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 YAMIN …….2ND AMICUS CURIAE

NATIONAL GENDER
AND EQUALITY COMMISSION (NGEC) …….3RD AMICUS CURIAE
AND

THE INTERNATIONAL COMMUNITY
OF WOMEN LIVING WITH HIV(ICW)…….....INTERESTED PARTY

PETITIONERS' SUPPLEMENTARY SUBMISSIONS

INTRODUCTION

1. These supplementary submissions relate to the amended petition, dated 10th September 2015, which challenges the forceful, unconstitutional and unlawful sterilization of the 1st Petitioner herein. The 1st petitioner is supported by the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) as the 2nd petitioner and the African Gender and Media Initiative Trust (GEM) as the 3rd petitioner.

2. The petitioners have filed the Amended Petition, amended on 10 September 2014 challenging the unlawful, forced and coerced sterilization of the 1st petitioner, a woman living with HIV, through a procedure known as Bilateral Tubal Litigation (BTL) without her knowledge or informed consent. Sterilization is a process that renders an individual incapable of bearing children. Forced sterilization occurs in instances where: a person has expressly refused the procedure; it is done without their knowledge; or where a person is not given an opportunity to provide consent to the procedure.

3. LAW, the 1st Petitioner herein, was forcefully and unlawfully sterilized by staff at the Marura Nursing Home, the 1st respondent herein. This unlawful and unconstitutional sterilization occurred in 2006, at a time when there was very high stigma associated with HIV, and information available on prevention of transmission of HIV from mother to child was highly fragmented and sparse.

4. The 1st respondent is a private health facility situate in Baba Dogo area of Nairobi County.

5. The 2nd respondent is the County Executive Committee Member in charge of Health Services in Nairobi County. He is sued as the person responsible for policy formulation and leadership on county health facilities, including services such as those provided by the 1st respondent.

6. The national government through the Minister of Health is sued as the state organ responsible for formulating health policies, a role that it continues to play as stipulated under the Fourth Schedule to the Constitution of Kenya, 2010, while the Attorney General was sued in his capacity as the legal representative and advisor to government.

7. The Interested Party is the International Community of Women Living with HIV, while the Secretariat of the United Nations Programme on HIV and AIDS (UNAIDS) is the 1st amicus curiae. These parties were joined to these proceedings on 29th July 2015.

8. Professor Alicia Ely Yamin is the 2nd amicus curiae; she was joined to these proceedings on 28th January 2016, while the National Gender and Equality

Commission, the 3rd amicus curiae, was joined to the proceedings on 8th February 2016.

9. In the Amended Petition, the petitioners allege that the manner in which the bilateral tubal ligation procedure was conducted was in violation of the 1st petitioners' fundamental rights and freedoms as stipulated under Articles 26, 27, 28, 29, 31, 33, 35, 43(1)(a), 45 and 46 of the Constitution of Kenya, 2010.

10. These submissions are supplementary to the Petitioners' submissions filed in this court on the 18th July 2016. In those submissions, as well as these supplementary submissions, the petitioners rely on the following pleadings and evidence in support of their petition:

a) Amended petition dated 10th September 2015.
b) Affidavit of LAW dated 10th September 2015 and annexures:
    i) Kadi Ya Jamii (which was presented to the 1st respondent).
    ii) Request for hospital and medical records.
    iii) Medical report by Dr Khisa Weston.
    iv) Psychological and psychiatric evaluation of LAW by Dr. David Bukusi and Elizabeth Khaemba.
c) Affidavit of Allan Maleche in support of the amended petition dated 10th September 2015.
d) Affidavit of Gladys Kiio dated 10th September 2015 and annexures:
    i) Report entitled Robbed of Choice: Forced and Coerced sterilization experiences of women living with HIV in Kenya.
e) Replying affidavit of LAW sworn on 18th July 2016.
f) Further affidavit of Allan Maleche sworn on 18th July 2016.

g) Petitioners' statement of agreed issues for determination filed on 8th December 2017.

h) List of documents and authorities filed on 10th December 2014.

i) Petitioners' Written Submissions filed on 18th July 2016.

j) List of Supplementary documents dated 18th July 2016.

k) Petitioners List of supplementary authorities dated 18th July 2016.

11. The respondents and the amici curiae also filed pleadings as follows:

The 1st respondent

a) Supporting and Replying Affidavit of Sophia Wanjiku and her bundle of documents which includes:

i) A copy of a contract between the 1st Respondent and Price Waterhouse Coopers.
ii) A copy of a consent form purportedly signed by the 1st Petitioner.
iii) Copy of the 1st Petitioners in patient medical file.
iv) A copy of the cardex form.

b) Written Submissions filed in court on 11th February 2016.

c) List of Authorities filed in court on 11th February 2016.

The 2nd Respondent

a) The 2nd and 4th respondents filed grounds of opposition out of time and without leave, on 19th November 2020.

The 3rd and 4th respondents

a) Grounds of opposition by the 3rd and 4th respondents filed on 3rd May 2016.

b) Written submissions filed on 3rd May 2016.

c) List of authorities of the 3rd and 4th respondents filed on 3rd May 2016.

The 1st amicus curiae

a) Written submissions dated 21st July 2016 and filed on 22nd July 2016.

2nd amicus curiae

a) Written submissions dated 18th July 2016 and filed on even date.

SUBMISSIONS ON THE AMENDED PETITION

12. The amended petition was filed on 10th September 2015. Oral testimony was taken from 30th April 2018 to 21st January 2021.[1]

13. These submissions are structured as follows:

(i) Brief summary of the facts and evidence;
(ii) Agreed issues for determination;
(iii) The violations of the constitutional and human rights of the petitioners;
(iv) Government's obligations and responsibilities; and
(v) The appropriate remedy.

BRIEF SUMMARY OF THE FACTS AND EVIDENCE

14. The 1st petitioner is a woman living with HIV and has been on antiretroviral treatment from 2006. She works as an ice-cream vendor earning about Kshs 150.00 a day. In 2006, when she was 20 years old, she was pregnant and was attending the Kariobangi Health Centre for ante natal care. While there, a health care worker advised her to undergo a HIV test, which was positive. She

[1] From page 23 of the typed proceedings.

then went for follow up care at Baba Dogo Health Centre for a confirmatory test for HIV, which also turned positive.

15. A nurse called Hellen attended to her during subsequent visits at the Baba Dogo Health Centre, and informed her that she ought not to have any more children since that would compromise her health, and even cause her death. She was further informed that she ought to deliver her baby by way of caesarian section so as to prevent transmission of the HIV virus. The cost of the caesarian section was estimated at Kshs 10,000.00 which the 1st petitioner could not afford. Hellen therefore asked the 1st petitioner to raise the sum of Kshs 300.00; she then directed her to a community health worker called Nancy Wanjiku, who gave the 1st petitioner two vouchers: one written CS and another written TL. These vouchers are attached to the 1st petitioner's affidavit sworn on 10th September 2015, and introduced into evidence as PEx.1. The 1st Petitioner was advised that she should use these vouchers to deliver at Marura Nursing Home, the 1st respondent herein.[2]

16. On 15th September 2006, the 1st petitioner presented herself at the Marura Nursing Home for the first time. The doctor who attended to her informed her that she was in labour, and since she was scheduled to deliver by way of caesarian section, this would be scheduled to happen the following day. On 16th September 2006, a nurse at the 1st respondent facility informed the 1st petitioner that she would be going into theatre that day at 4:00pm. She was taken into surgery at around 6pm and underwent the caesarian operation and successfully delivered a baby boy on 16th September 2006. In the course of

[2] See this evidence as presented by the 1st Petitioner during her oral testimony as well as in her affidavits.

the caesarian section, she was sterilized. However, the 1st petitioner was never informed that she had been sterilized.

17. The 1st petitioner only suspected that something was amiss when she was trying to conceive again in 2010. Around July 2010, she attended a medical camp in Mathare where she explained that she had been trying to conceive without success. The doctors there carried out tests on the 1st petitioner, and it was at this point that she was informed that she could not conceive because she had undergone a tubal ligation.

18. The 1st Petitioner avers that the procedure of tubal ligation as done on her was an infringement of her constitutional rights. The petitioner went to the 1st respondent in order to deliver her baby on the 15th September 2006. She was never informed that she would be subjected to a bilateral tubal ligation procedure. At no time did she give consent to undergoing a bilateral tubal ligation and becoming permanently sterilized. After she discovered that the bilateral tubal ligation procedure had been conducted on her, she tried to seek information from the 1st respondent as to what transpired during her surgery. This information has never been provided by the 1st respondent.

19. The 1st respondent responded to the petition by way of a replying affidavit sworn by Sophia Wanjiku, the proprietor of the 1st respondent. In that response, the 1st Respondent does not dispute the fact that staff at the 1st respondent facility performed a caesarian section and a bilateral tubal ligation on the 1st Petitioner when she was admitted at the 1st Respondent hospital. In addition, the 1st respondent admitted that it was at no point involved in screening of the 1st petitioner to determine what services she required. The 1st

respondent claims that it provided services to the 1st petitioner pursuant to an agreement between itself and Price Water House Coopers. It is pursuant to this agreement called Output Based Aid for Reproductive Health (OBA-RH)[3] that the 1st respondent was a service provider, and would provide services to indigent women living with HIV.

20. Of note, the 1st respondent admits that it did not procure informed consent from the 1st petitioner. In her affidavit, Sophia Wanjiku stated that "*informed consent by the 1st petitioner was given at Korogocho to OBA-RH and at the 1st respondent,"*[4] and that the 1st respondent was contracted, pursuant to the OBA-RH agreement, to perform the bilateral tubal ligation. However, the 1st respondent contradicts itself by indicating that it has no references to the community health worker at Baba Dogo Health Center or the Community Health workers who are stationed there.[5]

21. The 1st Respondent further admitted that they were not involved in the screening of, or provision of any form of counselling or education of the 1st Petitioner prior to conducting the operation on her. This was also a fact that Sophia Wanjiku (DW1) the 1st respondent's witness admitted during her cross examination.[6] While Sophia Wanjiku (DW1) testified that the 1st petitioner was properly counselled prior to being taken to the operation, it is apparent that this did not happen. To support her position, Sophia (DW1) attached a bundle of documents to her affidavit. During her cross examination, Sophia

[3] This agreement is annexed to the replying affidavit of Sophia Wanjiku.
[4] See para. 17 of the affidavit of Sophia Wanjiku sworn on the 13th April 2015.
[5] See para. 20 of the affidavit of Sophia Wanjiku sworn on the 13th April 2015.
[6] See the oral testimony of Sophia Wanjiku given on 21st January 2021.

Wanjiku stated that these documents were in fact not prepared by her.[7] In this bundle is included a consent form purported signed by the 1st petitioner prior to the time that she underwent surgery. Your Lordship will note that the purported consent form has various discrepancies which lead to the conclusion that the 1st petitioner did not give informed consent to a bilateral tubal ligation. First, the signature contained on that 'consent form' does not belong to the 1st petitioner.[8] Secondly, the purported consent form is said to have been signed by the 1st petitioner on the 10th September 2006, yet the 1st petitioner went to the 1st respondent for the first time on 15th September 2006.

22. Moreover, despite stating that the 1st respondent had an elaborate procedure for procuring informed consent from its patients, the 1st respondent did not demonstrate to this court how, if at all, procedures to obtain informed consent from patients such as the 1st petitioner are followed. The 1st respondent merely claimed that such screening and education should have been done by other entities, that is, PricewaterhouseCoopers and OBA-RH, with whom it had an agreement for delivery of health services. In fact, the 1st Respondent *expressly* admitted that in performing the bilateral tubal ligation on the 1st Petitioner, they did not seek her informed consent, as they *assumed* that such consent had been given elsewhere.[9]

23. The 2nd respondent filed a late response to the amended petition by way of grounds of opposition dated 19th October 2020, filed late and without leave. It did not deny that the bilateral tubal ligation was unlawfully conducted on the

[7] See the testimony of Sophia Wanjiku on 22nd May 2018 and 21st January 2021.
[8] See the examination in chief of the 1st Petitioner (conducted on 18th December 2017) where the 1st petitioner stated that she had never seen the purported consent form.
[9] See paragraphs 7 to 14 of the replying affidavit of Sophia Wanjiku sworn on the 13th Aril 2015.

