

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 606 OF 2014

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
19,20,21,25,27,28,29,31,33,35,43,45 AND 46 OF THE CONSTITUTION OF KENYA
(2010)
BETWEEN**

L.A.W.....1ST PETITIONER

**KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV & AIDS (KELIN)2ND PETITIONER**

AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM)3RD PETITIONER

AND

MARURA MATERNITY & NURSING HOME.....1ST RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER
IN CHARGE OF HEALTH SERVICES – NAIROBI COUNTY.....2ND RESPONDENT**

**CABINET SECRETARY, MINISTRY OF HEALTH.....3RD RESPONDENT
THE HON. ATTORNEY GENERAL.....4TH RESPONDENT**

AND

**THE SECRETARIAT OF THE JOINT UNITED NATIONS
PROGRAMME ON HIV/AIDS (UNAIDS Secretariat)1ST AMICUS CURIAE
PROFESSOR ALICIA ELY YAMIN2ND AMICUS CURIAE
NATIONAL GENDER AND EQUALITY
COMMISSION (NGEC)3RD AMICUS CURIAE
THE INTERNATIONAL COMMUNITY OF WOMEN
LIVING WITH HIV(ICW).....INTERESTED PARTY**

FURTHER SUPPLEMENTARY SUBMISSIONS OF THE PETITIONERS
(filed pursuant to leave granted by this Honourable Court on 19th July 2021)

1. These submissions are filed in response to the 1st Respondent's submissions dated 14th June 2021, the 2nd Respondent's submissions dated 16th July 2021 and the Interested Party's submissions dated 7th July 2021.

Submissions in Response to the 1st Respondents submissions

2. The petitioners reiterate that the bilateral tubal ligation conducted by the 1st Respondent on the 1st Petitioner was done without her knowledge or understanding of the procedure. The 1st Petitioner was forcefully sterilized without her informed consent and in violation of her constitutional and human rights. In particular:
 - a. The petitioner denies that she ever attended the 1st Respondent on 10th September 2006, and continues to deny that the signature contained on the purported document titled 'consent for operation' evinced by the 1st respondent belongs to her.¹ We further note the various contradictions that arose from this consent form which we have highlighted in our supplementary submissions.²
 - b. We further submit that even if the signature on the purported consent form belonged to the 1st Petitioner, which is denied, the mere signing of forms does not of itself signify that there was informed consent. It is apparent in this matter that the 1st Petitioner did not understand what procedure had been done when she went to give birth. This Court will recall that the 1st Petitioner is a woman of low socio-economic status and limited means. That is what led her to seek subsidized services at

¹ We reiterate our submissions at paragraph 52 of our Supplementary submissions.

² As above.

the Kariobangi Health Centre. As a woman living with HIV, she followed the advice of medical personnel that she trusted to undergo a caesarian section to deliver her baby so as to reduce the chances of the child contracting the virus. We reiterate that the 1st Petitioner did not expect to undergo a permanent form of family planning; she was never informed and never consented to a bilateral tubal ligation. The 1st Respondent, by its own admission, did not counsel her on the available options, and instead forcefully sterilized her, and did not bother to tell her what procedure she had undergone.

3. An analysis of these facts demonstrates that the 1st Respondent carried out the bilateral tubal ligation on the 1st Petitioner without her consent or knowledge.³
4. The 1st Respondent has attempted to absolve itself of responsibility by admitting that it did not procure informed consent from the 1st Respondent, but stating that the 1st Petitioner had given consent to other third parties at the Kariobangi Health Center, and that it's role was simply that of an 'implementing provider'.
5. Even by the standards set out by the 1st Respondent in its submissions and relying on the article by Mr Richard Wagner⁴, a medical provider has a duty to ***'disclose information on the treatment, test or procedure in question, including the expected benefits and risks, and the likelihood (or probability) that the benefits and risks will occur'***, and ***'[the patient] must comprehend the relevant information, and must grant consent, without coercion or duress.'***
6. We have demonstrated that the 1st Respondent, in complete disregard to the 1st Petitioner's right to know and in violation of her rights and its

³ See the Petitioners' Supplementary submissions at paras 50-66.

