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 ALLEGED CONTRAVENTION AND 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
IN THE MATTER OF:	THE CONSTITUTIONALITY OF SECTION 26 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006
IN THE MATTER OF:	DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3 (1)
IN THE MATTER OF:	INTERPRETATION, ENFORCEMENT AND PROTECTION OF THE BILL OF RIGHTS UNDER ARTICLES 19, 20, 22, 23, 24, 165, 258 AND 259 OF THE CONSTITUTION

BETWEEN

EM.....1ST PETITIONER

SN.....2ND PETITIONER

VERSUS

THE ATTORNEY –GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

NATIONAL AIDS CONTROL COUNCIL.....INTERESTED PARTY

1ST RESPONDENT AND THE INTERESTED PARTY'S SUBMISSIONS

1. Vide a petition dated 10th October, 2018, the petitioners moved this Honourable court seeking reliefs for their perceived grievances against the provisions of section 26 of the Sexual Offences Act No. 3 of 2006 (herein "the impugned law').

2. The gist of the petitioners' grievances is that section 26 of the Sexual Offences Act creates criminal sanctions and punishes persons living with human immunodeficiency virus (HIV) and is thus unconstitutional for:

i. Violating the petitioners' right to dignity, freedom from cruel, inhuman and degrading treatment by the manner in which it authorizes the forcible taking of blood, urine or tissue samples from persons suspected to have infected another/others with HIV or any other life threatening sexually transmitted disease,
ii. Violating their right to freedom from discrimination by the manner in which it singles out persons living with HIV (PLHIV) solely on the basis of their health status thereby creating offences arising out of actions done by PLHIV.

iii. Violating the petitioners' right to a fair trial by the manner in which it allows for mandatory testing of HIV for persons suspected to have deliberately transmitted HIV or any other life threatening sexually transmitted disease to another person thereby leading to self-incrimination.

iv. Infringing on their right to privacy by the manner in which it allows the taking and storage of blood samples until the finalization of the criminal case without any safeguards or provisions for confidentiality thus exposing their health status to third parties.

v. Infringing on the petitioners' right to family by purporting to criminalize consensual sexual activity on the sole basis of health status thereby limiting the right of PLHIV to consensually start a family with any person of their choosing who is not infected with HIV.

vi. Violating the principle of legality for being vague, ambiguous and unclear.

3. In response to the petition the 1st respondent filed grounds of opposition which were received by court on 21st June, 2019. The 1st respondent on 27th January, 2020 sought joinder of the Interested party and the same was granted. The interested party responded to the petition by way of a replying affidavit sworn on 17th May, 2021 by Dr. Ruth Laibon-Masha.

Issues for determination

4. From the pleadings and supporting affidavits of the petitioners, it is clear that this petition raises only two questions for determination:

i. Whether section 26 of the Sexual Offences Act No. 3 of 2006 is unconstitutional for violating:

   a) the principle of legality
   b) right to dignity, freedom from cruel, inhuman and degrading treatment
   c) right to freedom and equality before the law
   d) right to a fair trial
   e) right to privacy
   f) right to family

ii. Whether the petitioners are entitled to the reliefs sought.

A. Whether section 26 of the Sexual Offences Act No. 3 of 2006 is unconstitutional

Principles of constitutional and statutory interpretation

5. It is a well settled principle that every legally enacted statute enjoys a presumption of constitutionality and the burden to prove otherwise rests on the party alleging. We fully adopt the potent description of the presumption of constitutionality as expressed by the Supreme court of India in ***Hamdard Dawakhana & Anor vs The Union of India (Uoi) & Others. AIR1960 SC 554, 1960 CriLJ 671, (1960) IIMLJ 1 SC, 1960 2 SCR 671*** where the Superior Court held;

> ***(1) "in examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the needs of the people and the laws it***

enacts are directed to problems which are made manifest by experience and the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality.

(2) " That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived as existing, at the time of legislation." (Our emphasis)

6. The guiding principles of constitutional and statutory interpretation have well been established in various authorities. The courts in exercising judicial authority are obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution. Article 259 of the Constitution is the cornerstone of the interpretation of the constitution. It lays down the guidelines that the Constitution shall be interpreted in a manner that—Promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.

