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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CONSTITUTIONAL PETITION NO 8 OF 2017

IN THE MATTER OF ARTICLES 19, 27, 32 AND 44, OF THE
CONSTITUTION OF KENYA
AND

IN THE MATTER OF SECTIONS 5, 19, 20 AND 21 OF THE PROHIBITION
OF FEMALE GENITAL MUTILATION ACT (ACT NO. 32 OF 2011).

IN THE MATTER OF THE EQUALITY AND FREEDOM FROM
DISCRIMINATION

AND

IN THE MATTER OF THE RIGHT TO PARTICIPATE IN THE CULTURAL
LIFE OF THE PERSON'S CHOICE

BETWEEN

DR. TATU KAMAU.....PETITIONER

AND

THE HON. ATTORNEY GENERAL1ST RESPONDENT

ANTI-FEMALE GENITAL MUTILATION BOARD2ND RESPONDENT

AMMENDED PETITION

TO: REGISTRAR

THE HIGH COURT OF KENYA AT MACHAKOS



The Humble Petition of **DR. TATU KAMAU** of P.O BOX 1790- 90100 Machakos in the Republic of Kenya is as follows :-

THE PARTIES

1. Your Petitioner is a female adult of sound mind residing at Machakos County and her address of service for purposes of this suit shall be Care of **P. O. BOX 1790-90100 MACHAKOS.**
2. The 1st Respondent is the Honorable Attorney General of the Republic of Kenya established under **Article 156(1) of the constitution of Kenya** who is the principle legal adviser to the Government.

3. The 2nd Respondent is the **Anti-Female Genital Mutilation Board** established pursuant to section 3 of the **PROHIBITION OF FEMALE GENITAL MUTILATION ACT (Act No. 32 of 2011)** and its capable of suing and being sued.

BACKGROUND.

4. The Constitution prohibits discrimination at Article 27 which provides as follows:
 - a. *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
 - b. *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
 - c. *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
 5. **Article 258** of the Constitution entitles any person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention.
 6. The petitioner is also cognizant of this Honourable Court's obligation under **Article 2** of the Constitution to declare any law that is inconsistent with the Constitution null and void.
 7. The petitioner contends that the **PROHIBITION OF FEMALE GENITAL MUTILATION ACT** which outlaws Female circumcision is out rightly infringing on the women rights to perform their respective cultures.
 8. That the said Act seeks to condemn and misrepresent an age old tradition as violent and dangerous.
 9. Specifically it defines **female circumcision** under Section 2 as;-

"Female genital mutilation" which comprises all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons, and includes: -
-

- a) Clitoridectomy, which is the partial or total removal of the clitoris or the prepuce;
- b) Excision, which is the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora;
- c) Infibulation, which is the narrowing of the vaginal orifice with the creation of a covering, seal by cutting and oppositioning the labia minora, with or without excision of the clitoris, but does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose.

10. The problem with such representation of various forms of female circumcision as mutilation is that the term, among other things, presupposes malice and intention to incapacitate and destroy. Female circumcision is part of our National heritage and history attests to the fact that women from circumcising communities have been as biologically functional and productive as women from non-circumcising communities.

11. Section 19(1) of the Prohibition of Female genital Mutilation Act expressly forbids a qualified medical practitioner from performing female circumcision thereby denying willing adult women access to the highest attainable standard of health including the right to health care enshrined under Article 43(1)(a) of the Constitution of Kenya.

12. Further, Section 19(3) of the Act stipulates that NO offence under Subsection (1) is committed by an approved person who performs: -

- a. A surgical operation on another person which is necessary for that other person's physical or mental health.

13. Female circumcision or genital surgery is never used to treat mental health and there is absolutely no correlation between mental health and genital surgery in women or men. This is an outright lie because you cannot "Mutilate" in order to cure.

14. ~~11.~~ It is the petitioner's belief, which belief is widely shared among communities that no particular culture is superior to another and when examining issues of ethics, morality, law or politics, all cultural beliefs are equally valid and that truth itself is relative, depending on the cultural environment.