1st petitioner. In these grounds of opposition, the 2nd respondent did not deny that they have some oversight role to play in ensuring that health facilities provide services to patients within the legal framework.

24. The 3rd and 4th Respondents in their grounds of opposition dated 22nd April 2016 claim that they were not parties to the actions complained of by the Petitioners and should therefore not be party to the suit. They aver that the petition does not disclose any constitutional violation by the 3rd and 4th Respondents and that the Petitioners have not demonstrated the manner in which their rights have been violated by the 3rd and 4th Respondents.

The Implications of the Evidence

25. The fact that the 1st petitioner was sterilized by way of bilateral tubal ligation is admitted by the all the respondents. The fact that the petitioner was sterilized by way of bilateral tubal ligation was confirmed by Dr. Khisa Weston who conducted an examination of the 1st petitioner on 8th October 2014. Dr. Khisa is an obstetrician/gynaecologist with a specialization in, among other fields, women's reproductive health and HIV, and was in a unique position to give an expert opinion as to 1st petitioner had indeed been sterilized. His examination revealed that the 1st petitioner had undergone sterilisation, and that the procedure was permanent, and irreversible.[10] The expert opinion of Dr. Khisa was not disputed by any of the respondents.

[10] See the medical report of Dr Khisa Weston annexed to the 1st petitioner's affidavit sworn on 10th September 2015 as LAW-003.

26. The 1st petitioner was twenty years old when she was unlawfully sterilised at the 1st respondent. She still desires to have more children, and the fact that she could not bear more children has resulted in disagreements between herself and her husband. Eventually her husband left her due to her inability to conceive. To date, the 1st petitioner suffers from stress and worry due to her inability to conceive. The 1st petitioner underwent a psychological and psychiatric evaluation that was conducted on her by Elizabeth Khaemba and Dr. David Bukusi who concluded that the 1st petitioner suffers from major depressive disorder due to her inability to conceive, and that she requires anti-depressant medication and cognitive behavioural therapy to treat it.[11]

27. My Lord, the evidence further demonstrates that for a long time, women living with HIV were routinely sterilized as part of an unofficial government policy. The 3rd petitioner conducted a study, using a sample of forty women living with HIV, to investigate the prevalence of forced and coerced sterilization of women living with HIV. This study culminated in a report entitled ***Robbed of Choice: Forced and Coerced Sterilisation of Women Living with HIV in Kenya.***[12] This report contains accounts of fourty (40) women living with HIV, all of whom underwent bilateral tubal ligation without their knowledge or informed consent. Each of the women interviewed for the study stated that they would attend public health facilities where medical personnel would tell them that women living with HIV should not have any more children, and in particular, that "*women living with HIV must not give birth*."[13] Due to

[11] The psychological and psychiatric report is annexed to LAW's affidavit as LAW-005.
[12] This report is annexed to the affidavit of Gladys Kiio as GK-001.
[13] See Robbed of Choice: Forced and Coerced Sterilisation of Women Living with HIV in Kenya, Testimony of Maureen at p.6.

unceasing pressure from medical personnel as well as their ignorance on reproductive health, these women would sign whatever documents that were provided by medical personnel, even if they did not know what those documents stated. The study found that:

> *"healthcare providers, both doctors and nurses in some health facilities are violating the reproductive rights of [women living with HIV] by coercing or forcing them to accept unwanted surgical sterilization procedures. Family members, especially spouses and parents, have also participated in coercing or forcing [women living with HIV] to be sterilized, often based on misinformation provided by trusted medical professionals about the need for sterilization. Further, consent was routinely sought when the patient was in a vulnerable position, especially while in labour pains just about to go for a caesarean section. ... The study illuminates how the intersection of low socio-economic status, HIV and gender exacerbates vulnerability of [women living with HIV] to non-consensual contraceptive sterilization."*

28. The report further documented the impact of forced sterilization of women living with HIV. It found that:

> *"The impact of non-consensual sterilization on the women's physical, emotional and personal lives and their socio-economic status was evident. [Women living with HIV] reporting forced and coerced sterilizations endure immense physical, psychological and social trauma due to the permanent loss of the ability to give birth. Reported health complication post-tubal ligation including severe abdominal and back pains has negatively affected the active lives of these women who are mainly casual workers who rely on their physical fitness to earn a living. However, it was beyond the scope of the study to establish*

if the reported post-tubal ligation complications were as a result of the procedure of progression of the illness or both.[14]

29. The conduct, content and conclusions reached in this report were not disputed by any of the respondents.

AGREED ISSUES FOR DETERMINATION

30. The petitioners filed an agreed written list of issues for determination on 8th December 2017. Your Lordship is called upon the following issues:

a) Whether the sterilization of the 1st Petitioner by way of bilateral tubal ligation was done without her informed consent.
b) Whether the sterilization of the 1st Petitioner by way of bilateral tubal ligation amounted to a violation of her constitutional rights.
c) Whether the 2nd and 3rd respondents violated their statutory and constitutional obligations to protect the constitutional rights of the 1st petitioner
d) Whether the Petitioners are entitled to the remedies sought

31. Each issue for determination is addressed herein below, making reference to the relevant laws, policies and decided cases. Your Lordship will note that this is the first time that a case of this nature has been brought before Kenyan courts. In these supplementary submissions as well as those filed prior, we

[14] See Robbed of Choice: Forced and Coerced Sterilization of Women Living with HIV in Kenya, Conclusion at p. 30.

have referred to persuasive authority to demonstrate how the rights of the 1st petitioner have been violated by each of the respondents.

WHETHER THE STERILIZATION OF THE 1ST PETITIONER BY WAY OF BILATERAL TUBAL LIGATION WAS DONE WITHOUT HER INFORMED CONSENT

32. From the evidence that was tendered in court, it is common cause that the 1st respondent performed a bilateral tubal ligation on the 1st petitioner. We submit that the 1st respondent did not obtain the 1st petitioner's informed consent prior to performing that procedure on the 1st petitioner.

The Legal Elements of Informed Consent

33. My Lord, it is trite that under the common law, medical and surgical procedures constitute *prima facie* assault or battery unless authorized by a patient's informed consent.

34. In ***Samuel Gatenjwa v Marie Stopes Kenya & another [2020] eKLR***, the Court quoted the following dicta from ***Chester v Afshar 920040 UKHL***, in which Lord Steyn held:

> *"A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purpose. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient."*

35. In in ***P B S vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016) eKLR***, the following was quoted with authority:

> *"[U]nless it is an emergency, [a doctor] obtains informed consent of the parties before proceeding with any major treatment, surgical operation, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortuous liability…."*

36. It is submitted that while implied consent may be sufficient for minor treatments or therapies (such as when a doctor listens to a patient's breathing with a stethoscope), when it comes to an invasive procedure the patient's consent should be explicit.

37. If the petitioner were to have brought a claim in tort against a healthcare worker for battery for having performed a procedure without consent, it is submitted that in the ordinary course, the fact of consent having been given to the procedure is a defence which the defendant would have the onus to prove. However, this petition is not grounded in tort. Being a constitutional claim, it is accepted that the petitioners bear the onus of proving an infringement of their rights on a balance of probabilities. It is submitted, however, that the claim being of a nature involving a contention that a healthcare professional has performed an invasive surgical procedure without informed consent, that the respondents ought at least to bear an evidential burden to show that informed consent was obtained prior to the procedure being performed. This responsibility falls on the health care provider particularly in the case of provision of services to vulnerable and socio-economically persons such as the 1st petitioner herein. Moreover, this is information that would fall within the knowledge of the health care provider, and since they have the knowledge

of these special facts, the burden of proof falls on them, as outlined in section 112 of the Evidence Act.

38. In the South African case of ***Castell v De Greeff 1994(1) SA 408*** Ackerman J held that under the common law, where a medical provider alleges that consent has been procured prior to it performing a procedure, then the following requirements must, *inter alia*, be satisfied:

> *"(a) the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;*
> *(b) the consenting party must have appreciated and understood the nature and extent of the harm or risk;*
> *(c) the consenting party must have consented to the harm or assumed risk;*
> *(d) the consent must be comprehensive, that is extend to the entire transaction, inclusive of its consequences."*[15]

39. In ***CNM v Karen Hospital Limited [2016] eKLR***, HIV and AIDS Equity Tribunal held:

> *"Informed consent refers to consent given with the full knowledge of the risks involved, probable consequences and the range of alternatives available. We hasten to add that there is a big difference between consent and informed consent. ...*
>
> *In medical treatment, requiring invasive procedures, the doctor or health care personnel is required to disclose* ***sufficient information*** *to the patient to enable the patient to give an informed consent. Informed consent for HIV testing means that the person being tested for HIV agrees to undergo the test on the basis of understanding the testing procedures, the reasons for the testing, and is* ***able to assess the***

[15] At 425H-I/J.

personal implications of having or not having the test performed. *The requirement of informed consent is intended to uphold the dignity of the patient. It proceeds on the theory that the patient does not lose his dignity simply because he has fallen sick or because he does not know what his treatment will entail, which treatment option is better than the other, or others, and what risks are associated with any or all the available treatment options."* [Emphasis added.][16]

40. The High Court of Namibia held in ***LM, MI & NH v the Government of the Republic of Namibia [2012] NAHC 211***[17] considered whether or not informed consent had been procured by doctors prior to performing sterilization on the plaintiffs. The Court stated that it *"should be obvious that the required consent must be given freely and voluntarily and should not have been induced by fear, fraud or force. Such consent must also be clear and unequivocal*."[18]

41. The Namibian High Court further held that in order to obtain informed consent prior to a medical procedure, there must be adequate information given to the patient, seeing as the patient may be lay person, and not familiar with medical matters. This decision was affirmed on appeal by the Supreme Court of Namibia in ***Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19 (03 November 2014)***[19]. Here, the Namibian Supreme Court underscored that the decision to undergo sterilization:

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[16] The Tribunal's finding on informed consent were upheld on appeal in Karen Hospital Ltd v C N M [2018] eKLR.

[17] *LM, MI & NH v the Government of the Republic of Namibia [2012] NAHC 211* available at https://namiblii.org/na/judgment/high-court/2012/211.

[18] Para. 14.

[19] *Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19 accessible at* https://namiblii.org/na/judgment/supreme-court/2014/19.

"*must be made with informed consent, as opposed to merely written consent. Informed consent implies an understanding and appreciation of one's rights and the risks, consequences and available alternatives to the patient. An individual must also be able to make a decision regarding sterilization freely and voluntarily.*"

42. The Supreme Court also noted that in considering whether or not there was informed consent to a sterilization procedure, it was imperative to consider –

> *"whether the woman has the capacity to give her consent for sterilization at the time she is requested to sign consent forms. Therefore, it is not decisive what information was given to her during antenatal care classes or at the moment she signed the consent form if she is not capable of fully comprehending the information or making a decision without any undue influence caused by the pain she is experiencing."*

43. Based on the above understanding of "informed consent", it is submitted that the legal elements thereof include the following:

a) that the individual in fact subjectively assented or agreed to the entire transaction (the procedure, including its consequences and risks);

b) that such assent or agreement was freely and voluntarily made without duress, force or coercion; and

c) that the assent or agreement was adequately informed – the individual had sufficient knowledge of the nature, consequences, risks of, and alternatives to the procedure, and that the person appreciated and understood that information.

