

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 605 OF 2014

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
19,20,21,25,26,27,28,29,31,33, 35, 43, 45 AND 46 OF THE CONSTITUTION OF KENYA
(2010)

BETWEEN

SWK.....1ST PETITIONER
PAK.....2ND PETITIONER
GWK.....3RD PETITIONER
AMM.....4TH PETITIONER
KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV & AIDS (KELIN)5TH PETITIONER
AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM).....6TH PETITIONER

AND

MÉDECINS SANS FRONTIÈRES - FRANCE1ST RESPONDENT
PUMWANI MATERNITY HOSPITAL.....2ND RESPONDENT
MARIES STOPES INTERNATIONAL.....3RD RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER
IN CHARGE OF HEALTH SERVICES – NAIROBI COUNTY.....4TH RESPONDENT
CABINET SECRETARY, MINISTRY OF HEALTH.....5TH RESPONDENT
THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

Pursuant to Article 22 (1) of the Constitution of Kenya (2010) and The Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013.

PETITION

THE HUMBLE PETITION OF S.W.K, P.A.K, G.W.K, A.M.M , KENYA LEGAL AND ETHICAL ISSUES NETWORK HIV & AIDS (KELIN) AND AFRICAN GENDER AND MEDIA INITIATIVE (GEM) WHOSE ADDRESS OF SERVICE FOR PURPOSES OF THIS PETITION ONLY IS CARE OF KELIN, MAISSONETTE NO. 4 on LR NO. 1/714

~~KILIMANI, KINDARUMA ROAD, OFF RING ROAD KILIMANI, MOMBASA ROAD, SOMAK BUILDING (Next to AIRTEL) 4TH FLOOR, P.O.BOX 112-00202, NAIROBI~~ IS AS FOLLOWS:-

INTRODUCTION:

This matter is about the unconstitutional and unlawful sterilization of S.W.K, P.A.K, G.W.K and A.M.M, the 1st – 4th Petitioners who are women living with HIV. The 1st – 4th Petitioners are women who underwent a procedure medically known as bilateral tubal ligation without their informed consent at different health facilities named as respondents in this Petition. The manner in which the procedures took place was non-consensual and therefore unconstitutional and a violation of their reproductive health rights among other rights.

The remainder of the Petition is structured as follows:

- a) The Parties
- b) Factual and Procedural Background
- c) The Petitioners' Interests
- d) Summary of the Petitioners' claim and Legal Arguments
- e) The nature of Sterilization and its effects
- f) Particulars of Unconstitutionality
- g) Relevant International law framework on Sterilization of women
- h) Relevant legislative and regulatory framework for sterilization of women
- j) The Petitioners' Humble Prayer.

A) PARTIES

1. The Petitioners are as follows:

- a. SWK is the 1st Petitioner herein and is an adult female who resides in Nyandarua County, within the Republic of Kenya. She is infected with the HIV virus and is currently on anti-retroviral therapy and takes her drugs daily as prescribed by her Doctor.
- b. PAK is the 2nd Petitioner herein and is an adult female who resides in Nairobi County, within the Republic of Kenya. She is infected with the HIV virus and is currently on anti-retroviral therapy and takes her drugs daily as prescribed by her Doctor.

- c. GWK is the 3rd Petitioner herein and is an adult female who resides in Nairobi County, within the Republic of Kenya. She is infected with the HIV virus and is currently on anti-retroviral therapy and takes her drugs daily as prescribed by her Doctor.
- d. AMM is the 4th Petitioner herein and is an adult female who resides in Nairobi County, within the Republic of Kenya. She is infected with the HIV virus and is currently on anti-retroviral therapy and takes her drugs daily as prescribed by her Doctor.
- e. Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN), is the 5th Petitioner herein and is a non-partisan, non-profit making and non-governmental organization duly registered under the Non-Governmental Organizations' Act committed to and working to protect and promote health –related human rights in Kenya. We do this by facilitating access to justice for those who face human rights violations; creating partnerships with key stakeholders; building capacity of communities to know their rights; and analyzing laws and policies to ensure they integrate human rights principles. ~~the protection, promotion and enhancement of enjoyment of the right to health for all through public interest litigation, advocacy and law reform.~~
- f. African Gender and Media Initiative Trust (GEM), is the 6th Petitioner herein and is a not for profit organisation that works to advance gender equality through research and action on women's human rights. ~~GEM was founded against the backdrop of the need for evidence based programming in women's human rights work in Kenya.~~ The priority issues for GEM include sexual and reproductive health and rights of women, violence against women, economic justice and new media activism.