15. ~~12.~~ That each community has the liberty to practice any culture that is native and relevant to that society without the imperialist imposition from another culture that holds a different set of beliefs and/ or norms.

16. ~~13.~~ Moral principles are not necessarily apparent or widely acclaimed; hence the need for tolerance and respect of all cultures and as such, misrepresentation of a cultural practice by external societies and cultures should not take precedence.

17. ~~14.~~ That the rights of willing young women from the communities that practiced the now prohibited cultural ritual of female circumcision have been violated denying them their cultural claim to respect and acceptance from their loved ones and elders and their consent has been disregarded under Sections 19(6), 20 and 21 of the Prohibition of Female Genital Mutilation Act.

18. ~~15.~~ The Universal Declaration of Human Rights (UNDHR) states that:-

“human beings we are born free and equal in dignity and rights; we possess the inalienable right to freedom of religion in practice and the indispensable social and cultural rights for the dignity and freedom of an individual’s personality”

19. ~~16.~~ That simply condemning the **FEMALE CIRCUMSICION** and pushing for its abolition would be a violation of **articles 18 and 22 of the Universal Declaration of Human Rights (UNDHR)**

20. ~~17.~~ The petitioner contends that Section 19(5) of the act violates a woman’s right to culture guaranteed under Article 44 of the Constitution. The relevant provision in Article 44 is in the following terms:

“Every person has the right to use the language, and to participate in the cultural life, of the person’s choice. (2) A person belonging to a cultural or linguistic community has the right, with other members of that community— (a) to enjoy the person’s culture and use the person’s language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society.

21. The aforesaid **Section 19(5)** of the Act is to the effect that a person’s culture, religion or other custom or practice shall be of no effect whether or not any surgical procedure is performed on any person for the benefit of that person’s physical or mental health hence discounting culture as reason to undergo circumcision.

22. ~~18.~~ The petitioner further contends that the Act has created distress within some communities by overtly favoring the cultural practices of one gender against the cultural practices of the other gender in contravention of the constitutional fundamental right of gender quality.

23. ~~19.~~ That further and in addition the Act establishes the 1st respondent board, which seeks to advance the infringement of the Kenyan women who value and practice female circumcision.

24. ~~20.~~ As per **Section 5 of the Act**, the functions of the Anti-FGM Board shall be to;-

- a. design, supervise and co-ordinate public awareness programmes against the practice of female genital mutilation;*
- b. generally advise the Government on matters relating to female genital mutilation and the implementation of the Act;*
- c. design and formulate a policy on the planning, financing and co-ordinating of all activities relating to female genital mutilation;*
- d. provide technical and other support to institutions, agencies and other bodies engaged in the programmes aimed at eradication of female genital mutilation;*
- e. design programmes aimed at eradication of female genital mutilation;*
- f. facilitate resource mobilization for the programmes and activities aimed at eradicating female genital mutilation; and*
- g. perform such other functions as may be assigned by any written*

25. ~~21.~~ That it's the petitioner contention that the 2nd Respondent board serves to infringe on the aforementioned rights and as such ought to be disbanded.

26. ~~22.~~ Based on these facts the petitioner is seeking for redress before this Honourable Court for enforcement of the constitutional rights, freedoms and entitlements under **Articles 19, 27, 32 AND 44 of the constitution.**

RESULT

27. ~~23.~~ By virtue of **Article 3(1)** of the constitution of Kenya, your petitioner avers that she is duty bound to protect and defend the constitution from being violated.

28. ~~24.~~ By virtue of **Article 10(1)** of the constitution, your petitioner avers that all state organs, state officers, public officers and all persons are bound by the national values and principles of governance, whenever any of them applies or interprets the constitution, enacts, applies, or interprets any law ; or makes or implements public policy declarations and as such your petitioner is therefore entitled to petition this Honourable Court for protection and restoration of the said rights violated by the Prohibition of Female Genital Mutilation Act.