44. It is further submitted that the assessment of these criteria ought to be appreciated in the context of the particular circumstances and the particular patient. With respect to marginalized or indigent persons, or women of limited means and education such as the 1st petitioner, it is rational to expect that in order for knowledge and the appreciation thereof to be established, it would be necessary for the relevant information to be orally communicated, in a language that the individual understands. At a minimum, that information should include information on the nature of the procedure, the risks and consequences thereof, and the alternatives thereto.

45. My Lord, it is further noted that the requirement for a healthcare worker to ensure informed consent is obtained before undertaking a surgical procedure such as sterilization, is the norm, the accepted standard of care, and the expected ethical practice amongst healthcare workers as evidenced in the following guidelines.

46. The ***National Family Planning Guidelines 4th Edition (2010)*** emphasize the need for informed consent prior to sterilization of a woman in the following terms:

> *"Informed consent must be obtained and the client must sign a standard consent form for the procedure. …*
> *[Tubal ligation] is a permanent [family planning] method (reversal cannot be assured). Hence, a client <u>needs thorough and careful counselling before she decides to have this procedure. A consent form must be signed by the client in all cases before the procedure is undertaken.</u>"*[20] *(emphasis ours)*

[20] *National Family Planning Guidelines For Service Providers (2010) Updated to Reflect the 2009 Medical Eligibility Criteria of the World Health Organization* at page 173.

47. These guidelines have since been updated to provide more comprehensive guidance on the meaning and nature of informed consent in the ***National Family Planning Guidelines for Service Providers 6th Edition***:[21]

> *"[Informed consent is] the communication between client and provider that confirms that the client has made a voluntary choice to use or receive a medical method or procedure. Informed consent can only be obtained after the client has been given information about the nature of the medical procedure, its associated risks and benefits and, other alternatives. Voluntary consent cannot be obtained by means of special inducement, force, fraud, deceit, duress, bias, or other forms of coercion or misrepresentation*."[22] It is further stated that *"informed consent must be obtained and the client must sign a standard consent form for the procedure*".

48. The ***International Federation of Gynaecology and Obstetrics (FIGO) Guidelines on female contraceptive sterilization*** adopted in June 2011 also provide guidance on the question free and informed consent. Those guidelines are clear that:

> *"under human rights provisions and the professional codes of conduct, it is unethical and in violation of human rights for medical practitioners to perform procedures for prevention of future pregnancy on women who have not freely requested such procedure, or have not previously given their free and informed consent.*
>
> *Only the women themselves can give ethically valid consent to their own sterilization. Moreover, their consent should not be made a condition of access to medical care, such as HIV/AIDS treatment, natural or caesarean delivery, or abortion, or of any benefit such as*

[21] *National Family Planning Guidelines for Service Providers 6th Edition Updated to Reflect the 2015 Medical Eligibility Criteria of the World Health Organization.*

[22] *National Family Planning Guidelines for Service Providers* 6th Edition at page 49.

medical insurance, social assistance, employment, or release from an institution. Consent to sterilization should also not be requested when women are vulnerable, such as when going into labour or in the aftermath of delivery."

49. Further your Lordship**,** in 2014, six UN agencies: the World Health Organisation (WHO), the Office of the High Commissioner on Human Rights (OHCHR), UNAIDS, the United Nations Development Programme ("UNDP"), the United Nations Children's Emergency Fund (UNICEF), UN Women, and the United Nations Population Fund (UNFPA), issued a statement specifically providing guiding principles for the provision and regulation of sterilization services, so as to prevent involuntary sterilization, including against women living with HIV. According to the tenor of the statement,

> *"In obtaining informed consent, take measures to ensure that an individual's decision to undergo sterilization is not subject to inappropriate incentives, misinformation, threats or pressure. Ensure that consent to sterilization is not made a condition for access to medical care (such as HIV or AIDS treatment, …) or for any other benefit (such as medical insurance, social assistance…).*
>
> *Where women face contraindications to pregnancy, offer sterilization as one possible method from the full range of contraceptive options available. There are no legitimate medical or social indications for contraceptive sterilization.*
>
> *<u>As sterilization for the prevention of future pregnancy is not a matter of medical emergency, ensure that the procedure is not undertaken, and consent is not sought, when women may be vulnerable and unable to make a fully informed decision, such as when requesting termination of</u>*

pregnancy, or during labour, or in the immediate aftermath of delivery.[23]

Assessment of the Evidence in Relation to Informed Consent

50. It must be noted first, that no valid "**agreement**" or "**assent**" was obtained from the 1st petitioner. The 1st petitioner first presented herself on to the 1st respondent facility on 15th September 2006 as she had been advised to do by the community health worker at Baba Dogo Health Centre. The purpose of her attendance at the 1st respondent was to undergo a caesarean delivery, which would enable her deliver her baby without transmitting the HIV virus. While she had had been advised by the community health care worker that women living with HIV ought not to get children, as it was dangerous for them, she never was informed about permanent methods of birth control. She therefore did not agree to undergo any form of permanent birth control.

51. The 1st petitioner, in cross examination, testified that on 16th September 2006, just before she was to have gone for delivery at 1st respondent facility, the 1st petitioner was asked if she knew she was being sterilized; and while she answered in the affirmative, she did not know that sterilisation meant a procedure that would make her permanently unable to bear to children. At no time did any of the doctors and other personnel attending to her explain to her what a sterilization entailed, or that it was permanent in nature, nor did they

[23] Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO at page 14 available at https://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/.

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offer her any other form of family planning. That is why in 2010, after she remarried, she tried to conceive again - it is clear that the 1st petitioner did not understand the implications of the procedure to be performed on her. She therefore could not provide valid agreement or assent to the procedure.

52. The 1st respondent has produced before this court a document (Titled "consent for Operation") and annexed to the affidavit of Sophia Wanjiku, purportedly signed by the 1st petitioner allegedly consenting to the sterilization. It should be noted that the 1st Petitioner has disputed the veracity of that document for various reasons. First, that document is purported to have been signed by the 1st petitioner on the 10th September 2006. However, the 1st petitioner had never attended the 1st respondent before 15th September 2016 and did not sign this document as the denied the signature being hers in comparison to her national identification card.[24] Secondly, a person called Isaac NN is said to have witnessed the signing of the consent form on the same date. Sophia Wanjiku (DW1) confirmed that the said Isaac NN is a hospital administrator who is still in employment at the 1st respondent. The 1st respondent at no time called the said Isaac NN to testify as to the veracity of his having witnessed the 1st petitioner sign the consent form, despite Sophia Wanjiku (DW1) admitting during cross examination that he still works at the 1st respondent facility. Moreover, the said Isaac NN did not swear an affidavit to clarify the discrepancy in the purported consent form despite having time to do so.

53. Third, Isaac NN who was said to have witnessed the 1st petitioner signing the consent form is not in any way related to the 1st petitioner. He is a hospital administrator who works at the 1st respondent. In cross examination, Sophia

[24] See the testimony of LAW wherein she disputes the signature on the form.

Wanjiku testified that it is not hospital policy to allow hospital staff to witness or sign consent forms on behalf of patients. In addition, it is unclear why the said Isaac NN, a hospital administrator, was witnessing the 1st petitioner sign the document while she had been accompanied by her husband Erick Otieno (as indicated on her inpatient file, also annexed to the affidavit of Sophia Wanjiku.)

54. Third, the 1st petitioner was eventually taken in for her surgery on 16th September 2006. Sophia testified there is a procedure that must be followed prior to any surgery taking place. This begins by the doctor who would perform the procedure explain it to the patient, and after the patient signs the consent form, then the doctor performing the procedure must witness the signing by appending his (or her) signature after the patients. Sophia stated that this occurs so that the doctor can ensure that the patient has fully understood the implications of the procedure that is to be undertaken on them. In the consent form that has been produced by the 1st respondent, one Dr Wangwe, the doctor performing the procedure, and Dr Kerande, the anesthetist, signed the consent form on the 16th September 2006. It is therefore apparent that the doctors never explained to the 1st petitioner what procedure she was to undergo during her surgery, and therefore she could not give any consent to the procedures. Sophia did not give any explanation as to why the 1st petitioners' consent was (purportedly sought) six days prior to the date when she was to undergo the procedure. This raises further doubts about the credibility of the documents presented by the 1st respondent.

55. Finally, it will be noted that Sophia Wanjiku stated that she could not attest to the veracity of this document since she did not prepare it. She equally

confirmed during cross examination that she had never interacted with the 1st Petitioner while she was at the 1st respondent. In light of these unexplained discrepancies, we submit that the consent form was not in fact signed by the 1st petitioner, and ask Your Lordship to disregard it.

56. However, even if the consent document accurately bore the 1st Petitioner's signature, a fact that the 1st petitioner has denied, it would not be enough to show informed consent was obtained as the mere signing of a document does not signify an understanding of the contents therein.

57. Even if there had been valid assent (which we submit was not the case), the 1st petitioner was not adequately "**informed**" to establish "informed consent". The 1st respondent has not provided any evidence that the 1st petitioners was, prior to her surgery, counselled in a manner in which she could understand on any of the following: on the nature and impact of bilateral tubal ligation, on the procedure's probable permanent effect in rendering her sterile, on the risks of the procedure, and on her contraceptive options or alternatives to the procedure. Without this information, alongside with ample time for the 1st petitioner to consider the options available to her, she could not provide informed consent. We submit that this is information that can only be in the purview of the 1st respondent to provide, and that in line with section 112 of the Evidence Act, they ought to have provided.

58. The discrepancies in the 1st respondent's documents are also seen in copies in other documents that they have produced. They have annexed to the affidavit of Sophia Wanjiku copies of the 1st petitioner's medical file and cardex form. In that medical file, it demonstrates that the 1st petitioner was admitted to the

facility on 15th September 2006, and not on 10th September as claimed by Sophia Wanjiku.

59. Sophia Wanjiku (DW1) testified that the procedure for procuring informed consent ought to have been followed prior to the surgery performed on the 1st petitioner, and conceded that in the case of bilateral tubal ligation, it was particularly important to ensure that appropriate information and counselling was given to her the 1st petitioner. She further conceded that a woman who is in labour is a vulnerable woman who would not be in a frame of mind to give informed consent for a bilateral tubal ligation, and that any such informed consent to the procedure would need to have been sought and procured prior, when the woman was not in labour.[25]

60. Despite this testimony, the actual facts as demonstrated by the 1st respondent's documents show that a totally contrary procedure was followed. The medical file shows that on 16th September 2006, the 1st petitioner was in labour; she was attended to by a doctor at 2:30pm on 16th September 2006 where she was counselled for a bilateral tubal ligation, and thereafter, at 5:40pm, prepared for theatre. The caesarean section and the bilateral tubal ligation were performed at 6:00pm of the same day. This means that she was counselled for a procedure only three hours prior to the time that it took place, and when she was in active labour. The documentary evidence presented by the 1st respondent and considered alongside the testimony of Sophia Wanjiku demonstrates that even their own internal procedures were not followed, and that the process followed prior to the 1st petitioner's surgery on the 16th September 2006 was not sufficient to obtain informed consent from the 1st

[25] See the testimony of Sophia Wanjiku given on 21st January 2021.

petitioner, a vulnerable woman on account of the fact that she was in active labour.

61. We submit that even if the 1st petitioner was informed that she would be undergoing a bilateral tubal ligation on that day, there is no evidence that she was given adequate information and time to make the decision on family planning. It is also doubtful that given the circumstances at this point that relevant information as to the nature of the procedure, or that she would have been in a position to make an informed decision about family planning. In any event, since this was prior to surgery for a caesarean section, she was not in a position to make an informed decision on permanent methods of family planning. It will be noted that the only information that she had up until this point was that as a woman living with HIV, she ought not to bear any more children as this would risk her life. It only later emerged that she had been sterilized. This is evidence that the 1st petitioner had no understanding of the implications of the procedure, least of all that it would leave her permanently sterile. This was forceful sterilization.