⁴ Accessed on 18th June 2021, four days after the filing of its submissions.

responsibilities, did not take any measures to give the 1st Petitioner information about the bilateral tubal ligation.⁵ Moreover, despite being asked to provide information to the 1st Petitioner about the procedures that she underwent, the 1st Respondent completely ignored her, in violation of her constitutional right to access information and to respect her privacy.⁶

7. It is noted that the 1st Respondent has agreed with the various submissions made by the Petitioners in relation to the constitutional rights and freedoms that rightly the 1st Petitioner should enjoy. We reiterate that by sterilizing her without her consent, the 1st respondent violated the various constitutional rights of the 1st Petitioner. These constitutional rights also find expression in various treaties and covenants which form part of our law by virtue of Article 2(5) and 2(6) of the Constitution of Kenya, 2010.
8. The 1st Respondent alleges that there were parties to be called who would have given evidence to support the 1st Petitioner's account of what transpired. These include the doctors who screened the 1st Petitioner at the medical camp in 2010 (when she was first informed that she had undergone a bilateral tubal ligation) and the medical personnel at Kariobangi Health Centre who directed her to go to the 1st Respondent facility to deliver her child. Section 143 of the Evidence Act provides that "**No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.**" In this regard, the 1st Petitioner's evidence was sufficient to demonstrate that she was forcefully sterilized. The 1st Respondent does not dispute having performed the procedure on the 1st Petitioner and has failed to demonstrate that it has any procedures that it went through to procure

⁵ See paragraphs 21-23 of the Petitioners' Supplementary Submissions.

⁶ See Petitioners' Supplementary Submissions at paragraph 95-100.

informed consent from the 1st Petitioner before subjecting her to bilateral tubal ligation.

9. In any event, any further witnesses would only have been called to prove that the 1st Petitioner had in fact been sterilized, a fact that was amply demonstrated by the uncontested evidence of Dr Khisa Weston. The medical report by Dr Khisa showed that the 1st Petitioner had been sterilized, and simply confirmed the evidence of the 1st Respondent's witness that they did in fact subject her to a bilateral tubal ligation.
10. We note the 1st respondent's erroneous submission that the 1st Petitioner's rights have not been violated because she is alive and on antiretroviral therapy. We reiterate our submissions that as a result of the forced sterilization by the 1st respondent, the 1st Petitioner's quality of life has been negatively impacted since she has been prevented from having a fulfilling life because she has been prevented from having access to conditions that guarantee a dignified existence. In addition, she continues to suffer severe mental health challenges due the effects of sterilization on her life. The Human Rights Council, interpreting the right to life as contained in the International Covenant on Civil and Political Rights, in General Comment No. 36 on the Right to Life has stated that:

2. ... The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental rights, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.

3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.

11. In the same vein, we ask that the Court interpret the right to life holistically and to consider the effect that the forced sterilization of the 1st Petitioner had on her dignity, her health and her quality of life.
12. We further submit that the only reason that the 1st Petitioner was subjected to forced sterilization was because she was living with HIV. While we agree with the definition of discrimination, we point out that the petitioner was treated as she was due to her health status. As the 3rd petitioner's report *Robbed of Choice* demonstrates, forced sterilization of women living with HIV was commonplace,⁷ and these women were deliberately subjected to forced and coerced sterilization only because they were living with HIV, and on the basis of incorrect information that they ought not to bear any more children due to their HIV status. The findings in this report have not been rebutted, or even addressed in any way by any of the respondents.
13. We ask this Court to consider the intersecting circumstances of these women and the 1st Petitioner – a woman living with HIV and of limited socio-economic means - who did not know that she had even been sterilized until July 2010, when she attempted to have another baby. Her health status, social circumstances and lack of knowledge only goes to show the vulnerable circumstances that the 1st Petitioner continues to face, and how facilities such as the 1st respondent control how such vulnerable women receive care.⁸ These

⁷ See Petitioners' supplementary submissions at paras 119-121.

⁸ For the discussion on the intersection on the discrimination and stigma that women living with HIV face in access of reproductive health services please see paras 121 -123 of the Petitioners' Supplementary Submissions.

circumstances are unique to women like her, and to demand a comparator in order to prove discrimination would result in a miscarriage of justice.⁹ A similar approach was taken in *Carole Louise Webb v. EMO Air Cargo (UK) Ltd., United Kingdom, European Court of Justice, 1994*¹⁰ where the European Court of Justice held that the dismissal of a woman on the grounds of pregnancy was automatically direct discrimination and there was no need to establish if men were treated in a similar way because men could not find themselves in such situations. We submit that in this case that as a woman living with HIV, the 1st Petitioner was singled out due to her health status and her vulnerability, and the misconceived idea that she ought not to give birth to more children.

