with HIV in the country. In his elated reaction to the decision, Morka, the Executive Director of the Social Economic Rights Action Centre, remarked:⁹

We believe that this epochal decision will go a long way in correcting the wrongs suffered by people living with HIV as many of them have been discriminated against and have lost their jobs due to discrimination, just like Georgina.

The purpose of this article is to assess the decision of the Court in the *Ahamefule* case. While the case would seem to be a victory for people living with HIV in the country, it has left some important questions unanswered. First, the article gives the facts of the case and the Court's decision. It then questions the reasoning of the Court. The article argues that the decision merely gives people living with HIV false hope to realise their rights. It argues further that, apart from the fact that the decision lacks an in-depth analysis, it also misses an opportunity to address an important issue relating to the right to non-discrimination of people living with HIV. The article concludes by arguing that the supposed 'sweet victory' in the *Ahamefule* case has

7 Centre for the Right to Health *HIV/AIDS and human rights: Experiences of people living with HIV in Nigeria* (2001).

8 *Ahamefule* (n 1 above).

9 P Ogbo 'Nurse wins landmark case in Nigeria over dismissal for testing positive to HIV' <http://www.theeagleonline.com.ng/news/nurse-wins-landmark-case-in-nigeria-over-dismissal-for-testing-positive-to-hiv/> (accessed 28 May 2013).

left 'a sour taste' in our mouths since it does not in any real sense advance the rights of people living with HIV in Nigeria.

2 Facts of the case

The plaintiff, an auxiliary nurse, was an employee of the first defendant hospital, having been employed at the hospital since 1989. Some time in 1995, she developed a boil on her skin during her pregnancy and decided to seek medical attention at the first defendant hospital. During her medical examination, a series of tests were conducted on her by the second defendant without her informed consent or any knowledge of the nature or outcome of such tests. Rather, the second defendant merely informed her to take leave for two weeks through a letter dated 12 October 1995. Furthermore, with a sealed note the second defendant referred the plaintiff to the Lagos University Teaching Hospital (LUTH) to see one Dr Okany for a further medical examination. Upon arriving at LUTH, the plaintiff was asked to return with her husband and their blood samples were taken. On her next visit to the hospital, the plaintiff was shocked when Dr Okany informed her that she had tested positive for HIV, while her husband had tested negative. The plaintiff claimed that during the entire process, at no point was her consent formally sought before she was tested for HIV, neither was she offered pre- or post-test counselling. Furthermore, the plaintiff claimed that she was traumatised and psychologically destabilised by the news of her HIV-positive status. On her return to the first defendant hospital to confront the second defendant as to why he had not informed her about the HIV test and results, she was shocked about the hostile attitude of the second defendant, who ordered her out of his office. To further add insult to the plaintiff's injury, the second defendant abruptly terminated her employment through a letter dated 23 October 1995.

The plaintiff alleged that due to the shock of learning her HIV results and the subsequent termination of her employment, she could not cope emotionally and hence lost her pregnancy. In addition, she claimed that she experienced rejection and humiliation at the hands of the defendants, when the hospital refused to carry out the recommended cleaning exercise after her miscarriage due to her HIV status. The plaintiff therefore claimed that the purported termination of her employment due to her HIV status was unlawful and illegal, actuated by malice or bad faith, and that it constituted unfair discrimination contrary to the provisions of the African Charter on Human and Peoples' Rights (African Charter).¹⁰ More importantly, she claimed that subjecting her to HIV testing without her informed consent amounted to unlawful battery and that the failure to provide

¹⁰ African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the OAU, 27 June 1981, entered into force 21 October 1986.

pre- and post-test counselling services constituted unlawful neglect of professional duty. The plaintiff further claimed that the denial of treatment by the defendants due to her HIV status constituted a flagrant violation of her right to health, as guaranteed under the African Charter and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹

In agreeing with the plaintiff's claims, the Court held that the termination of her employment was unlawful and illegal and actuated by malice and extreme bad faith. The Court further held that subjecting the plaintiff to HIV testing without informed consent constituted unlawful battery and that the failure to provide pre- and post-test HIV counselling services amounted to unlawful neglect of professional duty. The Court also held that the failure to provide treatment for the plaintiff based on her HIV status was a violation of the provisions of the African Charter and ICESCR. The plaintiff was awarded damages amounting to N 7 million. This matter is currently on appeal to the Court of Appeal.