62. Absent positive evidence that the 1st petitioner intentionally communicated assent to the bilateral tubal ligation procedure, the "consent" element of informed consent is vitiated. No reliance can be placed on the mere fact of the 1st petitioner having signed forms: we have demonstrated that the form produced in court by the 1st respondent is incorrect and inaccurate. In any event, this questionable form does not indicate that the 1st petitioner had indeed understood that she was to undergo a bilateral tubal ligation, or had provided informed consent. This is apparent in the fact that the 1st petitioner continued to try and conceive and bear another child in 2010.

63. Your Lordship will note further that by the 1st Respondent's own submissions, informed consent was not obtained by them. At paragraph 14 of the Replying Affidavit of Sophia Wanjiku dated 13th April, 2015 she states that "*the 1st Respondent avers that the informed consent by the 1st Petitioner was given at Korogocho to OBA-RH and at the 1st Respondent."* In its written submissions**,** the 1st respondent avers that it provided services to the 1st petitioner pursuant to a contractual agreement entered between itself and Price Water House Coopers for provision of medical services. The 1st respondent further admits that pursuant to this agreement, women living with HIV were screened for the provision of services.[26]

64. It is pursuant to this agreement (OBA-RH)[27] that the 1st respondent was a service provider, and would provide services to indigent women living with HIV. A consideration of this agreement is apt. Clause 1.4 of the Contract indicates that as a service provider, the 1st respondent would provide long-term family planning services. It was then the responsibility of the 1st respondent to provide services "in accordance with national policies" and to ensure that "*all technical personnel in providing family planning services are professionally qualified*" and shall take "*appropriate measures to assure the safety of the voucher clients seeking family planning services at the ... facility."* Pursuant to this policy, the service provider, the 1st respondent, was also to be liable for any wrongful action arising out of delivery of the family planning options. It is therefore not correct for the respondent to attempt to shift liability of its wrongful and unconstitutional actions to a different entity.

[26] See generally Part 4(i) of the 1st respondents written submissions dated 10th February 2016 and filed in this court on 11th February 2016.

[27] This agreement is annexed to the replying affidavit of Sophia Wanjiku.

We therefore invite this Court to reject the 1st respondent's argument that "*the patient ought to have obtained sufficient information to enable her make the decision whether to purchase the vouchers"* as has been put in its written submissions.

65. Moreover, it will be noted that the 1st respondent was to be paid for each procedure that it provided. At clause 1.6 of the contract, it clearly demonstrates that the 1st respondent stood to make more money where it performed a bilateral tubal ligation. During her testimony, Sophia Wanjiku (DW1) admitted that the 1st respondent did receive payment for each procedure carried out under the contract.[28] This leads to the conclusion that the 1st petitioner was not given information about other forms of family planning because the 1st respondent was to be paid a larger sum of money after performing a bilateral tubal ligation on her.

66. My Lord, from the foregoing it is clear that the 1st Respondents did not seek the informed consent of the 1st Petitioner before sterilizing her. Moreover, there was no information given to the 1st petitioner, either prior or after the operation, on what exactly had happened to her. The fact that the operation was performed during childbirth, during the currency of labour pains, clearly points to the inevitable conclusion that no informed consent was given by the 1st respondent.

WHETHER THE STERILIZATION OF THE 1ST PETITIONER BY WAY OF BILATERAL TUBAL LIGATION PERFORMED WITHOUT HER

[28] See testimony of Sophia Wanjiku given on 21st January 2021.

KNOWLEDGE AND INFORMED CONSENT AMOUNTED TO A VIOLATION OF HER CONSTITUTIONAL RIGHTS AND FREEDOMS

67. In the South African *locus classicus* on informed consent, ***Castell v De Greeff 1994(1) SA 408 (C),***[29] Ackerman J held that there was an inalienable nexus between informed consent and bodily integrity. He stated that:

> *"It is clearly for the patient, in the exercise of his or her fundamental right to self-determination, to decide whether he or she wishes to undergo an operation, and it is in principle wholly irrelevant that the patient's attitude is grossly unreasonable in the eyes of the medical profession: the patient's right to bodily integrity and autonomous moral agency entitles him or her to refuse medical treatment".*

68. The Namibian Supreme Court, in Government of the ***Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19*** (03 November 2014)[30]. stated that:

> *"Individual autonomy and self-determination are the overriding principles towards which our jurisprudence should move in this area of the law… these principles require that in deciding whether or not to undergo an elective procedure, the patient must have the final word."*

69. The failure to obtain free and informed consent prior to undertaking the surgery was in violation of the Constitution, as well as the fundamental freedoms enshrined in international law. Your Lordship will note that the actual sterilization of the 1st petitioner took place in September 2006. While

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[29] *Castell v De Greeff 1994(1) SA 408(C) available at* https://ethiqal.co.za/wp-content/uploads/2019/08/CASTELLvDE-GREEF-1994-Disclosure-of-Risk-Reasonableness.pdf

[30] *Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19 accessible at* https://namiblii.org/na/judgment/supreme-court/2014/19.

some of the rights were not explicitly recognized by the retired Constitution, they found expression in various treaties to which Kenya has long since ascribed to. Moreover, we draw the attention of this Court to the edict of the Court of Appeal in ***Michael Mbogo Kibuti v Attorney General [2020] eKLR (Civil Appeal No. 82 of 2017)***[31] wherein it held that courts ought to consider claims brought under the Constitution of Kenya, 2010 even where such violations occurred under the old Constitution.

The Right to Freedom and Security of the Person

70. As was set out in section 70 of the retired Constitution, as well as in Article 29 of the Constitution of Kenya, 2010, every person has the right to freedom and security of the person, including the right not to be subjected to torture in any manner, whether physical or psychological, or to be treated or punished in a cruel, inhuman or degrading manner. The retired Constitution further prohibited inhuman, cruel and degrading treatment at section 74(1) which stated that "*No person shall be subject to torture or to inhuman or degrading punishment or other treatment*."

71. The right to security of the person and the prohibition against cruel, inhuman and degrading treatment is also contained in various international and regional treaties to which Kenya is a party. These include Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the African

[31] *Michael Mbogo Kibuti v Attorney General [2020] eKLR available at* http://kenyalaw.org/caselaw/cases/view/189435/.

Charter on Human and People's Rights (ACPHR) and Article 3 of The Convention Against Torture (CAT).

72. The right to freedom and security of the person, including the prohibition against cruel and inhuman treatment was considered by this Court in ***Samuel Rukenya Mbura & Others V Castle Brewing Kenya Limited & Another [2006] eKLR***[32] wherein this Court, considering the import of section 74 of the retired Constitution, defined inhuman or degrading treatment as including *"an action that is barbarous, brutal and cruel"* while degrading punishment is "*that which brings a person in dishonour or contempt*". This meaning was adopted with approval in other decision of this Court such as in ***David Gitau Njau & 9 others v Attorney General [2013] eKLR*** and ***Hezbon Ombwayo Odiero v Minister for State for Provincial Administration & Internal Security & 3 others (2016) eKLR.***[33] We therefore submit that such treatment is that which humiliates or debases an individual in such a manner that shows a lack of respect for, or diminishes, his or her human dignity.

73. A number of international bodies and other similarly-situated jurisdictions have addressed coerced sterilization finding that it violates the prohibition on cruel, inhuman and degrading treatment. At the regional level, the African Commission on Human and Peoples' Rights ("the African Commission") has clearly stated that involuntary sterilization violates the right to be free from cruel, inhuman and degrading treatment guaranteed under the ACPHR and the Protocol to the African Charter on Human and Peoples' Rights on the Rights

[32] *Samuel Rukenya Mbura & Others V Castle Brewing Kenya Limited & Another [2006] eKLR available at http://kenyalaw.org/caselaw/cases/view/18863.*

[33] *Hezbon Ombwayo Odiero v Minister for State for Provincial Administration & Internal Security & 3 others (2016) eKLR available at http://kenyalaw.org/caselaw/cases/view/118067.*

of Women in Africa. In ***Resolution 260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services,*** the Commission:

> *"firmly declares that all forms of involuntary sterilisation violate in particular the right to equality and non-discrimination; dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health; as enshrined in the regional and international human rights instruments, particularly the African Charter and the Maputo Protocol;"*[34].

74. Forced and coerced sterilization is a form of gender-based violence that constitutes cruel, inhuman and degrading treatment. The African Commission in its ***General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (2017)***, described forced or coerced sterilization as:

> "*a form of sexual and gender-based violence that amount[s] to a form of torture and other ill-treatment in view of the specific, traumatic and gendered impact of sexual violence on victims, including the individual, the family and the collective***.**[35]

[34] See the preamble of *Resolution 260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services - ACHPR/Res.260(LIV)2013* available at https://www.achpr.org/sessions/resolutions?id=280.

[35] General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) at paras. 57 and 58; available at https://www.achpr.org/legalinstruments/detail?id=60.

75. Courts on the continent have also found that the practice of coerced sterilization violates the prohibition of cruel, inhuman and degrading treatment. In ***Namibia v LM and Others (supra),*** the Supreme Court of Namibia found that the obtaining the consent for sterilization of women living with HIV while they were in labour or in exchange of other medically necessary treatment violated the right to be free from cruel, inhuman and degrading treatment, among other fundamental rights.

76. On the international front, the Human Rights Committee in ***ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*** has stated that State Parties to the ICCPR have an obligation to ensure the protection dignity and the physical and mental integrity of the individual. The Human Rights Committee stated further that Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. That prohibition in Article 7 of the ICCPR relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In addition, in ***ICCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women),*** the Human Rights Committee, has advised that in order to comply with article 7 of the ICCPR, and to allow the Committee to assess such compliance, state parties ought to provide the Committee information on measures to prevent forced abortion or forced sterilization.[36]

[36] CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women) at para. 11.

77. Further, in the ***Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 3, 2013),*** the Special Rapporteur emphasized that forced sterilization is an act of violence, a form of social control, and a violation of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment.[37] The Special Rapporteur further noted that "*international and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. Examples of such violations include abusive treatment and humiliation in institutional settings; **involuntary sterilization**…**forced abortions and sterilizations**.*"[38]

78. To this end, the Special Rapporteur called upon all states, to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups, including persons living with HIV, and to safeguard free and informed consent on an equal basis for all individuals without any exception, through legal framework and judicial and administrative mechanisms, including through policies and practices to protect against abuses.[39]

79. My Lord, there is similar authority even from international courts. In the case of ***V.C. v. Slovakia (Application No. 18968/07),*** the European Court of

[37] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 3, 2013) at paragraph 48.
[38] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez at para 46.
[39] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 3, 2013) at paragraph 85(e).

Human Rights ("ECtHR"), was faced with a claim from a Roma woman whose situation is similar to the 1st petitioner herein. She was presented with a request form for the procedure while she was in labour, and after she was informed by personnel at the hospital that if she got pregnant again, then either her or the child would die. Considering the import of Articles 3 and 8 of the European Convention on Human Rights[40] on State Parties, the ECtHR held that:

> *"106. The Court notes that sterilisation constitutes a major interference with a person's reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life. It may be legitimately performed at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes where the medical necessity has been convincingly established.*
>
> *107. However, in line with the Court's case-law referred to above, the position is different in the case of imposition of such medical treatment without the consent of a mentally competent adult patient. Such a way of proceeding is to be regarded as incompatible with the requirement of respect for human freedom and dignity, one of the fundamental principles on which the Convention is based.*
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> *108. Similarly, it is clear from generally recognised standards such as the Convention on Human Rights and Biomedicine, which was in force in respect of Slovakia at the relevant time, the WHO Declaration on the Promotion of Patients' Rights in Europe or CEDAW's General Recommendation No. 24 ... that medical procedures, of which*

[40] Article 3 of the European Convention on Human Rights prohibits torture, and inhuman or degrading treatment or punishment whereas Article 8 provides for right to respect for private and family life, home and correspondence.

sterilisation is one, may be carried out only with the prior informed consent of the person concerned. The same approach has been endorsed by FIGO [...]. The only exception concerns emergency situations in which medical treatment cannot be delayed and the appropriate consent cannot be obtained."

