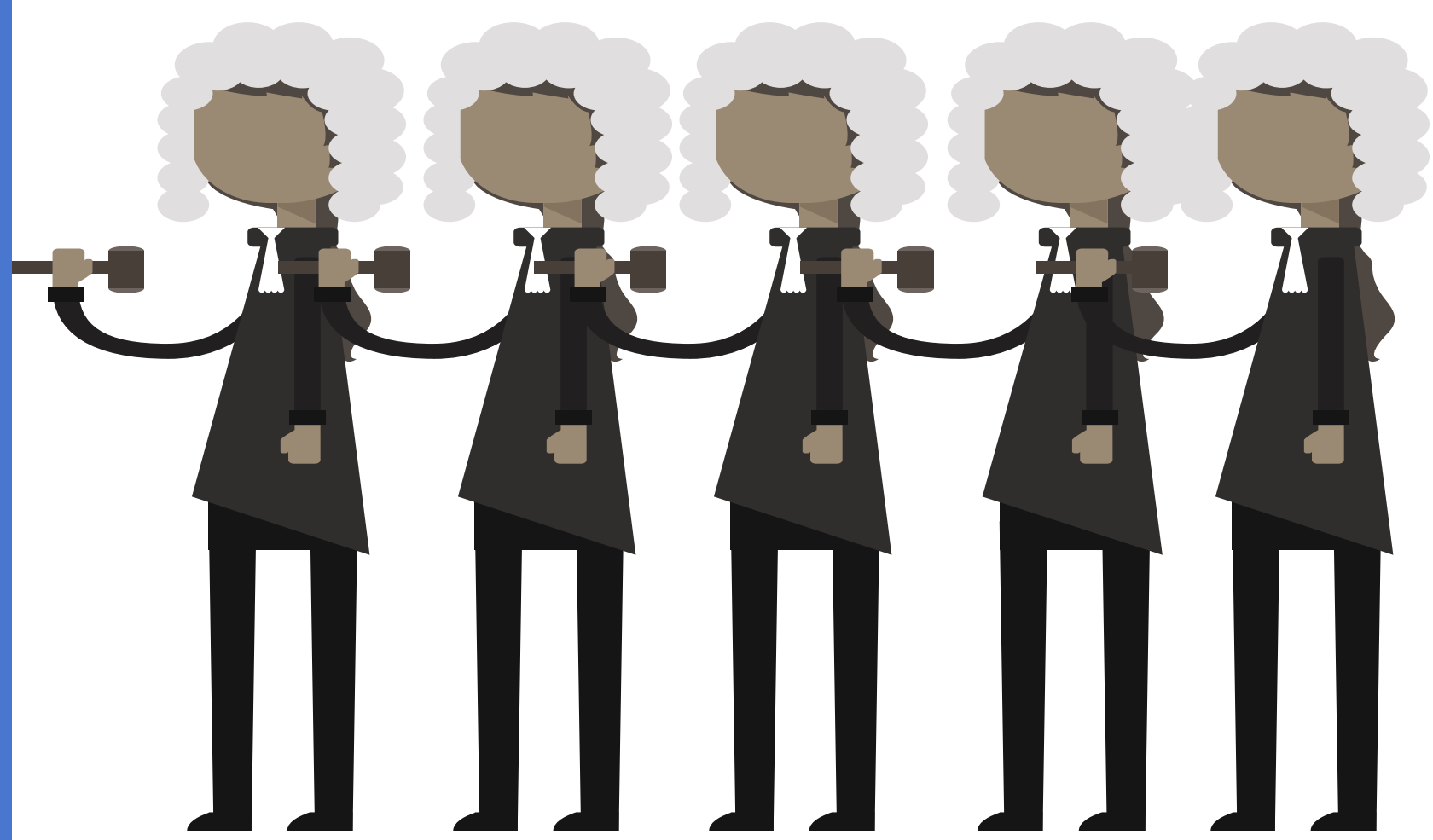


Termination of pregnancy under the Kenyan Constitution

An Explanation of the High Court Judgment of FIDA Kenya & 3 Others v Attorney General & 2 Others [2016] eKLR



On 12 June 2019, five judges of the High Court gave a unanimous judgment that clarifies the circumstances in which the Constitution allows for lawful termination of pregnancy or abortion.

The judgment also re-instates important guidance, standards and training tools to help trained health professionals to make safe abortion services available in the constitutionally-permitted circumstances.