3 Analysis of the case

The discussion that follows is an analysis of the High Court's decision based on these issues: testing without consent, including the non-provision of counselling and care services; the termination of employment based on the plaintiff's HIV status; and denial of treatment based on her HIV status. It will be argued that, although the decision was in favour of the plaintiff, it does not serve as a good precedent in advancing the rights of people living with HIV in the country.

3.1 HIV testing without consent

One of the most important ethical and legal challenges the HIV pandemic has raised in many societies relates to the issue of testing without informed consent. This is one of the issues the Court was asked to consider in the *Ahamefule* case. At the onset of the epidemic in Nigeria, misconceptions about the epidemic were rife and being HIV positive was equated with a 'death sentence'. Worse still, there was no cure for the epidemic and access to treatment was almost non-existent.¹² This caused panic and confusion in the country and led to a situation where health care providers resorted to conducting HIV tests without their patients' informed consent. Several studies have documented the negative experiences of women, especially pregnant women, who were subjected to HIV testing without their

11 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

12 See eg E Durojaye & O Ayankogbe 'A rights-based approach to access to HIV treatment in Nigeria' (2005) 5 *African Human Rights Law Journal* 187.

informed consent while attending antenatal care services.¹³ Incidences were reported where prospective employees were made to undergo HIV testing before employment.¹⁴

In *Ahamefule*, the Court reasoned that conducting HIV testing without the informed consent of the plaintiff was not only unlawful and illegal, but also amounted to battery. In addition, the Court held that a failure to provide pre- and post-test counselling was a breach of professional conduct. In a way, this pronouncement is a victory for people living with HIV. It is the first time in Nigeria that a court has found that conducting HIV testing without informed consent is unlawful. However, the limitation of this pronouncement is that the issue is approached from a tortious liability perspective and not from a human rights perspective. The Court did not refer to any human rights instruments, case law or even the provisions of the Nigerian Constitution in declaring the act unlawful. Merely declaring HIV testing without informed consent as unlawful without engaging in any legal analysis in support of this finding has tended to weaken the importance of this pronouncement.

There is no doubt that HIV testing without informed consent is a serious human rights violation. It is an undue interference with an individual's privacy and encroaches on the right to bodily integrity. Article 9 of the Universal Declaration on Human Rights (Universal Declaration)¹⁵ and article 17 of the International Covenant on Civil and Political Rights (ICCPR)¹⁶ guarantee an individual's right to privacy. This would seem to prohibit the unlawful interference with the correspondence, family, home and body of an individual. The Committee on Economic, Social and Cultural Rights (ESCR Committee) in General Comment 14 has explained that the right to health contains both freedoms and entitlements.¹⁷ According to the Committee, the term 'freedoms' implies that no individual should be subjected to non-consensual medical treatment.¹⁸ Also, the international Guidelines on HIV/AIDS and Human Rights provide that HIV testing must only be conducted with the informed consent of the individual.¹⁹ The Nigerian Federation of Gynaecology and Obstetrics (FIGO) has defined informed consent as 'consent obtained freely, without threats or improper inducements, after appropriate disclosure

13 See eg Centre for the Right to Health (n 7 above).

14 As above.

15 Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (10 December 1948).

16 International Covenant on Civil and Political Rights GA Res 2200A (XXI), UN GAOR, 21st session, UN Doc A/6316 (1966),

17 The Right to the Highest Attainable Standard of Health; ESCR Committee, General Comment 14, UN Doc E/C/12/2000/4.

18 As above.

19 Adopted at the 3rd International Consultation on HIV/AIDS and Human Rights (Geneva 25 July 2002), organised by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

to the patient of adequate and understandable information in a form and language understood by the patient'.²⁰

Under the Nigerian Constitution (as amended), section 34 guarantees the right to dignity, while section 37 protects the right to privacy.²¹ These provisions impose obligations on the government and individuals not to interfere with a person's dignity and privacy. Because HIV testing without consent may lead to adverse consequences, such as rejection and isolation, the right to dignity of an individual is infringed. In *R v Dymont*,²² the Canadian Supreme Court, while commenting on the legal implications of testing without consent, noted as follows:

The use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity ... [T]he protection of the Charter extends to prevent a police officer, an agent of the state, from taking a substance as intimately personal as a person's blood from a person who holds it subject to a duty to respect the dignity and privacy of that person.

