

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

AND

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

AND

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

AND

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

BETWEEN

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

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

HIV JUSTICE WORLWIDE 1ST AMICUS CURIAE
JOINT UNITED PROGRAMME ON HIV/AIDS 2ND AMICUS CURIAE
NATIONAL AIDS CONTROL COUNCIL.....INTERESTED PARTY

PETITIONERS' WRITTEN SUBMISSIONS

A. INTRODUCTION

1. These submissions relate to the Petition dated 10th December 2018 which challenges the provisions of Section 26 of the Sexual Offences Act No.3 of 2006, which section provides that:

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

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

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

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

(2) Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the Court may direct that an appropriate sample or samples be taken from the accused person, at such a place and subject to such conditions as the Court may direct, for purposes.

2. Each of the petitioners challenge the manner in which the application and enforcement of section 26 of the Sexual Offences Act has negatively affected their constitutional rights.

B. BRIEF SUMMARY OF THE FACTS AND EVIDENCE

3. The 1st Petitioner is an adult male Kenyan living with HIV. He lives and works in Kericho County. On 27th February 2018, at around midnight, he was asleep in his house when he was woken up by commotion outside. Some people, who claimed to be police officers barged into his house and assaulted him and attempted to place him in handcuffs. He was scared, in pain and in fear for his life, and he attempted to defend himself and in this effort, ended up biting the thumb of his assailant. Upon this happening, about seven people who then entered his house begun to beat him up and arrested him. He was later taken to the Sigowet Sub-County Hospital where blood samples were taken without his consent. He was subjected to forced HIV testing without his knowledge.

He only got to know what the blood samples were for when he was arraigned in court and he heard the court prosecutor, an agent of the 2nd respondent, read out his HIV status, and informed the court that he was being charged under section 26 of the Sexual Offences Act.¹

4. The 2nd Petitioner is an adult female living with HIV. She has been under treatment since 2012 and as at June 2018, she had an undetectable viral load.² In September 2018, she was going about her usual chores when a neighbor requested her assistance in taking care of her young son. Despite the fact that she was very busy, she agreed to tend to her neighbor's child. The next day her neighbor came to her house and accused her of having breastfed the child. This accusation came as a surprise to her since she had not breastfed the child and could not, since she had not had children since 2013. She tried to determine the source of this information, but came to the realization that this was a plot hatched to get her husband to extort her by forcing her husband to pay a fine to the village elders.
5. The 2nd Petitioner and her husband were later summoned by village elders where the 2nd petitioner was subjected to a kangaroo court, with the elders finding her guilty of breastfeeding Priscilla's child. The village elders asked her husband to pay a fine so as to settle the matter amicably. When they refused, Priscilla came to her house with police officers and arrested the 2nd Petitioner, and she was arraigned in court and charged with a violation of section 26 of the Sexual Offences Act. This turn of events led to the entire village knowing her HIV status despite the fact that she had prior to this incident not disclosed her HIV status anyone other than her family and close friends. Unable to raise the bail amount due to her socio-economic status, she

¹ See the charge sheet annexed to the affidavit of EM, marked as EM1.

² See a certified copy of the viral load results marked as SN2 to the affidavit of the 2nd Petitioner.

was detained for one month in unsanitary conditions which had a negative effect on her health and caused her immunity to become lower. When her husband eventually raised the bail amount, she was ostracized by the community in which she lived. Many of her neighbours now refuse to associate with her the way they used to before the arrest.

6. The 3rd Petitioner is an adult female living who has been living with HIV and been on medication since March 2005. Upon discovering her HIV status, she disclosed to her husband and suggested that he too should get tested. Instead, her husband became very upset and threw out all her anti-retroviral medication. The 3rd Petitioner returned to her doctor and got a fresh prescription, and the doctor advised her to take her medication in secret. In January 2006, she gave birth to her second born daughter and undertook measures to ensure that she did not pass the virus to her newborn child.
7. Whenever she would suggest to her husband that he should get tested for HIV, he would become physically and emotionally abusive to her. Eventually, he begun to fall ill and agreed to get tested for HIV. When this test turned positive, he became violent to the 3rd Petitioner and accused her of infecting him. After he tested positive, her husband continually threatened to kill her and to report her to the police for infecting him. On one occasion, he assaulted her with a hammer and left her locked up in her house for three days. She was eventually rescued by a neighbor who took her to the hospital where she was admitted for a period of two days. It was then that she left the marriage. In October 2017, she got into another relationship. She is however apprehensive that she faces arrest because of the manner in which section 26 of the Act is applied; this risk applies to all the discordant couples and breastfeeding mothers in the country who run the risk of being arrested and charged under this law.

8. The 4th Petitioner is an adult female living in Nairobi. She too is living with HIV and is married to the 5th Petitioner. She was tested for HIV in 2010 and was put on medication. She met the 5th Petitioner in 2011 and they went for HIV testing together where her result was positive and the 5th Petitioner's result was negative. They underwent counselling and were advised to use protection during sexual intercourse, and to ensure that the 4th Petitioner continues to adhere to her medication. The 4th and 5th Petitioners have lived together as husband and wife without any problems, and the 4th petitioner continued to take a medication until she had a CD4 count that was high enough for her to safely attempt to get pregnant. Under close supervision of her doctor, the 4th Petitioner conceived and gave birth to a baby girl. The 4th and 5th petitioners also took efforts to ensure that their child did not get the virus, and she tested negative at 18 months.
9. Despite the fact that the 4th Petitioner is living a healthy and wholesome life, she continues to fear that she will be arrested and charged under section 26 of the Sexual Offences Act as she is part of a discordant couple. She also fears that other women living with HIV run the risk of being arrested for breastfeeding their children. On his part, the 5th petitioner continues to fear that if he continues to relate with his wife, she will be arrested. He further contends that the burden of preventing the spread of HIV is only placed on persons living with HIV, such as his wife, and that the effect of the law is discrimination.
10. The 6th petitioner is also a part of a discordant couple. She was diagnosed with HIV in August 2004 at a time when there was a lot of stigma around persons who were living with HIV. Through interventions by her health care provider she has managed to adhere to treatment, and is now working with the National Empowerment Network of Persons Living with HIV (NEPHAK). Due to her

