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# COMMUNIQUE

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## KELIN v County Government of Kilifi and the County Assembly of Kilifi Petition E002 of 2022

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### INTRODUCTION

On 23<sup>rd</sup> March, 2022 KELIN filed a Petition against the County Government of Kilifi and the County Assembly of Kilifi, challenging the constitutionality of the Kilifi County Maternal, Newborn and Child Health Act due to procedural and substantive elements.

The Act was enacted on 6 July 2016, without undertaking meaningful public participation within the County, as required under the Constitution of Kenya (2010) as well as the County Government Act and Health Act. Moreover, the Act contains provisions that unjustifiably limit the rights and fundamental freedoms of women and girls in Kilifi County.

### WHAT IS THE CASE ABOUT?

The first reading of the Bill took place on 16<sup>th</sup> May 2016, before the Kilifi County Assembly. Subsequently, through an undated notice, the county undertook a public participation exercise that was then said to have been undertaken on diverse dates between 2<sup>nd</sup> June and 10<sup>th</sup> June 2016 in Malindi Nidhama Hall; Ganze at Ganze Secondary School; Kilifi North at Juwaba; Kaloleni at Kaloleni Women Hall; Kilifi South at Makio; Rabai at Rabai Women Hall; and Magharini at the Cultural Center.

On 12<sup>th</sup> July, 2016, the Bill was deliberated on by the Kilifi County Assembly. It was then scheduled for a second reading on 21<sup>th</sup> July 2016. The Act however came into operation on 6<sup>th</sup> July 2016 before it was passed by the County Assembly, and was gazetted on 12<sup>th</sup> July 2016.

### The events prior to passing of the Act as well as some of the provisions of the Act resulted in various violations of the Constitution

- a. **Lack of meaningful public participation:** Kilifi has a total of 7 sub-counties and thirty-five county assembly wards. Due to the vastness of the sub-counties, a substantial amount of the residents of Kilifi are based at the ward levels hence many do not have easy access to the sub-counties, where the public participation forums were held. The public participation sessions were not available and accessible to all inhabitants of Kilifi County. Further, the attendants were not given copies of the Petition prior to attending the session, and there were no translation/interpretation services provided. **The call for public participation was not disseminated publicly to ensure representation of all interested parties.** This is contrary to Article 10, 174 (c), 196 (1) (a) of the Constitution of Kenya provide that all state actors must provide meaningful public participation at the county level; as read together with the County Government Act;
- b. **Violation of the right to the highest attainable standard of health:** Section 7 of the impugned Act limits instances where termination of pregnancy may occur to emergency cases only, acting contrary to Article 43 (1) (a) as read together with Article 26 (4) of the Constitution of Kenya. The Act thereby fails to recognize that women and girls can access abortions where the health of the mother is in danger and by dint of any other written law. The Petition further notes that the limitation is not justifiable as it does not meet the threshold of Article 24 of the Constitution of Kenya.

- c. Violation of rights of children:** Section 22(1) (b) (i) of the Act allows for testing a child for HIV without the consent of a parent, guardian, or the child to determine whether a health care worker may have contracted HIV while treating the child. The absence of consent violates the child's right to privacy under Article 31 of the Constitution of Kenya, the best interest of the child as provided under Article 53 of the Constitution of Kenya and it fails to protect the child from abuse and inhumane treatment as protected under Article 29 of the Constitution of Kenya.

## **WHO IS INVOLVED?**

There is only one Petitioner, KELIN, which is a non-profit organization that works for access to justice and the promotion of health-related human rights in Kenya. The Petitioner brought this case in the interest of the public.

There are 2 Respondents, the 1st Respondent is the County Government of Kilifi, established under Article 176(1) of the Constitution and the County Governments Act No. 17 of 2012, while the 2nd Respondent is the County Assembly of Kilifi, established under Article 177 of the Constitution and section 7 of the County Governments Act.

The case further has one Interested party, Katiba Institute, a constitutional research, policy and litigation institute established to further the implementation of the Constitution of Kenya, 2010.

## **WHAT DOES THE PETITIONER WANT FROM THE COURT?**

The Petitioners seek the following reliefs from the Court:

- a. A declaration that the Kilifi Maternal, Newborn and Child Health Act is unconstitutional as it was passed without meaningful public participation contrary to Articles 10, 174(c), 196(1) of the Constitution as read with Section 10 and 87 of the County Governments Act, and Section 10 of the Health Act.
- b. A declaration that section 7(1) of the Kilifi Maternal, Newborn and Child Health Act is unconstitutional to the extent that it unjustifiably limits the right to health and the right to access reproductive health care including abortion as provided for under Articles 43(1)(a) and 26(4) of the Constitution.
- c. A declaration that Section 22(1)(b)(i) of the Kilifi Maternal, Newborn and Child Health Act is unconstitutional for violating the rights of children under Article 28, 29, 31, 43(1)(a) and Article 53(1)(d) and (2) of the Constitution as read with Section 14(1)(b) of the HIV Prevention and Control Act and section 9 of the Health Act to the extent that it allows testing of children for HIV without informed consent.
- d. A declaration that the provisions of Section 22(1)(b)(i) of the Kilifi Maternal, Newborn and Child Health Act is unconstitutional as it violates the right to privacy enshrined in Article 31(c) of the Constitution as read with Sections 8 and 9 of the Health Act and to the extent of that inconsistency is unconstitutional, null and void.