It should be noted that the National Policy on HIV/AIDS of 2009 prohibits any form of HIV testing without informed consent. However, given the devastating effect of the HIV epidemic in the worst-affected regions such as sub-Saharan Africa, some commentators have argued that the need for informed consent before testing may hinder an effective response to the epidemic.²³ This position is reinforced by the fact that treatment, hitherto unavailable to millions of people in need, is now largely available to people living with HIV. It is thus suggested that, since many people tend to avoid knowing their status, in some situations HIV testing should be made compulsory.²⁴ This has led to a shift in testing policy at the international level. For instance, recent guidelines by the World Health Organisation (WHO) and UNAIDS tend to favour provider-initiated testing as opposed to patient-initiated testing, especially with regard to pregnant women attending antenatal care.²⁵ While there seems to be some merit in scaling up HIV testing so that people can ascertain their status and commence treatment immediately, thereby preventing the further spread of HIV, this should never be done at the expense of the individual's

20 FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health *Ethical Issues in obstetrics and gynaecology* (2006).

21 Under the 1979 Constitution, which is applicable to this case, the right to dignity is guaranteed in sec 31, while under the present Constitution, the right to dignity is guaranteed in sec 34.

22 [1988] 2 SCR 417.

23 KM de Cock *et al* 'A serostatus-based approach to HIV/AIDS prevention and care in Africa' (2003) 362 *The Lancet* 1848; see also U Schuklenk & A Kleinsmidt 'Rethinking mandatory HIV testing during pregnancy in areas with high HIV prevalence rates: Ethical and policy issues' (2007) 97 *American Journal of Public Health* 1179.

24 F Venter 'Make HIV testing compulsory for South Africans' *Sunday Times Africa* 3 June 2007.

25 UNAIDS/WHO *Guidance on provider-initiated HIV testing and counselling in health care facilities* (2007) 5.

fundamental rights. Gruskin *et al* have argued that, while it is important to scale up HIV testing and for individuals to ascertain their HIV status, this should be done properly and ethically, paying respect to the individual's right to privacy and confidentiality.²⁶ In a nutshell, any approach to scale up HIV testing and prevention programmes must be consistent with a respect for human rights.

Obligations under human rights instruments and national constitutions are imposed specifically on the state. However, there is nothing to suggest that an individual or a private entity cannot be held accountable for human rights violations.²⁷ Therefore, it is immaterial that in this case the plaintiff's action is against a private hospital and its proprietor. An individual or private entity can still be held liable or accountable, almost in similar fashion as the government, for human rights violations.²⁸ Declaring HIV testing without consent a human rights violation would have had a greater effect than merely describing it as battery. This is because the Court will be able to invoke the applicable constitutional provisions and human rights instruments, thereby sending a strong warning to individuals, corporate bodies and the state that often indulge in such practices. Moreover, such a declaration will require the Nigerian government to take appropriate measures to prevent such practices, under the principle of due diligence.²⁹ More importantly, declaring coercive HIV testing as a violation of rights has the potential of soothing the bruised ego and dignity of the plaintiff. As noted above, testing without consent often undermines the dignity of an individual.

3.2 Failure of the Court to address the remedy for non-discrimination

The crux of the *Ahamefule* case was the unlawful termination of employment based on HIV status. This has remained a great challenge for people living with HIV. It is a common practice for people seeking employment to be subjected to HIV testing and even to be denied employment based on their HIV status. Experience has shown that

26 S Gruskin *et al* 'Beyond numbers: Using a human rights-based perspective to enhance anti-retroviral treatment scale up' (2007) *AIDS* 17. See also E Durojaye 'The impact of routine HIV testing on HIV-related stigma and discrimination in Africa' (2011) *International Journal of Discrimination and the Law* 187-200; J Csete & R Elliott 'Scaling up HIV testing: Human rights and hidden costs' (2006) 11 *HIV/AIDS Policy and Law Review* 5-10.

