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

PATRICK 234

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

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

Pursuant to Article 22 (1) of the Constitution of Kenya (2010) and The Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013.

PETITIONERS WRITTEN SUBMISSIONS FOR THE AMENDED PETITION DATED 10 SEPTEMBER 2015

1.0 Introduction

My Lordship,

The Petitioners make these Submissions in support of their amended Petition dated 10 September, 2015 which is now before this Honourable Court.

These submissions are structured as follows:

(i) Brief summary of the facts
(ii) Issues for determination
(iii) Government's obligations and responsibilities
(iv) Human and constitutional rights violated
(v) Remedies

2.0 Brief Summary of Facts

My Lord, this Petition is about the unconstitutional and unlawful sterilization of L.A.W, the 1st Petitioner herein, who is a woman living with HIV. The 1st Petitioner underwent a procedure medically known as Bilateral Tubal Ligation (BTL) without her informed consent at Marura Maternity and Nursing Home, the 1st Respondent herein. The manner in which the procedures took place was non- consensual and therefore unconstitutional.

On or about March 2006 when the 1st Petitioner was pregnant, she undertook a HIV test at Kariobangi Health Centre. The test was positive for HIV. She later went for a follow up test at Baba Dogo Health Centre where the test results confirmed that she was indeed HIV positive.

During subsequent visits to Baba Dogo Health Centre the 1st Petitioner was advised by a nurse that due to her health and HIV status it was wise for her not to have any more children as having more children would compromise her health and might even cause her death.

At eight months into the pregnancy she was sent from the Baba Dogo Health Centre to a Community Health Worker in Korogocho. The Community Health Worker gave her two vouchers worth Kshs. 300 one written "CS" and another "TL". She was advised that when she was due for delivery she should use them to deliver at Marura Maternity and Nursing Home.

On or about 15 September, 2006, she was admitted at the Marura Maternity and Nursing Home where she was prepared for theatre. Before the operation, the doctor asked her name, age and the number of children she already had. The operation went well and she gave birth to a baby boy.

The 1st Petitioner soon thereafter lost her husband and she remarried. Her current husband has wanted her to conceive but she has not been successful.

On or about July 2010, she visited a free medical camp in Mathare which was held by German doctors and explained to the doctor that she has been trying to conceive but has been unsuccessful. She underwent medical tests and the doctor informed her that her fallopian tubes are blocked because they had been ligated. The 1st Petitioner avers that the procedure of tubal ligation as done on her was an infringement of her constitutional rights, including her right to reproductive health, thus the present petition.

The 1st Respondent has not responded to the amended petition dated 15 September, 2015. The Court should take notice of this as all subsequent matters pleaded in the amended petition that are not specifically addressed by their previous replying affidavit should be considered as admitted and uncontested. In their response to the Petition dated 9 December, 2014 through the replying affidavit of Sophia Wanjiku, the 1st Respondent does not dispute the fact that they performed a Caesarian Section (CS) and a bilateral tubal ligation (TL) (sterilization) on the 1st Petitioner when she was admitted at the 1st Respondent hospital. The 1st Respondent admits that they were not involved in the screening and education of the 1st Petitioner before the performance of the operation. The 1st respondent makes the claim that such screening and education should have been done by other entities, that is, PricewaterhouseCoopers and OBA-RH. An attempt by the 1st respondent to enjoin PricewaterhouseCoopers and OBA-RH as third

parties was denied by the court vide a ruling delivered on 28 January, 2016. 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 (See paragraphs 7 to 14 of the replying affidavit of Sophia Wanjiku on behalf of the 1st Respondent).

The 2nd Respondent, the County Executive Committee Member in Charge of Health Services – Nairobi County, has not responded to the petition despite being duly served with the relevant court documents and entering appearance.

The 3rd and 4th Respondents (The Cabinet Secretary, Ministry of Health and the Attorney General respectively) in their grounds of opposition dated 22 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 Petitioners in their rejoinder to the 3rd and 4th respondents indicated 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.

My Lord, from the foregoing and from the pleadings submitted to this honourable court, the following facts are common cause:

(i) That the 1st Respondent performed the procedure of bilateral tubal ligation (sterilization) on the 1st Petitioner;
(ii) That the 1st Respondent did not obtain the 1st Petitioner's informed consent for sterilization.

3.0 Issues for Determination

My Lord, this court is called upon to determine the following disputed issues:

(i) Whether the sterilization of the 1st Petitioner by way of bilateral tubal ligation was done with the *informed consent* of the 1st Petitioner.
(ii) Whether the sterilization of the 1st Petitioner by way of bilateral tubal ligation amounted to a violation of her constitutional rights.
(iii) Whether the Petitioners are entitled to the remedies sought

We addressed each of the issues for determination while making reference to the relevant, laws, policies and decided cases both from the court's jurisdiction and neighboring jurisdictions. My Lord, it should be noted international legal instruments ratified by Kenya form part of Kenyan law by virtue of Article 2(6) which provides that:

> *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."*

We shall thus seek to equate the relevant constitutional provisions to the provisions of the relevant international treaties ratified by Kenya and applicable to case in hand.

4.0 Informed Consent

My Lord, it is not in dispute that the 1st Petitioner was sterilized by the 1st Respondent. The issue arising is whether there was informed consent before the sterilization. It is our submission that the sterilization of the 1st Petitioner by way of bilateral tubal ligation was done without her informed consent.

My Lord, we start by demonstrating why informed consent is critical in this case and how the 1st Respondent failed to obtain the informed consent of the 1st Petitioner.