2. The 1st, 2nd and 3rd Respondents are sued on their own behalf, the 4th Respondent is sued as the entity in charge of running the Pumwani Maternity Hospital which is the 2nd Respondent herein while the 5th Respondent is sued as the entity in charge of formulating policies regarding sexual reproductive health and services in the country. The 6th Respondent is sued in the capacity of the Principal Legal Adviser to the Government.
- a. The 1st Respondent is an international, independent, medical humanitarian organization that delivers emergency aid to people affected by armed conflict, epidemics, natural disasters and exclusion from health care. The 1st Respondent until December, 2013 ran Blue House Mathare Clinic.
 - b. The 2nd Respondent is one of the largest maternity hospitals in the country and is run by the Nairobi County Government.
 - c. The 3rd Respondent is the country's largest specialized sexual reproductive health and family planning organization.
 - d. The 4th Respondent is the County Executive Committee Member in charge of Health Services in Nairobi County and is responsible for policy formulation and leadership on county health facilities and pharmacies, ambulance services, promotion of primary health care, licensing and control of undertakings that sell food to the public, cemeteries, funeral parlors and cremations and liquor licensing.
 - e. The 5th Respondent is the Cabinet Secretary, Ministry of Health in the National Government and is statutorily mandated to deal with all Health policy matters including those related to reproductive health, family planning and HIV control, prevention and treatment among others at a national level and is sued in that capacity.

- f. The 6th Respondent is the Principal Legal Adviser to the Government and the person authorized by law to represent the Government in proceedings to which it is a party and is named in that capacity.

B) FACTUAL AND PROCEDURAL BACKGROUND

The 1st Petitioner

3. The 1st Petitioner avers that sometime in the year 2003 she tested positive for HIV after a period of illness. She was advised by a medical professional to take septrin and only started taking ARVs in 2005 which she takes to date.
4. On or about September, 2009 she conceived and used to attend pre natal clinic at Blue House Mathare Clinic which was ran by the 1st Respondent herein where she was referred to give birth at Pumwani Maternity Hospital the 2nd Respondent herein. Before she was referred to Pumwani Maternity Hospital the 2nd Respondent, a nutritionist at Blue House Mathare Clinic called 'Benta Anyango Owour' informed her that if she did not agree to undergo the Tubal Ligation during the time of giving birth, she would not qualify to receive food portions e.g. cooking oil, porridge and *ugali* flour and payment of the maternity bill at Pumwani Maternity Hospital the 2nd Respondent which was approximately Kshs. 8,000. On or about May, 2010, she gave birth through caesarean section at the Pumwani Maternity Hospital.
5. It was during the period before she was taken into the theatre for the cesarean section, that the nurse on duty that day ~~started talking~~ talked to her about the need to plan her family who advised her that since she already had ~~two~~ three children and was expecting another, she was better off undergoing bilateral tubal ligation. She was given a paper to sign that she will undergo both the caesarean section and a tubal ligation.

6. The 1st Petitioner further avers that on or about 23 May, 2010 several days after she was discharged from Pumwani Maternity Hospital she went to the Blue House Mathare Clinic, run by Médecins Sans Frontières- France, the 1st Respondent herein, after she had run out of formula provided to her at Pumwani Hospital, a nutritionist by the name of 'Benta Anyango Owuor who attended to her informed her that she will not qualify to get formula milk for her children and food portions for her unless she had proof that she had undergone the procedure of bilateral tubal ligation. ~~and was advised to go back to Pumwani Maternity Hospital to get proof that she had undergone the procedure.~~ Immediately the nutritionist realized that at the rear of her card, it was indicated that BTL had been performed on her.

~~7. The 1st Petitioner at that point went back to Pumwani Maternity Hospital where her Hospital card was stamped that she had undergone bilateral tubal ligation.~~

The 2nd Petitioner

8. The 2nd Petitioner avers that in the year 2001 at a medical camp in Majengo slums in Nairobi, she underwent a HIV test and the result was positive. She did not seek any form of treatment till 15 July, 2002 when her then husband died of HIV related complications. She was referred to Blue House Mathare Clinic where the doctors put her on Septrin and later started taking ARVs in July, 2004

9. The 2nd Petitioner further states that on 29 October, 2004 she gave birth to twin boys at Pumwani Maternity Hospital, the 2nd Respondent herein. The maternity and medical bill she incurred at Pumwani Maternity Hospital was paid by Blue House Mathare Clinic which was then being run by the 1st Respondent herein. After the birth, she was under instructions from the medical staff at Pumwani

Maternity Hospital, the 2nd Respondent herein and the doctor at Blue House Mathare Clinic who used to give her ARVs not to breastfeed the children but to feed them on formula milk which was to be provided weekly at Blue House Mathare Clinic together with food portions which included cooking oil, porridge and *ugali* flour.

10. The 2nd Petitioner further avers that at the clinic there was a specific nutritionist called 'Benta Anyango Owuor' who every time she went to collect the formula milk and food portions would tell her that she should undergo the bilateral tubal ligation. On one occasion she was told that if she did not have proof that she was on family planning, specifically tubal ligation, she would not qualify to receive formula and the food portions anymore.

