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JUSTICE MUMBI NGUGI AND THE 'HAVE NOTS': LIVING IN THE LEGACY OF P.A.O V AG

By Joshua Malidzo Nyawa.

> However, sitting by the bed of friends who had become infected with HIV, watching their struggle and believing that the law could play an affirmative role, I continued my involvement. For me, it was an ethical issue. People were dying. There were no drugs. There was no vaccine. Unusually, therefore, as Dr Mann taught, law had a positive role to play.[1]

> In the Sufi tradition there is a saying that 'when you hear hoofbeats, think of a zebra'. In the context of intellectual property, a similar saying might be: 'When you encounter patent and data rights, think of monopolies and denial of care.'[2]

Introduction

If the promises of the 2010 constitution are to mean anything to the 'Hohe hahe', the Dalits or the wanjiku then the court(s) or judges must be responsive. Put it differently, if the desires and aspirations that Kenyans had when promulgating the 2010 constitution are to be more than expressions on a piece of paper, then judges have to embrace the concept of responsiveness. *Siri Gloppen*[3], conceives the term 'court responsiveness' to mean the willingness of the courts to respond to the concerns of the marginalized groups. At the core of the concept of responsiveness to social rights, is how judges interpret the law, secondly, the legal culture together with judge's

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[1]Michael Kirby, 'The never-ending paradoxes of HIV/AIDS and human rights'(2004) 4 *AHRLJ* 12

[2]Yousuf A Vawda and Brook K Baker,'Achieving social justice in the human rights/intellectual property debate: Realising the goal of access to medicines ' (2013) 13 *AHRLJ* 55-81

[3] Siri Gloppen, 'Courts and social Transformation: An analytical Framework' in Roberto Gargarella, Pilar Domingo and Theunis Roux (Eds). *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* ASHGATE (2006)

personal ideological and personal values influences judges perception of their own role. *Karl Klare*[4] in his most quoted article, had argued that the judge's personal values and sensibilities could not be excluded from interpretive processes or adjudication in that the judges' political and moral values play a routine, normal and ineradicable role in adjudication. On the other hand, *Dikgang Moseneke* is of the view that the personal intellectual and moral preconceptions of judges do intrude into their adjudication[5], in other words, judges do also make value laden decisions. Therefore the court's responsiveness depends on the judge's sensitivity individually or collectively to the concerned voices. If there is a list kept anywhere containing the names of the judges who are responsive to the voices of the poor, if the angel would read the names after the 'rupture', then the name of **Justice Mumbi Ngugi** would be found in the first ranks. The learned justice has responded to the duty, she has served as a bulwark against the erosion of existing pro-poor institutional and policy arrangements.

This paper seeks to review the judgment rendered by Justice Mumbi in the PAO case[6], it seeks to celebrate the wise decision of the learned justice but most importantly it seeks to consider the following elements that: Firstly, access to medicine is essential to the enjoyment of The right to highest attainable standard of health, secondly the rights in the bill of rights are indivisible and interrelated and thirdly intellectual property rights should not triumph over The right to highest attainable standard of health.

PAO & Others v The Attorney General: A Brief summary

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[4] See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 169

[5] D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on HumanRights* 309, at 316-19

[6] *PAO & Others v The Attorney General*, High Court of Kenya, Petition No. 409 of 2009

The petitioner had raised critical issues pertaining to the constitutional right of citizens to the highest attainable standard of health. They are all living positively with HIV/AIDS. The petition was brought to challenge the constitutionality of the Anti-Counterfeit Act, 2008, specifically sections 2, 32 and 34 thereof. They alleged that the provisions affected or were likely to affect their access to affordable and essential drugs and medicines including generic drugs and medicines thereby infringing their fundamental right to **life**, **human dignity** and **health** as protected by Articles **26(1), 28** and **43** of the Constitution of Kenya. The three petitioners were all unemployed and relied on the Government programme to receive the ARVs and they started receiving a regular supply after the passage of the Industrial Property Act in 2001 which allowed the entry into the country of generic drugs. further that the government had failed to provide a clear definition of counterfeit goods under section 2 of the Act by defining counterfeit goods in the section in such a manner as would allow generic drugs to be included in the said definition thereby effectively prohibiting importation and manufacture of generic drugs and medicines in Kenya;