My Lord, it is not in dispute that informed consent is a critical component of any sterilization procedure and that the failure to obtain an individual's informed consent prior to performing a tubal ligation would violate the laws of Kenya and Kenya's international and regional legal obligations.

Obtaining a patient's informed consent prior to conducting any medical procedure, including a sterilization is well-recognized in Kenya and in other jurisdictions around the world.[1] The duty of care a health professional owes his patient is well established.

---

[1] See e.g. *Victorian Charter of Human Rights and Responsibilities Act 2006 – in Consumers Health Forum of Australia Informed Consent in Healthcare: An Issues Paper March 2013 at*

In *M (a Minor) v Amulega & another [2001] KLR 420* the High Court held that:

> *"It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment."*

In this case we submit that the 1st Respondent as a facility practicing medicine was obligated to acquire its patient's, 1st Petitioner's, informed consent prior to sterilizing her.

Obtaining informed consent prior to an invasive medical procedure is critical to ensure the fundamental rights of the patient are not violated. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (UN Special Rapporteur on Health) has affirmed the foundational import of informed consent stating that "guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary health care services".[2]

The components of informed consent are well-established. The Kenya National Patients' Rights Charter (2013) states (at Chapter 1 clause 8):

> *"Every person, patient or client, has a right (sic) to be given full and accurate information in a language one understands about the nature of one's illness, diagnostic procedures, proposed treatment, alternative and the costs involved for one to make a decision except in emergency cases. The decision shall be made willingly and free from duress."*

In the landmark case in South Africa, **Castell v De Greeff 1994(1) SA 408(C)**, Ackerman J outlined what constituted informed consent where he opined, (at 425):

> *"For consent to operate as a defence, the following requirements must, inter alia, be satisfied: the consenting party must have had knowledge and been aware of the nature of the harm or risk; the consenting party must have appreciated and understood the nature and extent of the harm and risk; the consenting party must have consented to the harm and assumed risk; the consent must be comprehensive, that it extend to the entire transaction, inclusive of its consequences.*

---

https://www.chf.org.au/pdfs/chf/Informed-Consent-Issues-Paper.pdf; ACT Health (2011) *Consent to Treatment: Procedures ACT Health: Canberra.*

[2] UNGASS *Report of the Special Rapporteur on the right to the enjoyment of the highest attainable standard of physical and mental health.* A/64/272, Sixty-fourth session, 10 August 2009at para 18. Available at www.ifhhro.org

In the United Kingdom, the Court in *Montgomery v Lanarkshire Health Board [2015] UKSC 11*, affirmed this and further noted that patients must be presented with alternatives to the medical procedure discussed as part of the informed consent process. The Court states thus (at para 87):

> *"An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments."*

The Court goes further and notes that medical personnel must ensure that the information is presented in an understandable manner such that she has all the necessary information to make a decision:

> *"Secondly, the doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed effectively if the information provided is comprehensible. The doctor's duty is not therefore fulfilled by bombarding the patient with technical information which she cannot reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form."*

Similarly, in the South African case **Oldwage v Louwrens (10253/01) [2004] ZAWCHC 9; [2004] 1 All SA 532 (C)**, the Court notes:

> *"Consent to treatment will only be informed if it is based on substantial knowledge concerning the nature and the effect of the act consented to. Thus a medical practitioner is obliged to warn a patient of the material risks and consequences which may ensue during and consequent to the proposed treatment"*

The Council of Europe's Convention on Human Rights and Biomedicine requires that medical practitioners give patient's objective and comprehensive information about his or her contemplated treatment, including its purpose, nature, consequences and risks, in order to enable the patient to make an informed decision.

Based on the above discussion, we submit that informed consent for general medical procedures requires the following:

(i) The patient is competent to give consent;

(ii) The patient has been provided with full information of the risks, benefits, alternatives and costs has been provided;
(iii) Consent is freely given;
(iv) Consent is specific to the procedure; and
(v) the information is comprehended by the patient, including that it was presented in a language and manner the patient understands.

With particular respect to sterilization, the Kenya National Family Planning Guidelines for Service Providers (2010) emphasizes the need for informed and voluntary consent prior to female surgical sterilization. The guidelines note that:

> *"special care must be taken to ensure that every client who chooses this method does so voluntarily and is fully informed about the permanence of this method and the availability of alternative, long acting, highly effective methods."*

Further, the guidelines caution service providers against providing any incentive for one to accept any form of contraception or in recruiting potential clients to perform surgical operations.

The International Federation of Gynaecology and Obstetrics (FIGO) has noted that in cases of sterilization, there can be no threats or inducements; the information has to be understandable; and the information has to be in a form and language she understands. Further, the FIGO guidelines acknowledge that for marginalized patients, including patients who have "little education" it can be difficult and time consuming to provide the relevant information for informed consent, but notes that it does not absolve medical providers from striving to fulfil the criteria for informed consent.

FIGO has also noted that sterilization is not an emergency procedure and thus she "must be given the time and support she needs to consider her choice. Her informed decision must be respected, even if it is considered liable to be harmful to her health".

We humbly draw to the attention of this court the case of *Government of the Republic of Namibia v LM and Others (SA 49/2012) [2014] NASC 19*, where the Court was confronted with facts similar to this particular case. The Court held that:

> *"The consent obtained was invalidated by the respondents' lack of capacity to give informed consent in light of the history of how the decision to sterilise them was arrived at and the circumstances under which the respondents' consent was obtained. It was merely written rather than informed consent, which in my opinion is not sufficient for the performance of a procedure as invasive and potentially irreversible as sterilisation.*

The important factor which must be kept in mind at all times is whether the woman has the capacity to give her consent for sterilisation 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.... For all these reasons, it is my considered opinion that none of the respondents gave informed consent because they were in varying degrees of labour and may not have fully and rationally comprehended the consequences of giving consent for the sterilisation procedure. This is especially the case given that none of the respondents made any appointment or booking to confirm their intention to be sterilised before going into labour."