11. The 2nd Petitioner avers that at this point she submitted and was referred by Benta Anyango Owuor the nutritionist to a community health worker who told her to report to Lions Clinic in Huruma, where medical personnel from Marie Stopes, the 3rd Respondent herein held a Family Planning clinic.

12. While at the Lions Clinic in Huruma, together with a group of other women, she on 8, June, 2005 underwent the procedure of bilateral tubal ligation after signing a form which she does not remember the contents, as she could not read, and the contents were not explained to her and on 15, June, 2005 went to Marie Stopes Clinic in EastLeigh for a review and the health professional who attended to her informed her that she was recovering well.

13. The 2nd Petitioner avers that when she went to collect the formula milk and food portions the next time at the Blue House Mathare Clinic she showed the card to the nurse that indicated she had undergone bilateral tubal ligation and was

issued with formula milk for her baby and food portions with no further confrontations from that point onwards.

The 3rd Petitioner

14. The 3rd Petitioner avers that in the year 2005, she fell sick and admitted to Kiambu District Hospital and was later diagnosed with tuberculosis (TB) and was started on TB treatment; on discharge, she was asked to continue picking TB drugs at a health facility near her. After she was discharged from hospital, she visited the Blue House Mathare Clinic which was run by the 1st Respondent at the material time, where she continued to pick TB drugs and where she also underwent a HIV test which was positive. She started taking ARVs in 2006.
15. The 3rd Petitioner further avers that on or about August 2009 she conceived and attended an ante natal clinic at Blue House Mathare Clinic. The 3rd Petitioner avers that when she was approaching her due date, she was informed at Blue House Mathare Clinic that she would give birth at Pumwani Maternity Hospital, the 2nd Respondent herein. She was given a referral letter at the Blue House Mathare Clinic which she presented at Pumwani Maternity Hospital when she was admitted to give birth.
16. The 3rd Petitioner further avers that the evening before she was scheduled to go to the theatre, the next morning, ~~a few hours before she was taken into the theatre,~~ a nurse whose name she cannot recall asked her if she was practicing any form of family planning and she responded in the negative.
17. The 3rd Petitioner further avers that before she went into theatre, she was given a form by a nurse which she signed after she was told the consent she was giving was to allow the doctor to perform a cesarean surgery on her since she had been in labour for a period of about 48 hours without giving birth. The 1st respondent made the payment of her maternity fees to the 2nd Respondent.

18. The 3rd Petitioner avers that she gave birth by way of caesarean and while she was still recuperating at Pumwani Maternity Hospital, she was brought formula milk by a community health worker from Blue House Mathare Clinic and was further advised not to breastfeed the child and to collect weekly formula and food portions from the Blue House Mathare Clinic which was run by the 1st Respondent.
19. The 3rd Petitioner states that it is only during the time she was recuperating in hospital that a nurse doing rounds at the ward informed her that the doctor had performed a tubal ligation on her when she enquired as to why she was in a lot of pain. She further states that she did not consent to such a procedure neither was she given an opportunity to choose the kind of family planning method she wanted to use.
20. The 3rd Petitioner further avers that when she went to Blue House Mathare Clinic for the ~~food portions and~~ baby formula she was asked by the nurse who attended to her if at all she was practicing any form of family planning; she told the nurse that she was informed that tubal ligation was done on her during the cesarean operation. She was told to go back to Pumwani Maternity Hospital to get proof that indeed she had undergone tubal ligation. She went back to Pumwani Maternity Hospital, where it was indicated on her card that she had undergone a tubal ligation after the same was confirmed from her file which contained medical records. She returned the same to Blue House Mathare Clinic and was issued with ~~food portions~~ and formula milk.

The 4th Petitioner

21. The 4th Petitioner avers that on or about August 2004 while attending an ante natal clinic at a health facility in Mathare North, she was tested positive for the

HIV virus. She later went for a confirmatory test at Pumwani Maternity Hospital in November, 2004, which test turned out positive and she continued with her ante natal visits there.

22. The 4th Petitioner further avers that she delivered normally on 8, March, 2005 at Pumwani Maternity Hospital, the 2nd Respondent herein but was advised not to breastfeed to minimize the risk of infecting her child. She was advised to collect baby formula milk weekly from Pumwani Maternity Hospital, the 2nd Respondent herein, but a nutritionist at the facility cautioned her that if she did not agree to undergo a tubal ligation, she would cease to qualify to receive the formula for the baby.
23. The 4th Petitioner further avers that every week when she went to collect formula from the 2nd Respondent, the nurse would tell her of the need to undergo a tubal ligation since according to the nurse, she could not continue giving birth in the future as giving birth would compromise her immunity and as a result she would die.
24. The 4th Petitioner further avers that she eventually gave in and on 4, May, 2005 attended a medical clinic at Lions Clinic in Huruma where health care professionals from Maries Stopes, the 3rd Respondents, herein were conducting a family planning drive for women and there she underwent the tubal ligation procedure. The Petitioner was given a form to sign, whose contents she cannot remember, as she cannot read, and the contents were not explained to her neither was she given any education on family planning and any other methods available. She was given a pink Marie Stopes card after the procedure indicating that she had undergone bilateral tubal ligation.