14. It will be noted that until the filing of the replying affidavit of the 1st respondent, the 1st Petitioner was never provided information about the procedures that were undertaken on her. The 1st respondent therefore continues to violate the right of the 1st Petitioner to access her health information.

Submissions in reply to the 2nd, 3rd and 4th Respondents Submissions

15. My Lord, the 2nd Respondent claims that the 1st Petitioner ought to have made a complaint to the Kenya Medical Practitioners and Dentist Board. My Lord, we submit that the failure to make such a report is not a legal requirement in

⁹ As an analogy, we refer to the discussion on the ways in which discrimination manifests and how it affects women differently in Crenshaw, Kimberle () "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," University of Chicago Legal Forum: Vol. 1989: Iss. 1, Article 8. Available at: <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>.

¹⁰ Carole Louise Webb v. EMO Air Cargo (UK) Ltd., United Kingdom, European Court of Justice, 1994 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0032&from=EN>.

the law, and this aspersion has no basis in law or practice. In any event, such a claim would not take away the fact that the 1st Petitioner had no information about any administrative measures that could be taken to initiate a complaint. As Sophia Wanjiku did testify that there were measures for patients to complain, in the form of suggestion boxes, these were never communicated to the 1st Petitioner. There was therefore no way for the 1st Petitioner to know what, if any administrative measures she could pursue to seek redress once she found out about her forced sterilization.

16. We submit further that even if the various policies that have been outlined by the 2nd Respondent, these policies do not speak to the lived reality that the 1st Petitioner experienced. Moreover, it is apparent from the actions of the 1st Respondent that these policies are not appropriately enforced by the 2nd and 3rd respondents. We submit that these guidelines in so far as they exist need to be remedied to address the situation of women situated in the same position as the 1st Petitioner. Moreover, they must be capable of implementation, which is the role of the 2nd and 3rd Respondents.
17. The need to review and revise existing laws and policy to eliminate discrimination against women was addressed by the Inter-American Commission on Human Rights in the case of *Maria Mamerita Mestanza Chávez v. Peru*¹¹ which dealt with forced sterilization, the state admitted that it had an obligation to review, and did pledge to review and change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women's autonomy.¹²

¹¹ María Mamérita Mestanza Chavez v. Peru, Case 12.191, Report No. 66/00, OEA/Ser.L/V/II.111 Doc. 20 rev. at 350 (2000) available at <http://www.cidh.oas.org/annualrep/2003eng/peru.12191.htm>.

¹² As above, Friendly settlement Para 14 (Changes in Laws and Public Policies On Reproductive Health and Family Planning).

18. Having found that there is evidence of forced sterilization, we ask this court to consider the violations to the 1st Petitioners' constitutional rights, and the fact that those violations have been caused in part by the failure of the state to perform its obligations to protect women living with HIV as they access reproductive health services. We reiterate that the forced sterilization by itself is enough for this court to find that her rights have been violated. It is not enough, as the 2nd Respondent would have this court do, to consider that her rights were not violated because the procedure is reversible.

Submissions in Response to the Interested Party's and Amici Curiae Submissions

19. None of the respondents have responded to the submissions by the Interested Party or the Amici Curiae.
20. The Interested Party's submissions corroborate the lived experiences of women living with HIV and show that this is a common practice. We submit that these submissions demonstrate that there is a pattern of subjecting women living with HIV to forced and coerced sterilization.
21. We ask that this Court be guided by submissions of the 1st and 3rd amici curiae which provide important information to this Court on the negative impact of the forced and coerced sterilization on public health outcomes and the response to HIV. The 1st Amicus Curiae has noted that involuntary sterilization compromises public health and HIV responses because it *'targets women often from the most vulnerable communities and populations'* and that *'forced sterilization ... is a misguided and ineffective response that*

*cannot be justified in the context of efforts to end mother to child transmission.*¹³