27 For a detailed discussion on this issue, see D Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 *Law, Democracy and Development* 21-48.

28 See Supreme Court decision in *Alhaji Dahiru Saude v Alhaji Halliru Abdullahi* (1989) 4 NWLR pt 116 387.

29 Under the principle of due diligence, a state can be held accountable for violations arising from the activities of a third party. See the African Commission on Human and Peoples' Rights' decision in *SERAC & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), where the African Commission found the Nigerian government liable for human rights violations perpetrated by multi-national oil companies in the Niger Delta area.

discriminatory practices against HIV-positive persons in the country are rife. Recounting personal experience, Olamide lamented that she had been dismissed from her employment when her employer discovered that she was HIV positive. Her employer had said that this was necessary so that she would not 'spread the fruit of her waywardness to other members of staff and clients'.³⁰ She further explained that her employer had gone ahead and informed her sister about this fact, as a result of which she was evicted from the place where she was living. This is just one of the many negative experiences HIV-positive persons are subjected to in the country. Out of ignorance and fear, employers tend to assume that being HIV positive implies that an employee cannot perform as expected or poses a threat to the health of others. This misconception is fuelled by socio-cultural beliefs that an HIV-positive status is the consequence of a loose or immoral lifestyle. This pushes HIV-positive people to the margins of society as they are unable to secure a source of livelihood, to afford the cost of treatment or to adhere to a treatment regime. The denial of employment opportunities based on real or perceived HIV status amounts to unfair discrimination and erodes the right to dignity of the person.

In *Ahamefule*, the defendants argued that their relationship with the plaintiff is that of master/servant under common law and, as such, they are entitled to terminate the employment contract. It is trite at common law that, in a contract of employment, the employer may terminate that contract for no reason at all. The plaintiff countered by arguing that, even in a contract of employment, if the letter terminating the contract specifically gives reasons for doing so, then it becomes necessary for the court to ascertain the correctness or otherwise of such reasons. More importantly, the plaintiff argued that the fact that the letter terminating her employment clearly referred to her HIV status as the reason, amounted to discrimination contrary to section 42 of the 1999 Nigerian Constitution (as amended) and the provisions of the African Charter. In response, the defendants argued that, since the case was instituted in 1995 before the promulgation of the 1999 Constitution, the plaintiff cannot rely on section 42 of the 1999 Constitution.

For some inexplicable reason, the Court failed to engage with the very substance of the case by not determining whether the termination of the plaintiff's employment based on her HIV status amounted to discrimination. This is a serious omission that diminishes the impact of the case in addressing the HIV-related stigma and advancing the rights of people living with HIV in Nigeria. As noted above, people living with HIV have continued to encounter serious challenges and human rights violations in every facet of their lives, particularly the workplace. More than 30 years into the HIV epidemic, stigma and discrimination remain barriers to HIV-prevention

30 E Udom 'PLWHA in Nigeria: A story of the neglected' *New Age* 17 June 2004.

programmes in many parts of Africa, including Nigeria. HIV-related stigma and discrimination not only fuel misconception about the epidemic, but may also aid the spread of the epidemic. Indeed, fear, ignorance and discrimination in the context of HIV have continued to lead to profound human cost, such as violence and abusive treatment.³¹ It is noted that '[n]egative attitudes and beliefs within communities can also increase internalised self-stigma, including guilt, shame and alienation felt by people living with HIV'.³² A stigma index survey conducted in Nigeria shows that people living with HIV still encounter violence, a denial of access to services and human rights violations contrary to the Nigerian Constitution and other human rights instruments.³³

For several years, activists and groups of people living with HIV have clamoured for laws to address discriminatory practices against people living with HIV. This call has been buoyed by the United Nations (UN) General Assembly's Declaration of Commitment, which calls on member states of the UN to enact anti-discriminatory legislation to address HIV-related stigma in their countries by 2004.³⁴ This call was reiterated in 2011 at the UN General Assembly's Political Declaration on HIV/AIDS, where states resolved to take decisive steps with a view to eliminating stigma and discrimination against people living with HIV by promoting laws and policies that would ensure the full realisation of all human rights and freedoms.³⁵ Nigeria is yet to fulfil its commitment as regards this call. However, the National HIV Strategic Framework places an emphasis on the need to respect the human rights of all, including people living with HIV, and to eliminate stigma and discrimination in the context of HIV in the country.³⁶ In addition, an Anti-Discrimination Bill is pending before the national legislature. Moreover, a National Policy on HIV/AIDS and the Workplace exists which prohibits discrimination against HIV-positive persons in the workplace.³⁷ A major challenge of this policy and other policies relates to its non-binding nature.