25. The 4th Petitioner was sickly after the procedure and always had pain in her abdomen especially where an incision had been made during the tubal ligation procedure. One week later she went to the Marie Stopes clinic in East Leigh for a checkup, she was treated and discharged and the pain declined but she still experiences a lot of pain in her abdomen during the cold season and also she couldn't undertake heavy chores.

~~26. These actions and conditions described above by the 1st—4th Petitioners constitute torture in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has been ratified by Kenya and thus forms part of Kenyan law in terms of Article 2(5) of the Constitution of the Republic of Kenya, 2010.¹~~

~~27. All of these actions and conditions under which the procedures were done and under which there was a threat to withhold their baby's formula and their food portions are a violation of the 1st to 4th Petitioner's constitutional rights, impeding the effective management of HIV and goes against medical best practices.~~

~~28. The 1st—4th Petitioners further aver that the threat of withholding vital food supplements for them and formula milk for their children discriminated against them and was an infringement on their right to life.~~

¹ Part 1 Article 1 of the convention provides: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

C) THE PETITIONERS' INTERESTS

29. The 1st - 4th Petitioners act in their own interests as persons having been sterilized by undergoing bilateral tubal ligation without their informed consent and subjected to torture and inhuman and degrading treatment in contravention of their constitutional and other rights, including their right to be free from torture and inhuman degrading treatment. The 5th and 6th Petitioners act in their own interest, in that judgment of this court will have a major impact on their ability to achieve their core objective of the 'protection, promotion and enhancement of enjoyment of the right to health and HIV related human rights' and promotion and protection of sexual and reproductive health rights for women respectively.
30. The six (6) Petitioners also act in the public interest in that the matter before this Honourable Court has extremely important implications for the health and constitutional rights of those women living with HIV in that it will uphold the requirement that women be given specific information on sterilization and alternative procedures for family planning in order to guard against such intervention being carried out without a fully informed choice.

D) SUMMARY OF THE PETITIONERS' CLAIM AND LEGAL ARGUMENTS:

31. The case of the 1st – 4th Petitioners is a small sampling of cases that have come to the attention of the 5th Petitioner through a report that was produced by Africa Gender and Media Initiative Trust (GEM) the 6th Petitioner herein based on a study conducted among 40 women living with HIV who aver that they were either forced or coerced to accept permanent sterilization procedures (bilateral tubal ligation) in health care facilities in Kenya. The study was conducted between October and November 2011 in Nairobi and Kakamega counties by the African Gender and Media Initiative Trust (GEM) the 6th Petitioner herein in

partnership with Women Fighting AIDS in Kenya, Lean on Me and Grassroots Empowerment Trust.²

32. This Honourable Court is charged with the fundamental duty to “observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights” in terms of Article 21(1) of the Constitution of the Republic of Kenya, 2010 [“the Constitution”]. The High Court has jurisdiction to “hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights” in terms of Article 23(1) of the Constitution.

33. This Honourable Court may moreover grant “appropriate” relief, including a declaration of rights, a conservatory order, an injunction, a declaration of the invalidity of a law and an order for compensation in terms of Article 23(3) (a-e) of the Constitution.

34. The Petitioners therefore believe and assert that it is necessary for this Honourable Court to declare that the act of coercive and or forceful sterilization of women living with HIV by way of bilateral tubal ligation without their informed consent, and the threat of withholding formula milk for their babies and food portions without proof of sterilization violates the Constitution and any such sterilization and threat to withhold lifesaving supplements is at all times unconstitutional.

E) THE NATURE OF STERILIZATION AND ITS EFFECTS

35. The International Conference on Population and Development (ICPD) Programme of action defines Reproductive health as "a state of physical, mental

² Robbed of Choice: Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya, African Gender and Media Initiative, Nairobi, 2012.

and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so". The World Health Organization defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

36. According to the Society of Obstetricians and Gynecologists of Canada, Tubal Ligation is an operation to stop a woman from getting pregnant. It is permanent. The fallopian tubes, which carry the eggs from the ovary to the womb (uterus) are burned, clipped, cut or tied (the tubes are sealed). The tubes are therefore closed so the sperm and the egg do not meet.³
37. Coerced sterilization occurs when financial or other incentives, misinformation or intimidation tactics are used to compel an individual to undergo the procedure while forced sterilization occurs when a person is sterilized without her knowledge or is not given an opportunity to provide informed consent.⁴
38. The decision to sterilize must be voluntary and women should not be pressured by their partners, families or health care providers to undertake the procedure. The decision to sterilize must also be an informed one. Health care providers must explain the details of the procedure, the risks and benefits, the permanent nature of sterilization as well as alternatives to sterilization including non-permanent methods of contraception and again sterilization should never be a