The Court in that case clearly held that obtaining the signature of a patient while she is in labour or on the way to the operating theatre is not adequate for informed consent.

My Lord, we call upon this court to take notice of the aim of family planning as emphasized by *The Programme of Action of the International Conference on Population and Development* (7.12) where it is noted:

"The aim of family-planning programmes must be to enable couples and individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so and to ensure informed choices and make available a full range of safe and effective methods. The success of population education and family-planning programmes in a variety of settings demonstrates that informed individuals everywhere can and will act responsibly in the light of their own needs and those of their families and communities. The principle of informed free choice is essential to the long-term success of family planning programmes. Any form of coercion has no part to play. In every society there are many social and economic incentives and disincentives that affect individual decisions about child-bearing and family size."

My Lord, we submit that when dealing with informed consent to sterilization not only are the general principles outlined above required, but also the following principles should also be taken into account:

(i) a document purportedly signed during the currency of labour pains, when the will of the Petitioner is overborne by the pain being experienced, and which document is to consent to a procedure totally unrelated to birth, cannot under any circumstance *conclusively prove* informed consent.

(ii) That sterilization is not an emergency procedure and thus a patient should be given enough time and support to make a decision.

(iii) That though it may be difficult and time consuming to ensure the informed consent of a marginalized patient is acquired, it is still necessary for medical practitioners.

My Lord, from the foregoing, the ingredients of informed consent are well established – and it is upon the 1st Respondent to prove that indeed the alleged consent strictly meets this clear test.

It is our submissions that the 1st Respondent has failed to meet the criteria for informed consent. First, the 1st Respondent does not dispute that they sterilized the 1st Petitioner by way of bilateral tubal ligation. Second, the 1st Respondent does not dispute that the procedure was done without seeking the informed consent of the 1st Petitioner on assumption that it had been given elsewhere.

My Lord, the 1st Respondent has produced before this court a document purportedly signed on behalf of the 1st Petitioner allegedly consenting to the sterilization. It should be noted that the 1st Petitioner has disputed the veracity of that document. However, even if the consent document accurately bore the 1st Petitioner's signature it would not be enough to show informed consent was obtained. Indeed, by the 1st Respondent's own submissions, informed consent was not obtained by them. My Lord, paragraph 14 of the Replying Affidavit of Sophia Wanjiku (dated 13 April, 2015) 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"*

We further submit that the onus on proving there was informed consent lies with the Respondents, as the 1st Respondent has agreed. However, the signed consent form even if signed by the 1st Petitioner would not be sufficient for meeting the 1st Respondent's burden of proving there was informed consent as there is no evidence that the 1st Petitioner was given all the relevant information regarding the nature and risks of sterilization and the alternatives to sterilization in a manner which she understood. 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. My Lord, there was no comprehensible information given, no synthesis of the information to allow comprehension and no volition. My Lord, 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.

4.0 Respondent's obligations and responsibilities

The 2nd and 3rd Respondents have a clear obligation to protect the constitutional rights of the 1st Petitioner. The 2nd and 3rd Respondents are in charge of the health sector at the county and national levels – and are responsible for the formulation and implementation of policies. In implementation of policies, the 2nd and 3rd Respondents would ordinarily ensure enforcement, compliance, trainings, education and supervisory duties in the delivery of health services at their respective governments. The 2nd and 3rd Respondents are directly in charge of public health facilities, and supervise private facilities to ensure their compliance with laws, regulations and policies.

It is our submission that the violation of the reproductive health rights of the 1st Petitioner herein was the direct result of the failure, neglect or refusal by the 3rd Respondents to perform their supervisory duties in health services provision by a private health facility, the 1st Respondent. My Lord, the 3rd Respondent abdicated its duties and supervisory responsibilities resulting in the coerced sterilization of HIV-positive women. We reiterate that these violations would not have occurred had the government effectively enforced the National Guidelines aforementioned, monitored their compliance or set up proper systems to achieve its monitory and supervisory roles.

My Lord, this obligation 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* the obligations of the state as regards human right were declared thus:

> *"In this regard, the obligations of the State and its Organs are clear cut it must "observe, respect, protect, promote and fulfill 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 fulfill their obligations."*

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* the Court found state officers responsible for human rights violations due for their failure to perform their duties and responsibilities. The Court states:

> *"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."*

The Court went further to note:

> *"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.*

Further, this is affirmed at the regional level where the African Commission on Human and Peoples' Rights (African Commission) in *Zimbabwe Human Rights NGO Forum v Zimbabwe 245/2* stated:

> *"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."*[3]

My Lord, it is also our submission that the 3rd Respondent failed to provide in the policy that HIV status should not be used as a basis for sterilization, and thus provided an 'appropriate ground' for the continued practice of forceful and coerced sterilization of women living with HIV. The research report by 3rd respondent entitled *Robbed of Choice:*

---

[3] The ACHPR notes (footnote 36) that: "In human rights jurisprudence this standard was first articulated by a regional court, the Inter- American Court of Human Rights, in looking at the obligations of the State of Honduras under the American Convention on Human Rights - Velásquez-Rodríguez, ser. C.,No.4, 9 Hum. Rts.l.J. 212 (1988). The standard of due diligence has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.' Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity."

Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya[4] clearly demonstrates a pattern, a pattern that speaks of government failures.