80. Thus, the ECtHR held that the respondent state was liable, that the sterilization without consent had "*grossly interfered with [her] physical integrity as she was thereby deprived of her reproductive capability*[41], and that the failure to obtain her informed consent prior to the sterilization showed "*gross disregard for her right to autonomy and choice as a patient" in violation of the prohibition of cruel, inhuman and degrading treatment*.[42]

81. In the present petition, 1st respondent's action of not obtaining informed consent from the 1st petitioner amounted to cruel, inhumane and degrading that was in disregard of her autonomy and right to choose her reproductive future. The consequences of the forced sterilization of the petitioner caused her, and continues to cause her, extreme mental suffering and violated her physical and mental integrity, and thus continues to violate her right to freedom of security of the person.

The Right to Dignity

82. Article 28 of the Constitution of Kenya provides that every person has inherent dignity and the right to have that dignity respected and protected.

[41] VC v Slovakia App. No. 18968/07, Eur. Ct. H.R. (2011) at para. 116. Available at https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-290&filename=002-290.pdf.

[42] VC v Slovakia at para 119.

While this right was not an express constitutional provision under the repealed Constitution, this Court in ***Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR*** found that even under the repealed Constitution, the right to dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights.[43]

83. This right is also provided for in Article 1 of the Universal Declaration of Human Rights (UDHR), Article 5 of the 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.

84. 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."*

[43] Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR available at http://kenyalaw.org/caselaw/cases/view/125045/.

85. 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***[44] when it held that "*Self-autonomy, or the ability to regulate one's own 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***[45] 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."*

86. 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."*

87. In the context of forced and coerced sterilization of women, The African Commission has noted that coerced sterilization does clearly violate the right to dignity guaranteed under the ACPHR. In its ***Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services***,

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

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

the Commission has stated that coerced sterilization is a form of involuntary sterilization characterized by the use of financial or other incentives, misinformation, or intimidation tactics to compel an individual to undergo the procedure declares that all forms of involuntary sterilization violate in particular the right to equality and non-discrimination, dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health.

88. My Lords, based on the foregoing authorities, we therefore submit that to the extent that the 1st respondent forcefully sterilised the 1st petitioner without her consent or knowledge, the 1st respondent violated her right to dignity.

The Right to Privacy

89. Article 31 of the Constitution of Kenya, 2010 provides that everyone has the right to privacy. It is also provided for in Article 12 of the UDHR, Article 17 (1) of the ICCPR, and Article 14 of the ACPHR.

90. In ***GSN v Nairobi Hospital & 2 others [2020] eKLR***[46] this Court held that

> *"Although the Section 70(c) of the repealed Constitution is restricted in its wording, it is necessary to interpret it as broadly as possible in order to ensure that all aspects of an individual's privacy are protected. This is the only way to ensure compliance with the international law on human rights. The protection of the right to privacy is integral to*

[46] *GSN v Nairobi Hospital & 2 others [2020] eKLR available at* http://kenyalaw.org/caselaw/cases/view/200351/.

democratic governance. As such, I would do a disservice to the Petitioner to limit the application of the provision to the vocabulary used by the drafters of the provision. In that regard, I hold that the right to privacy under the repealed Constitution can and should be interpreted broadly to include the personal privacy of an individual and the privacy of their information."

91. Privacy is to be expected in questions of personal choice and is closely interlinked with the dignity of a person and the achievement of their self-autonomy. As was stated by this Court in ***Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR***,

> *"privacy is a subjective expectation of privacy that is reasonable, inner sanctum helps achieve a valuable good - one's own autonomous identity. Privacy is not a value itself but it is valued for instrumental reasons, for the contribution it makes to the project of 'autonomous identity'. This protection in return seeks to protect the human dignity of an individual."*

92. In the context of coercive and non-consensual sterilization, the right to privacy, is directly linked to the right to one's private life. In ***VC v Slovakia (supra),*** the ECtHR held:

> "'*Private life' is a broad term, encompassing, inter alia, aspects of an individual's physical, psychological and social identity such as the right to personal autonomy and personal development, the right to establish and develop relationships with other human beings and the right to respect for both the decisions to have and not to have a child."*

93. Decisions on reproductive health are private, and any interference in that regard, whether by the state, or by private actors is a direct affront to the right

to privacy. In this regard, the Human Rights Committee in ***CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)***[47] has said that the right to privacy encompasses instances where women are subject to medical procedures without their informed consent, and gives as an example, instances where there are general requirements for the sterilization of women.

94. Ensuring there is informed consent before a medical procedure such as a sterilization which renders a woman permanently unable to bear children, we submit, is an essential component of having an autonomous identity as it enables patients to have full control over their own bodies and in this case, reproduction. Informed consent before a medical procedure such as a sterilization which is permanent procedure is mandatory. A woman being given the information, space and time to make this far-reaching decision is an essential component of having an autonomous identity.

95. My Lord, we have demonstrated the 1st petitioner was not given information, time and space to decide about the bilateral tubal ligation before it was forcefully performed on her. The 1st petitioner only came to discover that she had been sterilised in July 2010, four years after the procedure after she had been trying to conceive again and was unsuccessful. The fact that she was not even given the option to choose her preferred form of family planning grossly undermined her right to choose and her autonomy in decision making. It is therefore apparent that the failure to obtain the 1st petitioners informed consent violated her right to privacy.

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[47] *CCPR General Comment No. 28: Article 3* at para 20.

96. We submit further that this violation of the right to privacy is a continuing violation. It is noteworthy that the 1st respondent declined to respond to letters written by the 1st petitioner where she sought to know what procedures had been undertaken on her at the facility. To date, the 1st respondent has not provided this information to the 1st petitioner. In fact, the 1st petitioner only fully appreciated the extent of the effect of the procedures undertaken on her when she was examined by a different doctor, Dr Khisa Weston, who informed her what procedure had been undertaken on her and the permanent effects of the bilateral tubal ligation.

97. The refusal of the 1st respondent to provide information to the 1st petitioner continues to violate her right to privacy, and as the ***UN InterAgency Statement in Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO*** have noted that:

> "*The right to respect for privacy and family life includes being able to find out about whether or not sterilization has been performed, and the precise procedure used. Lack of access to their medical records makes it hard for individuals to get information about their health status or receive a second opinion or follow-up care, and can block their access to justice*."[48]

98. The forced sterilizations on the 1st petitioner was carried out without any reference to her as to the nature and consequences. The forceful sterilisation

[48] Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO at page 10 available at https://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/.

of the 1st petitioner dramatically affected her life. she was only 20 years old when the procedure was undertaken on her, and she still desires to have other children. The fact that she could not reproduce not only affected her mentally, but also affected her marriage, and eventually resulted in the break-up of her marriage. In this regard, we submit that the 1st respondent violated the right to privacy of the 1st petitioner, and that this violation continues to occur.

The Right to Highest Attainable Standard of Health

99. Article 43 (1)(a) of the Constitution of Kenya provides that every person has the right to the highest attainable standard of health, including the right to health care services and reproductive health care. The right to health includes: the right to physical and mental health wellbeing, the right to informed consent, provision of education and information, and access to quality health care services.[49]

100. My Lord, while the right to health was not explicitly recognized under the retired Constitution, the right to health was expressed in various international covenants and treaties to which Kenya has ratified. These are included in Article 25 of the UDHR, Article 12 of the ICSECR, Article 12 of CEDAW, Article 16 of the ACHPR, Article 14 of the Maputo Protocol. Moreover, these instruments continue to apply to the Kenyan context by virtue of Articles 2(5) and 2(6) of the Constitution of Kenya, 2010.

[49] Section 2 of the Health Act and Paragraph 9 of General Comment No. 14: The Right to the Highest Attainable Standard of Health.

101. The coerced and forced sterilization of the petitioners was in violation of their *rights to health, and particularly their reproductive health*. In both ***General Comment No. 14: The Right to the Highest Attainable Standard of Health*** and ***General Comment No. 22 (2016) on the Right to sexual and reproductive health,*** the CESCR defines reproductive health as including *"the freedom to decide if and when to reproduce; the right to information, and to have access to safe, effective, affordable and acceptable methods of family planning of their choice."* The right further includes the right to access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth. Due to the far-reaching effects of sterilization by way of bilateral tubal ligation, informed consent is an integral component in terms of provision of the service.

102. The Committee on Economic, Social and Cultural Rights (CESCR) in its ***CESCR General Comment No. 14*** has stated that the right to health includes the freedom *to "control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation."*[50] Similarly, the CEDAW Committee in ***General Recommendation No 24, Article 12 of the Convention (women and health) (1999)*** calls on State Parties to provide health services "*that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and*

[50] Para. 8 of CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

perspectives. As such, States parties should not permit forms of coercion, such as non-consensual sterilization, ….''[51]

103. The CESCR stated further that the right to quality health care services requires the provision of acceptable services, which *''are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives.*''[52]

104. Your Lordship will note that the 1st petitioner in this case is disenfranchised and marginalized as a result of her health and socio-economic status. In her testimony, as well as her affidavit, she indicates that she earns her daily bread by selling ice cream, and prior to 2015, she relied on her husband for financial support. It should be noted that the 1st petitioner was advised that in order to give birth to a healthy baby and to prevent transmission of the HIV virus to her infant, then she would require to have a caesarean section delivery; this operation was to cost Kshs 10,000.00 which she did not have. It was then that the option of having the operation done by the 1st respondent was given to her. She chose to go for delivery at the 1st respondent because this was the only option that was available to her.

105. The UN Special Rapporteur on Health has noted that marginalized populations, including women are at particular risk of violations of their right

[51] Para 22 of CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health).
[52] Para 22 of CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health.

to informed consent due to social, economic and cultural inequalities.[53] With respect to the sterilization of marginalized women, the UN Special Rapporteur on the Right to Health notes that:

> "*forced sterilization or contraception continues to affect women, injuring their physical and mental health and violating their right to reproductive self-determination, physical integrity and security. Women are often provided inadequate time and information to consent to sterilization procedures, or are never told or discover later that they have been sterilized. ...Stigma and discrimination against women from marginalized communities, including indigenous women, women with disabilities and women living with HIV/AIDS, have made women from these communities particularly vulnerable to such abuses*."[54]

106. The CESCR's General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art 12.) in interpreting the right to health states that:

> *The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."*[55]

[53] Report to the General Assembly (Main Focus: Right to Health and Informed Consent) Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health UN Doc A/64/272 (2009) para 46.

[54] Report to the General Assembly (Main Focus: Right to Health and Informed Consent) Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health at paras 55.

[55] General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art 12.) at para. 11.

107. My Lord, the mental health of the 1st petitioner was detrimentally affected as a result of the forceful sterilization that was undertaken on her by the 1st respondent. The 1st petitioner testified as to the mental anguish and distress that she suffered as a direct consequence of the forced sterilization, the lack of information about the procedures and the eventual knowledge that she had been rendered permanently unable to bear more children.[56] This further compounded the violations to their right to health, since it of necessity, includes the right to mental wellbeing. My Lord in this regard, we submit that the holding of this Court in ***W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR***[57] and affirmed by the Court of Appeal in ***Teachers Service Commission v WJ & 5 others [2020] eKLR*** is apposite, wherein it was stated that *"In addition, the fact that their psychological well-being was affected is a clear violation of their right to health, which is defined as including the highest attainable standard of physical and mental well-being."*

108. From the facts, we submit that 1st respondent violated the 1st petitioner's right to health when it failed to obtain her free and informed consent prior to performing a sterilization procedure on her, and by failing to provide her with adequate information before conducting the procedures on them. We submit further that the sterilization of the 1st petitioner without her free and informed consent did not meet the standard of quality health care services as a fundamental component of quality health care is providing the individual with the necessary information to obtain her informed consent.

[56] See the psychological reports annexed to the 1st petitioner's affidavit.