³ Source: sogc.org/publications/tubal-ligation-female-surgical-sterilization/ accessed on 17/1/2014

⁴ Against her will: Forced and Coerced sterilization of women worldwide. Open Society Foundations publication; September, 2011

pre-requisite for receiving another medical procedure further, sterilization is not an emergency procedure.⁵

39. The impacts of forced and coerced sterilization as evident from the Petitioners averments are:

- a. Emotional and relational impact: most women who are sterilized report emotional distress because they can no longer bear children, some women even have clinical depression and end up using anti-depressants. Some women develop a fear of the health care system and facilities and are reluctant to seek further care. Further, some of the women have faced abandonment by partners and social ostracism.
- b. Physical impact: the procedures are such that it takes a long time for women to heal and their menstrual cycle is affected, with menstruations non-existent or irregular. The women are unable to hold urine for a long period of time and they suffer frequent abdominal pains. Women who have undergone the procedure report that they experience reduced sexual desire.
- c. Financial impacts: women report spending money they would otherwise not have spent consulting doctors on reversals or alternative methods of conception.

F) PARTICULARS OF UNCONSTITUTIONALITY

40. The 1st – 4th Petitioners' accounts of their experience at the hands of health care workers demonstrates that the 1st, 2nd and 3rd Respondents failed in their obligation to respect, protect and fulfill the fundamental rights of the Petitioner.

⁵ International Federation of Gynecology and obstetrics (FIGO) guidelines on female contraceptive sterilization.

41. The Respondents were under the obligation to observe, respect, protect, promote and fulfill the rights and freedoms enshrined in the Bill of Rights, Chapter Four of the Constitution.
42. The act of coercive and forceful sterilization of the 1st -4th Petitioners violated their rights under the Constitution, specifically to:
- a. The right to life as under Article 26 (1).
 - b. Equality and freedom from discrimination as under Article 27 (1-8).
 - c. The right to human dignity as under Article 28.
 - d. Freedom from Torture under Article 29 (d) and from Cruel, inhuman and degrading manner under Article 29 (f). ~~Security of the person as under Article 29 (d & f)~~.
 - e. The right to privacy under Article 31 (a).
 - f. Freedom of expression and specifically freedom to seek and receive information or ideas as under Article 33 (1).
 - g. The right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom as under Article 35 (1) (b).
 - h. The right to the highest attainable standard of health , which includes the right to health care services including reproductive health care as under Article 43 (1) (a).
 - i. The Right to found and have families under Article 45.
 - j. The rights of the consumer to be given services of reasonable quality, the information necessary for them to gain full benefit of the services, and protection of their health as in Article 46 (1) (a-c) of the Constitution.
 - k. ~~Withholding medical treatment from the 1st Petitioner~~ The threat to withhold food portions from the 1st – 4th Petitioners violated her their right to life under Article 26 (1) and (3), right to equality and non-discrimination under Article 27 (1-8), the right to the highest attainable

standard of health, which includes the right to health care services, as under Article 43 (1) (a) , right to human dignity under Article 28, freedom from torture under Article 29 (d) and from cruel, inhuman and degrading manner under Article 29 (f) of the Constitution of Kenya.

43. The unlawful and involuntary sterilization of the 1st -4th Petitioners was unreasonable, unjustifiable and unconstitutional because it was not done in accordance with the law and ethics, was not necessary in the circumstances, was not legitimate and necessary and was not the reasonably available alternative of family planning.

~~44. The unlawful and involuntary sterilization of women living with HIV and in this particular case of the 1st -4th Petitioners conducted by the Respondents constituted discrimination on the basis of health and HIV status, in breach of Article 27 (4) of the Constitution.~~

G) RELEVANT INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

45. Article 2 (5-6) of the Constitution of the Republic of Kenya, 2010 states that:

“(5) The general rules of international law shall form part of the law of Kenya”
and;

“(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

It therefore follows that the court in exercising its mandate is bound to read and interpret the Constitution and take into account the understandings of fundamental rights at issue and as set out in instruments and conventions agreed to by the government.

46. The actions and inactions of the Respondents and the circumstances under which the 1st -4th Petitioners ~~was~~ were subjected to the involuntary sterilization by way of bilateral tubal ligation are contrary to a number of international legal instruments voluntarily and customarily agreed upon or ratified by Kenya, including the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination against women (CEDAW), African Charter on Human and Peoples' Rights (ACHPR), the Protocol to the African Charter on Human and Peoples' Rights (ACHPR) on the Rights of Women in Africa (Maputo Protocol), and the Convention against Torture (CAT). The specific rights violated include but are not limited to:

a. The Right to the highest attainable standard of health

- *Article 25, Universal Declaration of Human Rights* ("UDHR"): Establishes for everyone "the right to a standard of living adequate for the health and well-being of himself and of his family".
- *Article 12, International Covenant on Economic, Social and Cultural Rights* ("ICESCR"): "(1) The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."
- *Article 12, Convention on the Elimination of all forms of Discrimination Against Women* ("CEDAW"): Requires State Parties to "take all appropriate

measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”

- *Article 16, African Convention on Human and Peoples’ Rights (“ACHPR”):* “Every individual shall have the right to enjoy the best attainable state of physical and mental health.”