5.0 Human and Constitutional Rights

My Lord, we now discuss in detail the human and constitutional rights of the 1st Petitioner violated by the Respondents.

My Lord, the coerced sterilization of the 1st Petitioner violated her rights under the Constitution as follows:

- Her right to freedom and security of the person guaranteed under articles 29(d) and 29(f) of the Constitution;
- Her right to human dignity guaranteed under article 28 of the Constitution;
- Her right to privacy guaranteed under article 31(a) of the Constitution;
- Her right to health guaranteed under article 43(1)(a) of the Constitution; and
- Her right to equality and freedom from discrimination guaranteed under article 27 of the Constitution.
- Her right of access to information guaranteed under article 35(1) of the Constitution
- Her right to life as guaranteed under article 26(1) of the Constitution

Each right and its applicability to this case is discussed below.

5.1 Right to freedom and security of the person

Article 29 of the Constitution provides in relevant part that:

Every person has the right to freedom and security of the person, which includes the right not to be—

...

(d) subjected to torture in any manner, whether physical or psychological;

...

(f) treated or punished in a cruel, inhuman or degrading manner.

This right is also guaranteed under Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the African Charter on Human and People's Rights (ACPHR) which both provide that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

---

[4] Marked as GK-001 and annexed to the Supporting Affidavit of Gladys Kiio

The High Court in *Hezbon Ombwayo Odiero v Minister for State for Provincial Administration & Internal Security & 3 others [2016] eKLR* affirmed that the "[p]rohibition against torture, cruel, or inhuman and degrading treatment implies that an 'action is barbarous, brutal or cruel' while degrading punishment is that which brings a person dishonour or contempt."

This is similar under international and regional law. The Human Rights Committee has noted that the prohibition of torture, cruel, inhuman and degrading treatment protects both the dignity and physical and mental integrity of the individual stating that it "relates not only to acts that cause physical pain but also acts that cause mental suffering to the victim". It further notes that the right applies to patients in medical institutions.

The African Commission has similarly noted that the prohibition of cruel, inhuman and degrading treatment includes "Not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience... the prohibition of torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses."[5]

We submit that the failure to obtain the 1st Petitioner's informed consent prior to subjecting her to sterilization caused her considerable mental anguish, including subjecting her to contempt in violation of her right to be free from cruel, inhuman and degrading treatment.

The courts in Kenya have yet to address a case involving coerced sterilization under the new Constitution. However, a number of international and bodies and other similarly-situated jurisdictions have addressed coerced sterilization finding that it violates the prohibition on cruel, inhuman and degrading treatment. We shall thus rely on a number of decisions from other jurisdictions noting the peculiar circumstances of this case.

The Human Rights Committee has noted that countries must address forced sterilization when complying with the prohibition on cruel, inhuman and degrading treatment.[6] Further, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) emphasised that treatment without consent and denial of medical treatment may lead to a violation

---

[5] Doebbler v Sudan, paras 36-37.

[6] HRC General Comment No 28 at para 11

of the right to be protected from torture and cruel, inhuman, or degrading treatment. He notes that *"[i]nternational 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; female genital mutilation; violations of medical secrecy and confidentiality in health-care settings, such as denunciations of women by medical personnel when evidence of illegal abortion is found; and the practice of attempting to obtain confessions as a condition of potentially life-saving medical treatment after abortion."*[7]

My Lord, the Special Rapporteur on Torture in his report to the Human Rights Council also declared non-consensual sterilization *"an act of violence, a form of social control, and a violation of the right to be free from torture and other cruel, inhuman and degrading treatment."*[8]

The UN Special Rapporteur on Violence against Women, its Causes and Consequences expressed concern that practices such as coerced or forced sterilisation and forced abortions may violate a woman's right to physical integrity and security.[9]

Similarly, at the regional level, the African Commission has clearly stated that involuntary sterilization violates the right to be free from cruel, inhuman and degrading treatment guaranteed under the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. In Resolution 260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services, it *"**[f]irmly 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;"*.

---

[7] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez at para 46

[8] Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment, Juan E. Mendez, Paragraph 46, (Feb 3, 2013)

[9] Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Policies and Practices that Impact Women's Reproductive Rights and Contribute to, Cause or Constitute Violence against Women, Radhika Coomaraswamy" Commission on Human Rights 55th Session UN doc E/CN.4/1999/68/Add.4 (1999) at paras 45 and 51

Similarly-situated courts have also found that the practice of coerced sterilization violates the prohibition of cruel, inhuman and degrading treatment. In *Namibia v LM and Others*, 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.

The European Court of Human Rights in finding that the right to be free from cruel, inhuman and degrading treatment guaranteed under article 3 of the European Convention on Human Rights was violated in the coerced sterilization of a Roma woman in Slovakia noted that the sterilization had "grossly interfered with [her] physical integrity as she was thereby deprived of her reproductive capability."[10] The ECHR further noted that though there was no intention to mistreat the woman the failure to obtain her informed consent prior to a 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.[11]

In this case, the 1st Petitioner had no knowledge that she was sterilized while giving birth. Indeed, she sought medical advice when she was unable to conceive after she had been sterilized. She had not received any previous information regarding the procedure, including the nature of the procedure, the risks, benefits and alternatives to sterilization, and the fact that sterilization is permanent. The coerced sterilization has resulted in significant mental and psychological anguish for the 1st Petitioner as well as the other women whose stories were documented and compiled by the 3rd Petitioner.

Further, my Lord, we have produced before this court information that show that *"the procedures are such that it takes a long time for women to heal and their menstrual cycle is affected, with menstruations non-existent or irregular. The women are unable to hold urine for a long period of time and they suffer frequent abdominal pains. Women who have undergone the procedure report that they experience reduced sexual desire"*

My Lord, we submit that a woman forced to suffer these effects, for a procedure that she did not consent to is cruel, inhuman and degrading and constitutes torture.

