

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO 447 OF 2018**

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 29, 31, 32,  
43(1)(a), 45, 49, 50(2) AND 53 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTIONALITY OF SECTION 26 OF THE SEXUAL  
OFFENCES ACT NO. 3 OF 2006**

**AND**

**IN THE MATTER OF DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3(1) OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF INTERPRETATION, ENFORCEMENT AND PROTECTION OF BILL  
OF RIGHTS UNDER ARTICLES 19, 20, 22, 23, 24, 165, 258 AND 259 OF THE  
CONSTITUTION**

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**BETWEEN**

**EM.....1<sup>ST</sup> PETITIONER**  
**SN.....2<sup>ND</sup> PETITIONER**  
**SKM.....3<sup>RD</sup> PETITIONER**  
**MA.....4<sup>TH</sup> PETITIONER**  
**MR.....5<sup>TH</sup> PETITIONER**  
**JW.....6<sup>TH</sup> PETITIONER**  
**KENYA LEGAL AND ETHICAL ISSUES NETWORK**  
**ON HIV & AIDS (KELIN).....7<sup>TH</sup> PETITIONER**

**-VERSUS-**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**PETITION**

**TO: THE HIGH COURT OF KENYA**  
**NAIROBI**

THE HUMBLE PETITION OF EM, SN, SKM, MA, MR, JW, AND KENYA LEGAL AND ETHICAL ISSUES NETWORK HIV & AIDS (KELIN) WHOSE ADDRESS OF SERVICE FOR PURPOSES OF THIS PETITION ONLY IS CARE OF **NOW ADVOCATES LLP, MAISONETTE NO 1, 30 MASABA ROAD, OFF BUNYALA ROAD, LOWER HILL, P.O BOX 70678-00400 NAIROBI** IS AS FOLLOWS: -

**A. DESCRIPTION OF THE PARTIES**

1. The 1<sup>st</sup> Petitioner is an adult male Kenyan of sound mind residing and working for gain in Kericho County within the Republic of Kenya. He is living with the human immunodeficiency virus [**HIV**] and has filed this Petition on his own behalf as a person whose rights and enjoyment thereof have been violated and/or are threatened of violation by the provision of the law forming the subject matter of this Petition.
2. The 2<sup>nd</sup> Petitioner is an adult female Kenyan of sound mind residing and working for gain in Nakuru County within the Republic of Kenya. She is living with HIV and has filed this Petition on her own behalf as a person whose rights and enjoyment thereof have been violated and/or are threatened of violation by the provision of the law forming the subject matter of this Petition.
3. The 3<sup>rd</sup> Petitioner is an adult female Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya. She is living with HIV and has filed this

Petition on her own behalf as a person whose rights and enjoyment thereof have been violated and/or are threatened of violation by the provision of the law forming the subject matter of this Petition.

4. The 4<sup>th</sup> Petitioner is an adult female Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya. She is living with HIV, is married to the 5<sup>th</sup> Petitioner, and has filed this Petition on her own behalf as a person whose rights and enjoyment thereof, including the right to form a family, have been violated and/or are threatened of violation by the provision of the law forming the subject matter of this Petition.
5. The 5<sup>th</sup> Petitioner is an adult male Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya. He is HIV negative, is married to the 4<sup>th</sup> Petitioner, and has filed this Petition on his own behalf as a person whose rights and enjoyment thereof have been violated and/or are threatened of violation by the provision of the law forming the subject matter of this Petition.
6. The 6<sup>th</sup> Petitioner is an adult female Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya. She is living with HIV and has filed this Petition on her own behalf as a person whose rights and enjoyment thereof have been violated and/or are threatened of violation by the provision of the law forming the subject matter of this Petition.
7. The 7<sup>th</sup> Petitioner is the Kenya Legal and Ethical Issues Network on HIV & AIDS [**KELIN**]. KELIN is a non-partisan, non-profit, and non-governmental organization duly registered under the Non-Governmental Organizations Act working to protect and promote health related human rights in Kenya by facilitating access to justice for those who have faced human rights violations, creating partnerships with key stakeholders, building capacities of communities to know their rights, and analysing laws and policies to ensure they integrate human rights principles.