advocacy on the issues of rights of people living with HIV, she is aware of the provisions of section 26 of the Sexual Offences Act, and now lives in fear of being charged under this law despite the fact that she and her husband are in a consensual relationship where each party is aware of the others status.

11. The Petitioners are supported by the 7th Petitioner, which is a non-governmental organization working to protect and promote health related human rights in Kenya by facilitating access to justice for those who have faced human rights violations. The 7th Petitioner has supported the petition by way of an expert affidavit sworn by Ambrose Rachier, who has undertaken various engagements in the area of HIV and AIDS³ and Dr Walter Jaoko, a medical doctor and Assistant professor who has worked at the Kenya AIDS Vaccine Initiative and who has extensive experience in treating and working with persons living with HIV. The 7th Petitioner's expert affidavits demonstrate that:

- a. There is consensus amongst experts, that laws such as section 26 of the Sexual Offences Act which criminalise transmission of HIV undermine public health efforts and human rights.
- b. Criminal sanctions are not of any use in the reduction of transmission of HIV, and further they are wholly inappropriate where:
 - i. There is no significant risk of transmission of HIV.
 - ii. Where a person does not know he or she is HIV positive, or does not understand how HIV is transmitted.
 - iii. Where a person has disclosed his or her HIV positive status to the person at risk.

³ See the expertise of Mr Ambrose Rachier outlined in paragraph 6 of the 7th Petitioner's affidavit as well as his curriculum vitae annexed as AR2.

- iv. Where a person has not disclosed HIV status because of fear of violence or other serious negative consequences.
- c. Where a HIV positive person has taken reasonable measures to reduce the risk of HIV transmission such as using a condom or taking other precautions, including adhering to treatment by taking of ARVs, there is a very low risk of transmission of HIV. In addition, there is no possibility of HIV transmission through biting where the saliva of the person with HIV contains little to no blood.⁴
- d. The taking of ARVs, particularly in combinations of Highly Active Anti Retroviral Therapy (HAART) can stop the replication of HIV and reduce morbidity and mortality rates amongst persons living with HIV.
- e. The 1st Interested Party has in the Kenya AIDS Strategic Framework 2014/15-2018/19 and the Kenya AIDS Response Progress Report 2016, committed to ensure that laws that perpetuate stigma and discrimination are reviewed. This is further noted in the The Second Kenya AIDS Strategic Framework 2020/21-2024/25 where the Ministry of Health and the 1st Interested Party note that when persons living with HIV are criminalized, they suffer multiple violations of human rights.
- f. Laws such as section 26 of the Sexual Offences Act merely increase stigma and discrimination against PLHIV and make it less likely that they will pursue health affirming behavior.
- g. Overbroad legislation such as section 26 of the Sexual Offences Act only fuels stigma against PLHIV and gives license to other people to stigmatise and discriminate against persons living with HIV.

⁴ See the Expert Consensus Statement on HIV "Treatment as Prevention" in Criminal Law Reform" annexed to the affidavit of Ambrose Rachier and marked AR3, and to the affidavit of Dr Walter Jaoko and marked DRWJ3.

- h. Medical evidence demonstrates that people living with HIV are able to lead normal and full lives, including marrying, giving birth and raising children.⁵
12. The 1st respondent opposed the petition by way of undated grounds of opposition. In these grounds, the 1st respondent merely denies that the contents of the petition, but does not address any of the issues raised in the petition. each of the assertions made in the petitioner have no basis. The 1st respondent does not address any of the lived experiences of the petitioners nor the rights violations that are laid out in the petition or and the supporting affidavit. The 1st respondent has equally not responded to the evidence brought forth by the expert affidavits of the 7th petitioner
13. The 2nd respondent has neither entered appearance nor filed a response to address the concerns raised in the petitioner despite the fact that it's the 2nd Respondent who prosecutes these case in court as is the case of the 1st petitioner.
14. On its part, the Interested Party has opposed the petition by way of a replying affidavit sworn by Dr Ruth Laibon Masa, the Chief Executive Officer of the Interested Party. In this affidavit, the Interested Party admits that it is responsible for mobilizing and coordinating resources for the prevention of HIV transmission. It is also responsible to provide care and support to the infected and affected persons. The Interested Party denies that section 26 of the Sexual Offences Act criminalises persons living with HIV as described,

⁵ See the UNAIDS Guidance Note Ending Overly road Criminalisation for HIV non-disclosure, exposure and transmission: Critical Scientific, medical and legal Considerations (2013) annexed to the affidavit of Ambrose Rachier and marked AR6.