22. The 2nd amicus curiae has highlighted that the forced sterilization of women living with HIV is inherently discriminatory, it only targets women and is done as a result of harmful stereotypes about women. The 2nd Amicus curiae and has outlined a three step approach this Court can apply. We submit that using this approach outlined by the 2nd amicus curiae, this court can articulate the stereotypes that underlie the sterilization of women living with HIV such as the 1st Petitioner, it can determine if forced sterilization affect the rights of the 1st Petitioner and finally it can make orders that serve to promote rights and empower the 1st Petitioner and other similarly situated women.¹⁴
23. The 3rd amicus curiae has provided information demonstrating that forced sterilization is a discriminatory act of sexual and gender based violence and which constitutes cruel, inhuman and degrading treatment or torture. It has also provided information on the obligations of the Kenyan government to act with due diligence to eliminate forced and sterilization. These obligations include ensuring access to information on reproductive health and rights, legislation punishing forced sterilization, support and oversight of healthcare providers, and training of medical personnel. The state is also required to put in place measures to deter the practice of forced sterilization. As noted by the 3rd amicus curiae, and as we have Kenya is required to enact laws and regulations necessary to deter and sanction forced sterilization, to monitor and supervise the provision of health care, to investigate and prosecute those responsible for forced sterilization and to ensure that victims have access to judicial protection and are adequately compensated.

¹³ Page 17 of the 1st Amicus Curiae's Submissions.

¹⁴ Page 20 of the 2nd Amicus Curiae's Submissions.

24. We submit that these measures would be appropriately addressed in the remedies that we have sought in the amended petition. On the question of compensation for the 1st Petitioner, it will be noted that the Supreme Court of Kenya in *William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR*¹⁵ has stated that “*Quantification of damages in [questions of constitutional violations] does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play.*” Such considerations were also taken into account in *Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR* wherein the Court noted that the Petitioners had suffered both psychological and physical harm which could not be remedied. It stated that “*No amount of money can adequately compensate such suffering. However, considering the nature of the violations of their constitutional rights, the psychological and physical suffering visited on each one of them, and considering the above legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, I find that the petitioners are entitled to compensation.*” In this case, the court awarded the petitioners the sum of Kshs 20,000,000.00. We urge that this Court be similarly guided and award the sum of Kshs 30,000,000.00 to the 1st Petitioner in compensation for her physical and psychological suffering which continues to date.
25. In addition, these remedies would be in keeping with Kenya’s obligations as outlined in the *Political Declaration on HIV and AIDS: Ending Inequalities and Getting on Track to End AIDS by 2030*¹⁶ a Resolution adopted by the

¹⁵ William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR available at <http://kenyalaw.org/caselaw/cases/view/216115/>.

¹⁶ Political Declaration on HIV and AIDS: Ending Inequalities and Getting on Track to End AIDS by 2030 (A/RES/75/284) available at <https://undocs.org/A/RES/75/284>.

General Assembly on 8 June 2021 and supported by Kenya wherein it committed to

“...[Eliminate] all forms of sexual and gender-based violence, ..., by adopting and enforcing laws, changing harmful gender stereotypes and negative social norms, perceptions and practices, and providing tailored services that address multiple and intersecting forms of discrimination and violence faced by women living with, at risk of and affected by HIV.”

26. In sum, we reiterate the assertions made in the amended petition as well as our submissions and the supplementary submissions, and urge this court to allow the amended petition as prayed.

These are our humble submissions.

DATED AT NAIROBI THIS 15TH DAY OF OCTOBER 2021



**ALLAN ACHESA MALECHE and NYOKABI NJOGU
ADVOCATES FOR THE PETITIONERS**

DRAWN & FILED BY:-

Allan Achesa Maleche (Practice No: LSK/2021/02706)

& Nyokabi Njogu (Practice No: LSK/2021/02707)

C/O KELIN

Karen C, Kuwinda Lane, Off Langata Road.

P O Box 112 - 00202 KNH

NAIROBI

+254 708 389 870

amaleche@kelinkenya.org

TO BE SERVED UPON

Ojienda & Co. Advocates

View Park Towers, 2nd Floor

Uhuru Highway
P.O. Box 17245-00100
NAIROBI

Kithi & Co Advocates
Maendeleo Hse, 4th Floor
Monrovia Street/ Utalii Lane
NAIROBI

The Hon. Attorney General
State Law Office
Sheria House
Harambee Avenue
P.O. Box 40112
NAIROBI

Nungo, Oduor & Waigwa Advocates
Maisonette No. 1, Court 30
Mombasa Road, Off Bunyala Road
P.O. Box 70678-00400
NAIROBI.

Rachier & Amollo Advocates
Mayfair Centre, 5th Floor
Ralph Bunche Road
P.O. Box 55645-00200
NAIROBI

Sylvester Mbithi
National Gender & Equality Commission
Solutions Tech Place
1st Floor, Longonot Road,
NAIROBI

Jackson Awele Advocates LLP
Chaka Place, 2nd Floor,
Argwings Kodhek Rd, Hurlingham
P.O Box 22701, 00100
NAIROBI