5.2 Right to dignity

---

[10] VC v Slovakia, para 116.

[11] Id at para 119.

Article 28 of the Constitution provides: *"Every person has inherent dignity and the right to have that dignity respected and protected."* The right to dignity is also guaranteed under Article 1 of the Universal Declaration of Human Rights (UDHR), Article 5 of the ACHPR, and Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

In *A.N.N v Attorney General [2013] eKLR*, the High Court has noted that the right to dignity includes the right to determine one's own affairs. The Court affirmatively quoted the South Africa Constitutional Court in *Barkhuizen v Napier [2007] ZACC 5* when it held "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."[12] In the context of health the High Court in C.O.M. v Standard Group Limited & another *[2013] eKLR* relied on the dicta in *NM and Others v Smith 2007 ZACC 6* where it was held that the disclosure of a person's HIV status by another violated the dignity and psychological integrity of that person.

Regional mechanisms in other countries have also grappled with the application of the right to dignity. The African Commission has held that: "Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right."[13]

The African Commission further elaborated on what constituted the right to dignity, noting that "exposing victims to personal sufferings and indignity violates the right to human dignity", further noting that "personal suffering and indignity can take many forms".[14]

The African Commission has noted that coerced sterilization does clearly violate the right to dignity guaranteed under the African Charter.[15]

In this case, it is clear that subjecting 1st Petitioner to sterilization without her informed consent led to personal suffering and indignity as she was unable to engage in a fundamental reproductive act: bearing children. Further it undermined her ability to regulate her own affairs, namely her reproduction.

---

[12] A.N.N v Attorney General [2013] eKLR

[13] *Purohit and Moore v Gambia*, Comm. 241/01, para 57

[14] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE)/Sudan*, Comm. 279/03-296/05, para 158.

[15] Resolution 260.

5.3 Right to privacy

Article 31 of the Constitution states in relevant part: *"Everyone has the right to privacy..."*

The right to privacy is also protected in Article 12 of the UDHR; Article 17(1) of the ICCPR; Article 22 of the Convention on Rights of Persons with Disability; Article 16 of the Convention on the Rights of the Child (CRC); Article 10 of the African Charter on the Rights and Welfare of the Child; and Article 8(1) of the European Convention on Human Rights.

In the seminal case on the right to privacy in Kenya, *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR*, the High Court found that *"(a) privacy is a subjective expectation of privacy that is reasonable, (b) it is reasonable to expect privacy in the inner sanctum, in the truly personal realm, (c) a protected inner sanctum helps achieve a valuable good-one's own autonomous identity. It emerges to my mind that...privacy is not a value in itself but 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."*

Under international law, the Human Rights Committee has indicated that the right to privacy encompasses instances where women are subject to medical procedures without their informed consent.[16]

Ensuring there is informed consent before a medical procedure such as a sterilization which renders the 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.

In this case, the failure to obtain 1st Petitioner's informed consent violated her right to make her own decisions and we submit undermined her autonomous identity.

5.4 Right to the Highest Attainable Standard of Health

My Lord, Article 43(1) (a) of the Constitution provides that: *"Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care."*

---

[16] HRC General Comment No 28 at para 20

This right is also incorporated through Article 12 of the International Covenant of Economic Social and Cultural Rights (ICESCR); Article 12(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Article 24 on the CRC; Article 16 of the ACHPR; Article 14 of Maputo Protocol; and Article 14 of the African Charter on the Rights and Welfare of the Child.

My Lord, it is our submissions that the sterilization of the 1st Petitioner without her informed consent was a violation of her right to health and more specifically, her right to reproductive health.

Reproductive health has been defined by the Committee on Economic, Social and Cultural Rights (CESCR) the body tasked with the interpretation and monitoring of the ICESCR, thus:

> *"Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right to access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth."*

We submit that the right to health includes the following: (i) the right to physical and mental health wellbeing; (ii) the right to informed consent; (iii) patients be provided with education and information; and (iv) access to quality health care services.

The High Court has further noted that the right to health includes psychological well-being. In *W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR* the High Court held 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."*

A central component of the right to health is the obligation to obtain informed consent prior to any medical procedure. The CESCR notes: "[t]he right to health…include[s] the right 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."

The CESCR further elaborated in relation to state duties as regards to women's right to health that such strategies should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full

range of high quality and affordable health care, including sexual and reproductive services.

Article 12(1) of the CEDAW requires that voluntary, as well as informed consent to health services be obtained.[17] General Recommendation No 24 of CEDAW states 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."[18] It further recommends that countries ensure health services are consistent with the human rights of women, including the rights to autonomy, informed consent, choice as well as privacy and confidentiality.[19] The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has stressed that this means that women "have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives".[20]

Further the UN Special Rapporteur on Health has noted that marginalized populations, including women are at particular risk of violations of their right to informed consent due to social, economic and cultural inequalities.[21] 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."*[22]

The right to health also requires that patients be provided with relevant education and information. 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 notes that:

---

[17] CEDAW Committee's General Recommendation No. 24

[18] Para 22.

[19] Para 31(e).

[20] Para 20.

[21] "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.

[22] Id at paras 55

"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. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels."

Finally, the right to health requires the provision of quality health care services. In *Sudan Human Rights Organisation and COHRE v Sudan 279/03-296/05*, the African Commission, in examining the meaning of the right to health in the ACHPR, recognised the obligations on the State to respect protect and fulfill health rights by providing services that are available, accessible, acceptable and of quality.