In 1995, at the time the *Ahamefule* case was filed, the applicable Constitution was the 1979 Constitution. Section 37 of that Constitution, which is *in pari materia* with section 42 of the 1999 Constitution (as amended), prohibits discrimination against any citizen of Nigeria on various grounds, including race, birth, religious grouping, sex or political affinity. Even if the plaintiff had relied on the

31 UNAIDS *Global AIDS epidemic report* (2012) 74.

32 As above.

33 As above.

34 UN General Assembly Special Session on HIV/AIDS Resolution A/S-26/L2 June 2001.

35 UN General Assembly Resolution on Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS A/RES/65/277.

36 National Agency for the Control of AIDS (NACA) *National HIV/AIDS Strategic Framework 2010-2015* (2010).

37 Ministry of Labour and Productivity *National workplace policy on HIV/AIDS* (2005) 14.

incorrect law (section 42 of the 1999 Constitution), this should not have been fatal to her case. There is no reason why the Court should not have invoked the provisions of the 1979 Constitution to protect the rights of the plaintiff. This is even more so when one considers that the Court is expected to be a refuge of justice and the last hope of the oppressed. On several occasions, the Nigerian Supreme Court has emphasised that justice should never be sacrificed at the altar of technicalities.³⁸

By failing to consider whether the termination of the plaintiff's employment amounted to discrimination under the Constitution, the Court would seem to have fallen into the same pit as the earlier judgment in *Odaife & Others v Attorney-General & Others*.³⁹ In that case, the applicants – four HIV-positive prisoners – had alleged that the denial of treatment based on their HIV status was discriminatory and in violation of section 42 of the Nigerian Constitution (as amended) and article 2 of the African Charter. The Court had ruled that section 42 of the Nigerian Constitution did not prohibit discrimination on the basis of one's health or HIV status, and that therefore the applicants' claim failed. This decision has been criticised for its narrow interpretation of the Constitution and for failing to consider articles 2 and 3 of the African Charter.⁴⁰

It should be noted that Nigeria is one of a few countries in Africa that has domesticated the African Charter.⁴¹ Article 2 of the African Charter prohibits discrimination on various grounds, including 'other status'. The phrase has consistently been interpreted to include health or HIV status.⁴² Although the African Commission on Human and Peoples' Rights (African Commission) has not had the opportunity to interpret articles 2 and 3 in the context of HIV/AIDS, it has explained the importance of these provisions in several cases. For instance, in *Legal Resources Foundation v Zambia*, the African Commission explains that articles 2 and 3 are fundamental provisions of the Charter that are not subject to derogation.⁴³ In addition, the Commission in one of its Resolutions has explained that any measures adopted to curb the spread of HIV must be grounded in a respect for human rights.⁴⁴ This should have been the approach of the Court in *Ahamefule*. More

38 See eg *Falobi v Falobi* (1976) 1 NMLR 169.

39 (2004) AHRLR 205 (NgHC 2004).

40 See E Durojaye 'Discrimination based on HIV/AIDS status: A comparative analysis of the decision of the Nigerian High Court's decision in *Festus Odaife & Another v Attorney-General of the Federation & Others* with other Commonwealth countries' (2007) 11 *Law, Democracy and Development* 137.

41 See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria (LFN) 2004.

42 See eg ESCR Committee General Comment 20 on non-discrimination in economic, social and cultural rights (art 2 para 2 of ICESCR).

43 (2001) AHRLP 84 (ACHPR 2001) para 63.