Who were the parties in the case?

Petitioners

- The case was brought by four Petitioners, including the Federation of Women Lawyers (FIDA Kenya), a young woman, JMM, and two community activists on women's health and rights, Ruth Mumbi Meshack and Victoria Otieno Awuor.
- Two organisations supported the Petitioners' case as interested parties: Article 19 Eastern Africa and Physicians for Human Rights.



JMM

The second Petitioner (JMM) was a young girl who died during the course of the court case. JMM had become pregnant after being raped as a 14-year old child (defiled) by an older man. After accessing an unsafe abortion, she suffered complications including sepsis, haemorrhagic shock and kidney failure. She died following being unable to access adequate post-abortion care.

Respondents

- The Respondents were the Attorney General, the Cabinet Secretary of the Ministry of Health and the Director of Medical Services (DMS).
- Five interested parties supported the Respondents' opposition to the Petition: the East Africa Center for Law and Justice, the Kenya Christian Professionals Forum, the Catholic Doctors Association, John Mbugua and Nazline Uma Rajput.

Friends of the Court

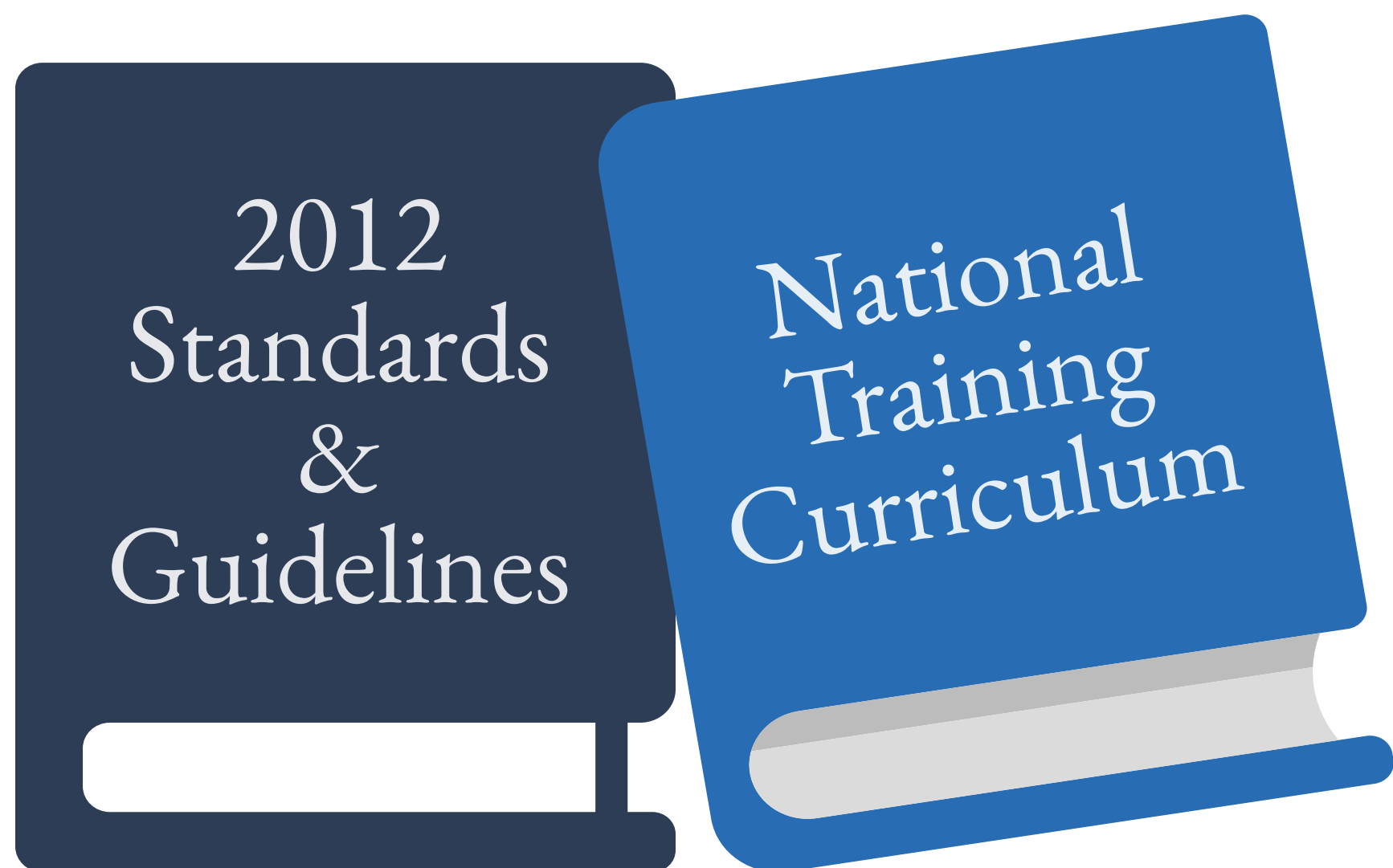
- Three friends of the Court (*amici curiae*) made submissions on the case: Women's Link Worldwide, the National Gender and Equality Commission, and the Kenya National Commission on Human Rights.