In this case, we submit that the Respondents failed to obtain the 1st Petitioner's informed consent as outlined above in violation of the right to health. We further submit that the Respondents failed to provide the 1st Petitioner with the adequate information regarding the procedure including the nature of the procedure, the risks and potential non-permanent alternatives. Finally, we submit that the sterilization without the 1st Petitioner's informed consent does 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.

Finally, sterilizing the 1st Petitioner without her informed consent deeply affected her psychological well-being as evidenced by the Psychological and Psychiatric Evaluation produced before this court (annexure LAW 004 to the amended petition) in violation of her right to health. The report makes the following conclusion:

"L. has suffered Major Depressive Disorder due to her inability to conceive and the reaction of her social relationship and circumstances. This has contributed to her outbursts of anger, which have negatively impacted her relationships and social life."

5.5 Right to Freedom From Discrimination

Articles 27(4) and 27 (5) of the Constitution provides: *"(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief,*

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

The right to non-discrimination is also guaranteed under Articles 2 and 3 of the ICCPR, Article 12 of CEDAW, Articles 2 and 18(3) of the ACHPR, and Article 2 of the Maputo Protocol.

The High Court in *Peter K. Waweru v Republic [2006]eKLR* has 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."

It further stated that "Discrimination has" been defined as a
"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".

The definition of discrimination was affirmed when in *Pravin Bowry v Ethics & Anti-Corruption Commission [2015] eKLR* the High Court adopted the definitions outlined above when addressing a discrimination claim under the new Constitution.

With particular respect to discrimination against women, CEDAW defines discrimination in article 1 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."

A number of international and regional bodies have found coerced sterilization of marginalized women violated the prohibition of discrimination.

The CEDAW Committee noted, in General Recommendation 19, that coercive acts can amount to discrimination, stating that "[d]iscrimination against women includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." This includes subjecting women to coercive medical procedures which can result in physical, mental or sexual harm to the women.

In *AS v Hungary 4/2004*, the CEDAW Committee found that Hungary had violated the complainant's rights to protection from discrimination in health care provided for under article 12, amongst other rights, in obtaining her signature on consent forms while she was in labour and failing to provide her with information on the nature, risks and alternatives of sterilization in a manner she could understand.

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 Resolution 260.

We submit that the 1st Petitioner and other HIV-positive women who had been subjected to sterilization without their informed consent as documented by the 3rd Petitioner were discriminated against on the basis of their gender and their health status in violation of article 27.

Under the definition of discrimination, we submit that 1st Petitioner was subjected to sterilization without her informed consent when a man who was HIV-positive would not have been subjected to a sterilization without his consent.

The 1st Petitioner and the other women whose experiences the 3rd Petitioner has documented were all sterilized while giving birth. Men are never placed in the situation of having to access the healthcare system in such circumstances and thus are never in a position where they are vulnerable to being sterilized without their informed consent. Given this biological difference between men and women, the fact that only women have been coercively sterilised based on research done by the 3rd Respondent, and the failure of the Respondents to enact appropriate safeguards created a discriminatory climate that was conducive to sterilizing HIV-positive women without their informed consent.

The CEDAW Committee in General Recommendation 19 has found that violence against women includes coerced sterilization. It further found in General Recommendation 19 that such violence against women is a form of discrimination against women. The United Nations Commission on Human Rights has expanded on this in resolution 2003/45 where it noted that "all forms of violence against women occur within the context of de jure and de facto discrimination against women and the lower status accorded to women in society."

The European Court of Human Rights has found that the failure of government to take adequate measures to protect women from domestic violence violates the prohibition of discrimination. In *Opuz v Turkey*, Opuz sued Turkey for failing to adequately protect her from the likelihood of violence by her ex-husband. She argued in part that Turkey violated her right to discrimination on the basis of sex. The ECHR held that Turkey's failure, even if unintentional, to protect the applicant against domestic violence breached women's right to be free from discrimination as guaranteed under article 14. The Court further found that domestic violence primarily affected women and that the general and discriminatory judicial passivity of Turkey created a climate that was conducive to domestic violence. Finally, the Court held that domestic violence in Turkey was gender-based, which constituted a form of discrimination against women.

In this case, similarly the lack of clear legislative and policy guidelines on informed consent for sterilization and the failure to particularly address the risks of coerced sterilization women face in law and policy violated the 1st Petitioner's right to be free from discrimination on the basis of sex.

We also submit that the 1st Petitioner was particularly vulnerable to coerced sterilization because she was HIV positive, which is a protected ground as it falls under health status. Kenya continues to have high rates of stigma against people living with HIV. The HIV Stigma Index found that over 15% of the participants in the study reported being subject to discrimination and stigma in accessing health service because of their HIV status. Further the HIV Stigma Index found that of the 1030 Respondents almost 10% reported that they felt they had been coerced into considering a sterilization.

My Lord, we submit that the unlawful sterilization of the 1st Petitioner was an act born out of the seeds of discrimination of a particular population based on their gender and health status: women living with HIV.

To the extent that the Court finds there has been an infringement on the right to be free from cruel, inhuman or degrading treatment, under article 25(a) there can be no justifiable limitation to that right.

With respect to the other rights, the Respondents have provided no justification for the limitation on 1st Petitioner's rights. Instead, the Respondents have merely argued that they were not responsible for the failure to obtain informed consent or in the case of 1st Respondent they were not required to obtain informed consent. Given this, and the requirement under article 24(3) that the state or person seeking to justify a particular limitation shall demonstrate the limitation was justifiable, we submit that no adequate justification has been provided by the Respondents for the limitation of 1st Petitioner's rights.