- and alleges that the provision should be interpreted using the literal rule, which would have the effect of having a clear and precisely worded section.
15. The Interested Party's affidavit does not respond to any of the experiences of the petitioners, and does not address any of the rights violations that are apparent in the manner in which the section has been used to charge them. They have failed and ignored to adequately address these real life experiences that demonstrated that the law can be used unjustly to negatively affected the lives of PLHIV and consequently affect the national HIV response.
 16. The only conclusions your Ladyship can draw from the response and evidence put forth by the respondents is that they are menial denials and averments with no evidential support. The evidence put for the by the interested party (strategic plan) is actually in support of the case of the Petitioners noting the interventions the seek to roll out to have an enabling legal and policy legal framework and rid out punitive laws that affected the petitioners. Your Ladyship will note that the Kenya AIDS Strategic Framework (KASF II) annexed by the Interested Party as **RLM-2** in its Replying Affidavit, champions the protection of constitutionally guaranteed human rights. At the preface of this Strategic Framework (*See page 2 of Annexure*), the Interested Party's Chairperson Ms. Angeline Siparo, posits that the Interested Party will respect constitutionally guaranteed human rights and ensure that scientific evidence and knowledge are translated into concrete programmatic actions. Further at page 14 of the document, the Interested Party recounts the lessons learned from the implementation of KASF I and the recommendations it carries into the implementation of KASF II. One of the recommendations therein is to 'scale up interventions to address human rights violations, access to justice against HIV related stigma and discrimination'. This recommendation is buttressed at page 18 of the document as one of the

Council's Overall Implementation Approaches. Your Ladyship will further note that at pages 44 and 45 of the aforesaid document, the Interested Party also expressly identifies one of the goals of the present strategic framework as: Protection of Human Rights and Elimination of all forms of violence and HIV related stigma and discrimination against people living with HIV, key and priority populations.

C. THE IMPLICATIONS OF THE EVIDENCE

17. Petitioners have proved beyond a balance of probabilities that section 26 of the Act violates rights and is being used to harm persons living with HIV. The factual and lived experiences of each of the 1st – 6th Petitioners has demonstrated that this section of law has been used:
 - a. To harass persons living with HIV, to test them for HIV without their consent and unjustifiably used to publicize information about their health;
 - b. Harass people living with HIV and expose them and their families to extortion;
 - c. As a tool of gender based violence against women living with HIV;
 - d. As a tool of harassment to men and women living with HIV and who have after considering all information available to them, decided to establish families.
18. The continued application of this section is also leading to a loss of the gains that have been made in the HIV response. This section is also overbroad to the extent that it is vague, and is arbitrary enforced.
19. Given that the 1st, 2nd and interested party have not specifically responded to the lived experiences of the petitioners and the expert evidence brought forth,

the court can logical reach the conclusion that what is not express denied or responded to is admitted.

D. SECTION 26 OF THE SEXUAL OFFENCES ACT VIOLATES THE PRINCIPLE OF LEGALITY.

20. The principle of legality requires that legislation should not be so vague, that the subject must await the interpretation given to it by judges before he/she can know what is and what is not prohibited. The Hon. Justice Mativo in Law Society of Kenya vs Kenya Revenue Authority & Another (2017) e KLR held that the principle of legality is an integral part of the rule of law and that one of the main ingredients of the rule of law is the certainty of law. The learned judge went further to set out the specific criteria that all laws or any legislation must meet to qualify as constitutional. Such criteria included the following:

- a) Law must state explicitly what it mandates;
- b) What is enforceable; and
- c) Definitions of potentially vague terms to be provided.

21. Similarly, in AIDS Law Project vs Attorney General & Others (2015) e KLR, a case that has not been appealed by the 1st respondent and is very similar to the case at hand, the court held that the constitution requires laws with criminal penalties to be precise, and further that laws which are vague are unconstitutional. The Court stated:

“It is now recognized as part of the rules of international law that the principle of legality is an integral part of the rule of law and as was appreciated by Nyamu J (as he then was) in Keroche Industries Ltd vs Kenya Revenue Authority & 5 others (2007) e KLR ‘one of the

ingredients of the rule of law is certainty of law.' Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and value recognized by our constitution..."

22. The High Court in that case equally stated that under the principle of legality, two key principles emerge:
 - a) No one should be punished under a law unless it is sufficiently clear and certain to enable him know what conduct is forbidden before he does it and;
 - b) No one should be punished for any act which was not clearly ascertainably punishable when the act was done.
23. The Petitioners submit that the provisions under section 26 of the Sexual Offences Act are vague, expressed in ambiguous language and do not state the scope or specify the acts and/or omissions that attract criminal sanctions. For instance, the *mens rea* requirement for the offence created therein is unclear. For an individual to be charged under section 26(1) of the Act, s/he ought to knowingly or deliberately transmit HIV or any 'life threatening' STI; which knowledge would be next to impossible to prove in a court of law. As has been stated in the expert affidavit of Dr. William Jaoko as deposed at paragraph 25 of his Affidavit sworn on 10th December 2018 (*See page 309 of the bundle*) determining which encounter actually led to HIV transmission between two people can be difficult. The seasoned medical practitioner, who also doubles up as the deputy director at the Kenya AIDS Vaccine Initiative, deposes that there is no medical test to definitively ascertain whether

transmission occurred during a particular incident or which person transmitted HIV to another.