7. The Supreme Court in ***the Matter of Interim Independent Electoral Commission Constitutional Application No. 2 of***

2011 [2011] eKLR also rendered itself as below with regard to constitutional interpretation:

> ***"The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and <u>in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations</u> that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.***

8. In ***Council of County Governors Vs Attorney General & another [2017]*** **eKLR,** ***Njoya & 6 Others v Attorney General & Another [2004] eKLR*** the court also stated that the constitution should be given a purposive, liberal interpretation. Its provisions must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.

9. With regard to statutory interpretation, it has already been established by the Superior courts on various occasions that the jurisprudential principles require that: a court should as much as possible read the impugned statute/provision so far as is possible to be in conformity with the Constitution to avoid an interpretation that clashes therewith. The court ought to examine the object and purpose of the Act and if any statutory provision read in its context can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution. ***(Re Hyundai Motor distributors (PTY) and others v Social No and others*** **[2000] ZACC 12 2001(1) SA 545)**.

10. The object and purpose principle is important to discern the intention expressed in the Act itself-***Tinyefunza vs AG of Uganda, Constitutional Petition No. 1 of 1997, UGCC 3.*** Another established principle of statutory interpretation is that in searching for the purpose of the act, it is legitimate to identify the mischief sought to be remedied by the legislation such as the social and historical background of the legislation- ***Nairobi Petition 472 of 2017 Apollo Mboya v Attorney General & 2 others [2018] eKLR.***

11. Turning to the present petition, it has been demonstrated that various factors informed the enactment of the impugned law. To begin with, we urge this Honourable court to take judicial notice of the fact that the HIV/AIDs phenomenon is a global epidemic which has no cure but can only managed through proper medical care. It is demonstrated in the replying affidavit of the Interested party (pg.9 RLM-3) that 41,000 people (6,806 children and 34,610 adults) are newly infected with HIV every year and 21,000 Kenyans (4,333 children and 16,664 adults) die of HIV related causes every year. The prevalence of HIV is twice that in men at 6.6% thereby making women and young girls the most vulnerable group in need of state protection.

12. Additionally, the Interested party swears that due to anecdotal incidents of deliberate HIV transmission including myths of "virgin cleansing of HIV" that saw a stark rise in cases of sexual violence in Kenya more particularly against women and children, the state moved

in to protect this vulnerable population by criminalizing deliberate transmission of HIV within the ambit of sexual offences.

13. Further, despite the adoption of progressive policies aimed curbing gender based violence, evidence has shown that sexual and gender based violence as forms of human rights violation impede effort geared towards ending HIV. This is well demonstrated at page 52, 53 and 90 of the Interested party's annexure marked "RLM-2" showing the link between sexual violence and HIV.

14. In examining the purpose, effect, the historical background behind the enactment of the impugned law, and the intention of the legislature, we urge this Honourable court to take judicial notice of the fact that Kenya and in general Africa as a continent, continues to be ravaged by the scourge that is the HIV/AIDs epidemic despite the scientific gains that have been made towards reducing the mortality rate. By passing the impugned law the Legislature was not acting in a vacuum but responding to a situation in which the State needed to intervene.

15. We further urge this Honourable court to be cognizant of the provisions of Article 43 of the Constitution which provide that every person has the right to the highest attainable standards of health and it is the responsibility of the State to actualize this right. The petitioners' rights must be weighed within this limitation and the limitations provided under Article 24 of the Constitution.

16. A declaration of unconstitutionality of the impugned law will undermine public health goals and create a legal vacuum in enforcement of laws protecting persons from deliberate HIV transmission, and in light of such legal vacuum, the general public, and more particularly the vulnerable population stands to suffer irreparable loss if the impugned law is declared unconstitutional. We humbly call on this Honourable court to breathe life into section 26 of the Sexual Offences Act and not to stifle the intention of the law maker.

17. Thus, any interpretation of impugned provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, which sovereign power has been delegated to the state institutions such as the judiciary which must exercise it only in accordance with the Constitution.

i. Alleged contravention of right to dignity, freedom from cruel, inhuman and degrading treatment

18. The petitioners allege that the impugned law, particularly section 26(2) of the impugned law violates their right to dignity, freedom from cruel, inhuman and degrading treatment by the manner in which it authorizes the forcible taking of blood, urine or tissue samples from persons suspected to have infected another with HIV or any other life threatening sexually transmitted disease. The petitioners contend that these provisions violate their right to dignity as PLHIV in that the forcible taking of samples denigrates their bodies and denies them the freedom to choose what is to be done to their bodies.