8. The 7<sup>th</sup> Petitioner acts in its own interest in that judgment of this Court will have a major impact on its ability to achieve its core objective of the “protection, promotion and enhancement of enjoyment of the right to health and HIV-related human rights”.
9. The 7<sup>th</sup> Petitioner also acts in the public interest in that the matter before this Honourable Court has extremely important implications on the rights of persons living with and affected by HIV, including the rights of the petitioners and others to enjoy the highest attainable standard of health and health care services. The Court’s judgement will impact on government’s efforts to address the HIV epidemic and therefore its ability to fulfil the right to the highest attainable standard of health as well as the 7<sup>th</sup> Petitioner’s ability to achieve its core objective on the “protection, promotion and enhancement of enjoyment of the right to health and HIV-related human rights”.
10. The 1<sup>st</sup> Respondent is the principal legal advisor to the Government and is statutorily mandated by Article 156(4)(b) of the Constitution to represent the National Government in court and has been sued in that capacity.
11. The 2<sup>nd</sup> Respondent is a holder of a constitutional office established under Article 157 of the Constitution and is, *inter alia*, mandated with instituting and undertaking criminal proceedings against any person before any court in respect of any offence alleged to have been committed.

## **B. BACKGROUND INFORMATION AND FACTS OF THE CASE**

12. This Honourable Court is charged with the fundamental duty to “observe, respect, protect, promote and fulfil 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. The High Court also has the jurisdiction to interpret the Constitution including the question as to

whether any law is consistent with or in contravention of the Constitution in terms of Article 165(3)(d).

13. Article 258 of the Constitution entrenches the right of every person to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention whether in person or acting in the public interest.

14. This Honourable Court is obligated to interpret the Constitution in a manner that “advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights” under Article 259(1)(b).

15. This Honourable Court has jurisdiction to grant “an 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.

16. The Petitioner’s claim is against the provisions of Section 26 of Sexual Offences Act No. 3 of 2006 (hereinafter referred to as “the Act”), the said Section 26 of the Act provides thus;

*26. (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and wilfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—*

*(a) will infect another person with HIV or any other life threatening sexually transmitted disease;*

*(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;*

*(c) will infect another person with any other sexually transmitted disease,*

*shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.*

*(2) Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct, for the purpose of ascertaining whether or not he or she is infected with HIV or any other life threatening sexually transmitted disease.*

*(3) The sample or samples taken from an accused person in terms of subsection (2) shall be stored at an appropriate place until finalization of the trial.*

*(4) The court shall, where the accused person is convicted, order that the sample or samples be tested for HIV or any other life threatening sexually transmitted disease and where the accused person is acquitted, order that the sample or samples be destroyed.*

*(5) Where a court has given directions under subsection (4), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.*

*(6) An appropriate sample or samples taken in terms of subsection (5)—*

*(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of determining whether or not the accused person is infected with HIV or any other life threatening sexually transmitted disease; and*

*(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.*

*(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—*

*(a) the State;*

*(b) any Minister; or*

*(c) any medical practitioner or designated persons,*

*in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.*

*(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the cause of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.*

*(9) Where a person is convicted of any offence under this Act and it is proved that at the time of the commission of the offence, the convicted person was infected with HIV or any other life threatening sexually transmitted disease whether or not he or she was aware of his or her infection, notwithstanding any other sentence in this Act, he or she shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.*

*(10) For purposes of this section—*

*(a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be prima facie proof that the person concerned is infected with HIV; and*

*(b) if it is proved that a person was infected with HIV after committing an offence referred to in this Act, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when the offence was committed.*

### **PARTICULARS OF VIOLATION IN TERMS OF THE PRINCIPLE OF LEGALITY**

17. The Petitioners contend that section 26 is vague, is expressed in ambiguous language, does not state the scope and specify the acts and/or omissions attracting criminal sanctions stated. Further, that it violates the rule of law and principle of legality which requires all laws with criminal penalties to be sufficiently clear, not to be vague and over broad so as to limit understanding of its scope and to avoid its arbitrary enforcement and prosecution. In particular:

- a) The meaning of the term "life threatening sexually transmitted disease" or what constitutes "life threatening sexually transmitted disease" has not been provided. Similarly, the scope and boundary of the term is unclear and ambiguous.
- b) The wording "...does anything or permits the doing of anything..." under section 26(1) is too wide and lacking in clarity of scope on what acts and/or omissions are prohibited by law.
- c) The wording "...is likely to lead..." as used under section 26(1)(b) is ambiguous.
- d) The wording "after committing an offence" as used under section 26(10) (b) is over broad and discriminatory.



### **PARTICULARS OF VIOLATION IN TERMS OF RATIONALITY**

18. The purpose of the Act is provided in the Act itself as the “prevention and protection of harm from unlawful sexual acts [and] connected purposes”. Section 26 cannot be reasonably calculated to achieve this purpose and is instead directly contrary to the purpose in that it entrenches in law and perpetuates in society discrimination, stigma, and fear and thereby disincentivizes people from testing for HIV, seeking treatment and disclosing their status. Knowledge of one’s HIV status allows one to seek treatment, which greatly reduces if not eliminates the risk of further transmission, and employ a range of other transmission prevention strategies; expansion of HIV diagnosis and treatment are therefore necessary conditions for a successful HIV response. Section 26 of the Act thereby threatens progress gained and severely hamstrings further progress in Kenya’s response to the HIV epidemic.

### **PARTICULARS OF VIOLATION OF THE CONSTITUTION AND UNJUSTIFIABLE AND UNREASONABLE LIMITATION OF RIGHTS IN TERMS OF ARTICLE 24 OF THE CONSTITUTION**

19. The Petitioners further contend that section 26 of the Act unreasonably and unjustifiably limits the rights of people living with HIV and/or their families and/or loved ones, particularly:

- a. The constitutional right of women, marginalized groups, the poor and people living with, vulnerable to, or believed to be living with HIV and other STIs to equality and to be free from discrimination in terms of Article 27 of the Constitution as well as international and regional treaties, namely Articles 2 and 26 of the International Covenant on Civil and Political Rights [**ICCPR**], Article 2 of the International Covenant on Economic, Social and Cultural Rights [**ICESCR**], and Articles 2 and 3 of the African Charter on Human and Peoples’ Rights [**ACHPR**], in that it subjects people living with HIV and other STIs, and those who know their HIV status, whom are by far more likely to be women

because women are more vulnerable to HIV and because women are more likely to test for HIV, to different treatment on the sole basis of their gender and health status. Further, that the poor and marginalized are particularly subject to prosecution because they are less able to access HIV treatment and therefore less likely to have viral suppression or low viral loads, which lessens dramatically or eliminates the risk of HIV transmission, and because they are less likely to have access to other means of prevention such as condoms and pre-exposure prophylaxis, a type of treatment that people who do not have HIV may use to prevent them from becoming HIV positive even if they are exposed to the virus.

- b. The constitutional right of women and people living with, vulnerable to, or believed to be living with HIV and other STIs and their families to dignity as guaranteed under Article 28 of the Constitution, and in international and regional treaties, namely under Article 5 of the ACHPR in that it singles out women and people living with HIV and other STIs for criminal sanctions exposing them to personal suffering and entrenching stigma against people living with HIV; and further in that it denies the intrinsic worth and humanity of people living with HIV if interpreted to criminalize consensual sexual activity on the sole basis of health status.
- c. The constitutional right of women and all people living with, vulnerable to, or believed to be living with HIV and other STIs be free from cruel, inhuman and degrading treatment as guaranteed under Article 29(f) of the Constitution, and in international and regional treaties, namely under Article 7 of the ICCPR and Article 5 of the ACHPR in that it singles out people living with HIV and other STIs for criminal sanctions exposing them to psychological suffering and humiliation.
- d. The constitutional right to privacy in terms of Article 31(a-d) and in international and regional treaties, more specifically Article 17 of the ICCPR and Article 12 of the Universal Declaration of Human Rights in that interjects the criminal law into

the most private and intimate aspects of life, sex and family life, and in that allows for violations of confidentiality in matters of health and healthcare.

