

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 606 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  
19,20,21,25,27,28,29,31,33,35,43,45 AND 46 OF THE CONSTITUTION OF KENYA  
(2010)

BETWEEN

L.A.W.....1<sup>ST</sup> PETITIONER  
KENYA LEGAL AND ETHICAL ISSUES NETWORK  
ON HIV & AIDS (KELIN) .....2<sup>ND</sup> PETITIONER  
AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM) ....3<sup>RD</sup> PETITIONER

AND

MARURA MATERNITY & NURSING HOME.....1<sup>ST</sup> RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER  
IN CHARGE OF HEALTH SERVICES – NAIROBI COUNTY.....2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF HEALTH.....3<sup>RD</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

AND

THE SECRETARIAT OF THE JOINT UNITED NATIONS  
PROGRAMME ON HIV/AIDS (UNAIDS Secretariat) .....AMICUS CURIAE  
THE INTERNATIONAL COMMUNITY OF WOMEN  
LIVING WITH HIV(ICW).....INTERESTED PARTY

*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 L.A.W AND 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) 4<sup>TH</sup> FLOOR, P.O.BOX 112-00202, NAIROBI.~~ IS AS FOLLOWS:-

### **INTRODUCTION:**

This matter is about the unconstitutional and unlawful sterilization of L.A.W the 1<sup>st</sup> Petitioner who is a woman living with HIV. The 1<sup>st</sup> Petitioner is a woman who underwent a procedure medically known as bilateral tubal ligation without her informed consent at Marura Maternity and Nursing Home, the 1<sup>st</sup> Respondent herein. The manner in which the procedures took place was non- consensual and therefore unconstitutional and a violation of her reproductive health 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
- i. The Petitioners' Humble Prayer.

### **a) PARTIES**

1. The Petitioners are as follows:-

- a) LAW is the 1<sup>st</sup> Petitioner herein and is an adult female Kenyan who resides in Nairobi County, within the Republic of Kenya. She is infected with the HIV virus and is on anti-retroviral therapy which she takes daily as prescribed.

- b) Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN), the 2<sup>nd</sup> Petitioner herein is a non-partisan, non-profit making and non-governmental organization duly registered under the Non- Governmental Organizations' Act committed to the protection, promotion and enhancement of enjoyment of the right to health and especially the protection and promotion of HIV related human rights through public interest litigation, advocacy, training and law reform.
- c) African Gender and Media Initiative Trust (GEM), is the 3<sup>rd</sup> 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 1<sup>st</sup> Respondent is a Medical Facility situated in Mathare area and is sued on its own behalf.
3. The 2<sup>nd</sup> 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.
4. The 3<sup>rd</sup> 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.

5. The 4<sup>th</sup> 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 named in that capacity.

**b) FACTUAL AND PROCEDURAL BACKGROUND**

6. The 1<sup>st</sup> Petitioner avers that on or about March 2006 when she was pregnant, she undertook a HIV test at Kariobangi Health Centre which test was positive for HIV. She later went for a follow up test at Baba Dogo Health Centre where the test results confirmed that she was indeed HIV positive.
7. The 1<sup>st</sup> Petitioner during subsequent visits to the Baba Dogo Health Centre, she was advised by a nurse that due to her health and HIV status it was wise for her not to have any more children as having more children would compromise her health and might even cause her death.
8. At eight months into the pregnancy she was sent from the Baba Dogo Health Centre to a Community Health Worker in Korogocho at her residence who gave her two vouchers worth Kshs. 300 one written "CS" and another "TL". She was advised that when she was due for delivery she should use them to deliver at Marura Maternity and Nursing Home.
9. On or about 15 September, 2006, she was admitted at the Marura Maternity and Nursing Home where she was prepared for theatre. Before the operation, the doctor asked her name, age and the number of children she already had. The operation went well and she gave birth to a baby boy.

10. The 1<sup>st</sup> Petitioner soon thereafter lost her husband and she remarried. Her current husband has wanted her to conceive but she has not been successful.
11. On or about July 2010, she visited a free medical camp in Mathare which was held by German Doctors and explained to the doctor that she has been trying to conceive but has been unsuccessful. She underwent medical tests and the doctor informed her that her fallopian tubes are blocked because they had been ligated.
12. The 1<sup>st</sup> Petitioner avers that the procedure of tubal ligation as done on her was an infringement of her reproductive health rights and dignity which occasioned her a social injustice.
- ~~13. These actions and conditions described above by the 1<sup>st</sup> petitioner 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.<sup>1</sup>~~
- ~~14. All of these actions and conditions under which the procedures were done and under which she was not given proper and full information to allow her make an informed decision to undergo the tubal ligation are a violation to the 1<sup>st</sup> Petitioner's constitutional rights, impede the effective management of HIV and go against medical best practices.~~

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<sup>1</sup> 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**

13. The 1<sup>st</sup> Petitioner acts in her own interest as a person having been sterilized by undergoing bilateral tubal ligation without her informed consent and therefore 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 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners act in their own interest, in that judgment of this court will have a major impact on their ability to achieve their core objectives 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.