This is so because the definition of counterfeit drugs in section 2 of the Act includes the ***"manufacture, production…or making, whether in Kenya or elsewhere, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods."***

A. **The concept of indivisibility and interrelatedness of rights**

Indivisibility and interrelatedness is the idea that there is a mutually reinforcing dynamic between different categories of rights in the sense that the 'effective implementation of one category of rights can contribute to the effective implementation of other categories of rights and

vice versa'[7], or in the words of *Dokno* 'True, a hungry man does not have much freedom of choice. But equally true, when a well-fed man does not have freedom of choice, he cannot protect himself against going hungry.[8]The rights under the constitution do not exist in pigeon holes, isolated from each other.[9]

All rights in the bill of rights therefore and in particular The right to highest attainable standard of health (under article 43) is indivisible, interdependent and interrelated with other human rights[10] as guaranteed in the Constitution and in several other international instruments ratified by Kenya. This principle has been espoused in various decisions by the Kenyan courts, to start with, In *M A O*[11] , when the judge was faced with a claim of violation of The right to highest attainable standard of health, the judge started from the premise that there is an inter linkage of human rights, that due to the indivisibility, interdependence and interrelatedness of human rights, the other human rights are equally essential for the respect and dignity of each person.[12] The learned judge further held that the right to highest attainable standard of health and dignity are 'inextricably related', he held thus

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[7]Helen Quane, A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples

[8] Jose W. Diokno, *Human Rights Make Man Human* (Sept. 5, 1981)

[9] see Justice Majanja in *Duncan Otieno Waga V Hon. Attorney General* Petition 94 Of 2011 at para 57; see also General Comment No. 9 on the Domestic Application of the International Covenant on Economic, Social and Cultural Rights, CESCR, General Comment 9, The Domestic Application of the Covenant (Nineteenth session, 1998), U.N. Doc.E/C.12/1998/24 (1998), para. 10 in which the Committee on Economic, Social and Cultural Rights (CESCR) states as follows:
'The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.'

[10] See Paragraph 5 of the 1993 Vienna Declaration and Programme of Actions adopted by the World Conference on Human Rights on 25th June 1993 stated in the Geneva 'All *human rights are universal. indivisible and interdependent and interrelated,'*

[11]*M A O & another v Attorney General & 4 others* Petition 562 of 2012

[12]*M A O (* ibid at 11) at para 123

> The right to highest attainable standard of health and the right to dignity are inextricably related. In providing health care of acceptable quality, health care institutions must respect the dignity of their patients. They must also be responsive to the needs of their patients and provide acceptable care. In this situation, when patients are not given care that affords them the right to dignity, it can negatively affect their well-being.[13]

While construing the rights under article 9 off the Pakistan constitution, the supreme court of Pakistan provides a better illustration, the court noted that the rights are supporting each other, an individual cannot enjoy the right to life where there is a violation of the right to dignity, andsecondly, the court noted that the right to life is violated where the socio-economic rights are not fulfilled or where the environment is polluted, it noted thus

> ***"if both (rights) are read together, [the] question will arise whether a person can be said to have dignity of man if his right to life is below [the] bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and [an] unpolluted environment."***[14]

On the other hand, The Supreme Court of India has held that the right to live with human dignity, enshrined in Article 21, is derived from the Directive Principles of State Policy and therefore includes protection of health.[15] Further, it has also been held that the right to health is integral to the right to life and the Government has a Constitutional obligation to provide health facilities[16]

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[13] *M A O* (ibid at 12) at para 127

[14] *Zia vs WAPDA* [1994] 32 PLD Supreme Court 693 (Pak.)

[15] Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802

[16] State of Punjab v. Mohinder Singh Chawla, AIR 1997 SC 1225.0

When confronted with the eviction of the 'Hohe hahe', *Justice Mumbi* firstly recognised that the right to housing is linked with the other rights and its violation leads to the violation of the other rights, she correctly held that

> An eviction of the nature undertaken by the respondents does not just violate the right to housing. Encompassed in a person's dwelling is their family life, their ability to take care of their children; their ability to live a secure and dignified life. When they are denied their shelter, their dignity, security, and privacy is impaired[17].