24. Additionally, the words in the statute “...*does anything or permits the doing of anything*” used therein to denote the *actus reus* are equally ambiguous and would require the interpretation of a judge for an accused person to know exactly what action is outlawed by the section.
25. The wording “...*is likely to lead*” as used under section 26 (1)(b) is overly broad and ambiguous. It would be extremely difficult for an ordinary person to ascertain exactly what behavior the law considers ‘likely to lead’ to another person being infected. The 1st Petitioner is one of the victims of this ambiguity. As demonstrated in his evidence, he was he was arrested and charged under section 26(1) for biting a police officer’s thumb, yet this was a spontaneous reaction, done in self defence, and prompted by the inhuman manner in which the police officer handled him during the arrest.
26. The expert evidence demonstrates that there is no scientific proof that HIV may be transmitted through biting where the infected person’s saliva contains no, or a small quantity of blood. This much is ascertained by Dr Jaoko’s affidavit, wherein he explains that HIV is transmitted through exposure to ONLY certain bodily fluids i.e. blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids and breast milk. He also draws this Court’s attention Consensus Statement published by HIV experts (marked as annexure “**DRWJ-3**”) (*See pages 433 to 436 of the bundle*) where it was concluded that there is no possibility of HIV transmission through biting when the saliva of a PLHIV contains no or a small quantity of blood.⁶

⁶ See paragraph 18 of the affidavit of Dr Walter Jaoko.

27. The 1st Petitioner was however, after being subjected to a test without his consent, charged under section 26 (1) (b). (*See charge sheet annexed as “EM – 1” at pages 21 & 22 of the bundle*) and now faces up to 15 years in prison if convicted, yet there was little to no chance that his actions, which this court should note were unintentional and only occurred because of an unlawful invasion to his home, would lead to the infection of the police officer with HIV or any other life threatening sexually transmitted disease. The 1st Petitioner’s case is a demonstrate of the manner in which the ambiguity under the impugned section 26 is susceptible to abuse and arbitrary application against people living with or vulnerable to HIV.
28. In the same breath, the Petitioners contend that section 26 equally does not specify what is meant by the words “...*life threatening sexually transmitted disease*” thus making it impossible for ordinary citizens to know what exactly that section of the law frowns upon. The lack of clarity as to what constitutes a life threatening sexually transmitted disease, leaves too much room for violation of rights, and would require the interpretation of a judge to ascertain exactly what constitutes an offence under the Act.
29. The Petitioners submit that flowing from the evidence on record and the law, it is certain that section 26 of the Sexual Offences Act offends the principle of legality as it creates criminal sanctions and punishes individuals without being sufficiently clear on exactly what conduct is forbidden and what is ascertainably punishable therein. We pray that this Court finds and holds as such.

E. VIOLATION OF RIGHTS GUARANTEED UNDER THE CONSTITUTION OF KENYA, 2010.

30. The Petitioners submit that it is trite but necessary to state at the outset, that article 2 of the Constitution of Kenya 2010 establishes its supremacy over all other laws. Article 10(2) provides for the national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Article 259 requires that the Constitution be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of law and that contributes to good governance.
31. The Petitioners contend that section 26 of the Sexual Offences Act No.3 of 2006 as is, offends the national values provided for under article 10 of the constitution. It violates several human rights and fundamental freedoms guaranteed by the constitution as discussed herein below:

I. Right to dignity and freedom from cruel, inhuman and degrading treatment.

32. Article 28 of the Constitution of Kenya provides that every person has inherent dignity and the right to have that dignity respected and protected. This right is also provided for in Article 1 of the Universal Declaration of Human Rights (UDHR), Article 5 of the African Charter on Human and Peoples' Rights (ACPHR), Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), the Preamble of ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment. The ACHPR links the right to dignity to the right to freedom from cruel, inhuman and degrading treatment. Article 5 of the Charter states: “*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of their legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel inhuman or degrading punishment and treatment shall be prohibited.*”

33. This is in tandem with the provisions of Article 29 (f) of the Constitution of Kenya 2010 which provides that every person has the right to freedom and security of the person which includes the right not to be treated or punished in a cruel, inhuman or degrading manner.
34. The right to dignity is a means to the enjoyment of all other human rights and as stated in Article 19 of the Constitution, the reason for recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. This was restated in *A.N.N v Attorney General [2013] eKLR* where the court held that Article 28 of the Constitution “*makes it clear that the protection of the dignity of all human beings is at the core of the protection of human rights under the Constitution.*”
35. The right to dignity is capable of judicial enforcement. The High Court in *A.N.N v Attorney General (supra)* relied on the persuasive decision of the Constitutional Court of South Africa in *Barkhuizen v Napier [2007] ZACC 5*⁷ when it held that “*Self-autonomy, or the ability to regulate one’s own*

⁷ *Barkhuizen v Napier [2007] ZACC 5* available at <http://www.saflii.org/za/cases/ZACC/2007/5.html>.

*affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity", as well as the decision in **Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14***⁸ wherein the court held that "...the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity."

36. Relying on these two decisions, the High Court held that:

"Regardless of one's status or position, or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. Consequently, doing certain things or acts in relation to a human being, which have the effect of humiliating him or her, or subjecting him or her to ridicule is, in my view, a violation of the right to dignity protected under Article 28."

37. Similarly, the High Court of Kenya in **Kenya National Commission on Human Rights & Another vs Attorney General & 3 Others (2017) e KLR** elaborated further on the right to human dignity stating thus:

- a. *"The inherent dignity of all people is a core value recognized under the Constitution. It is a guaranteed right under Article 28 and it constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights. The rights to life and dignity are the most important of all human rights, and the source of all other personal rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. The importance of dignity as a founding value of our*

⁸ *Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14* available at <http://www.saflii.org/za/cases/ZACC/2013/14.html>.

constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.”