19. Visram J. (as he then was) in ***Samwel Rukenya Mburu v Castle Breweries, Nairobi HCC 1119 of 2003*** described inhuman and degrading treatment by stating:

> ***"Prohibition against torture, cruel or inhuman and degrading treatment implies that an "action is barbarous, brutal or cruel" <u>while degrading punishment is "that which brings a person dishonour or contempt"</u>***

20. The Court in ***Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another [2017] Eklr***, adopted the decision in the Zimbabwean case of ***Jestina Mukoko v Attorney General (36/09) [2012] ZWSC 11 (20 March 2012), Constitution Application No.36 of 2009,*** where the Court defined inhuman and degrading treatment as follows:

> ***"Section 15(1) of the Constitution between torture on the one hand and inhuman or degrading treatment on the other. The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of torture, on the victim intentionally and for a specific purpose. Torture is an aggravated and deliberate form of inhuman or degrading treatment. What constitutes torture, or inhuman or degrading treatment depends on the circumstances of each case.***

Inhuman treatment is treatment which when applied or inflicted on a person intentionally or with premeditation causes, if not actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation: Ireland v United Kingdom [1978] 2 EHRR 167 para 167."

21. The Court of Appeal while considering the question as to whether the death sentence as envisaged under our law amounts to cruel and inhuman or unusual punishment in the case of ***Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR*** defined inhuman treatment as follows:

"...Inhuman treatment is defined as 'physical or mental cruelty that is so severe that it endangers life or health"

22. The Superior Court thus concluded:

"Based on these definitions <u>cruel, inhuman and degrading punishment is that which is done for sadistic pleasure, in order to cause extreme physical or mental pain, and that is disproportionate to the crime,</u> so that it causes moral outrage within the community. We do not think that the death sentence falls within these definitions. The death sentence is not done for the sadistic pleasure of others."

23. Section 36 of the Sexual Offences Act provides for the taking of evidence of medical or forensic nature from persons charged with offences under the Sexual Offences Act. The samples taken are to be stored until the finalization of the trial and where the accused person is acquitted the samples are to be destroyed.

24. The impugned section 26 is facsimile to the provisions of section 36 of the Sexual Offences Act. The taking of blood, urine or any other medical or forensic evidence as provided for under both provisions is not done for sadistic pleasure. It is thus clear that the impugned section 26 is not aimed at subjecting persons such as the petitioners, to cruel, inhuman and degrading treatment, since similar provisions exist in statute with a constitutional underpinning. The impugned law is rather aimed at ensuring that all material is availed to enable the court reach a just determination.

ii. ***The alleged contravention of the right to equality and freedom from discrimination***

25. The petitioners fault the impugned law for discriminating against PLHIV suspected to have deliberately transmitted HIV or any other life threatening sexually transmitted disease to another person.

26. It is important to note that he impugned law does not contain any provisions that treat PLHIV and suspected to have deliberately transmitted HIV or any other life threatening sexually transmitted disease to another person, any differently. As observed under section

36 of the Sexual Offences Act, similar provisions apply to persons suspected to have committed a sexual offence.

27. A look at the wording of section 26(2) reveals that the impugned law is also not couched in mandatory terms. The section provides:

> *(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*

28. Where the words **"may"** and **"shall"** have been used, the Court of Appeal in ***Sony Holdings Ltd –vs- Registrar of Trade Marks & Another [2015] Eklr*** held that: -

> ***"It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision…… Whether the words "shall" or "may" convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters."***

29. In the Australian case of ***Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council (1948) 77 CLR 544 at 568,*** it was stated:

> ***"'May', unlike 'shall', is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as 'shall' which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears."***

30. And in the case of ***Kenya Wildlife Service -vs- Joseph Musyoki Kalonzo [2017] eKLR*** the Court of Appeal was of the view that the use of the word "may" as used in section 25 of the of Wildlife Conservation and Management Act No. 47 of 2013 did not bind a party to the proceedings of the County Wildlife Conservation and Compensation Committee for purposes of pursuing compensation for personal injury or death or damage to property. The Superior court stated:

> ***"6. In other words, there is no ouster clause in the Wildlife and Conservation Management Act, that bars a party from seeking relief outside the process provided for under that Act. An ouster, or privative clause specifically divests the court of jurisdiction to hear or entertain any matters arising from the specific statute. <u>In this case, Section 25 of the Act only gives an aggrieved party an option to pursue its claim either</u>***

<u>through the process stipulated under the Act, or through the court."</u>

31. From the use of the word "may" in the impugned law herein, it is clear that section 26(2) gives discretion to the court noting that a person may voluntarily agree to have their blood samples taken. The said section being merely permissive, does not bind the court to issue the order so contemplated if in its opinion the same would not serve the interests of justice for all parties or the suspect has agreed to the voluntary drawing of their blood.

32. Additionally, where court deems fit to issue an order under section 26(2), such an order is amenable to be appealed, varied or set aside should the person to whom such an order is issued choose to exercise such remedies.

33. It has been held time again by this Honourable court and the Superior courts that mere differentiation or inequality of treatment does not *per se* amount to discrimination. A person claiming unfair discrimination must first establish that because of a distinction drawn between them and others, they have been denied equal protection or benefit of the law. The claimant must also demonstrate that the denial is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the legislature had in mind when enacting the statutory provision.

34. In the case of ***Peter K Waweru v Republic [2006],*** the court held that:

> ***"29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim."***

35. The Court in ***John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR*** also stated;

> ***"it must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se***

amount to discrimination and a violation of the constitution."

36. And in ***Nelson Andayi Havi vs Law Society of Kenya & 3 Others Petition No. 607 of 2017 (2018) Eklr,*** the Court formulated a three-piece approach in identifying discrimination as follows:

"90. In determining discrimination, the guiding principles are clear. The first step is to establish whether the law differentiates between different persons. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair."

37. The court went on to say…

"96. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation"

38. The right to equality and freedom from discrimination is limited to the extent that certain rights have to be compromised in order to compensate certain disadvantaged groups, such as in the particular

instance, vulnerable women, young girls and children who are mostly disadvantaged by past socio-economic, cultural and religious practices and only the law can protect them.

39. Article 27 does not confer absolute rights. Indeed, Article 27(8) empowers Parliament to enact laws for the advancement of such people. In the case of ***Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] Eklr,*** the Court equally expressed itself in similar terms where it stated:

> ***"In regard to Article 27(4), the drafters were aware of the past history of discrimination and realized that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The Constitution has also identified various vulnerable groups of our society who have been victims of discrimination in the past. The extent to which the Constitution has addressed their grievances is both immediate and in future. Article 27 as a whole is clearly not only meant to prevent discrimination or inequality, but also in our context and history to eliminate them presently and in the future. It is an attempt to level the playing field where legislation is inadequate or does not address the needs of a particular vulnerable group."***

40. PLHIV share with others the duty not to harm others. The impugned law does not constitute discrimination against PLHIV simply due to their health status. It must also be appreciated that the State has a responsibility to protect its citizens by penalizing malafide actors who, aware of their endangering health status, decide to deliberately infect or endanger the lives of others such as vulnerable women and young girls. It is thus our humble submission that the impugned law does not violate the petitioners' rights to equal benefit and protection of the law as it is clearly provided for under statute.

iii. Alleged contravention of the right to a fair trial

41. The petitioners are aggrieved that the impugned law infringes on their right to a fair trial by the manner in which it allows for mandatory testing of HIV for persons suspected to have deliberately transmitted HIV or any other life threatening sexually transmitted disease to another person, thereby leading to self-incrimination. The question therefore arises, does providing a blood sample amount to such self-incrimination? Certainly not!