- *Article 14, Protocol to the ACHPR on the Rights of Women in Africa (“Maputo Protocol”)* and General Comment No. 2 on Article 14.1 (a), (b), (c)and (f) and Article 14.2 (a) and (c) of the Protocol:

1. State Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- a. the right to control their fertility;
- b. the right to decide whether to have children, the number of children and the spacing of children;
- c. the right to choose any method of contraception;
- d. the right to self-protection and to be protected against sexually transmitted infections, including HIV & AIDS;
- e. the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV & AIDS, in accordance with internationally recognized standards and best practices;
- f. the right to have family planning education.

b. The right to be free from Torture, cruel , inhuman and degrading treatment or punishment

- *Article 5, UDHR:* “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

- *Article 7, ICCPR*: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”
- *Article 2 Convention against Torture (“CAT”)*: Requires States to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and establishes the absolute and unqualified nature of the prohibition of torture.
- *Article 5, ACHPR*: “...All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”
- *Article 4(1), Maputo Protocol*: “Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited”.

c. Right to Dignity of the person

- *Article 1, UDHR*: “All human beings are born free and equal in dignity and rights.”
- *Preamble, ICCPR, ICESCR, CEDAW, CAT and CRC*: Recognizes the inherent dignity of the human person.
- *Article 5, ACHPR*: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”
- *Article 3, Maputo Protocol*: “Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”

d. Right to privacy or private life

- *Article 12, UDHR*: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”.

- *Article 17(1), ICCPR*: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”.

e. Right to informed consent and the right to information

- *Article 10(h), CEDAW*: Requires State Parties to ensure that women have “access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”
- *Article 19, UDHR*: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
- *Article 19(2), ICCPR*: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally in writing or in print, in the form of art, or through any other media of his choice.”
- *Article 9(1), ACHPR*: “Every individual shall have the right to receive information.”
- *Article 14, Maputo Protocol*: also, States are obligated to “provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.”
- **General Comment No. 2** on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, “State parties should ensure that the necessary legislative measures , administrative policies and procedures are taken to ensure that no woman is forced because of her HIV status, disability, ethnicity or any other situation to use specific contraceptive methods or undergo sterilization or abortion. The use of family planning/ contraception

and safe abortion services by women should be done with their own informed and voluntary consent.

f. Right to determine the number and spacing of one's children

- *Article 16(1) (e), CEDAW*: Requires state parties to ensure that women have “the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.
- *Article 14(1) (b), Maputo Protocol*: Provides for the right to decide whether to have children, the number of children and the spacing of children.

g. Right to be free from discrimination and right to equality

- *Article 2, UDHR; Article 2(1), ICCPR; Article 2(2) ICESCR*: All rights and freedoms in the UDHR, ICCPR and ICESCR are guaranteed “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- *Article 26, ICCPR*: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and the law is to prohibit any discrimination on the above mentioned grounds.
- *Article 12, CEDAW*: Requires State Parties to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.” See also *Article 2(e), CEDAW*.
- *Article 2, ACHPR*: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

- *Article 18(3), ACHPR*: “The State shall ensure the elimination of every form of discrimination against women”.
- *Article 2, Maputo Protocol*: Mandates the elimination of “discrimination against women through appropriate legislative, institutional and other measures”.

h) Right to Marry and found a family

- Article 23, ICCPR The right of men and women of marriageable age to marry and to found a family shall be recognized.

47. The right to health has been established as extending to sexual and reproductive health. Reproductive health has been defined by the Committee on Economic, Social and Cultural Rights (CESCR) the body tasked with the interpretation and monitoring of the ICESCR, as:

"Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right to access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth."

48. The CESCR has also confirmed that the right to health includes “the right to control one’s health and body, including sexual and reproductive freedom” and has further elaborated in relation to state duties as regards to women’s right to health that such strategies should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services.