Armed with such judicial philosophy, Justice Mumbi's reasoning in *PAO* was not different, she reasons that the petitioners, as citizens of Kenya, have the right to life guaranteed under Article 26(1); the right to human dignity provided for under Article 28; the right to the highest attainable standard of health guaranteed under Article 43(1) of the Constitution are inextricably bound.[18] She holds thus

> In my view, The right to highest attainable standard of health, life and human dignity There can be no argument that without health, the right to life is in jeopardy, and where one has an illness that is as debilitating as HIV/AIDS is now generally recognised as being, one's inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised[19].

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[17]See *William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others* [2014] eKLR; see also *Mitu-Bell Welfare Society v Attorney General & 2 others*[2013] Eklr where she held that

> Such an argument fails to recognise the essential connection, inter-dependence and indivisibility of rights and more importantly, is made in ignorance of the fact that the classification of rights as first or second generation has long been abandoned, and the indivisibility and interdependence of human rights recognized.

[18]*PAO* (supra) at para 53,

[19]*PAO* (ibid) at para 56, she relied on In General Comment No. 14 on The right to highest attainable standard of health, the Committee on Economic, Social and Cultural Rights which notes that 'Health is a fundamental human

Justice Mumbi thus gave teeth to article 19, the purpose of the protection and realising of the human rights and fundamental freedoms being to preserve the dignity of an individual and the realisation of the potential of human beings and as such a violation of The right to highest attainable standard of health would lead to a violation of The right to highest attainable standard of health and the right to life. The violation of one has a replica effect on the others due to the interdependency and indivisibility[20]

B. The socio-context: a case for the 'have nots'

Does the law have a duty to the poor? Does the law serve any purpose to those who do not have? Is the law meant only to serve the rich? The hopes and dreams embedded in the 2010 constitution however seeks to correct the injustices of the past and puts the poor, vulnerable and the marginalised at the center. *Nicholas Orago*[21] while writing on the best method to interpret the incorporation of the socio-economic rights and why their entrenchment in the constitution, writes on the hopes and aspirations of Kenyans in the following terms

> The struggle for a new constitutional dispensation in Kenya was underpinned by the desire for a new political, economic and social dispensation capable of eradicating poverty, inequality and marginalisation. The aim of the Kenyans who struggled for the new political and socio-economic dispensation was the entrenchment of a just system of

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right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.'

[20] *Rangal Lemeiguran & Others V Attorney General & Others* Miscellaneous Civil Application 305 Of 2004

[21] Nicholas Wasonga Orago, Socio-economic rights and the potential for structural reforms: A comparative perspective on the interpretation of the socio-economic rights in the Constitution of Kenya, 2010 in Morris Kiwinda Mbondenyi, Human rights and democratic governance in Kenya: A post-2007 appraisal Pretoria University Law Press (2015); In the South African Context, Sandra Liebenberg 'Socio-Economic Rights – Adjudication under a Transformative Constitution' (2010) 36 opines thus: 'The recognition of socio-economic rights represents an attempt to redress the tendency within liberal human rights discourse to exclude issues of impoverishment and material disadvantage from it referential framework.'

government that will enhance access to the basic socio-economic goods and services for the Kenyan people, especially the poor, vulnerable and marginalised.

In the post-2010 dispensation, what should a judge do? A judge is expected to uphold the leitmotifs and goals of the constitution, a judge is to participate actively in the amelioration of the poor, to enforce substantive equality and not formal equality. With this as the background, every time a judge is confronted with human rights violation claims, he is not to mechanically apply the law, a judge should not look at the facts and look at the text of the law and see if they apply to the facts, a judge should look more than the law, a judge should also consider the historical background and social context of each case, however I do not mean that a judge should dispose of the law. *Chaskalson* also put out this view in *Makwanyane* that ‘ a constitutional right must not be construed in isolation , but in its context , which includes the history and background to the adoption of the constitution , other provisions of the constitution itself and in particular , the provisions of the bill of rights of which it is part’

The high court has in various opinions underscored this principle. In *John Kabui Mwai* [22] The high court correctly underscored the historical injustices of the country and the need of enforcement of social justice in the following terms

> “When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection. Rightly or wrongly,

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[22] *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others,* Nairobi Petition No. 15 of 2011 [2011]eKLR

and it is not for the court to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognizing the necessity of corrective measures … It was out of the realization that unequal people cannot be treated equally."