[57] *W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR available at* *http://kenyalaw.org/caselaw/cases/view/109721/*.

The Right to Freedom from Discrimination

109. Article 27(4) and (5) of the Constitution of Kenya, 2010 prohibits discrimination on any ground. 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.

110. 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."*[58]

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

111. 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".*

112. This definition was affirmed by this Court in ***Pravin Bowry v Ethics & Anti-Corruption Commission [2015] eKLR*** the High Court adopted the definitions outlined above when addressing a discrimination claim the Constitution of Kenya, 2010.

113. Discrimination on the basis of gender is defined at Article 1 of CEDAW as

> "*... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*."

114. In the context of forced sterilisation, a number of international and regional bodies have found that the practice of forced and coerced sterilization of marginalized women violated the prohibition of discrimination of women on the basis of their gender, the socio-economic status and also on the basis of their health status.

115. Similarly, the African Commission has clearly stated that the coerced sterilization of HIV-positive women in Africa violates their right to be free from discrimination in its ***Resolution 260 on Involuntary Sterilisation and***

the Protection of Human Rights in Access to HIV Services. In that resolution, the African Commission notes that there are the numerous reports of involuntary sterilisation of women living with HIV in certain State Parties to the ACPHR, and condemns this as a form of discrimination and a human rights violation in relation to the access to adequate health services. It also reaffirms that *"all medical procedures, including sterilization, must be provided with the free and informed consent of the individual concerned in line with internationally accepted medical and ethical standard*."

116. The CEDAW Committee ***CEDAW General Recommendation No. 19: Violence against women, 1992*** has stated that coercive acts can amount 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"*[59]

117. The CEDAW has considered the discriminatory nature of forced and coerced sterilization in ***AS v Hungary Communication No 4 of 2004***[60], where the communication concerned a doctor in Hungary who had performed a forced sterilization procedure without providing adequate information regarding the procedure, and without obtaining Ms. A.S.'s free and informed consent. The

[59] CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 6.

[60] AS v Hungary available at https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf.

doctor in question had required her to sign the consent form when she was in labour. The CEDAW Committee found that Hungary had violated the complainant's rights to protection from discrimination in health care and in family relations and in particular, to consent to medical procedures, to information on family planning, and the right to determine the number and spacing of her children, under Articles 10(h), 12 and 16(1)(e) of the CEDAW. It is also noteworthy that the Committee found that the violation was a continuing one, since the procedure of sterilization is intended to be a permanent procedure, and any attempts to reverse it carries significant risks and would likely be permanent.[61]

118. We further urge your Lordship to be guided by the sentiments of Judge Ljiljana Mijovic who dissented in ***VC v Slovakia (Application No. 18968/07***). The learned judge in addressing the forced and coerced sterilization of Roma women, highlighted why a finding that forced and coerced sterilization violated the right to be free from discrimination was important to address the broad and systemic nature of the coerced sterilization finding that it was apparent that the victim in this case was marked out due to her ethnic origin. Similarly, my Lord, we submit that the facts herein demonstrate that the 1st petitioner was sterilised purely because of her health status. She was misinformed that she should not conceive again. While she was informed of the need to go on family planning, at no time did she consent to a bilateral

[61] While these observations and views on the continuing violation and the nature of sterilization were made in the context of considering the admissibility of the Communication, we submit that they apply with equal force in the circumstances at hand, and in particular, on the merits of the case presented by the 1st petitioner.

tubal ligation, or was she informed that she was being offered a permanent form of sterilisation.

119. We submit that in the circumstances, there is ample evidence to demonstrate that the 1st petitioner was singled out for forced sterilization as a result of her HIV status. In addition, as demonstrated by the report "***Robbed of Choice: Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya,***[62] women living with HIV were forced and coerced into sterilization procedures where these procedures were forced on them without their knowledge or consent, or where they were scared into presenting themselves for permanent family planning procedures because they were HIV positive, and therefore should not bear any more children.

120. That forced and coerced sterilization is inherently a discriminatory practice has also been discussed in ***Patel, P. Forced sterilization of women as discrimination.*** [63] In that article, the author notes that "*forced and coerced sterilization primarily targets women who are perceived as inferior or unworthy of procreation. Forced and coerced sterilization of marginalized women is part of existing stigma and discrimination facing the marginalized population."* Because it is founded on stigma, "*the motivating reason for forced and coerced sterilizations is to deny specific populations the ability to procreate due to a perception that they are less than ideal members of society."*

[62] Annexed to the affidavit of Gladys Kiio as GK-001.

[63] *Public Health Rev* 38, 15 (2017), at page 9 available at https://publichealthreviews.biomedcentral.com/articles/10.1186/s40985-017-0060-9.

121. In the present petition, the 1st petitioner was first informed that she should not conceive or bear any further children due to the fact of her HIV status. We ask the Court to take judicial notice of the fact that in the period after HIV was declared an epidemic, women were routinely criticized for their choice to procreate due to the stigma associated with HIV. This was based on a paternalistic and discriminatory belief that women living with HIV could not, or should, not bear children. Moreover, it was erroneously believed that women living with HIV would invariably transmit the virus to their children. These misconceptions about HIV transmission have since been debunked.[64]

122. Your Lordship will note that many of the women living with HIV who are subjected to forced and coerced sterilization are marginalized and of limited education. Like the 1st petitioner herein, these women are reliant on facilities such as the 1st respondent's for safe and accessible services, where they can deliver their children safely. These women are in a vulnerable position because facilities such as those run by the 1st respondent control how and when they receive health care.

123. We submit that the 1st petitioner was particularly vulnerable to coerced sterilization due to her marginalized status and because she is a woman living with HIV; it was due to discrimination based on the intersecting grounds of her gender and health status: as women living with HIV.

[64] See Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO at pages 3-4 available at https://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/.

The Right to Access Information

124. The right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom is guaranteed under Article 35(1) of the Constitution of Kenya, 2010. It also applied in Kenya by virtue of Article 9(1) of the ACPHR and Article 14 of the Maputo Protocol which also provide for the right to information and education on family planning. The significance of information to reproductive health is reinforced by Article 10(h) of the CEDAW provides which requires that women have access to *"specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."*

125. My Lord, we submit that the 1st petitioner required information about the procedures she was to undergo in order for her to give free and informed consent, and thus, secure her fundamental rights. In ***Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others [2013] eKLR***[65], this Court did note the importance of access to information for citizens in the exercise of their fundamental rights and freedoms. It noted that it is –

> "*beyond dispute that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. It has been recognised expressly in the Constitution of Kenya 2010, and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution.*"

[65] *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others [2013] eKLR* available at http://kenyalaw.org/caselaw/cases/view/88569/.

126. In that case, the court adopted with approval the finding of the court in ***Brummer v Minister For Social Development 2009 (II) BCLR 1075 (CC)***[66] wherein it stated that "*the right to information is at the core of the exercise and enjoyment of all other rights by citizens and access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights*."

127. The Special Rapporteur on Health has summarised the importance of access to information and transparency as essential features of an effective health system in his report to the seventh session of the Human Rights Council in 2008 where he stated:

> *"access to health information is an essential feature of an effective health system, as well as the right to the highest attainable standard of health. Health information enables individuals and communities to promote their own health, participate effectively, claim quality services, monitor progressive realization, expose corruption, hold those responsible to account, and so on."*

128. Without information about the type and nature of the procedure being carried out, as well as the information about the permanence of the procedure, the 1st petitioner could not have given consent. It is apparent that the 1st respondent, by its own admission, did not give the 1st petitioner health information or counselling prior to subjecting her to bilateral tubal ligation.

129. Moreover, despite request for information made by the 1st petitioner as to her medical records and the procedures performed on her at the 1st respondent facility, the 1st respondent continues to refuse to avail that information, in

[66] *Brummer v Minister For Social Development 2009 (II) BCLR 1075 (CC) available at* http://www.saflii.org/za/cases/ZACC/2009/21.html.

violation of both Article 35 of the Constitution of Kenya, as well as sections 4 and 9 of the Access to Information Act. This is therefore a continuing violation.

130. Compounding the violation of the right to information, it is apparent that the 1st petitioner had no information about how she could seek recourse after she suffered the violations at the 1st respondent. The 1st respondents witness, Sophia (DW1) stated that the 1st respondent never received any complaints from the 1st petitioner about the procedure taken on her. She stated further that such complaints could be received by way of a suggestion box. It should however be noted that the 1st petitioner is a woman of limited education, having studied only until standard three. It is therefore questionable that she would be able to present her complaints to the 1st respondent by way of a suggestion box, particularly because she was not made aware of it, or had no means to engage with it.

The Right to Life

131. The violation of the right to health is tied to the right to life. This Court in ***P.A.O & 2 Others v Attorney General [2012] eKLR***[67] reaffirmed the nexus between the right to dignity, the right to health and the right to life in the following terms:

> *"In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life*

[67] *P.A.O & 2 Others v Attorney General [2012] eKLR* available at http://kenyalaw.org/caselaw/cases/view/79032.

is in jeopardy, and where one has an illness that is as debilitating as HIV/AIDS is now generally recognised as being, one's inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised."

132. While the facts in ***P.A.O & 2 Others v Attorney General [2012] eKLR*** were different, in that in that case, the question for determination by the court was the provision of life saving medication, we submit that the dicta above applies with equal force to the present petition where the actions directly affected the quality of life of the 1st petitioner, and have affected her ability to have a dignified life.

133. In ***Villagran Morales et al. v Guatemala, Series C, No. 63, 19 Nov. 1999***[68] the Inter-American Court of Human Rights held that:

> *"The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it."*

[68] *Villagran Morales et al. v Guatemala, Series C, No. 63, 19 Nov. 1999 available at* https://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf.

134. My Lord, it is our submission that the violations of the rights that we have referenced herein above led to further violations of the right to life for the 1st petitioner. By being subjected to forced sterilisation, she has since been prevented *from having access to conditions that guarantee a dignified existence* as held in the ***Villagran Morales et al. v Guatemala*** (***supra***). Moreover, she continues to suffer psychologically due the effects of sterilization on her life. The 1st petitioner has testified that she wishes to have more children. At the time of institution of the petition, she was suffering from immense stress that her husband would desert her due to her inability to conceive. Her husband did eventually leave her due to her inability to conceive, and this ruined her life.[69] It is apparent that the consequences of the forced sterilisation have been detrimental to the quality of life of the 1st petitioner.

135. My Lord, one participant in the report ***Robbed of Choice: Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya*** mentioned above notes: "*The sterilization ruined my life*."[70] We ask this court to take note of challenges women face in a largely patriarchal society that Kenya is. An unsanctioned act that makes a woman lose her sense of "completeness" and in turn makes her start viewing her life as "meaningless" is a threat to her right to life, and to her quality of life.

[69] Affidavit of LAW sworn on 10th September 2015 at para. 17 and 31. See also the psychological and psychiatric evaluation of LAW annexed to this affidavit.

[70] Page 1 of Robbed of Choice: Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya.

No Reasonable Justification

136. It will be noted that there have been no reasons advanced by any of the respondents to indicate that the rights of the 1st petitioner herein were to be limited. We submit that the right to freedom from torture, cruel and degrading treatment are absolute and cannot be limited, as is provided under Article 25 of the Constitution. As provided in Article 24 of the Constitution, 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, considering all relevant factors. It is noteworthy that none of the respondents have advanced the position that any of the rights that they violated, and continue to violate, were justifiably limited. In the absence of any lawful justification, we submit that the 1st petitioner's rights were violated unjustifiably.

THE OBLIGATIONS OF THE 2ND AND 3RD RESPONDENTS

137. The submissions above relate to the violation of the constitutional rights of the 1st petitioner by the 1st respondent. In the following section, we highlight the obligations of the state in the respect of the rights of the petitioners.