44 See Resolution on the HIV/AIDS Pandemic Threat Against Human Rights and Humanity adopted at the 29th ordinary session of the African Commission held in Tripoli, Libya, ACHPR Res 53/(XXIX)01.

recently, the African Commission, in its first ever General Comment on articles 14(1)(d) and (e) of the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol), has noted that women are more likely than men to suffer the consequences of HIV-related stigma and discrimination.⁴⁵ The Commission further noted that 'the societal context based on gender inequalities, power imbalances and male dominance' can further compound HIV-related stigma and discrimination for women and deny them their fundamental rights.⁴⁶

Also, the South African Constitutional Court in *Hoffmann v South African Airways*⁴⁷ has held that the denial of employment to a prospective employee based on his HIV status is a clear violation of the equality clause in section 9 of the South African Constitution.⁴⁸ The Court further noted that when HIV-positive people are denied employment, they are deprived of the opportunity to earn a living and their worth as human beings is devalued, thus leading to the violation of their right to dignity. The Court in *Ahamefule* should have adopted a purposive interpretation of section 32 of the 1979 Constitution, holding that the termination of the plaintiff's employment undermined not only her right to equality and non-discrimination, but also her right to dignity. Moreover, given the serious human rights violations HIV-positive women often encounter in Nigeria, as exemplified by the plaintiff's experience in *Ahamefule*, the Court could have shown greater sensitivity to the gender dimension raised by this case. Failure of the Court to consider the applicable constitutional provisions and the dimension of gender in this case has deprived the plaintiff of the justice she deserves. This is contrary to the maxim in law *ubi jus ibi remedium* (where there is a right there is always a remedy).

3.3 Denial of treatment as a violation of the right to health

An important reasoning of the Court in *Ahamefule* is that the failure to provide medical treatment to the plaintiff solely based on her HIV status constitutes a violation of the right to health under article 16 of the African Charter and article 12 of ICESCR, as at the time this case was instituted, access to HIV treatment was almost unavailable for the majority of people in need. The Nigerian government commenced its treatment programme in 2002. It was estimated that only 12 000

45 African Commission on Human and Peoples' Rights General Comments on Articles 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at the 53rd ordinary session of the African Commission, October 2012.

46 n 45 above, para 3.

47 2000 11 BCLR 1235 (CC).

48 Sec 9(3) of the South Africa Constitution provides that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

persons out of the total number of people in need of treatment were receiving it as of 2005.⁴⁹ In 2006, the Nigerian government commenced its ambitious free anti-retroviral therapy programme, making it one of the biggest in the region. Consequently, the number of sites providing anti-retroviral treatment has increased from a low 20 to about 450 sites across the country.⁵⁰

Recent statistics have shown a tremendous improvement in the number of people receiving treatment. By the end of 2010 it was estimated that 400 000 people in need of treatment in the country were receiving it.⁵¹ While progress has been made in relation to the number of adults receiving treatment in the country, access to the prevention of mother-to-child transmission remains a great challenge. Nigeria lags behind in realising universal access to prevent mother-to-child transmission of HIV, accounting for about a 30 per cent gap in realising such treatment.⁵² Many factors account for poor access to HIV treatment in Nigeria. These include a weak or poor infrastructure; lack of political will; high cost of medicines; non-respect for human rights; and stigma and discrimination. A study has documented the human rights challenges that people living with HIV encounter in the health care setting in the country, showing that people living with HIV are often maltreated by health care providers and are sometimes denied access to health care services.⁵³

After reviewing the facts, the Court was of the view that the failure to provide treatment to the plaintiff solely based on her HIV status constituted a violation of article 16 of the African Charter. While this seems to be a positive and progressive approach by the Court, there was no legal analysis in support of this reasoning. The Court failed to make reference to international human rights law or the jurisprudence of other jurisdictions in arriving at its decision. For instance, the Court could have relied on General Comment 14 of the ESCR Committee in emphasising the importance of access to treatment for vulnerable and marginalised groups such as people living with HIV.⁵⁴ The ESCR Committee noted that ensuring access to treatment on a non-discriminatory basis to all, particularly vulnerable and marginalised groups, constitutes a minimum core obligation of the right to health. While the Committee notes that the obligations contained in the Covenant are imposed on states, it nonetheless reasons that non-state actors have a duty to ensure that the right to health is not violated.⁵⁵ Also, the Revised International Guidelines on HIV and Human Rights has emphasised the need to ensure access to treatment for HIV-

49 Durojaye & Ayankogbe (n 12 above).

50 NACA (n 2 above).

51 Federal Ministry of Health *Fact sheet: Universal access: The journey so far* (2011) 2.

52 UNAIDS Report 2011.

53 C Reis *et al* 'Discriminatory attitudes and practices by health care workers towards patients with HIV/AIDS in Nigeria' (2005) 2 *PLoS Medicine* 246.