42. Our position is informed by the holding of court in the case of ***Richard Dickson Ogendo & 2 others v Attorney General & 5 others [2014] eKLR,*** where Majanja J considered similar aspects of fair trial vis-à-vis self-incrimination where a person is called on to draw breath into a breathalyzer to establish the alcohol levels in the body system. The court held as follows:

"To my mind, the privilege of an accused person not to incriminate himself protects against compulsory oral examination for the purposes of extorting unwilling confession or declaration implicating the accused in the commission of crime. ***The purpose of protection against self-incrimination was summed up by the US Supreme Court in MIRANDA VARIZONA 384 US 436 (1996) where it observed as follows: "All these policies point to one overriding thought the constitutional foundation underlying the privilege is the respect of a government, state or federal, must award to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance to require the government to shoulder the entire load' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the crucial, simple expedient of compelling it from his own mouth …. In SCHMER BER Vs CALIFORNIA, 384 US 757 (1966), the United States Supreme Court held that the compulsory taking of blood for analysis of its alcohol and its use in evidence did not violate the defendants privilege against self-incrimination".***

43. We also seek to rely on the High Court decision in ***Republic v Amos Kipyegon Cheruiyot [2016] Eklr,*** where the court adopted the decision ***Richard Dickson Ogendo Case*** and pronounced itself on a similar issue as follows:

> ***"The consensus therefore in all these decision is that the rule against self-incrimination is confined to protection against suspect being compelled to make an oral statement or to testify in such a way as to condemn himself."***

44. The Superior Court went on further to state:

> ***"In this case the accused is not being asked to provide testimonial or communicative (written) material that may implicate him – he is being asked to provide 'real or physical evidence' in the form of a blood sample. There is no guarantee that such blood sample will end up incriminating the accused. It may well be that the results of the blood sample analysis may exonerate him."***

45. In ***Republic v John Kithyululu [2016] Eklr***, the High Court was persuaded by the Supreme Court holding in the American case of ***Pennsylvania vs Muniz 496 US 582*** where it was held as follows: -

> ***"The privilege against self-incrimination protects an "accused from being compelled to testify against***

himself, or otherwise provide the State with evidence of a testimonial or communicative nature," Schmerber v. California, 384 U. S. 757, 384 U. S. 761, but not from being compelled by the State to produce "real or physical evidence," id. at 384 U. S. 764. To be testimonial, the communication must, "explicitly or implicitly, relate a factual assertion or disclose information." Doe v. United States, 487 U. S. 201, 487 U. S. 210. Pp. 496 U. S. 588-590."

46. The case of ***R vs. Mark Lloyd Stevenson [2016] eKLR (Kiambu Criminal Revision No. 1 of 2016),*** also examined the concept of self-incrimination whereby it authoritatively quoted and was persuaded by the European court of Justice in ***Sanunders v United Kingdom A/702 (1997) 23 EHRR 313,*** which stated:

"...that the right against self-incrimination lies ..in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of

innocence...<u>The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent."</u>

47. Section 122A of the Penal Code Cap 63 also envisages the taking of medical or forensic evidence whereby a person suspected of having committed a serious offence can be required by a court order or by the suspect's own consent to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence. This provision is also a clear demonstration that the requirement to provide or the voluntary provision of 'real or physical evidence' in the form of a blood sample does not violate a suspect's right to a fair trial.

48. It is thus clear from the holding of the various Superior courts in the above cited authorities that drawing of blood samples or any forensic medical evidence does not amount to self-incrimination and that protection against self-incrimination only extends to protection against a suspect being compelled to make an oral statement or to testify in such a way so as to condemn himself.

49. Whereas Article 50(2)(*l*) of the Constitution provides for the right to a fair trial, which includes the right not to give self-incriminatory evidence, it must also be noted that every accused person has a right to challenge evidence adduced against him.

50. It has already been observed that section 36 of the Sexual Offences Act accords similar treatment to persons charged with offences under the Sexual Offences Act. Also, a person can only be convicted once it has been established beyond all reasonable doubt that he committed the offence Certainly, it cannot therefore be said that the impugned law is unconstitutional for violating the petitioners right to a fair trial. The same was observed by the High Court in the ***Republic v Amos Kipyegon Cheruiyot case*** as follows:

> ***"I note that under Section 36 of the Sexual Offences Act, 2006 an accused person charged with a sexual offence can be directed by the court to provide DNA samples. The aim here is to ensure that all material is availed to enable the court reach a just decision. The rights of a suspect charged under the Sexual Offences Act are not any less than the rights of a suspect charged with a criminal offence under the Penal Code. To require that a suspect provide a blood sample does not in my opinion vitiate his right against self-incrimination."***

51. Flowing from the above cited statutory and legal authorities, we respectively submit that the petitioners claim of the alleged contravention of their right to a fair trial is based on a misapprehension of both the Sexual Offences Act and the Constitution.

iv. Alleged contravention of the right to privacy

52. On this limb the petitioners allege that the impugned law violates their right to privacy in that it allows the taking and storage of blood samples until the finalization of the criminal case without any safeguards or provisions for confidentiality thus exposing their health status to third parties.