38. Section 26 of the Sexual Offences Act singles out persons living with and/or infected with HIV and permits the taking of samples of their blood, urine or tissue without their consent (*See section 26 (2) -(6) of the act*). It then proceeds to create an offence carrying a jail term of not less than 5 years should the accused persons refuse to give a sample (*See section 26 (8)*). The Petitioners contend that these provisions violate the right of PLHIV to dignity, as the forcible taking of their samples denies them the liberty to choose what is done to their bodies, and therefore degrades their intrinsic worth as human beings.
39. This infringes on their autonomy as they are denied the fundamental right to have a say on matters involving their own bodies. The 1st Petitioner for example, deposes at paragraph 12 of his Affidavit filed herein that he is a victim of this mandatory testing and annexes the medical report arising thereof. (*See annexure “EM -2” at page 33 of the bundle*) He avers that this process had a negative impact on his psychological well-being.
40. Similarly, it subjects each persons living with HIV to untold stigma and shame when they are charged under this section, despite the fact that they have taken measures to ensure that they are adhering to medication and are taking all appropriate measures to ensure that they do not transmit the virus. In the case of the 2nd Petitioner, she was stripped of her dignity when she was subjected to a kangaroo court – all intended to shame her into payment of money – and based on false allegations. Her personal information was published in the media, and she has stated that this caused her intense mental anguish and

suffering.⁹ In the case of the 3rd Petitioner, she was the victim of extensive gender based violence once she disclosed to her husband that she had tested positive for HIV, and whenever she would attempt to take treatment, or to encourage him to get tested, he would threaten her with reporting to the police that she had exposed him to HIV.

41. The Petitioners thus contend that the impugned section has in practice being used by the respondents in a manner that violated these petitioners' rights, and further, that its continued existence threatens the rights of persons like the 4th and 5th Petitioner with a violation of their right to dignity, as well as the violations of their right to be free from treatment that undermines their self-worth.

II. Freedom from discrimination

42. Article 27 of the Constitution of Kenya, 2010 prohibits discrimination on any ground. It states at the relevant sections that:

(4) the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5.) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

⁹ See the affidavit of the 2nd Petition at paragraphs 55-66.

43. The right to freedom from discrimination is also guaranteed under Articles 2, 3 and 26 of the ICCPR, Articles 2(e) and 12 of the CEDAW, Article 2 and 18 (3) of the ACHPR, and Article 2 of the Maputo Protocol.
44. In *Peter K. Waweru v Republic* [2006] eKLR this Court defined discrimination as:

“affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured. From the above authorities it emerges that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex creed etc. or due to unfair practice and without any objective and reasonable justification.”¹⁰

45. The Court went further to state that discrimination would include:

“distinction which whether intentional or not but based on grounds relating to personal characteristics of an individual or a group [which] has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of Society”.

¹⁰ *Peter K. Waweru v Republic* [2006] eKLR available at <http://kenyalaw.org/caselaw/cases/view/14988/>.

46. In Dijaje Makuto vs State Criminal Appeal No.31 of 1999 the Court of Appeal in Botswana observed that persons living with HIV constituted a group who had a right to be free from discrimination. The Court stated:

“An identifiable group or class of persons who suffer discrimination as such group or class for no other reason than the fact that their membership of the group or class, is entitled to challenge that law in court as invalid under the constitution...”

47. Moreover, it should be noted that women are affected more by the discrimination that is perpetuated by section 26 of the Act. As noted in the expert affidavit of Dr Walter Jaoko, HIV is more prevalent in women than in men, and it is young women who are most at risk of contracting HIV. While women are usually open to starting treatment for HIV, they face a wide array of social and economic challenges that make it difficult for them to access and adhere to treatment.¹¹
48. This expert evidence corroborates what is borne out in the 2nd, 3rd and 4th petitioners’ affidavits. These female petitioners have all been taking their medication and adhering to treatment. However, the 2nd Petitioner was falsely accused of breastfeeding her neighbours child. Because she is a woman living with HIV, and despite the fact that she has been adherent to treatment, this false accusation levelled against her made her vulnerable to violations of her human rights from her community and to eventually being charged under section 26 of the Act. Similarly, the 4th Petitioner, despite the fact that she is adherent to treatment and was able to take measures to ensure that she does not transmit the virus to her child, was in constant fear of being singled out for prosecution for exposing her child to the virus.

¹¹ See the affidavit of Dr Walter Jaoko at paras 18 and 19.

49. The 3rd petitioner's situation also clearly illustrates a pattern of discrimination. She was subjected to gender based violence by her husband once he learnt that she had tested positive for HIV. He would also not allow her to take her medication and instead threw it out. The CEDAW Committee ***CEDAW General Recommendation No. 19: Violence against women, 1992*** has stated that domestic and gender based violence amounts to discrimination, stating that:

*“the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”*¹²

50. The Petitioners submit the provisions under section 26 of the Sexual Offences Act are vague, overly broad and ambiguous. In the midst of this ambiguity, the purpose and effect of section 26 is to single out persons living with HIV by creating offences that criminalize many of the actions of persons living with HIV as an identifiable group or class of persons, thus discriminating against this group or class of persons solely on the basis of their health status contrary to the provisions of Article 27 (4) and (5) of the Constitution of Kenya 2010. It should be noted that the actions of persons living with HIV that are criminalized do not necessarily result in the transmission of HIV. Section 26 therefore only serves to further exacerbate the stigma and discrimination that persons living with HIV face. The Court in the **Law Society of Kenya** case (*See above*) cited the case of **Grayned vs City of**

¹² CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 6.

Rockford where the United States Supreme Court was categorical that a vague law impermissibly creates dangers of arbitrary and discriminatory application. The Petitioners submit that because of the vagueness of section 26, it automatically is considered discriminatory because of its application in relation to persons living with HIV.