54 General Comment 14 (n 17 above).

55 As above.

positive persons as a human right imperative.⁵⁶ More recently, the African Commission in General Comment on articles 14(1)(d) and (e) of the African Women's Protocol, emphasised the importance of realising access to treatment for women in the context of HIV.⁵⁷ The Commission noted that the denial of access to comprehensive sexual and reproductive health care services for women may further predispose them to HIV infection.⁵⁸

In addition, the Nigerian Court could have drawn inspiration from the decisions of other Commonwealth courts on similar issues. A good example is the decision of the South African Constitutional Court in the *Treatment Action Campaign* case.⁵⁹ This decision established that the denial of access to treatment to HIV-positive persons undermined their right to health and sexual and reproductive health. This case has remained a point of reference in articulating the right of HIV-positive persons to treatment. While the decisions of other courts are not binding on Nigerian courts, they no doubt serve as persuasive authority which can be relied on in the absence of any jurisprudence at the national level addressing similar issues.

As stated earlier, Nigeria is one of a few countries in Africa that has incorporated the African Charter into its domestic law. This provides ample opportunity for Nigerian courts to invoke the provisions of the Charter to advance human rights in the country. Indeed, in a number of cases Nigerian courts have applied the provisions of the African Charter to provide relief for the victims of human rights violations.⁶⁰ However, most of these cases have dealt with civil and political rights and few cases relate to the violation of socio-economic rights. Therefore, this has raised the question of whether Nigerian courts can invoke the socio-economic rights provisions of the African Charter in cases before them. This is more so when one considers that section 6(6)(c) of the Constitution provides that the provisions of chapter II of the Constitution, which essentially deals with socio-economic rights, are not justiciable.⁶¹ This clearly raises the possibility of a clash between the Constitution and the African Charter. In *Abacha v Fawehinmi*,⁶² the Supreme Court noted that by virtue of incorporation, the African Charter Enforcement and Ratification Act

56 Adopted at the 3rd International Consultation on HIV/AIDS and Human Rights, Geneva, Switzerland, 25 July 2002, organised by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

57 General Comment on art 14(1)(d) and (e) (n 45 above).

58 n 57 above, para 5.

59 *Minister of Health v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC).

60 See eg cases such as *Ogugu v The State* (1994) NWLR (Part 366) 1; see also *Peter Nemi v State* [1994] 1 LRC 376 (SC); *Agbakova v Director State Security Service* [1994] 6 NWLR 475.

61 See sec 6(6)(c) of the Nigerian Constitution 1999, which provides that all rights, including the right to health, listed in ch 2 of the Constitution, shall not be made justiciable. A similar provision is contained in sec 6(6)(c) of the 1979 Constitution.

62 [2000] 6 NWLR (Part 660) 228.

has become part and parcel of Nigerian law and must be treated like any other statute. To this extent, in the event of a conflict between the African Charter and any other Nigerian statute, the former will take precedence. However, where there is a conflict between the African Charter and the Constitution, the latter takes precedence. Implicit in this decision is that the socio-economic rights provisions of the Charter might not be invoked to apply to cases before Nigerian courts.

Some commentators have argued that the decision in *Abacha* constitutes a narrow interpretation of the law and would further erode the rights of vulnerable and marginalised groups to seek justice in redressing socio-economic rights violations in the country.⁶³ Thus, in *Odafe*, the Court held that the denial of treatment to four HIV-positive prisoners constituted a violation of their right to health guaranteed under article 16 of the African Charter. This position would seem to coincide with that of the Court in *Ahamefule*. As radical as this would seem, it fails to consider the conflict which this may raise, given that socio-economic rights are not enforceable in Nigeria. Moreover, it fails to consider the Supreme Court's decision in *Abacha*. Given that the doctrine of judicial precedent is an entrenched part of the Nigerian legal system, the question may be asked whether a High Court can overrule or ignore the decision of the highest court in the land. Perhaps one may also ask: Does the pronouncement in *Ahamefule* raise any conflict with the Nigerian Constitution? It would seem so. The remedy being sought relates to the violation of the right to health, which falls under chapter II of the Constitution that has been declared unenforceable.⁶⁴ If at all there is any reason for the Court to deviate from the decision in *Abacha*, the Court should have provided a sound reasoning to this effect. Sadly, however, the Court in *Ahamefule* merely invoked article 16 of the African Charter and article 12 of ICESCR without laying the legal foundation for this.