53. With much respect to the petitioners, such pleading and submission is based on a misguided interpretation of both the constitution and applicable statute laws. Firstly, Rule 8 of the **Medical Practitioners and Dentists Board (Disciplinary Proceedings) Procedures Rules** prohibits disclosure of a patient's medical information in the following terms:

> *A practitioner or an institution shall not disclose to a third party information which has been obtained in confidence from a patient or the patient's guardian, where applicable. The practitioner or institution shall safeguard the confidential information obtained in the cause of practice, teaching research or other professional duties subject only to such exceptions as are applicable. The following are possible expectations:*
>
> *1. The patient or his lawyer may give a valid consent.*
>
> *2. The information may be required by law or through a Court Order.*
>
> *3. Public interest may persuade a Practitioner that his/her duty to the community overrides the one of the patient."*

54. Secondly, as already submitted, the provisions of the impugned law mirror those of section 36 of the Sexual Offences Act, which provide that notwithstanding the provisions of section 26, evidence of forensic or medical nature taken from suspects under the said provisions be stored at an appropriate place until finalization of the trial.

55. Thirdly, section 122A of the Penal Code Cap 63 as observed earlier in our submissions also permits the taking of medical or forensic evidence to confirm or disprove that the suspect committed the alleged offence. Such evidence is also stored until the trial is finalized.

56. Fourthly, it must be appreciated that whereas medical records/ a patient's medical information constitutes confidential information protected by the law, the right to privacy is not absolute and in some certain circumstances, it must give way to the greater public interest in disclosure. Article 35 1(b) of the Constitution states that every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. Article 35(3) gives the state the right to publish and publicise any important information affecting the nation. The petitioners' right must therefore be enjoyed within this limitation.

57. Lord Bingham set out the principles under which a doctor may disclose the information held in confidence in the case of ***W v Edgell [1990] 1 ALL ER 835*** as follows;

i. a real and serious risk of danger to the public must be shown for the exception to apply.
ii. disclosure must be to a person who has legitimate interest to receive the information.
iii. disclosure must be confined to that which is strictly necessary (not necessarily all the details)

58. We also seek to rely on the decision of the High Court ***David Lawrence Kigera Gichuki v Aga Khan University Hospital [2014] Eklr,*** whereby it outlined principles to be considered in the disclosure of confidential information obtained in the cause of practice by a medical practitioner as follows:

> ***"i. That a medical practitioner or medical facility is under an obligation not to release confidential information about a patient without the patient's knowledge or consent;***
>
> ***ii. That there are, however, circumstances in which the medical practitioner or institution may be required to release such information for valid governmental and public interest reasons;***
>
> ***iii. That a medical practitioner or institution may be required by law or a court order to release information about a patient without the patient's consent."***

59. The right to privacy cannot be used as a tool for circumventing a just legal process intended to prove an offence. If that were the case, every offender would petition the constitutional court alleging violation of their right to privacy thereby jeopardizing performance of duties by the investigating authorities. Also, if the petitioners take issue with the evidence gathered during investigations, they have the right, at the earliest opportunity to challenge its admissibility in the in court. The petitioners have thus failed to demonstrate how the impugned law violates their right to privacy.

iv. Alleged contravention of the right to family

60. With much respect to the petitioners, it is absurd to posit that the impugned law denies PLHIV an opportunity to start a family with a partner who is HIV negative.

61. First, the challenged provision does not prohibit PLHIV from having sexual relations. The petitioners' arguments are therefore based on a nonexistent legal proposition that is not derived from section 26 of the Sexual Offences Act. To satisfy the definition of the crime, there must be elements such as malice or the intent to cause unlawful harm, which in this case is to propagate the HIV virus by engaging in any practice whereby another person may become infected, knowing that the infection is being caused. If an infected person engages in sexual practices and does not infect their partner, either because they use protection or because they have the virus under control through the relevant treatment, this does not satisfy the definition of the crime

involving the HIV virus, as the elements of the crime have not been fully met.