III. The Right to fair trial

51. Article 49 (1)(d) of the Constitution of Kenya, 2010 guarantees the right of an arrested person not to be compelled to make any confession or admission that could be used in evidence against that person. Article 50(2) provides for the right to a fair trial which includes the right to be presumed innocent and the right to refuse to give self-incriminating evidence. Article 50(4) provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. The right to a fair trial, which includes the right not to be forced to incriminate one's self and the right to be presumed innocent until proven guilty find expression in Article 7 of the ACHPR and Article 14 of the ICCPR.
52. Section 26(2) of the Sexual Offences Act No.3 of 2006 allows for the mandatory testing for HIV (or other life threatening sexually transmitted disease) of a person charged under the Act. Section 26(10) of the Sexual Offences Act states that where a person is charged under the Act, then a result that reveals the presence of *HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be prima facie proof that the person concerned is infected with HIV; and if it is proved that a person was infected*

with HIV after committing an offence referred to in this Act, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when the offence was committed.

53. These provisions of section 26 of the Act have the effect of subjecting persons living with HIV to mandatory testing for HIV in order to establish their culpability when facing a charge under the Act. This violates the provisions under articles 49(1)(d), 50(2) and (4) of the Constitution of Kenya 2010 compelling an accused person living with HIV to provide evidence that would incriminate him or her in a manner that violates constitutional rights. Section 26 (10) then presumes the guilt of the arrested person once a positive test result is achieved, which violates the accused persons right to be presumed innocent contrary to the provisions of article 50(2) of the Constitution of Kenya 2010. Dr. Walter Jaoko, gives expert evidence at paragraph 25 of his Affidavit (*See page 309 of the bundle*) that determining which encounter led to HIV transmission and who transmitted HIV to whom can be difficult. There is no medical test to definitely ascertain whether transmission occurred during a particular incident or which specific person transmitted HIV to another. The presumption at section 26(10) hereinabove mentioned is therefore unfair, discriminatory and a clear infringement of the right to fair trial.
54. This Court can find useful guidance in **Wahome vs Republic (2005) eKLR** where the High Court overturned the conviction of a person accused of rape and transmission of a sexual infection, because the medical report could not clearly conclude whether the rape victim had contracted gonorrhea before or after the rape. This Court is urged to follow suit and find that the presumption under section 26 (10) (b) that an accused person found to have been infected with HIV after committing the offence referred to in the act, shall be presumed to have been infected at the time the offence was committed; unfair,

oppressive and in violation of the accused persons constitutional right to fair trial.

IV. Right to privacy.

55. Article 31 of the Constitution of Kenya 2010 provides that every person has a right to privacy, which includes the right not to have: -
- a) *Their person, home or property searched;*
 - b) *Their possessions seized;*
 - c) *Information relating to their family or private affairs unnecessarily required or revealed; or*
 - d) *The privacy of their communications infringed.*
56. The right to privacy is also provided for in Article 12 of the UDHR, Article 17 (1) of the ICCPR, and Article 14 of the ACPHR.
57. This right was further defined in **Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) e KLR** where the High Court stated thus:
- “The right to privacy consists essentially of the right to live one’s life with minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in false light, non-revelation of irrelevant and embarrassing facts, unauthorized publishing of private photographs, protection from disclosure of information...”*
58. The Petitioners submit that section 26 of the Sexual Offences Act mandates the taking of samples from the accused person, storage of these samples until the finalization of trial and testing of these samples. The nature of this

provision we submit, exposes information relating to a person's HIV status to third parties without any safeguards and/or provisions for confidentiality. Section 26 does not provide for protection with respect to disclosure of such information, which information we submit may expose an already marginalized group of PLHIV to further stigma and discrimination.

59. The 1st Petitioner for instance, recounts through his Affidavit sworn on 10th December 2018 (*See pages 16 to 20 of Petitioner's bundle*) he was arrested, subjected to HIV testing without his consent and further how he was arraigned in court, where he was shocked to hear details about his HIV status read out by the prosecutor in open court while charges were being preferred against him under section 26 of the Sexual Offences Act. He avers that such unwarranted disclosure of his status to the public exposed him to a lot of psychological torture and mental anguish. There was a similar violation by the respondents when the 2nd Petitioner's HIV status was publicized and later published, yet she had chosen to inform only a few trusted family members of her health information.
60. The Petitioners contend that the lack of protection of this kind of information against exposure to third parties infringes the rights of persons living with HIV not to have information relating to their private affairs unnecessarily revealed contrary to the provisions of Article 31(c) of the Constitution. We implore your lordship to find useful guidance in the case of **AIDS Law Project vs Attorney General & 3 others (2015) e KLR** where a three-judge bench of the High Court held that section 24 of the HIV and AIDS Prevention and Control Act No.14 of 2006 was in contravention of Article 31 of the Constitution, for requiring PLHIV to disclose their status to "sexual contacts" while failing to impose a corresponding duty to the recipients of such information to adhere to the confidentiality principle.

61. The Petitioners submit that with respect to protection of information about the health status of persons living with HIV from unwarranted dissemination to third parties, section 26 of the Sexual Offences Act is a facsimile of the impugned section 24 of the HIV and AIDS Prevention and Control Act; which this Honourable Court adjudged unconstitutional. We pray that in the premises, section 26 ought to suffer the same fate, and deservedly so.