What was the case about?

The Petitioners' case was about the lack of availability of lawful and safe abortions, particularly for women and girls who fall pregnant as a result of rape or defilement.

Section 26(4) of the 2010 Constitution states that abortion is not permitted "unless, in the opinion of a **trained health professional**, there is need for **emergency treatment**, or the **life or health** of the mother is in danger, or if permitted by any other written law."

The Petitioners in the case, approached the Court to clarify what this provision means.



The Petitioners were also concerned that the DMS had withdrawn the **2012 Standards and Guidelines** for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya and a **National Training Curriculum** for the Management of Unintended, Risky & Unplanned Pregnancies.

These documents guided, set standards and provided training for healthcare workers on safe abortion. The Petitioners considered that withdrawing these documents was unlawful and violated the constitutional rights of women and girls of reproductive age by restricting access to safe abortion in constitutionally-permitted circumstances.

In **December 2013**, the **Director of Medical Services (DMS)** had issued a **letter** in which the 2012 Standards and Guidelines were withdrawn.

Then in **February 2014**, the DMS issued a **memo** which withdrew the National Training Curriculum and instructed all healthcare workers in public, private and faith-based organisations not to participate in any trainings on safe abortion or on the use of the drug **Medabon**.

The memo threatened that anybody who participated in trainings or using Medabon would be subjected to legal and professional sanctions.

The memo stated that the 2010 Constitution made "abortion on demand" illegal and so there was no reason to train healthcare workers on safe abortion or to import medicines for medical abortion.

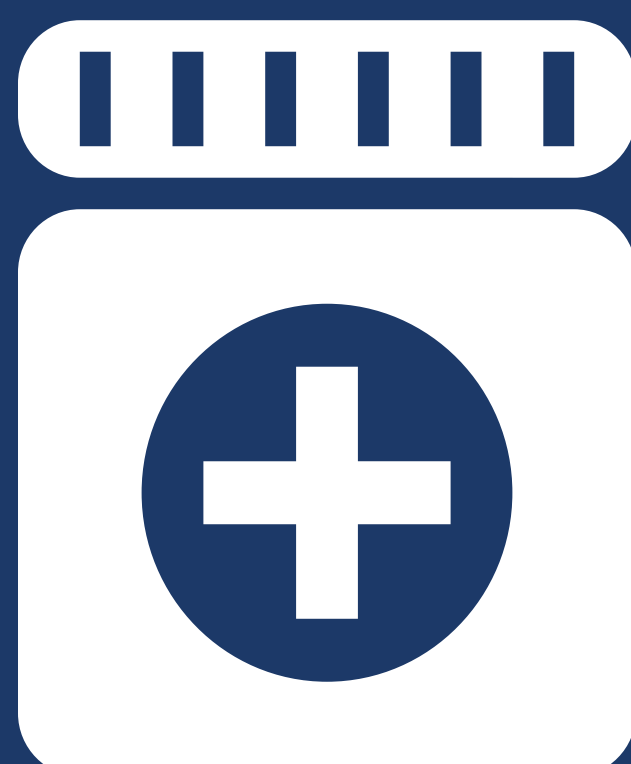
What is Medabon?

Medabon is a combination pack of medications (Mifepristone and Misoprostol) used for inducing abortion.

Medabon is the only medicine registered in Kenya for medical abortion.

Medical abortion causes a pregnancy to be terminated by administering medicines. This is different to surgical abortion.

Professor Joseph Karanja, an expert witness for the Petitioners explained that it is accepted best practice to opt for medical abortions for terminating pregnancies up until the 12th week of gestation.



How did the Government's actions affect women?