4 Conclusion

This article has shown that the decision of the Nigerian High Court in *Ahamefule* is a welcome development as it can potentially advance the rights of people living with HIV in Nigeria. However, the major gaps in this decision relate to the failure of the Court to clearly articulate the human rights of people living with HIV in line with international human rights principles and standards. For instance, while the Court found that conducting HIV testing without informed consent amounts to unlawful battery, it failed to examine the implications of this from a

63 See eg C Onyemelukwe 'Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence' (2007) 7 *African Human Rights Law Journal* 446 469.

64 See cases such as *Archbishop Okogie & Others v The Attorney-General of Lagos State* (1981) 2 NCLR 350.

human rights perspective. More disappointedly, the Court ignored or failed to engage on whether the termination of the plaintiff's employment based on her HIV status constituted an act of discrimination contrary to the Nigerian Constitution and the African Charter. This was a missed opportunity for the Court to deal with a very pertinent issue that has continued to deter HIV-positive persons from living a dignified and meaningful life. For many years, HIV-related stigma and discrimination have continued to fuel human rights violations and to hinder efforts aimed at curbing the spread of the epidemic.

There is no doubt that the Court acted boldly by holding that a denial of treatment to a person based on her HIV status constitutes a violation of article 16 of the African Charter and article 12 of ICESCR. This can potentially advance the human rights of people living with HIV in the country. It has been argued that giving effect to the rights of vulnerable and marginalised groups can serve as a tool for achieving social justice in society.⁶⁵ This is based on the idea that progressive court decisions or pronouncements are able to improve the lives of vulnerable and marginalised groups in society. However, the Court should have formulated a well-reasoned argument for side-stepping the decision of the Supreme Court in *Abacha*. This lack of finesse on the part of the Court in *Ahamefule* has potentially pitted its decision with that of the Supreme Court in *Abacha*. It has been argued that since the doctrine of judicial precedent is well recognised under Nigerian law, it would seem that the decision of the Supreme Court in *Abacha* remains the law and is binding on a lower court.⁶⁶ Egede has lent his support to the decision of the Supreme Court in *Abacha* in coming to the conclusion that the African Charter is not superior to the Constitution. He notes that this position represents the correct interpretation of the law and that to hold otherwise would have been absurd, considering the provisions of sections 1(1) and (3) of the Constitution.⁶⁷

In summary, the fact that over 10 years passed before justice was finally done is merely a reminder of the deficiencies in the Nigerian legal system. It is a known fact that access to justice for the poor and disadvantaged in the country is often hindered by the high cost of litigation and the undue delay in the administration of justice. This

65 See M Pieterse 'The potential of socio-economic rights litigation for the achievement of social justice: Considering the example of access to medical care in South African prisons' (2006) 50 *Journal of African Law* 118.

66 E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' in M Killander (ed) *International human rights law and domestic human rights litigation in Africa* (2010) 149-172.

67 See E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African Law* 254. The combined reading of these provisions (similar to the 1979 Constitution) is to the effect that the Constitution is the supreme law of the land and that if any law is inconsistent with the Constitution, the Constitution shall prevail and such law shall be declared null and void to the extent of its inconsistency.

tends to erode the confidence of vulnerable and marginalised groups in the justice system. For many vulnerable groups, including people living with HIV, the justice system has suddenly become a nightmare - unreliable and incapable of providing adequate relief for human rights violations. Given the fears, misconceptions and stigmas associated with HIV, having to wait for over a decade to secure justice for the unlawful termination of employment is nothing short of a miscarriage of justice. The common saying that 'justice delayed is justice denied' is apt in this situation.