V. Right to family

62. Article 45 of the Constitution of Kenya 2010 provides for the right to family. It states:
- (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.*
 - (2) Every adult has the right to marry the person of the opposite sex, based on the free consent of the parties.*
63. Section 26(1) of the Sexual Offences Act provides as follows:
- 26 (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know –*
- (d) will infect another person with HIV or any other life threatening sexually transmitted disease;*
 - (e) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;*
 - (f) will infect another person with any other sexually transmitted disease;*

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

64. The Petitioners submit that section 26(1) denies people living with HIV their constitutional right to family by purporting to criminalize consensual sexual activity on the sole basis of health status. The 4th Petitioner for instance, deposes in her Affidavit supporting this Petition (*See pages 60 to 65 of the Petitioner's bundle*) that she is in a serodiscordant relationship with the 5th Petitioner who is HIV negative, which relationship resulted in the birth of a healthy child who tested negative for HIV. The 4th Petitioner however, is apprehensive that despite her relationship with the 5th Petitioner being consensual, charges may possibly be brought against her under section 26 of the Sexual Offences Act just because she fell in love with and chose to get married to a partner who is HIV negative; unfairly exposing her to stringent and unjustifiable criminal sanctions.
65. The wording of section 26 (1) can be construed as limiting to the right of persons living with HIV to marry and start a family with any person of the opposite sex who is not infected with HIV, notwithstanding that these persons are in a consensual marriage and that there are scientifically proven methods that can be employed by such couples when they wish to start a family without necessarily transmitting HIV. To that extent, we urge the Court to find that section 26(1) contravenes the provisions under section 45 of the Constitution by purporting to deny discordant couples the right to start a family.
66. We submit that it is unfair and unconstitutional for Section 26 (1) of the Sexual Offences Act to ascribe criminal liability specifically in respect of consensual sero-discordant relationships as is the case with the 4th and 5th Petitioners

herein without any due regard to the steps taken to protect themselves and their child in order to enjoy their constitutional right to family and continuity of lineage. The 5th Petitioner deposes at paragraph 33 of his Affidavit (*See page 71 of the bundle*) that he loves the 4th Petitioner and choses to be with her in full awareness of her HIV status and further that he chooses to express this love to her through marriage and physical intimacy, a right fully protected under article 45 of the constitution. It is therefore unfair, unjust and unconstitutional for section 26 (1) to purport to criminalize physical intimacy in such a scenario. We implore your lordship to find and hold that the intention of the law cannot be to curtail and/or command the intentions of consenting adults, with little to no regard to their individual choices or preferences as to how they lead their own lives.

67. The 6th Petitioner equally deposes in her Affidavit (*See pages 76 to 82 of the bundle*) that she, being HIV positive has been married to her husband for more than seven years and that since she has faithfully adhered to treatment, her viral load is so low that her husband is not in any risk of infection. To buttress the 6th Petitioner's deposition, we refer to the expert evidence of Dr. Walter Joko at paragraph 21 of his Affidavit sworn on 10th December 2018 where the medical practitioner affirms that a low or undetected viral load, as achieved by treatment renders the risk of transmission negligible or non-existent.
68. In the circumstances, it is clear that section 26 of the Sexual Offences Act fails to consider the scientific gains made in the fight against HIV where there are treatments that suppress the viral load of an infected person to the extent of rendering the chances of transmission to be extremely low or all together nonexistent. We therefore urge the Court to be guided in its determination by the Joint United Nations Programme on HIV/AIDS (UNAIDS) Guidance Note: *Ending Overly broad criminalization of HIV non-disclosure, exposure*

and transmission: critical scientific, medical and legal considerations (2013) (Marked as **Annexure AR-6** in the 7th Petitioners Affidavit). In this document, the UNAIDS notes that PLHIV are able to work, study, marry, give birth and raise children and that where treatment is adhered to; HIV infection no longer necessarily results in pre mature death.

69. Given this medical reality, the singling out of PLHIV for criminalization fuels the sense that this marginalized group have something to be ashamed of and gives license to others to stigmatize and discriminate against them. In the Guidance Note, *see page 197 of the bundle*) it is advised that any criminal law response to HIV should:
- appropriately reflect the best and latest available scientific and medical knowledge relating to HIV.
 - Treat HIV proportionally to similar harms and risks – not singling out HIV for harsh treatment; and
 - Require generally applicable criminal law principles and elements in support of any prosecution and guilty verdict.
70. We urge the Court to take judicial notice of the abovementioned guidance note and to find and hold that to the extent that section 26 of the Sexual Offences Act fails to consider the latest available scientific and medical knowledge relating to HIV, it violates the constitutional right to family for persons living contrary to the provisions of article 45 of the Constitution.

F. LIMITATION OF CONSTITUTIONAL RIGHTS BY SECTION 26 OF THE SEXUAL OFFENCES ACT NO.3 OF 2006.

71. Article 24 of the Constitution of Kenya 2010 clearly outlines when the limitation of a constitutional right is justifiable. It states in relevant parts:

(1) A right or fundamental freedom in the bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- a) The nature of the right and fundamental freedom;*
- b) The importance of the purpose of limitation;*
- c) The nature and extent of limitation;*
- d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;*
- e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

...

(2) The state or a person seeking to justify a particular limitation shall demonstrate to the Court, tribunal or other authority that the requirements of this article have been satisfied.

72. In **AIDS Law Project vs Attorney General & 3 others (2015) e KLR** the High Court favourably cited the case of **R vs Demers** where the Canadian Supreme Court adopted the view that if the state in pursuing a legitimate objective uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The three-judge bench of the High Court further noted that when determining whether a limitation is justifiable, international and universal standards should be taken into account. The Court held:

“84. Therefore, for a limitation to be justified it must satisfy the criteria that it is “is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. In dealing with these standards, the Supreme Court of Uganda while dealing with a similar provision in Obbo and Another vs. Attorney General [2004] 1 EA 265 expressed itself as follows:

“It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons: -

(i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples.