The Petitioners' case was that as a result of the government's actions, access to safe abortion services as provided for in section 26 of the Constitution had been undermined and restricted.

The Government's actions restricted access to information and created confusion about the grounds for lawful abortion. This has led to reduced availability of medical abortions in particular and their availability to be administered by trained health professionals who aren't medical doctors, such as nurses and midwives.



This has led to women and girls who are victims of sexual violence or otherwise require access to lawful abortion services, being dependent on unsafe abortions, at the hands of unqualified and untrained persons.

They gave evidence that this has led to the immense suffering, trauma, death and disability of women and girls (those who are poor or in rural areas particularly), personal expense on poor women who are victims of sexual assault, and huge expense on the healthcare system in dealing with complications from unsafe abortions.

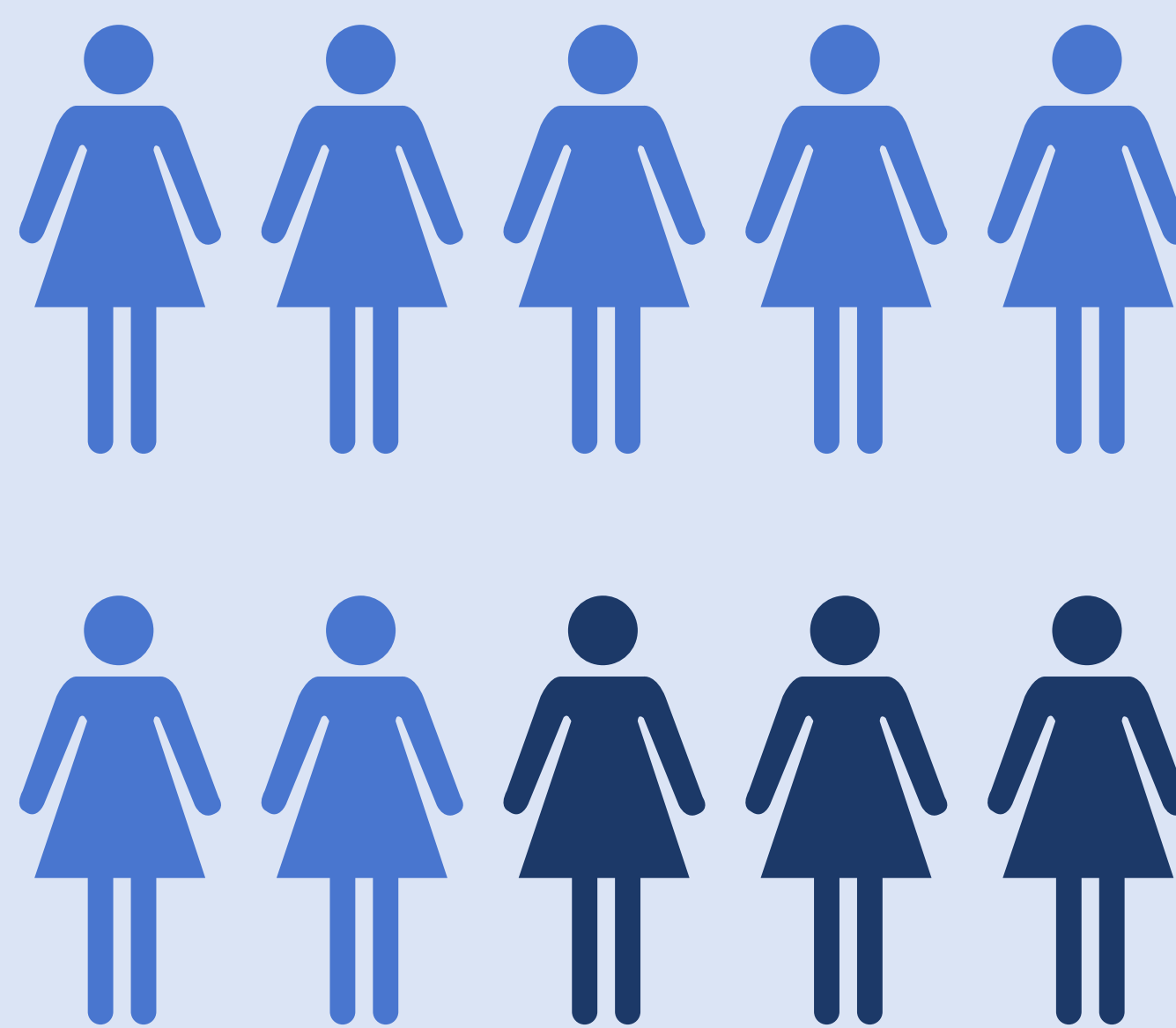


The Petitioners gave evidence that the Government's actions had created fear, apprehension and confusion amongst healthcare workers and the police, leading to reduced services, prosecution of sexual assault victims who access abortion services, and unjustified harassment of healthcare workers.