14. The 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:**

15. The case of the 1<sup>st</sup> Petitioner is a small sampling of cases that have come to the attention of the 2<sup>nd</sup> Petitioner through a report that was produced by Africa Gender and Media Initiative Trust (GEM) the 3<sup>rd</sup> 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 3<sup>rd</sup> Petitioner herein in

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

16. 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.

17. 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.

18. The Petitioners therefore believe and assert that it is necessary for this Honourable Court to declare that the act of sterilization of women living with HIV by way of bilateral tubal ligation without their informed consent violates the Constitution and any such sterilization is at all times unconstitutional.

**e) THE NATURE OF STERILIZATION AND ITS EFFECTS**

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

20. 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.<sup>2</sup>

21. 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.<sup>3</sup>

22. 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 pre-requisite for receiving another medical procedure further, sterilization is not an emergency procedure.<sup>4</sup>

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

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<sup>2</sup> Source: [sogc.org/publications/tubal-ligation-female-surgical-sterilization/](http://sogc.org/publications/tubal-ligation-female-surgical-sterilization/) accessed on 17/1/2014

<sup>3</sup> Against her will: Forced and Coerced sterilization of women worldwide. Open Society Foundations publication; September, 2011

<sup>4</sup> International Federation of Gynecology and obstetrics (FIGO) guidelines on female contraceptive sterilization.



- 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**

24. The 1<sup>st</sup> Petitioner's accounts of her experience at the hands of health care workers demonstrates that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed in their obligation to respect, protect and fulfill the fundamental rights of the 1<sup>st</sup> Petitioner.
25. 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.
26. The act of coercive and forceful sterilization of the 1<sup>st</sup> Petitioner violated her 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 1<sup>st</sup> Petitioner~~ The threat to withhold food portions from the 1<sup>st</sup> Petitioner violated her 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.

27. The unlawful and involuntary sterilization of the 1<sup>st</sup> Petitioner 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.

~~28. The unlawful and involuntary sterilization of women living with HIV and in this particular case of the 1<sup>st</sup> Petitioner conducted by the 1<sup>st</sup> Respondent constitutes 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**

28. 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.

29. The actions and inactions of the Respondents and the circumstances under which the 1<sup>st</sup> Petitioner was 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 Convention 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 the [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”.
- *Article 8(1), ECHR*: “Everyone has the right to respect for his private and family life, his home and correspondence.” Any interference with this right must be in accordance with the requirements of Article 8(2).

#### **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.”

**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*: as above

**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 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.

29. 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.”*



30. 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.
31. 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.”<sup>5</sup>
32. 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...”<sup>6</sup>
33. 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.

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<sup>5</sup> 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

<sup>6</sup> 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

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.<sup>7</sup>

34. The African Commission on Human and Peoples’ Rights, meeting at its 54<sup>th</sup> Ordinary Session reaffirmed that all medical procedures, including sterilization, 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.<sup>8</sup>

35. 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**

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<sup>7</sup> Ibid note 6

<sup>8</sup> 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 54<sup>th</sup> Ordinary Session held from 22 October to 5 November 2013, in Banjul, The Gambia

36. 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 eludes to quality of health care upholding ethics, professionalism and justice.

37. 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 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.

38. 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.

39. 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.

40. 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.

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

42. It is apparent from the guidelines mentioned as read together with the provisions of the Constitution, International Conventions and instruments that there is need for policy and law makers to come up with a law on involuntary/forced/ coerced sterilization. Such policy must be compliant with the Constitution and should incorporate principles from international guidelines and best practices in other jurisdictions.

43. 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 1<sup>st</sup> Petitioner by way of bilateral tubal ligation as done by the 1<sup>st</sup> Respondent amounted to a violation of the human and constitutional rights of the 1<sup>st</sup> Petitioner as outlined in the Petition herein.

- b. 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.
- c. This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> 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.
- d. This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> 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.
- e. This Honourable Court issues an order directing the 3<sup>rd</sup> Respondent to review the National Family Planning Guidelines for Service Providers to address the provisions that are discriminatory.
- f. This Honourable Court issue 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.
- g. This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> 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.
- h. This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to establish clear procedural guidelines for following up on complaints of rights violations and strengthen administrative accountability at hospitals.

- i. This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to create a monitoring and evaluation system to ensure full implementation of laws and policies regarding the performance of tubal ligation.
- j. This Honourable Court issues an order directing the 3<sup>rd</sup> 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.
- k. This Honourable Court is pleased to order the 1<sup>st</sup> Respondent to pay general and exemplary damages on an aggravated scale to the 1<sup>st</sup> Petitioner for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.
- l. ~~An Order~~ This Honourable Court issues an order that since this Petition is in the Public Interest, each party should bear their own costs.
- m. ~~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.
- n. This Honourable Court be pleased to make such other orders as it shall deem fit and just.

**DATED** at Nairobi this \_\_\_\_\_ day of \_\_\_\_\_ 2014.

**AMMENDED** at Nairobi this \_\_\_\_\_ day of \_\_\_\_\_ 2015.

**ALLAN ACHESA MALECHE**  
**ADVOCATE FOR THE PETITIONERS**

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