138. The state has an obligation to protect the constitutional rights and freedoms of citizens. The 2nd and 3rd respondents are in charge of the health sector at the county and national levels respectively.[71] They are directly in charge of public

[71] See the Fourth Schedule of the Constitution as well as sections 15 and 20 of the Health Act.

health facilities, and they ensure that private health facilities comply with the law. Sections 14 and 15 of the Health Act set out the responsibilities for formulation and implementation of the 2nd and 3rd respondents. In implementation of policies, the 2nd respondent is directly responsible in ensuring enforcement at the county level, whereas the 3rd respondent is responsible for this function at national government level. Neither the 2nd or 3rd respondents filed any documents in this court setting out how they had undertaken their obligations in line with the Constitution and the Health Act in carrying out their roles.

139. It is our submission that the violation of the rights of the 1st petitioner herein was the direct result of the failure, neglect and refusal by the 2nd and 3rd respondents to perform their supervisory duties in health services. The 2nd respondent's grounds of opposition consists of mere denials, and in both is grounds of opposition and its written submissions, the 3rd respondent claims that that it did not violate any of the 1st petitioner's rights, and admits that there is no specific legislation or policy with respect to bilateral tubal ligation. It further avers that it is the responsibility of the executive arm of the state to formulate such policy. We demonstrate below what the responsibilities of the 2nd and 3rd responsibilities are.

140. The 1st respondent is under direct supervisory control of the 2nd respondent, while the 3rd respondent exercises control of all health facilities in Kenya, as well as provides policy guidance to county health services such as the 2nd respondent. My Lord, we submit that the 2nd and 3rd respondents abdicated their duties and supervisory responsibility which has resulted in the forced sterilization of women living with HIV. We reiterate that these violations

would not have occurred had the government effectively enforced the National Guidelines on Family Planning aforementioned, monitored their compliance or set up proper systems to achieve their monitoring and supervisory roles.

141. Your Lordship will note that the 2nd and 3rd Respondent have an obligation to ensure that the rights of persons seeking medical services are not violated by any entity, whether private or public. Moreover, the 2nd and 3rd Respondent regulate and supervise the provision of health services within their respective areas of jurisdiction. The petitioners therefore contend that the 2nd and 3rd respondents failed their supervisory duties and responsibilities to ensure the protection of the public from violation of their rights. Further, the petitioners aver that the failure to strictly enforce the relevant guidelines in relation to informed consent – contributed to the violation of the rights of the petitioners. The petitioners aver that it is the responsibility of the 2nd and 3rd respondents to ensure that health services provided adhere to the constitution, legislative and policy guidelines, in addition to respecting human rights and meeting international standards.

142. My Lord, this obligation by the state to ensure the respect and fulfilment of the constitutional rights of the petitioners is clearly provided for by the Constitution of Kenya at Article 21 and has been affirmed by various decisions by the courts in Kenya. In ***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3***

others Petition No 65 of 2010[72] the obligations of the state as regards human rights were set out in the following manner

> *"In this regard, the obligations of the State and its Organs are clear cut it must "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights" The very raison d'etre of the State is the welfare of the people and the protection of the people's rights and it is its obligation, under international and national laws, to ensure that human rights are observed, respected, and fulfilled, not only by itself but also by other actors in the country. For this purpose, it can and should regulate the conduct of non-state actors to ensure that they fulfil their obligations."*

143. This duty was further expounded ***in C.K. (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR***[73] the Court found state officers responsible for human rights violations due to their failure to perform their duties and responsibilities. The Court held that

> "*The State's duty to protect is heightened in the case of vulnerable groups such as girl-children and the State's failure to protect it need not be intentional to constitute a breach of its obligation."*

144. The Court went further to note:

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[72] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Petition No 65 of 2010* Available at http://kenyalaw.org/caselaw/cases/view/90359/.

[73] *C.K. (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR available at http://kenyalaw.org/caselaw/cases/view/89322/.*

"*In the instant case the police owed a Constitutional duty to protect the petitioners' right and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners' fundamental rights and freedoms as entrusted in the Constitution..... the Police failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringes upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 and further by failing to enforce existing defilement laws the police have contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.*

145. The positive obligations of the state to act to protect human rights were discussed by the African Commission in ***Zimbabwe Human Rights NGO Forum v Zimbabwe 245/2 Comm. No. 245/02 (2006)*** wherein it stated that:

> *Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation."*[74]

146. In reaching its decision, the African Commission adopted with approval a judgment of the Inter American Court of Human Rights in ***Velásquez Rodríguez v Honduras Resolution No. 22/86, Case 7920***, where the Court

[74] *Zimbabwe Human Rights NGO Forum v Zimbabwe 245/2 Comm. No. 245/02 (2006)* at Para 143 available at https://www.achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf.

asserted that there is state responsibility even for the actions of private individuals. It stated that a State "*has failed to comply with [its] duty ... when the State allows "private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention*."[75]

147. The violations meted out on the 1st petitioner were as a direct result of the 2nd and 3rd respondents' failure to ensure compliance with the national policies through training and ensuring enforcement of the law. In questions of family planning, the 2nd and 3rd respondents have an obligation to ensure that services are provided to women living with HIV, and to ensure that these are not discriminatory in effect. In ***General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,*** the African Commission has reiterated the specific state obligations of state parties to "*ensure that the necessary legislative measures, administrative policies and procedures are taken to ensure that no woman is forced, because of her HIV status, disability, ethnicity or any other situation, to use specific contraceptive methods or undergo sterilization or abortion. The use of family planning/contraception and safe abortion services by women should be done with their own informed and voluntary cons*ent."[76]

148. The CEDAW Committee has set out in ***CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*** the obligation of

[75] Velásquez-Rodríguez v. Honduras, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, paras. 172-76.

[76] General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa at para. 47 available at https://www.achpr.org/legalinstruments/detail?id=13.

state parties with regards to women's right to health. It has stated, that the government obligation as regards the right of women to health is to *"eliminate discrimination against women in their access to health-care services throughout the life cycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period*."[77]

149. The CEDAW Committee further states that

> *"States parties should implement a comprehensive national strategy to promote women's health throughout their lifespan. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services.*[78]

150. This has been built upon by the CESCR in General Comment No. 14 on the Right to the Highest Attainable Standard of Health[79] on where it has been stated that

> *States should also ensure that third parties do not limit people's access to health-related information and services. The committee has stated that it "interprets the right to health ... as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health such as ... access to health-related education and information."*

[77] CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) at para. 1.
[78] CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) at para. 29.
[79] *General Comment No. 14 on the Right to the Highest Attainable Standard of Health* at para. 35.

151. It is apparent that the 2nd and 3rd respondents abdicated their responsibilities. In their cross-examination of the witnesses, these respondents did not dislodge the 1st petitioner's evidence that she had unlawfully been sterilised. As demonstrated during hearing as well as their grounds of opposition, these respondents gave no information to the court on what measures they had taken to ensure effective supervision of private health facilities such as the 1st respondent. Moreover, these respondents do not deny that they have a role to play in ensuring that services given by health facilities are done in accordance with the law.

152. We submit that had the 2nd and 3rd respondents undertaken their responsibilities as required by law, by putting in place structures and policies that ensure that both private (such as the 1st respondent) and public health facilities work and respect the rights of marginalized women, then the question of the forced sterilisation of the 1st petitioner, as well as that of many other women living with HIV, would not have occurred.

THE APPROPRIATE REMEDY

153. My Lord the amended petition outlines 14 prayers that are sought before the court. We list them here for ease of reference:

a) This Honourable Court declares that the act of sterilization of the 1st Petitioner by way of bilateral tubal ligation as done by the 1st Respondent amounted to a violation of the human and constitutional rights of the 1st petitioner as outlined in the Petition herein.

b) This Honourable Court declares that it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when and how often to bear children.

c) This Honourable Court issues an order directing the 2nd and 3rd Respondents to put in place guidelines, measures and training for health care providers and social workers that are in line with FIGO Guidelines on sterilization and informed consent.

d) This Honourable Court issues an order directing the 2nd and 3rd Respondents to conduct in depth mandatory training of all practicing gynaecologists and obstetricians on the revised FIGO ethical guidelines on the performance of tubal ligation.

e) This Honourable Court issues an order directing the 3rd Respondent to review the National Family Planning Guidelines for Service Providers to address the provisions that are discriminatory.

f) This Honourable Court issue an order directing that there be instituted a mandatory forty-eight (48) hours waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery.

g) This Honourable Court issues an order directing the 2nd and 3rd Respondents to conduct public awareness campaigns to educate patients and citizens about their rights to informed consent, privacy and information and ensure that information on patients' rights is immediately accessible within health care facilities.

h) This Honourable Court issues an order directing the 2nd and 3rd respondents to establish clear procedural guidelines for following up on complaints of rights violations and strengthen administrative accountability at hospitals.

i) This Honourable Court issues an order directing the 2nd and 3rd Respondents to create a monitoring and evaluation system to ensure full implementation of laws and policies regarding the performance of tubal ligation.

j) This Honourable Court issues an order directing the 3rd Respondent to issue a circular directing all medical and health facilities (both public and private) that forceful or coercive sterilization of women living with HIV is not a government policy.

k) This Honourable Court is pleased to order the 1st Respondent to pay general and exemplary damages on an aggravated scale to the 1st Petitioner for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.

l) An Order This Honourable Court issues an order that since this Petition is in the Public Interest, each party should bear their own costs.

m) This Honorable Court issues an order directing the Respondents within 90 days of the Court Judgment to file affidavits in this Court detailing out their compliance with orders d, e, f, g, h, I, j, k and l.

n) This Honourable Court be pleased to make such other orders as it shall deem fit and just.

154. We submit that Article 23(3) is the guiding legal provision that guides the Court in determining what remedies to be granted to a party whose rights and fundamental freedoms have been threatened, infringed, denied or violated. That constitutional provision uses the term '*including'* when listing the six possible remedies that the court can grant. As such this Court has wide discretion in granting relief in claims of constitutional violations, and the prayers by the petitioners herein are well within the provisions of Article 23(3) of the Constitution.

155. We now highlight the importance of each of these prayers and why we submit that these are appropriate and necessary to remedy the infringement of the petitioners' rights.

156. The Petitioners seek declaratory orders in prayers (a) and (b). On the basis of the evidence outlined above, we submit that the petitioners have proved the requirements necessary for the grant of the declaratory orders as required under Article 23(3) of the Constitution of Kenya, 2010. In addition, we have proved that the violations as committed by the respondents have been proved on a balance of probabilities.

157. Prayers (c), (d), (e), (f), (g), (h), (i) and (j) are remedies that mandate the respondents to take positive measures to avert future and further violations of the rights of women who may be in similar circumstances as the 1st petitioner. We reiterate that the positive duty placed upon the state to take steps and put in place structures that will ensure that the rights of women living with HIV are not violated by use of forced and coerced sterilisation. Moreover, there is a positive obligation on all health care providers to ensure that there is

adequate information given to women seeking services about the health care services that they will receive and to have an accountability mechanism for any issues that may arise out of such service provision. It is in this regard that we urge this court to grant prayers (g), (h), (i) and (j).

158. My Lord with regard to the need to enact, amend or review the relevant legal and policy frameworks so as to ensure the rights of other women are safeguarded, we rely on the cases of ***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others (Supra)*** where the Court lamented the widespread forced evictions and the lack of appropriate legislative or policy framework. The Court therefore directed as follows:

> *"It is on this basis that it behooves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in* ***Articles 9*** *and* ***10*** *of the* ***Constitution."***

159. In that case, the Court found that due to the widespread evictions it was necessary to direct the Government towards an appropriate legal framework based on internationally acceptable guidelines. My Lord we submit that this

dictum is informative in this case, it is necessary that the Ministry of Health, be compelled to review the National Family Planning Guidelines for Service Providers so as to ensure that the discriminatory provisions are amended and that they are in line with the Internationally accepted standards as prayed for in prayer (e).