The Petitioners cited data to prove the extent of the harm.

**58% of
maternal
deaths**

In 2013, Kenya was one of the ten countries that contributes to 58% of global maternal deaths.



The Ministry of Health acknowledges in its own documents that **30% of maternal deaths** are a result of unsafe abortions.



**119,912
women**

In 2012, 119,912 women received care for complications from unsafe abortions in Kenya.

What was the Government's defence?

The State opposed the Petitioners' case, arguing that it sought to legalise "abortion on demand".

They argued that the DMS lawfully withdrew the Standards & Guidelines and the National Training Curriculum to promote harmony following disagreement from stakeholders on their contents. They argued that the documents had been withdrawn for the **public good**, to protect the **right to life** under the Constitution, and to protect women's health by reducing mortality and morbidity.

What was the Court's judgment ?



- The Court found in favour of the Petitioners.
- It clarified the scope of the constitutionally-permitted grounds for lawful abortion in Kenya.
- It reinstated the Standards & Guidelines and the Training Curriculum.
- And it awarded compensation to JMM's mother for JMM's suffering as a result of the Government's actions.

On what grounds can abortion be provided?



The general rule

The general rule under Article 26 of the Constitution is that abortion is unlawful and illegal.



The exceptions

BUT, section 26(4) of the Constitution makes certain exceptions to this general rule. The Court held that **abortion in these exceptional circumstances is a human right.**

Section 26(4) of the Constitution

Section 26(4) says that if a **trained health professional** is of the opinion that any one of the following conditions are met, then an abortion may lawfully be provided:

- There is a need for **emergency treatment**; OR
- The life OR **health of the mother** is in danger; OR
- If **any other written law** permits abortion in the particular circumstances.

"Trained health professionals" include any health professional with medical training at the proficiency level of a **medical officer, nurse, midwife or clinical officer** who has been trained and educated with the skills needed to manage pregnancy-related complications, and who is validly licensed. Abortion services are therefore **NOT** restricted to medical doctors only.

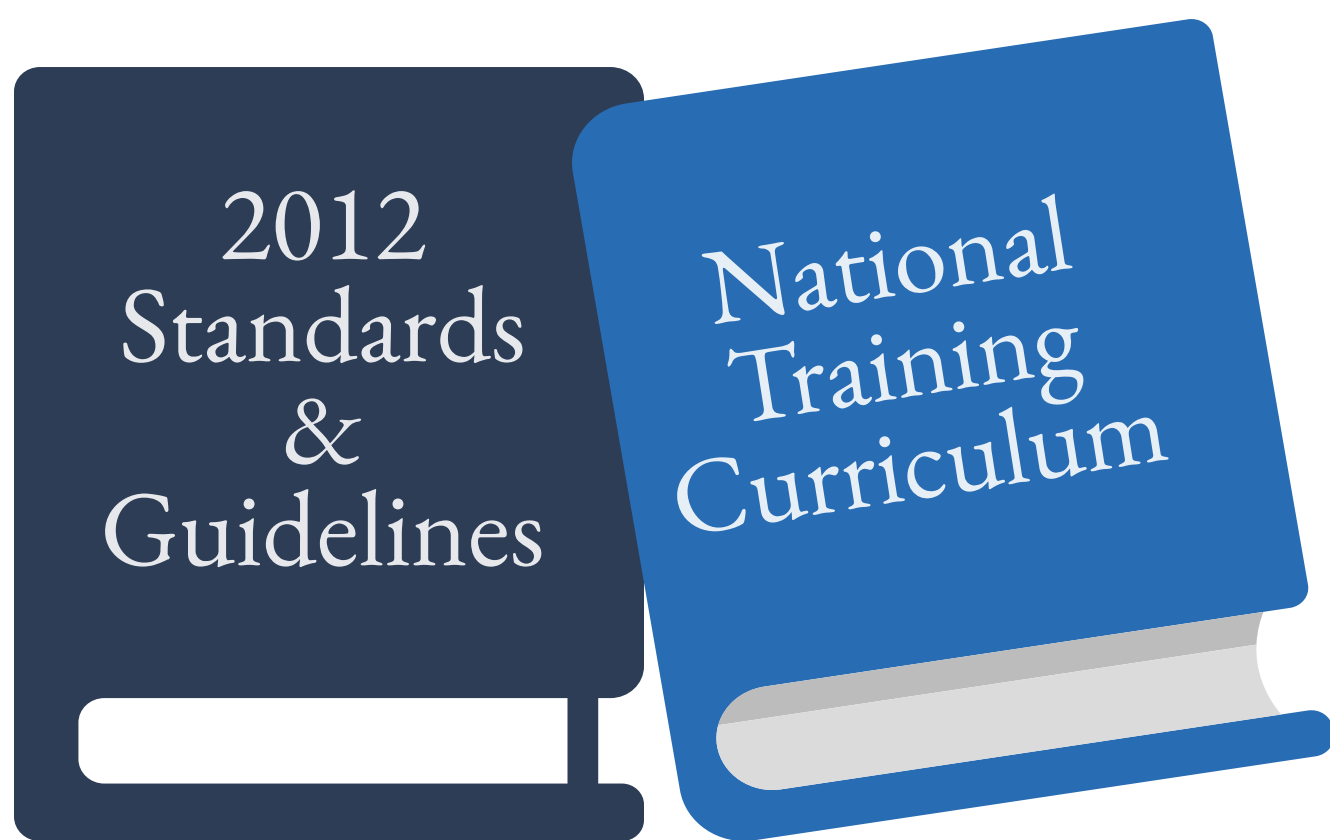
"Emergency treatment" means necessary immediate healthcare that is administered to **prevent death or the worsening of a medical situation.**