62. The petitioners' alleged contravention of the right to family also brings to the core the question as to whether family can only be obtained through sexual relations? We think not. The practice of adoption for families wanting to have children is no longer alien to the African culture and has now become a common occurrence not only for partners who cannot bear children but also for individuals who wish to be single parents, individuals who simply wish to adopt instead of bearing children among other reasons. Family is not defined by blood relations only.

v. Alleged contravention of the principle of legality

63. The petitioner alleges that: - The meaning of the term *"life threatening sexually transmitted disease"* or what constitutes *"life threatening sexually transmitted disease"* has not been defined; that the wording *"...does anything or permits the doing of anything..."* under section 26 (1) is too wide and lacking in clarity and scope on what acts and/or omissions are prohibited by law, that the wording *"...is likely to lead..."* as used under section 26 (1) (b) is ambiguous, and that the wording *"after committing an offence"* as used under section 26 (10) (b) is broad and discriminatory.

64. Article **165 (3) (d) (i) & (ii)** of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the

question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of, the constitution.

65. This Honourable court has time and again held that where the constitutionality of a statute or statutory provision is in issue, the court is obliged to determine whether through application of all legitimate interpretive aids, the impugned statute or statutory provision is capable of being read in a manner that renders it constitutionally complaint. Additionally, the golden rule of construction requires that the words of a statute must be given their ordinary, literal and grammatical meaning.

66. The case of ***Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR*** quoted **Schreiner JA** where he stated in ***Jaga v Donges No and Another*** **[1950] (4) SA 653(a)** that the words and expressions used in a statute must be interpreted according to their ordinary literal meaning in the statement and that they must be interpreted in the light of their context.

> ***"A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim noscitur a sociis (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision."***

67. The United States Supreme Court in ***Grayned vs. City of Rockford***, held that an enactment is void for vagueness if its prohibitions are not clearly defined. And in ***Law Society of Kenya v Kenya Revenue Authority & another [2017] Eklr,*** the High Court expressed itself with regard to vagueness as follows:

> ***"A statute is void for vagueness and unenforceable if it is too vague for the average citizen to understand. There are several reasons a statute may be considered vague; in general, a statute might be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed. A statute is also void for vagueness if a legislature's delegation of authority to administrators is so extensive that it would lead to arbitrary prosecutions."***

68. The above was summarized as follows by the court: **(a)** that the Law must state explicitly what it mandates, and **(b)** what is enforceable, **(c)** Definitions of potentially vague terms are to be provided.

69. The mere fact that a word has not been defined in a statute does not mean that the statute is vague since expressions in a statute must be interpreted in their ordinary literal meaning. Applying the plain meaning rule in a literal examination of section 26(1)(a)(b)(c) clearly shows that the provisions are impossibly open to more than on

meaning. In construing statutes, the court ought to seek an interpretation that promotes the objects of the principles and values of the Constitution so as to avoid an interpretation that clashes. It is therefore our submission that section 26(1)(a)(b)(c) is not vague, ambiguous or unclear.

Constitutional Petition Number 97 of 2010, herein, The Aids Law Project Case

70. The petitioners in their pleadings and submissions have put heavy reliance on the *Aids Law Project Case* and urged this Honourable court to be persuaded by the decision rendered therein. it is important that the *Aids Law Project Case* be differentiated from the instant petition.

71. The *Aids Law Project Case* impugned section 24 of the ***HIV and AIDS Prevention and Control Act, No. 14 of 2006*** (herein the HIV Act) which came into effect on 1st December 2010. The said section 24 of the HIV Act was declared unconstitutional by the High court on grounds that it was vague and lacking in certainty, in the absence of a clear definition of what amounts to sexual contact, it violated Article 31 in that it legally required those who suffer from HIV/AIDs to disclose their status to "sexual contacts", whereas the later are not under any duty to keep such information confidential.

72. Section 24 of the HIV Act is dissimilar to section 26 of the Sexual Offences Act, is defined in clear legal terms and does not use the term 'sexual contact'. The words under section 26(1)(a)(b)(c) are clear,

unambiguous and capable of being understood in their ordinary literal meaning. Also, section 26 only prohibits deliberate transmission of HIV and does not create an obligation to persons who suffer from HIV/AIDs to disclose their status to their sexual partners, thereby maintaining their right to privacy.