(ii). Secondly, the preamble to the Constitution recalls the history of Uganda as characterized by political and constitutional instability: recognises the people’s struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be

binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so."

85. It is therefore imperative for the Court to take into account the international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy as well as decisions by Courts in jurisdictions with similar legal systems in determining what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

73. The Petitioners submit that they have demonstrated through these submissions and the Affidavit evidence on record, that the provisions of section 26 of the Sexual Offences Act limits several of their constitutional rights and fundamental freedoms. The Petitioners have submitted on the limitation of the rights of persons living with HIV to inter alia Dignity and freedom from torture, cruel, inhuman or degrading treatment, fair trial, privacy etc. At the outset, it occurs that section 26 of the Sexual Offences Act purports to limit some of the rights and fundamental freedoms which the Constitution at article 25 expressly precludes from any form of limitation. Article 25 provides as follows:

"Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited: -

- (a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;*
- (b) Freedom from slavery or servitude;*
- (c) The right to fair trial; and*
- (d) The right to an order of habeas corpus"*

74. The Petitioners contend that as demonstrated in these submissions, the purported limitation of the rights of PLHIV as an identifiable group, to fair trial and against freedom from torture, cruel and inhuman treatment by the impugned section 26 contravenes the express provisions of article 25 of the constitution and thus should be adjudged unconstitutional. We implore your lordship in reaching this finding, to be guided by article 2 (4) of the Constitution of Kenya 2010 which is categorically clear that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.
75. Be that as it may, the Petitioners also submit that although there is no clearly outlined purpose for Section 26 provided in the Act; it is possible to surmise that it was enacted for public health purposes specifically to reduce HIV transmission and to punish deliberate transmission of HIV by imposing criminal penalties.
76. Even if it could be argued that the limitation of the rights outlined above is necessary for public health purposes, section 26 is drafted in a manner that allows for the arbitrary use of means which are broader than is necessary to accomplish that objective. As established by the Canadian Supreme Court in **R vs Demers**, a case favourably cited by this Court in **AIDS Law Project vs Attorney General & 3 others (2015) e KLR**, the use of means which are broader than necessary often leads to the violation of the principles of fundamental justice and that in doing so, an individual's rights will have been limited for no reason. Section 26 of the Sexual Offences Act as demonstrated in the course of these submissions, criminalizes a number of situations that do not necessarily result in public benefit. For instance, it criminalizes

consensual unprotected sex between discordant couples, notwithstanding that the partners therein have consented to be with each other, and/or that there exists treatments that can render a PLHIV's viral load to be so low that they cannot transmit HIV to their partner. We submit that the lack of consideration of such salient scientific developments in the field of HIV denies such couples their right to family and continuity of lineage as accorded by article 45 of the Constitution. This particular limitation is not reasonable and cannot be justifiable in an open and democratic society based on human dignity, equality and freedom.

G. THE APPROPRIATE REMEDY

77. Persons living with HIV continue to be vulnerable, due to the high level of stigma associated with HIV as well as socio-economic factors which predispose them to further marginalization and discrimination in society. This Court has a duty under the Constitution to ensure the protection of marginalised groups. As affirmed by the expert testimony, and the evidence attached to their respective affidavits, there is no positive impact of laws specifically criminalizing the transmission and exposure of HIV. There is no evidence that such laws deter individuals from conduct that poses risk of HIV transmission and/or increases the likelihood of persons living with HIV disclosing their HIV status to their potential sexual partners. This is particularly true where such laws are broad and vague, leaving potential offenders unaware of what specifically is criminalized.
78. In granting remedies to determine the constitutionality of statute or the violation of rights, the Court is guided by Article 23(3) in determining what

remedies to be granted to a party whose rights and fundamental freedoms have been threatened, infringed, denied or violated. This Court has wide discretion to grant relief in claims of constitutional violations, and the prayers by the petitioners herein are well within the provisions of Article 2(4) and Article 23(3) of the Constitution.

79. The Petitioners seek declaratory orders in prayers (a) and (b) and in prayer (c) they urge the court not to award costs to any of the parties as it's a matter of public interest. The prayers are listed below for ease of reference:

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

80. On the basis of the evidence outlined above, we submit that the petitioners have proved the requirements within the evidentiary thresholds necessary for the grant of the declaratory orders and have proved on a balance of probabilities, that the enforcement of the impugned section violates their rights, as well as continues to threaten the rights of other persons living with HIV.

81. My Lord with regard to prayer (c) we submit that given this Petition is brought in the public interest, each party should bear their own costs. We are guided by *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR*¹³ where the Supreme Court held that:

“Just as in the Presidential election case, Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making. The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs.”

82. With regard to Prayer (d) we urge the court to use the discretion granted to it by Article 23(3) which uses the term ‘including’ when listing the six possible remedies that the court can grant. As such this My Lord you have wide discretion in granting relief in claims of constitutional violations, and we pray that you exercise it.
83. We therefore pray that in light of the facts borne out in the petition and the supporting affidavits, as well as the law analysed herein above, that this Court allows the Petition dated 10th December 2018 as prayed, and declares section 26 of the Sexual Offences Act No.3 of 2006 unconstitutional and struck from the statute.
84. We humbly submit.

DATED at NAIROBI this

10th

day of

December

2021.

¹³ *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR* available at <http://kenyalaw.org/caselaw/cases/view/95668/>.



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