49. The Special Rapporteur to the UN on the right to health has reconfirmed these obligations, stating that, “Reproductive freedom should never be limited by individuals or States as a family planning method, HIV&AIDS prevention, or any other public health agenda.”⁶
50. The Special Rapporteur to the UN on torture and other cruel and inhuman or degrading treatment or punishment in his report to the Human Rights Council emphasizes, “International and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. Examples of such violations include abusive treatment and humiliation in institutional settings, involuntary sterilization and denial of legally available health service...”⁷
51. The Special Rapporteur on Torture unequivocally declared non- consensual sterilization ‘an act of violence, a form of social control, and a violation of the right to be free from torture and other cruel, inhuman and degrading treatment. He calls upon states to ‘outlaw forced and coerced sterilization in all circumstances’ and clarifies that sterilization for purposes of pregnancy prevention can never be justified on ground of medical emergency at paragraphs 33,48 and 88) of the report. Moreover, the Special Rapporteur recognizes the particular vulnerability of socially excluded and marginalized groups in the context of forced and coerced sterilization.⁸
52. The African Commission on Human and Peoples’ Rights, meeting at its 54th Ordinary Session reaffirmed that all medical procedures, including sterilization,

⁶ Report of the Special Rapporteur on the Rights of everyone to the enjoyment of the highest attainable standard of physical and mental health , Anand Grover, paragraph 58,(Aug.10, 2009),A/64/272

⁷ Report of the Special Rapporteur on Torture and other cruel , inhuman or degrading treatment , Juan E. Mendez, Paragraph 46, (Feb.3,2013) , A/HRC/22/53

⁸ Ibid note 6

must be provided with the free and informed consent of the individual concerned in line with internationally accepted medical and ethical standards and further urged state parties to the African Charter to put in complaint mechanisms, legal assistance, and reparation for women living with HIV who are victims of involuntary sterilization.⁹

53. The World Health Organisation in its Publication “Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO” affirm that special care must be taken to ensure that every person makes a voluntary choice regarding the use of any contraceptive method and particularly for sterilization, since it is a surgical procedure that is intended to be permanent.

H) RELEVANT LEGISLATIVE AND REGULATORY FRAMEWORK FOR STERILIZATION IN KENYA

54. Apart from the Constitution of Kenya, there is no specific legislation in force in Kenya that addresses the issue of informed consent before medical procedures. The Kenya Medical Practitioners and Dentists’ Board, the regulatory body of medical practice in Kenya in its mission, vision and the core values alludes to quality of health care upholding ethics, professionalism and justice.

55. The National Family Planning Guidelines for Service Providers (2010) emphasizes informed and voluntary consent prior to female surgical sterilization. The guidelines note that:

“Special care must be taken to ensure that every client who chooses this method does so voluntarily and is fully informed about the permanence

⁹ Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services; The African Commission on Human and Peoples’ Rights, meeting at its 54th Ordinary Session held from 22 October to 5 November 2013, in Banjul, The Gambia

of this method and the availability of alternative, long acting, highly effective methods”

Further, the guidelines caution service providers against providing any incentive for one to accept any form of contraception or in recruiting potential clients to perform surgical operations.

56. The aforementioned guidelines affirm the right of a woman to change her mind even after she had initially consented. In highlighting that people living with HIV have rights to access family planning options, the guidelines do not explicitly state that HIV status should not be used as a criteria to force or coerce women living with HIV to sterilization.

57. The International Federation of Gynecology and Obstetrics (FIGO) Guidelines on female contraceptive sterilization define the conditions under which consent cannot be sought in any case. Of particular importance are:

- a. Prevention of future pregnancy cannot ethically be justified as a medical emergency, and thus cannot be used as a reason for a doctor to sterilize a woman without her full, free and informed consent.
- b. No minimum or maximum number of children may be used as criteria to sterilize a woman without her full, free and informed consent.
- c. Only women themselves can give ethically valid consent to their own sterilization.
- d. Women’s consent to sterilization should not be made a condition of access to medical care, such as HIV treatment or of any benefit such as release from an institution.
- e. Consent to sterilization should not be requested when women may be vulnerable, such as when requesting termination for pregnancy, going into labour or in the aftermath of delivery.

- f. As for all non-emergency medical procedures, women should be adequately informed of all the risks and benefits of any proposed procedure and of its alternatives; and
- g. The right of all persons with disabilities who are of marriageable age to marry and to found a family is recognized.
- h. All information must be provided in a language, both spoken and written, that the women understand and in an accessible format such as sign language, braille and plain non- technical language appropriate to the individual woman's need.

58. Human rights are also reflected in standards of medical ethics. The World Medical Association International Code of Medical Ethics stipulates that physicians shall:

- a. Always exercise his/her independent professional judgment and maintain the highest standards of professional conduct;
- b. Respect a competent patient's right to accept or refuse treatment;
- c. Not allow his/her judgment to be influenced by personal profit or unfair discrimination; and,
- d. Be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity.

59. Forced and coerced sterilization is a violation of international medical ethics and a clear misuse of medical expertise.

61. The recently launched Kenya National Patients' Rights Charter, 2013 clearly outlines the rights of patients at Chapter One to include the right to the highest attainable standard of health, right to refuse treatment, right to informed consent to

treatment, right to information and right to be treated with respect and dignity. It further provides that every person has a right to complain about health services to the relevant authorities and such complaints should be investigated.