5.6 Right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom as under Article 35(1) (b)

My Lord, it is our submission that the violations of the human and constitutional rights of the 1st Petitioner would have been avoided had the 1st Respondent provided the required information. In this regards, the right to information of the 1st Petitioner was violated.

The significance of information to reproductive health is reinforced by Article 10(h) of CEDAW, 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."*

My Lord, *the right to information is at the core of the exercise and enjoyment of all other rights by citizen*[23] *and access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights.*[24]

It therefore follows that a deprivation of the right to access information automatically leads to violations of other rights. My Lord, we have demonstrated that the 1st Petitioner was indeed sterilized without her informed consent. And we have demonstrated that informed consent consists of the *elements of information, comprehension and volition and that the information provided must be sufficient, understandable and there must be no coercion or undue influence in its procurement.*

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

---

[23] *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others* [2013] eKLR

[24] Brummer v Minister For Social Development 2009 (II) BCLR 1075 (CC)

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."*

As it relates to the 2nd and 3rd Respondents, CESCR in General Comment 14 (at 35) expands the positive obligations of the state thus: *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."*

The 2nd and 3rd Respondent failed in this regard and contributed to the violation of the right to access to information by the 1st Petitioner.

5.7 Violation of the right to life

The violation of the right to health is tied to the right to life as under Article 26(1). In *Villagran Morales et al. v Guatemala, Series C, No. 63, 19 Nov. 1999* (at para. 144), 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."*

Justice Mumbi Ngugi in *P.A.O & 2 Others v Attorney General [2012] eKLR*

> *"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 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."*

My Lord, it is our submissions the violation of the right to health of the Petitioner also threatened to violate her right to life. The act of sterilization on the 1st Petitioner

prevented her from having access to conditions that guarantee a dignified existence as held in the *Villagran Morales* case. Further, the 1st Petitioner has suffered psychologically and in as much as this violates her right to health, it by extension violates her right to life.

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;"*[25] 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.

6.0 Remedies

My Lord the amended petition outlines 11 prayers that are sought before the court. The prayers are outlined below 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 gynecologists 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 ~~seven (7) days~~ <u>forty eight (48) hours</u> waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery.

[25] Page 1 of the Report.

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 matter be brought up for mention before this Honourable Court six (6) months after the date of judgment to confirm compliance with the orders issued.~~ 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.

My Lord we will highlight the importance of each of the prayers and why it's key for the court to issue them. Prayers (a) and (b) are critical in ensuring that the court pronounces it's self on the violation of the rights that the 1st Petitioner has faced. We have aptly demonstrated the violations through the affidavits of the 1st Petitioner and in the submissions. Prayers (c), (d) (e), (f), (g), (h), and (i) are remedies that implore 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. My Lord this Court may be guided by the holding in Head of Department, Department of Education,

Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another[26]

> *"Importantly, the obligation to protect the rights in the Bill of Rights goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right.76 This Court has held that in some circumstances the Constitution imposes a positive obligation on the "[s]tate and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection. "The point is well-captured by Nugent JA in Van Duivenboden:*
>
> *"While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights."*

My Lord, the High Court in Friends of Lake Turkana Trust v Attorney General & 2 others *[2014] eKLR* in assessing the State's obligations to protect the environment in terms of Article 42 relied on dictum in *Guerra v Italy (1998) 26 EHRR 357* and *Oneryildz v Turkey (2005) 41 EHRR 20* and found "that there is a positive obligation on the part of public authorities to supply information about the risks involved in living in close proximity to an environmentally sensitive use, particularly one which poses a risk to their right to life."

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 Nationals 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 *(Muthurwa Estate)*[27] where the Court held:

> *"Before I do that, I must lament the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands, Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. . . . It is on this basis that it behoves 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*

[26] (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC)

[27] Petitions No. 65 of 2010.

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.***"

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 dicta 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.

My Lord, from the foregoing, it is clear that this honourable court can rightly order the Government 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 recently issued a similar order in the case of *Daniel Ng'etich & Others v The Attorney General & Other Petition No. 329 of 2014 at the High Court in Nairobi*_where Justice Mumbi Ngugi directed as follows:

> "*That the 4 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."*

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

My Lord, 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.

My Lord with regard to prayer (j) that calls on the court to compel the 3rd Respondent to issue a circular. We submit that in the circumstances with due consideration to the potential for the target groups 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. In Prakash Singh & Ors v Union Of India And Ors_the Supreme Court of India delivered a historic 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."

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 no repetition that one of the national values is the protection of the marginalised. It similarly bears no repetition that persons living with HIV are vulnerable to stigma and discrimination and are marginalised in our 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.

My Lord, it is our humble submission that this honourable court has the power to order the 2nd and 3rd Respondents to issue a circular to its officers 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 and/or their agents continue with this practice of forced & coerced tubal ligation of women living with HIV. There exists a possibility that health care workers may continue carry 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 are provided for. This will equally 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 & practices and are equally apprised of the dangers of implementing unconstitutional directives or practices. This court has rightly directed the government, and the Ministry of Health has complied, in *Daniel Ng'etich & Others v The Attorney General & Other* mentioned above that:

"the 4th Respondent [Cabinet Secretary for Health] *does issue a circular, within Thirty (30) days hereof, directed to all public and private medical facilities and public health officers clarifying that section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya, does not authorise the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment."*

My Lord with regard to prayer (k) that seeks to compel 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. We submit that My Lord, it is our submissions that the violations of the

human and constitutional rights of the 1st Petitioner entitles her to both general and exemplary damages. 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.*

My Lord, we have demonstrated that:

(a) The 1st Petitioner was sterilized without her informed consent;
(b) And that this unlawful sterilization violated her fundamental human and constitutional rights.