73. Further, as already observed in our submissions, although the right to privacy is not absolute, the petitioners' right to privacy is still safeguarded under Rule 8 of the **Medical Practitioners and Dentists Board (Disciplinary Proceedings) Procedures Rules** which prohibits disclosure of a patient's medical information unless the information is required by law or through a Court Order, or the medical practitioner is persuaded his/her duty to the community overrides the one of the patient.

74. In addition, the decision in the *Aids Law Project Case* is a decision rendered by a court of concurrent jurisdiction. Whereas it may be highly persuasive in its influence, it is not legally binding on this Honourable court as a court of concurrent jurisdiction. We say this with respect to the doctrine of judicial comity in that we believe our pleadings, submissions and the authorities cited present strong and legitimate reasons to the dissuade this Honourable from adopting the position in the *Aids Law Project Case*.

SUBMISSIONS OF THE AMICI

75. The legal principles applicable to the participation of a friend of the court in proceedings were set out by the Supreme Court

in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR*** as follows:

i. An amicus brief should be limited to legal arguments.
ii. Amicus intervention ought to always be governed by the principle of neutrality, and fidelity to the law
iii. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici.
iv. An amicus brief ought not to raise any perception of bias or partisanship, by documents filed, or by their submissions.
v. An amicus ought to be neutral in the dispute, where the dispute is adversarial in nature.

76. With much respect to the petitioners, the brief as submitted at pages 5 to 18 has failed to understand the impugned law, taken a partisan position being that of the petitioners, failed to identify issues not addressed by the parties so as to give guidance on the same and remained biased to the purpose and intention of the law.

77. Notably, the amici have advanced the position that HIV criminalization undermines the HIV response and threatens public health, HIV criminalization is not effective at preventing HIV nor protecting vulnerable populations from HIV infection, HIV criminalization reinforces HIV –related stigma and discrimination, HIV criminalization interferes with State's obligation for the realization of the right to the highest attainable standards of health.

78. We categorically wish to state that the impugned law does not criminalize HIV as understood by the amici. The impugned law criminalizes deliberate transmission of HIV and other life threatening sexually transmitted diseases. It is not illegal to be HIV positive in Kenya.

79. Secondly, the amici just like the petitioners have failed to appreciate the origin of the legislation which is to protect vulnerable groups such as women, young girls and children from sexual violence which has been prevalent in Kenya. As already demonstrated in our submissions, of the premises for inclusion of section 26 is to protect vulnerable groups from deliberate transmission of HIV and other life threatening sexually transmitted diseases stemming from among others, myths of 'Virgin cleansing of HIV".

80. Thirdly, at paragraph 33 of the brief, the amici advance a case for universal testing and treatment as the most efficient strategy to preventing HIV. This recommendation fails to appreciate that individuals have a freedom of choice and cannot be compelled to be tested or treated. Thus without an alternative approach such as imposition of criminal sanctions, vulnerable groups which the impugned law seeks to protect continue to remain even more vulnerable because there are no legal sanctions against the perilous acts of the offenders.

81. Fourthly, the amici seem to give contradicting recommendations all in one breath. In the said paragraph 33, it is also recommended that

criminal sanctions should apply where there is proof beyond reasonable doubt that a person who is HIV positive acted with intention to transmit HIV and does in fact transmit it. Such a submission agrees with the provisions of section 26 since a person can only be convicted once it is established beyond all reasonable doubt that he committed the alleged offence.

82. Fifthly, the amici have placed heavy reliance on books, journals, articles, reports and conference abstracts. Pursuant to the provisions of section 35 of the Evidence Act Cap 80 Laws of Kenya, such media documents taken alone are of no probative without the maker being called as a witness in the proceedings.

83. It is thus our humble submission that the amici brief dated 16th September, 2019, totally goes against the principles set out by the Supreme court. Our prayer is that the same ought to be disregarded by this Honourable court as if it were not available in the first place.

B. <u>Whether the petitioners are entitled to the reliefs sought</u>

84. Having demonstrated that the impugned law is constitutional, we posit that the petition dated 10th October, 2018 has no merit and the petitioners are not entitled to the reliefs sought in therein. We therefore pray that the same be dismissed in its entirety. We wish not to labour the Honourable court with a prayer for costs.

We humbly submit.

Dated at Nairobi this 28th day of January, 2022

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