When deciding the case, Justice Mumbi Ngugi[23] not only looked at the law but also considered the socio-economic context in which the matter arose, she underscored the fact that the petitioners in the case were men of straw. She held thus

> Many of those who are infected with the virus are, like the petitioners, unemployed and therefore financially incapable of procuring for themselves the anti-retroviral branded medication that they need to remain healthy. They are therefore dependent on generic anti-retroviral medication which is much cheaper and therefore more accessible to them. From the pleadings and submissions before me, it is common ground that until the passage of the **Industrial Property Act in 2001 (Act No. 3 of 2001)**, it was not possible for poor people infected with HIV/AIDS to access anti-retroviral medication as the only ones available were expensive branded medicine. Generic anti-retroviral drugs were not available in Kenya as the existing legislation did not allow parallel importation of generic drugs and medicines. **Section 58 (2)** of the **Industrial Property Act, 2001** as read with **Rule 37 of the Industrial Property Regulations, 2002,** allowed the parallel importation of generic drugs. It is on the basis of this legislation that availability and access to anti-

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[23] see also William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others [2014] eKLR at para 79 where also considered other factors other than the law

> Unlike the birds of the air, men women and children whose dwellings have been demolished will not fly away and perch on a tree, and then begin to rebuild their nests afresh. As most of those evicted from informal settlements are often poor, they become homeless, join the ranks of the dispossessed in the streets, or find another vacant piece of land to put up their shacks and continue with their precarious existence. Until the next eviction and demolitions.

retroviral drugs has increased and greatly enhanced the life and health of persons such as the petitioners who have been living with HIV/AIDS.

It was her position therefore that any legislative measure that would affect accessibility and availability of anti-retroviral medicines must be viewed in the socio-economic context set above. And if such measure would have the effect of limiting access, then such measure would ipso facto threaten the lives and health of the petitioners and others infected with HIV and Aids, and would be in violation of their rights under the Constitution. By this, justice Mumbi goes above the provisions of the law, she looks at the socio-economic context to decipher the purpose of the right to highest attainable standard of health, and who are likely to be affected by such a provision of the law. In equal measure Denning LJ had in*Buchanan and Co* v. *Babco IJmited*[24]explained the principle as follows:

> "They adopt a method which they call in English strange words - at any rate they were strange to me - the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the

[24] |1977]QB208

sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?[25]

If history is indeed a great revealer of intent as Justice Njoki holds[26] and that events inspire laws and public processes and at the heart of these laws and processes are shortcomings to be remedied, crises to be averted, needs to be met and a nation to be efficiently and effectively governed, then Justice Mumbi's evocation of the socio-economic context was timely and appropriate. Her reminder of the dire situation of the petitioners was in tandem with the goals of the 2010 constitution.

C. The right to highest attainable standard of health Vis-à-vis the right to property: adopting a human rights approach?

Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly 'intimate bedfellows'.[27] They are no longer existing in isolation of each other, they interact with each other. A human rights-based approach to HIV/AIDS as per *Gumedze* entails three distinct dimensions that it firstly refers to the processes of using human rights as a framework for addressing the HIV/AIDS pandemic. Secondly, it entails the assessment of human rights implications of any HIV/AIDS policy, strategic plan, programme, legislation or constitution. Thirdly, it involves the making of human rights an integral dimension of the design, implementation, monitoring and evaluation of these HIV/AIDS related policies, strategic plans, programmes, legislations and constitutions[28]. This approach therefore subjects all

[25].ibid at 213

[26] Raila Odinga and Another v IEBC and others, Presidential Petition No. 1 of 2017.

[27]Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?* 5 Minn. Intell. Prop. Rev. 47 (2003).

[28]Sabelo Gumedze, HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights(2004) 4 *AFRICAN HUMAN RIGHTS LAW JOURNAL*

plans, framework and legislations dealing with HIV/AIDS to human rights. As I have earlier observed that the rights are indivisible and interrelated, then the plans and legislation have to be in tandem with the entire bill of rights.