My Lord, the 1st Petitioner was robbed of her choice to determine the number and spacing of one's children, right to marry and found a family, and she further suffered psychological defects due to the unlawful sterilization. We submit that indeed these warrant an award of damages.

My Lord, we refer to *Dick Joel Omondi v Hon. Attorney General [2013]eKLR* where 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."*

The Court goes further to note:

> *"The High Court has awarded damages for violation of constitutional rights in a number of torture cases that have come before it. In the case of Haruni Thungu Wakaba -v- The Attorney General Misc Appl. No. 1411 of 2004, Okwengu J, awarded the Petitioners who were incarcerated and had their rights violated, general damages for each of the 20 applicants ranging from Kshs.1,000,000.00 to Kshs.3,000,000.00. In the case of Rumba Kinuthia –v- Attorney General (supra), Wendoh J made an award of Kshs.1,500,000.00 as general damages."*

My Lord, it is our submission that the damages awarded will go a long way in healing the deep scars suffered by the 1st Petitioner due to the unlawful sterilization as evidenced by the relevant medical reports annexed to the 1st Petitioners affidavits. We also rely on the cases of *Otieno Mak'Onyango v Attorney General (2012) eKLR* and *Mwangi*

Stephen Mureithi v Daniel Toroitich Arap Moi (2011) eKLR where the courts awarded damages for infringement of constitutional rights.

A number of other jurisdictions have awarded damages for sterilization without informed consent. In *Government of Namibia v LM & others (supra)* the court damages were awarded for infringement of human rights through forced and coerced sterilisation:

> *"For all these reasons, it is my considered opinion that none of the respondents gave informed consent because they were in varying degrees of labour and may not have fully and rationally comprehended the consequences of giving consent for the sterilisation procedure. This is especially the case given that none of the respondents made any appointment or booking to confirm their intention to be sterilised before going into labour. In my view, the appeal in respect of each of the respondents ought to be dismissed and the matter referred back to the High Court for the determination by that court of the quantum of damages payable by the appellant."*

In *Isaacs v Pandi, [2012] ZAWCHC 47*, 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. The underlying legal finding was overturned on appeal, but the appeal did not discuss the damages award.

In Canada, the Court in *Muir v The Queen in right of Alberta, 132 D.L.R. (4th) 695* awarded a woman who had been subjected to sterilization without her informed consent $375,280 (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.

We submit that the 1st petitioner will no longer be able to easily have a child. If she is to pursue the option of having a child she would have to engage in in vitro fertilization, an expensive process which is beyond the economic means of 1st petitioner. Had it not been for the 1st respondent's actions, 1st petitioner would not have to avail of herself of this expensive option. 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.

Finally, in exercising its discretion, we humbly ask that this court be guided by the Lesotho case of *Mosisili v Editor, Mirror Newspaper and Others Case No CIV/T/275/2001* where the Court pointed out that:

> *"...it has been said that generally, it serves little purpose to refer to other cases where damages have been awarded since seldom is one case similar to another. What the cases offer are general guiding principles which by no means are exhaustive either. In the final analysis a judge makes an award that he thinks meets the justice of the case."*

My Lord with regard to prayer (l) My Lord we submit that given this Petition is 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 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."

My Lord with regards to prayers (m) and (n) we request that guidance is taken from the crafting of the order in the *Muthurwa Case and Daniel Ng'etich & Others v The Attorney General case*, where the Court crafted orders with timelines whereby the Respondents were required to file affidavits that allowed the Court to monitor compliance with its ruling. We submit that in this matter such order may well be necessary to ensure compliance within a reasonable period of time and to guarantee that another ruling of this Court does not go unnoticed.

We trust that our arguments and evidence submitted before the court will persuade your Lordship to allow our petition as prayed.

These are our humble submissions.

ALLAN ACHESA MALECHE
ADVOCATE FOR THE PETITIONERS

DRAWN & FILED BY: -

ALLAN ACHESA MALECHE
KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS (KELIN)
MOMBASA ROAD, SOMAK BUILDING (Next to Airtel) 4th FLOOR
P.O. BOX 112-00200, KNH
EMAIL: amaleche@kelinkenya.org
MOBILE NO: +254 708 389 870
NAIROBI.

TO BE SERVED UPON:-

OJIENDA & CO. ADVOCATES
VIEW PARK TOWERS, 2ND FLOOR
UHURU HIGHWAY
P.O.BOX 17245-00100
NAIROBI

MANEGENE & PARTNERS ADVOCATES
BRUCE HOUSE- 10TH FLOOR, ROOM 1001,
STANDARD STREET,
P.O.BOX 7183-00200,
NAIROBI.

THE HON. THE ATTORNEY GENERAL
STATE LAW OFFICE
SHERIA HOUSE
HARAMBEE AVENUE
P.O BOX 40112
NAIROBI

RACHIER & AMOLLO ADVOCATES
MAYFAIR CENTER, 5TH FLOOR
RALPH BUNCHE ROAD
P.O BOX 55645-00200
NAIROBI

NUNGO, ODUOR & WAIGWA ADVOCATES

MAISONETTE NO. 1, COURT 30 (Next to Riley Group Security)
MOMBASA ROAD, OFF BUNYALA ROAD
P.O.BOX 70678-00400
NAIROBI

NATIONAL GENDER & EQUALITY COMMISSION
3rd FLOOR, SOLUTION TECH PLACE,
LONGONOT ROAD, UPPER-HILL,
P.O BOX 27512 -00506,
NAIROBI