160. My Lord, there is legal precedent demonstrating that this court can order the State to develop or review policy guidelines and regulations where the continued absence of such guidelines or regulations leads to violation of human rights. This court has issued a similar order, which was fully complied with, in the case of ***Daniel Ng'etich & Others v The Attorney General & Other [2016] eKLR***[80] as follows:

> *"That the 4th respondent [The Cabinet Secretary for Health] does, in consultation with county governments, within Ninety (90) days from the date hereof, develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and that incorporates principles from the international guidance on the involuntary confinement of individuals with TB and other infectious diseases."*[81]

161. My Lord, the International Federation of Gynecology and Obstetrics (FIGO) has formulated useful guidelines on female contraceptive sterilization that

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[80] *Daniel Ng'etich & Others v The Attorney General & Other [2016] eKLR available at* http://kenyalaw.org/caselaw/cases/view/127856.

[81] That Tuberculosis Isolation Policy is available at http://www.kelinkenya.org/wp-content/uploads/2018/06/Kenya-TB-Isolation-Policy-2018.pdf. in the Foreword, at Page 2, Dr Kioko Jackson, then the Minister for Medical Services outlines the steps that the Ministry of Health (the 3rd respondent herein) took to ensure compliance with the court orders given in the Daniel Ngétich case.

ought to be emulated in our context. The guidelines define the conditions under which consent cannot be sought in any case. Of particular importance are:

a) *Prevention of future pregnancy cannot ethically be justified as a medical emergency, and thus cannot be used as a reason for a doctor to sterilize a woman without her full, free and informed consent.*
b) *No minimum or maximum number of children may be used as criteria to sterilize a woman without her full, free and informed consent.*
c) *Only women themselves can give ethically valid consent to their own sterilization.*
d) *Women's consent to sterilization should not be made a condition of access to medical care, such as HIV treatment or of any benefit such as release from an institution.*
e) *Consent to sterilization should not be requested when women may be vulnerable, such as when requesting termination for pregnancy, going into labour or in the aftermath of delivery.*
f) *As for all non-emergency medical procedures, women should be adequately informed of all the risks and benefits of any proposed procedure and of its alternatives; and*
g) *The right of all persons with disabilities who are of marriageable age to marry and to found a family is recognized.*
h) *All information must be provided in a language, both spoken and written, that the women understand and in an accessible format such as sign language, braille and plain non- technical language appropriate to the individual woman's need.*

162. We submit that an adoption of guidelines that are in line with the FIGO guidelines on sterilization and informed consent is of utmost importance to

prevent future violations of reproductive health rights of women – especially those living with HIV.

163. My Lord with regard to prayer (j) that calls on the court to compel the 5th respondent to issue a circular directing all medical and health facilities that the forceful and coercive sterilization of women living with HIV is not a government policy. We submit that in the circumstances with due consideration to the potential for women living with HIV to be exposed to stigma and discrimination on the basis of their health status, it is necessary for this Court to intervene in ensuring that a judgment in favour of the petitioners is widely publicised.

164. In ***Prakash Singh & Ors v Union Of India And Ors the Supreme Court of India*** delivered judgment instructing central and state governments to comply with a set of seven directives laying down practical mechanisms to kick-start police reform. The Court held that:

> *"Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the*

Central Government and/or the State Governments pass the requisite legislations."[82]

165. My Lord we submit that the circumstances in this case possess the gravity and urgency described above and require intervention of this Court. My Lord it bears repetition that one of the national values is the protection of the marginalized. It can also not be gainsaid that 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. My Lord we submit that given the vulnerability of the 1st Petitioner and others who may be in similar circumstances this Court must intervene in ensuring they are protected from any continued violation of their rights.

166. My Lord, it is our humble submission that this court has the power to order the 3rd Respondents to issue a circular to health care facilities directing them to stop doing acts which have been found unconstitutional by the court. My Lord, a great injustice would be occasioned if after the order of unconstitutionality has been given, state officers, their agents or other entities within their supervisory control continue with this practice of forced & coerced tubal ligation of women living with HIV. There exists a possibility that health care workers may continue carrying out this inhuman and degrading practice even after the court makes its decision finding it illegal and unconstitutional. The order as to a circular will ensure that the court does not issue orders in vain and that clear timelines as to implementation of the order

[82] Prakash Singh & Ors vs Union Of India And Ors on 22 September, 2006 available at https://indiankanoon.org/doc/1090328/.

are provided for. This will also ensure that healthcare workers both in the private and public sector are still not under the impression that it is legal to implement unconstitutional directives or practices, and are equally apprised of the dangers of implementing unconstitutional directives or practices. As we have demonstrated above, there is precedent for such an order having been granted by this Court and fully complied with by the 5th respondent in ***Daniel Ng'etich & Others v The Attorney General & Others (supra).***

167. My Lord with regard to prayer (k) that seeks to compel the respondents to pay general and exemplary damages on an aggravated scale to the 1st petitioner for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization, it is our submission that the violations of the human and constitutional rights of the 1st petitioner entitles her to both general and exemplary damages and that this would constitute appropriate redress for the infringement of their rights as individuals. This Court is properly placed to award damages in such a case involving gross violation of human and constitutional rights as provided under Article 23(3) (e) states: *In any proceedings brought under Article 22, a court may grant appropriate relief, including an order for compensation.*

168. In ***Dick Joel Omondi v Hon. Attorney General [2013] eKLR*** the Court stated:

> *"It is now settled law that a party whose constitutional rights are found to have been violated by the state is entitled to damages. The quantum of damages is in the discretion of the Court, taking into account the nature of the violations."*[83]

[83] *Dick Joel Omondi v Hon. Attorney General [2013] eKLR available at* *http://kenyalaw.org/caselaw/cases/view/93333/.*

169. Other jurisdictions have awarded damages for sterilization without informed consent. In ***Government of Namibia v LM & others (supra)*** the Namibian Supreme Court awarded damages for the infringement of human rights of the plaintiffs who had been subjected to forced and coerced sterilisation and referred the matter back to the High Court for determination of quantum.

170. Similarly, in ***Isaacs v Pandie, [2012] ZAWCHC 47***[84]***,*** the High Court of South Africa in 2012 found the applicant had been sterilized without informed consent and awarded damages for past medical expenses, general damages, future medical expenses and loss of earnings in the amount of R410,172.35.[85] It is noteworthy that while the underlying legal finding was overturned on appeal, the quantum of damages was not reviewed.

171. In Canada, the Court in ***Muir v The Queen in right of Alberta, 132 D.L.R. (4th) 695***[86] awarded a woman who had been subjected to sterilization without her informed consent $375,280[87] (Canadian dollars). In reaching this amount the Court awarded the plaintiff $250,280 for her pain and suffering and awarded her aggravated damages in the amount of $125 000 because of the stigma and humiliation she experienced as she had been sterilized ostensibly due to an intellectual disability.

172. We submit that the 1st petitioner will no longer be able to conceive and bear children, depriving them of a deeply intimate part of her humanity. She

[84] *Isaacs v Pandie [2012] ZAWCHC 47 available at* http://www.saflii.org/za/cases/ZAWCHC/2012/47.html.
[85] Approximately Kshs 3,015,174 as at January 2021.
[86] *Muir v The Queen in right of Alberta, 132 D.L.R. (4th) 695 available at* https://eugenicsnewgenics.files.wordpress.com/2014/01/muir-v-alberta.pdf.
[87] Approximately 32,218,020 as at January 2021.

continues to long for children, to suffer mental illness, disharmony in her relationships, shame and humiliation. Had it not been for the 1st respondent's actions, as well as the 2nd and 3rd respondent's failure to carry out their constitutional and statutory mandates, the 1st petitioner would not have undergone the forced sterilization. It is also noted that the procedures are effectively permanent in nature, and any chance of reversal has extremely limited possibility of success. Effectively, if the 1st petitioner is to ever have a chance at conceiving, she would have to do so through in vitro fertilization, a costly and invasive procedure which is well beyond the means of the 1st petitioner. Even Sophia (DW1) the 1st respondent's witness admitted to the fact that the only way to reverse a bilateral tubal ligation was through expensive and invasive surgery.

173. Again, were it not for actions of the 1st respondent, and the inaction of the 2nd and 3rd respondents, the 1st petitioner would not even have to consider these options, which are well out of her means. We humbly submit that any compensation award take into account not only the 1st petitioner's pain and suffering, but also the cost of in vitro fertilization in order to provide meaningful redress.

174. In this regard, we urge the Court to take guidance from the various authorities of this Court where global awards of damages have been made after taking into account the nature of the violations and the circumstances of the plaintiffs, or petitioners, as the case may be. In ***Wachira Weheire v Attorney-General [2010] eKLR (Miscellaneous Civil Case 1184 of 2003)***[88], this Court

[88] ***Wachira Weheire v Attorney-General [2010] eKLR (Miscellaneous Civil Case 1184 of 2003) available at*** http://kenyalaw.org/caselaw/cases/view/66294.

made an award of Kshs 2,500,000.00 to a petitioner whose rights to liberty and freedom from cruel, inhuman and degrading treatment were violated. In ***GSN v Nairobi Hospital & 2 others (supra),*** this court made an award of Kshs 2,000,000.00 to a petitioner who had suffered physical and psychological suffering as a result of the violations of her right to privacy.

175. In cases where there have been multiple constitutional violations, or where the effect of the violations are prolonged, courts have rightly made higher awards. In ***Michael Rubia v Attorney General [2020] eKLR (Petition No 10 of 2013),***[89] the court awarded the sum of Kshs 17,000,000.00 to the estate of the petitioner as general damages for the violation of his constitutional right to liberty for a period of 9 months. This was also the approach taken by this court in ***Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR (Constitutional Petition 441 of 2015)***[90] where the petitioners were awarded Kshs 20,000,000.00 each as damages for the violation of their rights under section 72 and 74 of the retired Constitution. This approach was cemented in law by the Court of Appeal in ***Koigi Wamwere v Attorney General [2015] eKLR (Civil Appeal 86 of 2013)***[91] where the Court found that a lower sum than Kshs 12,000,000.00 for the violations under section 74 of the retired Constitution were patently inadequate.

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[89] ***Michael Rubia v Attorney General [2020] eKLR (Petition NO. 10 of 2013 available at http://kenyalaw.org/caselaw/cases/view/192889.***

[90] Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR available at http://kenyalaw.org/caselaw/cases/view/168130/.

[91] Koigi Wamwere v Attorney General [2015] eKLR (Civil Appeal 86 of 2013) available at http://kenyalaw.org/caselaw/cases/view/106472.

176. My Lord, we submit that guided by the authorities above, this court ought to consider the myriad and continuing violations that the 1st petitioner suffered, and continues to suffer, and award the sum of Kshs 30,000,000.00.

177. My Lord with regard to prayer (l) 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***[92] 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."*

178. My Lord with regards to prayer (n) we submit that guidance is to be taken from the crafting of the order in ***Daniel Ng'etich & Others v The Attorney General (supra)*** and ***Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*** where the Court crafted orders with timelines whereby the respondents were required to file affidavits that allowed the Court to monitor compliance with its judgment. The application of these structural orders and reliefs were considered to be appropriate by the Supreme Court of

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

Kenya in ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR***.[93]

179. We submit that in this matter such an order is necessary to ensure compliance within a reasonable period of time and to guarantee that another ruling of this Court does not go unenforced, and in this regard, we urge this Court to take judicial notice of the increased non-compliance of court orders by the State.

180. In light of the analysis of the facts of the amended petition as well as the law and authority we have set out, we submit that this Court can safely conclude that the petitioners' have proved their case beyond a balance of probabilities on each of the five agreed issues that arose for determination. We therefore urge the Court to allow the amended petition as prayed.

These are our humble submissions.

DATED AT NAIROBI THIS 29th DAY OF APRIL 2021

ALLAN ACHESA MALECHE and NYOKABI NJOGU
ADVOCATES FOR THE PETITIONERS

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