The right to health entails access to essential drugs as a major concern of the realisation of the right to health.[29]It is also implied that the right to health encompasses not only access to medicine but also a minimum and universal right to affordable essential medicines[30]The Committee on Economic, Social and Cultural Rights (CESCR) elucidated the understanding of "the highest attainable standard of health" by stating that "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health[31]. The committee further considered the essential elements of the right to include "accessibility", "acceptability" and "quality" in the right to health.[32] Among these, Accessibility means not only physical accessibility, but includes economic accessibility that requires health facilities, goods and services to be affordable for all.[33]This means that the access to medicines involves affordable prices.[34]

Ostergard Jr et al[35]in their moving article, 'Give Me Property or Give Me Death' have identified an obstacle to the access of medicine. They have correctly argued that, the main obstacle is the current system under which states protect intellectual property rights, this is because it puts the

[29]UN Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, (52nd Session) (27 June 2001) E/CN.4/Sub.2/2001/13 para 42.
[30]Melissa McClellan, ' 'Tools for Success': The TRIPS Agreement and The Human Rights to Essential Medicine' (2005) 12 *Wash & Lee J Civil Rts & Soc Just* 153, 160-161; the author is of the view that the right to life and the right to health determines a right to essential affordable medicines.
[31]CESCR, *General Comment No. 14*, para 9.
[32] Ibid (General comment 14), para 12.
[33]Ibid, para 12(b)
[34]Ibid, para 12.
[35]Robert L. Ostergard Jr. & Shawna E. Sweeney , 'Give Me Property or Give Me Death: Reconciling Intellectual Property Rights and the Right to Health', *Journal of Human Rights*, 10:3, 339-357, DOI: 10.1080/14754835.2011.596057

needs of the poor who need access to essential medicines to survive against the interests of pharmaceutical firms to recoup their investments and to earn a profit. The intellectual property system protects profits over the subsistence needs of poor and impoverished people The intellectual property rights system has been accused and rightly so of prioritizing property rights and the pursuit of profits over the common good(the benefit of people accessing the highest attainable standards of health. An owner of a patent has therefore the authority to set the price because he owns the invention, this scenario has been equated to 'The pricing scheme which is tantamount to dangling a treatment in front of dying people and telling them they could not have it simply because they were poor' or as*sellin* puts it 'does one size fit all?"[36], the patent system does not differentiate between the poor and the rich, by doing so does it fit in all the circumstances, unlike in the West, formal equality is not applicable in kenya. Formal equality is blind to the socio-economic disparities that may exist in every society[37]. In other words, there is a need for substantive equality which is stark different from formal equality,it aims at promoting social justice and egalitarianism in a society, particularly for the marginalised or vulnerable groups.[38]

Substantial equality fits in the rights-based approach unlike the formal equality if the elements of the rights-based approach are anything to go by. *Gumedze*[39]identifies the essential elements of a rights-based approach to health services to include'safeguarding human dignity, ensuring the provision of a health care system that is accessible to all, giving attention to gender-related

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[36]Jennifer Anna Sellin, 'Does One Size Fit All? Patents, the Right to Health and Access to Medicines', *Neth Int Law Rev* (2015) 62:445–473
[37]E Durojaye, 'Realising Equality In Access To Hiv Treatment For Vulnerable And Marginalised Groups In Africa' *Per / Pelj* 2012(15)1

[38]Rawls *Theory of Justice*
[39]Sabelo Gumedze, HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights(2004) 4 *AFRICAN HUMAN RIGHTS LAW JOURNAL*

issues, removing advertent or inadvertent discrimination in the ways in which services are rendered, and paying special attention to the rights of vulnerable and marginalised groups in society'[40]. At the core of this approach is the need to ensure that a special attention is given to the vulnerable and marginalised groups in a society, this can only happen when formal equality is not considered or in the words of *O'Regan*in the famous *Hugo* case that 'although long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality'. The intellectual property rights system seeks to treat 'unlike alike' and like unlike'.