- e. The constitutional right of people living with, vulnerable to, or believed to be living with HIV and other STIs to freedom of religion under Article 32 and in international and regional treaties more specifically Article 18 of the ICCPR and Article 8 of the Universal Declaration of Human Rights in that it interjects the criminal law into the institution of marriage, a sanctified institution in many faith traditions.
- f. The constitutional right of all people to the highest attainable standard of health as guaranteed under Article 43(1)(a) of the Constitution as well as in international and regional treaties, namely under Article 12 of the ICESCR and under Article 16 of the ACHPR, in that it creates stigma and discrimination and thereby drives the HIV epidemic whilst hamstringing the state's ability to respond to the epidemic.
- g. The constitutional rights to protection from the state of the family unit as the natural and fundamental unit of society and the necessary basis of social order, the right of every adult to marry on the basis of free consent of the parties, and the right to freedom from arbitrary or unlawful interference with family under Articles 45 and 31 of the Constitution and in international and regional treaties more specifically enshrined under Articles 17 and 23 of the ICCPR and Article 10(1) of the ICESCR in that it intrudes on the sanctity and privacy of marriage between consenting parties, it creates stigma and discrimination against couples in which one partner has HIV and the other does not [**discordant couples**], it criminalises consensual physical intimacy between partners, it threatens to separate families by removing a parent or partner from the family to be incarcerated, in that it criminalizes procreation between discordant couples, and in other ways to be further expanded upon.

- h. The constitutional right of people living with, vulnerable to, or believed to be living with HIV and other STIs to a fair trial as guaranteed under Article 50(2) of the Constitution, and in international and regional treaties, namely under Article 9 of the ICCPR and Article 7 of the ACHPR in that due to the vague nature of section 26 and its over breadth it can lead to arbitrary arrest and prosecution.
  - i. The constitutional rights of children of people living with, vulnerable to, or believed to be living with HIV to basic nutrition and parental care and protection in terms of Article 53(1)(c,e) and to have their best interests be of paramount importance in every matter concerning the child in terms of Article 53(2) as well as in international and regional treaties, more specifically Article 10(3) of the ICESCR in that it creates stigma and discrimination against breastfeeding whereas this is the means by which most people in Kenya nourish their infants and the only practical means by which to do so for many as well as the medically suggested means including for people living with HIV; and in that it threatens to separate children from their parents by removing the parent from the child to be incarcerated for lengthy periods on the basis of their HIV status whereas it is in the presumptive interest of the child to be raised by both of her parents.
20. The Respondents are under the obligation to observe, respect, protect, promote and fulfil the rights and freedoms enshrined in the Bill of Rights, Chapter Four of the Constitution.
- a) Article 2(4) guarantees the right to secure protection of the Constitution against impermissible legislations by Parliament.
  - b) Article 2(5) provides that general rules of international law shall form part of Kenya's law, while Article 2(6) incorporates international treaties to which Kenya is a party to be part of Kenyan law.

- c) Article 20(3) provides that in applying a provision of the Bill of Rights, a court shall (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
- d) Article 21(1) provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
- e) Article 24(1) provides that a right or fundamental freedom cannot be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

**YOUR PETITIONERS therefore humbly pray for the following orders:**

- a) A declaration that section 26 of the Sexual Offences Act No. 3 of 2006 is inconsistent with the Constitution and therefore void and invalid in terms of Article 2(4) of the Constitution.
- b) A declaration that section 26 of the Sexual Offences Act No. 3 of 2006 is wholly unconstitutional and it accordingly stands to be struck from the statute.
- c) This Honourable Court be pleased to issue an order that each party should bear their own costs on the grounds that this Petition is in the public interest.

d) This Honourable Court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.

**DATED** at **NAIROBI** this                      day of    2018

**NOW ADVOCATES LLP**  
**ADVOCATES FOR THE PETITIONERS**

**DRAWN AND FILED BY:**

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**NAIROBI**

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**TO BE SERVED UPON: -**

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