I) YOUR PETITIONERS' HUMBLE PRAYER

REASONS WHEREFORE YOUR PETITIONER HUMBLY PRAYS THAT:

- a. This Honourable Court declares that the act of sterilization of the 1st, 2nd, 3rd and 4th Petitioners by way of bilateral tubal ligation as done by the 2nd and 3rd Respondents amounted to a violation of the human and constitutional rights of the 1st – 4th Petitioners as outlined in the Petition herein.
- b. This Honourable Court declares that the act of threatening to withhold the provision food portions and formula milk and lifesaving ingredients by the 1st and 2nd Respondents is a violation of the human and constitutional rights of the 1st – 4th Petitioners as outlined in the petition herein.
- c. This Honourable Court declares 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.
- d. This Honourable Court issues an order directing the 4th and 5th Respondents to put in place guidelines, measures and training for health care providers and social workers that are in line with FIGO Guidelines on sterilization and informed consent.
- e. This Honourable Court issues an order directing the 4th and 5th Respondents to conduct in depth mandatory training of all practicing gynecologists and obstetricians on the revised FIGO ethical guidelines on the performance of tubal ligation.

- f. This Honourable Court issues an order directing the 5th Respondent to review the National Family Planning Guidelines for Service Providers to address the provisions that are discriminatory.
- g. This Honourable Court issues an order directing that there be instituted a mandatory ~~seven (7) days~~ forty eight (48) hours waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery.
- h. This Honourable Court issues an order directing the 4th and 5th Respondents to conduct public awareness campaigns to educate patients and citizens about their rights to informed consent, privacy and information and ensure that information on patients' rights is immediately accessible within health care facilities.
- i. This Honourable Court issues an order directing the 2nd -5th Respondents to establish clear procedural guidelines for following up on complaints of rights violations and strengthen administrative accountability at hospitals.
- j. This Honourable Court issues an order directing the 4th and 5th Respondents to create a monitoring and evaluation system to ensure full implementation of laws and policies regarding the performance of tubal ligation.
- k. This Honourable Court issues an order directing the 5th Respondent to issue a circular directing all medical and health facilities (both public and private) that forceful or coercive sterilization of women living with HIV is not a government policy.
- l. This Honourable Court is pleased to order the 1st, 2nd, 3rd, 4th and 5th Respondents to jointly and severally pay general and exemplary damages on an aggravated scale to the 1st, 2nd, 3rd and 4th Petitioners for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.

- m. ~~An Order~~ This Honourable Court issues an order that since this Petition is in the Public Interest, each party should bear their own costs.
- n. ~~This matter be brought up for mention before this Honourable Court six (6) months after the date of judgment to confirm compliance with the orders issued.~~ This Honorable Court issues an order directing the Respondents within 90 days of the Court Judgement to file affidavits in this Court detailing out their compliance with orders d, e, f, g, h, I, j, k and l.
- o. This Honourable Court be pleased to make such other orders as it shall deem just and fit.

DATED at Nairobi this _____ day of _____ 2014.

AMMENDED at Nairobi this _____ day of _____ 2015.

ALLAN ACHESA MALECHE
ADVOCATE FOR THE PETITIONERS

DRAWN & FILED BY: -

ALLAN ACHESA MALECHE
KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS (KELIN)
~~KINDARUMA ROAD, OFF NGONG ROAD, KILIMANI~~
MOMBASA ROAD, SOMAK BUILDING (Next to Airtel) 4th FLOOR
P.O. BOX 112-00200, KNH
EMAIL: amaleche@kelinkenya.org
MOBILE NO: +254 708 389 870
NAIROBI.

TO BE SERVED UPON:-

HAMILTON HARISSON & MATHEWS
(Incorporating ORARO & CO) Advocates
I.C.EA. BUILDING
KENYATTA AVENUE

P.O.BOX 30333,
NAIROBI.
EMAIL: litigation@hhmo.co.ke

J.K.KIBICHO & CO. ADVOCATES
ACK GARDEN HOUSE, 2ND FLOOR, WING 'A'
1ST NGONG AVENUE/ OFF BISHOPS ROAD
P.O.BOX 73137 – 00200
NAIROBI.

MANEGENE & PARTNERS ADVOCATES
BRUCE HOUSE- 10TH FLOOR, ROOM 1001,
STANDARD STREET,
P.O.BOX 7183-00200,
NAIROBI.

THE HON. THE ATTORNEY GENERAL
STATE LAW OFFICE
SHERIA HOUSE
HARAMBEE AVENUE
P.O BOX 40112
NAIROBI

RACHIER & AMOLLO ADVOCATES
MAYFAIR CENTER, 5TH FLOOR
RALPH BUNCHE ROAD
P.O BOX 55645-00200
NAIROBI

NUNGO, ODUOR & WAIGWA ADVOCATES
MAISONETTE NO. 1, COURT 30 (Next to Riley Group Security)
MOMBASA ROAD, OFF BUNYALA ROAD
P.O.BOX 70678-00400
NAIROBI