Even within the WTO as *Vawda*[41] notes, member states have unanimously agreed that the TRIPS Agreement should be interpreted 'in a manner supportive of WTO members' right to protect public health and, in particular, to promote *access to medicines for all*'.[42] Justice Mumbi understood the need to balance between the two rights and the fact that the right to highest attainable standards of health could not be enjoyed without the access to drugs[43]and that any legislation that would render the cost of essential drugs unaffordable to citizens would thus be in violation of the state's obligations under the Constitution. She also accepted there is a need to prohibit trade in counterfeits which is inherent in the right of holders of intellectual property rights to benefit from their innovations. Most importantly in her decision, she found the act had prioritized the enforcement of IPR over the access to medicine. She expressed herself thus

[40]Ibid at 16,17

[41]Yousuf A Vawda and Brook K Baker, 'Achieving social justice in the human rights/intellectual property debate: Realising the goal of access to medicines' (2013) 13 *AHRLJ* 55-81

[42]Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 para 4 (November 2001)

[43]She relied on General Comment No. 14 on the Right to Health, the Committee on Economic, Social and Cultural Rights to hold that 'Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.'

> 83. The Anti-Counterfeit Act has, in my view, prioritized enforcement of intellectual property rights in dealing with the problem of counterfeit medicine. It has not taken an approach focused on quality and standards which would achieve what the respondents have submitted is the purpose behind the Act: the protection of the petitioners in particular and the general public from substandard medicine. Protection of consumers may have been a collateral issue in the minds of the drafters of the Act. This is why for instance, the rights of consumers of generic medicine are alluded to in the proviso to Section 2 of the Act.85. Should the Act be implemented as it is, the danger that it poses to the right of the petitioners to access essential medicine which they require on a daily basis in order to sustain life is far greater and more critical than the protection of the intellectual property rights that the Act seeks to protect. The right to life, dignity and health of the petitioners must take precedence over the intellectual property rights of patent holders.

She concludes by noting that the IPR have to give way to the rights of the citizens

> While such intellectual property rights should be protected, where there is the likelihood, as in this case, that their protection will put in jeopardy fundamental rights such as the right to life of others, I take the view that they must give way to the fundamental rights of citizens in the position of the petitioners.

The reasoning of Justice Mumbi can be compared to that of the African Commission which found In *Free Legal Assistance Group and Others v Zaire*,[44] that a shortage of medicine

[44] (2000) AHRLR 74 (ACHPR 1995) at para 47

constituted a violation of article 16 of the African Charter and further that the recognition of the right to health is related to the right to dignity[45], the commission expressed itself thus

> Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16.

Most relatable is the decision by the South Africa Constitutional Court, in *Minister of Health and Others vTreatment Action Campaign and Others*, Famously the Tac case held that the failure of the state to ensure access to the drug Nevirapine to pregnant women to prevent mother to child transmission of HIV was a violation of the constitutional right to the highest attainable standard of health.

<u>Conclusion</u>

> "Idea of a better world is one in which medical discoveries would be free from patent and there will be no profiteering from life and death".[46]

If the rights in the constitution are to mean more than just mere expressions or aspirations, they need to be enforced, if indeed the constitution is not "*the Constitution of this Republic is not a toothless bulldog, nor is it a collection of pious platitudes*'[47] then it needs judges with a transformative mind, judges who understand the leitmotif of the 2010 constitution, and Justice

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[45] Art 5 African Charter

[46] Dhavan, Rajeev (2004) The Patent Controversy, the Hindu, dated December 10, 2004. Available at www.thehindu.com/2004/12/10/stories/2004121002361000.htm

[47] Frank Shields J. in *Marete Vs. Attorney-General* KLR 690

Mumbi Ngugi is such a judge. Justice Mumbi is in the words of Lord Denning a true reflection of the 'bold spirit'[48]. The 2010 constitution demands for a passionate and responsive judge. A judge who is sensitive to the need to bring about change and redress some of the wrongs that are done to people who are not even regarded as human.

In the words of *Mwaura*[49], our constitution can promise to shelter us from the evils of unchecked power, in the form of political rights, it can promise us milk and honey in the form of SERs. But it cannot protect us if we lack the courage and the self-restraint to protect it and by extension ourselves. I add to the words that if the honey is to flow then the bee-keeper is to be courageous, armed with the necessary equipment is to act continuously without ceasing in harvesting the honey, if the milk is to be collected and served as tea, then the shepherd should be apt to the task. Such an ideal bee-keeper and shepherd is Justice Mumbi Ngugi, she has an orangutan bond with the leitmotif of the constitution.

[48]A Denning *The Discipline of Law* First Edition (1979) 315.
[49] Charles Mwaura Kamau, *Principles of constitutional law* (2014) at pg XV

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