29. 25. By virtue of **Article 10(2)** of the constitution, your petitioner avers that the national values and principles of governance include; the rule of law, human rights, integrity, social justice, equity, transparency, accountability and sustainable development and the same has been violated by the said Act.
30. 26. By virtue of **Article 19(2)** of the constitution and in contravention of the same, your petitioner avers that the dignity of traditional practitioners of female circumcision is disregarded and actively demeaned through state sanctioned ridicule and harassment of individuals and communities. The culture is portrayed negatively using terms such as retrogressive and primitive.
31. 27. By virtue of **Article 19(3)** of the constitution and in contravention of the same, your petitioner avers that the state has withdrawn the right and fundamental freedom to practice female circumcision from all adult females in Kenya and as such they are denied their inherent right and fundamental freedom of choice to pursue their cultural or religious destinies.
32. 28. By virtue of **Article 27** of the constitution, your petitioner avers that every citizen has a right to equality and freedom from discrimination but the said Act shows open intolerance to adult women who wish to undergo female circumcision even for the purpose of upholding their culture in violation of this provision of the constitution and they are treated unequally to the men who undergo a similar surgical procedure.
33. 29. Further to the foregoing, the traditional female circumciser are openly scorned by the state and are denied the special training given to their male circumciser counterparts.
34. 30. By virtue of **Article 32** of the constitution, your petitioner avers that every citizen is entitled to freedom of conscience, religion, belief and opinion but the said Act discriminates directly against adult women of specific ethnicity, cultural and religious beliefs with reference to their traditional practice of female circumcision.
35. 31. By virtue of **Article 44** of the constitution, your petitioner avers that every person has the right to use the language and to participate in the cultural life of the person's choice however by enacting the subject Act, the state has denied adult women from circumcising communities their right to participate in their cultural life of their choice.
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APPLICABLE LAWS AND PROVISIONS

36. ~~32.~~ **ARTICLE 1(1)** of the constitution establishes the sovereignty of the people of Kenya.
37. ~~33.~~ **ARTICLE 2** of the Constitution provides that the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.
38. ~~34.~~ **ARTICLE 3(1)** of the Constitution obligates every person to respect, uphold and defend the Constitution.
39. ~~35.~~ **ARTICLE 10** of the Constitution sets out the National values and principles of governance for Kenya which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; and good governance, integrity, transparency and accountability.
40. ~~36.~~ **ARTICLE 19** of the Constitution provides the place of Bill of rights in Kenya as a state and the rationale for the recognition and protection of human rights and fundamental freedoms
41. ~~37.~~ **ARTICLE 21** makes provision for the implementation of human rights and fundamental freedoms.
42. ~~38.~~ **ARTICLE 27** of the Constitution makes provision for equality and freedom from discrimination.
43. ~~39.~~ **ARTICLE 32** which enshrines the Freedom of conscience, religion, belief and opinion.
44. ~~40.~~ **Article 44** which provides the right to participate in the cultural life, of the person's choice

LOCUS STANDI

45. ~~41.~~ The petitioner affirms that she is justified to institute the petition under Article 22(1) and Article 258(1), (2) of the constitution as the rights and fundamental freedoms guaranteed in the bill of rights has been denied, violated, infringed and threatened.

JURISDICTION

46. ~~42.~~ The petitioner relies on Article 23 and Article 165(3) of the Constitution that confers the High Court the jurisdiction to hear and determine this petition.

47. ~~43.~~ That the High Court bears the primary responsibility for determining whether any law is inconsistent with or in contravention of the Constitution.

48. ~~44.~~ That the courts must be creative in fashioning appropriate relief that is tailored to the facts of the case and is consistent with the values of the Constitution.