The "health of the mother" includes not only the impact of pregnancy on the mother's **physical health**, but also her **mental, psychological, and social health and wellbeing.**

The Court also affirmed that **all acts of sexual violence** exact a "major and unacceptable" toll on the health of women and girls.

The Court said **Parliament has the power to legislate** additional situations where abortion is permissible.

What is the status of the 2012 Standards & Guidelines and the National Training Curriculum?



The Court held that the 2012 Standards & Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya and the National Training Curriculum for the Management of Unintended, Risky & Unplanned Pregnancies had been **arbitrarily and unlawfully withdrawn**. The letter and memo that withdrew these documents were declared null and void.

The Court declared that the withdrawal of these documents violated the rights of women and girls of reproductive age as well as the rights of health professionals.

The effect is that the 2012 Standards & Guidelines can be applied and used by health professionals to inform and guide them in exercising medical decisions and judgment relating to abortion and post-abortion care.

Health professionals can also resume trainings under the National Training Curriculum without any threat of legal or professional sanction.

Myths and misunderstandings



The judgment does NOT legalise "abortion on demand"

The Court was adamant that the effect of its decision is not to make "abortion on demand" lawful. Abortion remains generally unlawful and only permitted in certain, restricted circumstances.



Lawful abortion is NOT limited to cases of rape only

The Court clearly held that abortion is permitted for victims of sexual violence if the health professional is of the opinion that the pregnancy poses a risk to the life, physical, mental, or social health of the mother. But the Court did NOT limit lawful abortion only to cases of sexual violence. It said that "it is not the cause of the danger that determines whether an abortion is necessary but the effect of the danger". If emergency treatment is needed, the health of the mother is in danger or any other law permits lawful abortion, a trained health professional may provide the service regardless of whether the woman or girl is a victim of sexual violence.



The judgment does NOT totally invalidate the criminalisation of all forms of abortion under the Penal Code

The Court held that the provisions of the Penal Code that criminalise abortion remain valid but only insofar as unlawful abortions are concerned. These provisions must be read with section 26(4) of the Constitution and the Sexual Offences Act. It is not a crime to provide or access an abortion in the circumstances permitted under the Constitution.



The word "abortion" does NOT include miscarriage

The word "abortion" (an intentional act terminating a pregnancy) does NOT include miscarriage. No person can be punished for miscarrying a pregnancy.



*The Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) was formed in 1994 and registered as a Non-Governmental Organisation (NGO) in 2001. Our goal is to advocate for a holistic and rights-based system of service delivery in health and for the full enjoyment of the right to health by **all**, including the vulnerable, marginalised, and excluded populations.*

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