QUESTIONS FOR INTERPRETATION

49. ~~45.~~ The Petitioner proposes for a constitutional interpretation of the following question:-

- a. whether or not the Enactment and coming to force of the **PROHIBITION OF FEMALE GENITAL MUTILATION ACT** was in contravention of Articles 19, 27, 32 and 44 of the Constitution?
- b. whether or not the rights of women to uphold and respect their culture has been violated in enacting the prohibition of Female Genital Mutilation Act?
- c. whether or not Sections 5, 19, 20 and 21 of the **PROHIBITION OF FEMALE GENITAL MUTILATION ACT** ~~is~~ are unconstitutional?
- d. whether or not the 1st Respondent was illegally created and serves to infringe the rights of women as enshrined in the constitution?

RELIEF SOUGHT;

The petitioner therefore humbly asks for the following orders:

- a. *A declaration that the Legislature contravened the provisions of Articles 19, 27, 32 AND 44 of the Constitution in enacting the **PROHIBITION OF FEMALE GENITAL MUTILATION ACT.***
 - b. *A declaration that the Sections 5, 19, 20 and 21 of the **PROHIBITION OF FEMALE GENITAL MUTILATION ACT** ~~is~~ are unconstitutional and thus invalid.*
 - c. *That a declaration that the numerous provisions of the Act that violate the Constitution cumulatively render the entirety of the Act untenable and therefore constitutionally invalid ab initio.*
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- d. *That a declaration that the 1st Respondent purportedly established by this Act is illegal as it created without the authority of the law.*
- e. *Any other relief that the Court deems fit and just to grant.*

Costs of the suit.

~~DATED~~ at ~~Machakos~~ this ~~18th~~ day of ~~JULY~~ 2017

AMMENDED at Machakos this^{20th}..... day of NOVEMBER 2017



DR. TATU KAMAU
PETITIONER

DRAWN AND FILED BY
DR. TATU KAMAU
P.O. BOX 1790- 90100
MACHAKOS

TO BE SERVED UPON;-

- 1. THE HON. ATTORNEY GENERAL,
ATTORNEY GENERAL OFFICES,
NAIROBI**

- 2. ANTI-FEMALE GENITAL MUTILATION BOARD,
NAIROBI.**

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ANTI-FEMALE GENITAL MUTILATION BOARD 2ND RESPONDENT

AMMENDED AFFIDAVIT IN SUPPORT

I, DR. TATU KAMAU a resident of Machakos within the Republic of Kenya, care of P.O. Box Number 1790-90100 Machakos do hereby make oath and state as follows:-

1. **THAT** I am the petitioner herein hence competent to swear this affidavit in support of the petition herein.
2. **THAT** I am entitled under the constitution to institute Court proceedings where I believe that the constitution has been contravened, or is threatened with contravention.
3. **THAT** I am also cognizant of this Honourable Court's obligation under the constitution to declare any law that is inconsistent with the constitution as null and void.



4. **THAT** the prohibition of Female Genital Mutilation Act which outlaws female circumcision is out rightly infringing on the women rights to perform their respective cultures and particularly adult women who are capable of giving consent.


5. **THAT** it is my belief that the rights of adult ~~young~~ women from the communities which value and practice female circumcision to participate in the cultural life of their choice has been violated in enacting the aforesaid Act.


6. **THAT** the aforesaid adult ~~young~~ women are entitled to enjoy their rights as enshrined in the constitution.

7. **THAT NO** particular culture is superior to another and I belief that the 2nd Respondent board and its parent Act violate the rights of adult ~~young~~ women as enumerated in the petition.

8. **THAT** it is in the interest of justice that the orders sought herein are granted.

9. **THAT** what is stated herein above is true to the best of my knowledge, information and belief.

SWORN at Machakos)
 by the said)
DR. TATU KAMAU)
 this....^{20th}..... day of **NOVEMBER** 2017)
 BEFORE ME)
)
COMMISSIONER FOR OATHS)



 DEPONENT

DRAWN AND FILED BY
DR. TATU KAMAU
P.O. BOX 1790- 90100
MACHAKOS