

**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**

**LAW .....1<sup>ST</sup> PETITIONER**  
**KENYA LEGAL AND ETHICAL ISSUES NETWORK**  
**ON HIV & AIDS (KLELIN).....2<sup>ND</sup> PETITIONER**  
**AFRICAN GENDER AND MEDIA**  
**INITIATIVE TRUST (GEM).....3<sup>RD</sup> PETITIONER**

**AND**

**MARURA MATERNITY AND NURSING HOME.....1<sup>ST</sup> RESPONDENT**  
**COUNTY EXECUTIVE COMMITTEE MEMBER**  
**IN CHARGE OF HEALTH SERVICES-**  
**NAIROBI COUNTY.....2<sup>ND</sup> RESPONDENT**  
**CABINET SECRETARY MINISTRY OF HEALTH.....3<sup>RD</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**THE SECRETARIAT OF THE JOINT UNITED NATIONS**  
**PROGRAMME ON HIV/AIDS**  
**(UNAIDS SECRETARIAT).....1<sup>ST</sup> AMICUS CURIAE**  
**PROFESSOR ALICIA ELY YAMIN.....2<sup>ND</sup> AMICUS CURIAE**  
**NATIONAL GENDER AND EQUALITY COMMISSION**  
**(NGEC).....3<sup>RD</sup> AMICUS CURIAE**

**THE INTERNATIONAL COMMUNITY OF WOMEN**

**LIVING WITH HIV(ICW).....INTERESTED PARTY**

**2<sup>ND</sup> RESPONDENTS' WRITTEN SUBMISSIONS**

**AGAINST THE PETITION**

May it please your Lordship,

**A. FACTUAL BACKGROUND**

**L.A.W**

1. The 1<sup>st</sup> petitioner states that she is a woman living with HIV and has been on antiretroviral treatment from 2006. She further states that she works as an ice-cream vendor earning about Kshs.150/= a day. In 2006, she states she attended Kariobangi Health Centre, while pregnant for her antenatal care. She states she undertook a HIV test and tested positive. She then attended Baba Dogo Health Care Centre for a confirmatory test, which also turned out positive.
2. She indicates that a nurse called Hellen attended to her subsequent visits at Baba Dogo Health Centre, and informed her that she ought not to have any more children since it would compromise her health, and even cause her death. No evidence has been tabled to this effect. She stated that 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 ceasarian section was estimated at Kshs.10,000/=, which the Petitioner indicates she could not afford.
3. The 1<sup>st</sup> Petitioner indicates that the said nurse Hellen asked her to raise the sum of Kshs.300/=, then directed her to a community health worker called Nancy Wanjiku, who gave the 1<sup>st</sup> Petitioner two vouchers, one written CS and the other TL. The 1<sup>st</sup> Petitioner was then informed that the vouchers would be used by her to deliver at Marura Nursing Home, the 1<sup>st</sup> Respondent herein. She does not indicate whether she discussed all these with a family member, spouse or even friend.

4. The 1<sup>st</sup> Petitioner further states that on 16<sup>th</sup> September, 2006, she presented herself at the 1<sup>st</sup> Respondents' facility for the 1<sup>st</sup> time, and her caesarean section scheduled for the next day. She underwent the caesarean section at 6 p.m. on 16<sup>th</sup> September, 2006 and delivered a baby boy. She then indicates that it was at this point that she was sterilized, but was not informed.
5. The 1<sup>st</sup> Petitioner indicates that she discovered something was amiss on or about the year 2010, when she tried to conceive with no success. She attended a medical camp at Mathare, and after being tested, she was informed she could not conceive because she had undergone a tubal ligation.
6. The 1<sup>st</sup> Petitioner states that the tubal ligation performed on her was an infringement of her constitutional rights. She states that she went to the 1<sup>st</sup> Respondent to deliver her baby, and was never informed that she would be subjected to a bilateral tubal ligation procedure, despite having both cards in her possession for a while. She states she never consented to the procedure, and that she even sought to find out from then 1<sup>st</sup> Respondent on what happen to her, with no success.
7. The 1<sup>st</sup> Respondent responded to the petition, through a Replying Affidavit of Sophia Wanjiku, the proprietor of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent denied the above. They state that consent for the procedure was obtained and produced a consent form signed by the 1<sup>st</sup> Petitioner herself. It stated that in fact, and as it usually does in cases of referrals, consent was obtained a fresh. The 1<sup>st</sup> Respondent went ahead to take the court through the extensive process of obtaining informed consent at their facility, and further produced all supporting documents in its possession.
8. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents also deny the assertions by the Petitioners and opposed the Petition through their various grounds of opposition.

9. The Petitioners' case is anchored on the fact that no consent was obtained from the 1<sup>st</sup> Petitioner for the Bilateral Tubal Ligation, and therefore coercion was used.
10. The 2<sup>nd</sup> Respondent opposes the Petition and will be relying on the court record, Grounds of Opposition dated 19<sup>th</sup> November, 2020, and the submissions hereunder. We submit as follows:

## **B. LAWS & POLICIES ON REPRODUCTIVE HEALTH IN KENYA**

1. It is noteworthy that we borrow most of our laws on reproductive health rights from International and regional conventions and declarations. These include:
  - a) *United Nations Universal Declaration of Human Rights. New York: United Nations, 1948 (Article 2,3,25 and 26)*
  - b) *UN International Covenant on Economic, Social and Cultural Rights (ICESCR). New York: United Nations, 1966 (Article 2,10 and 12)*
  - c) *Convention on the Elimination of all Forms of Discrimination Against Women (Article 11,12 and 14)*
  - d) *Convention on the Rights of the Child (Articles 2,6 and 24)*
  - e) *African (Banjul) Charter on Human and Peoples' Rights (Articles 2,16,18 and 25)*
  - f) *The African Charter on the Rights and Welfare of the Child (Articles 3,5,11,14, 21 and 27)*
2. The Constitution of Kenya 2010, which is the supreme law of the land, gives provisions on the right to reproductive health under the Bill of Rights. The Constitution also under Article 2(6) provides that ***Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.*** Kenya has therefore incorporated the provisions of various International and Regional Conventions into its domestic law and has also gone further to enact specific laws that protect reproductive rights. The issue of adequacy of the law is determined by the existing provisions.

3. The Constitution of Kenya, 2010 in Article 43 (1) guarantees Kenyans the right to the highest attainable standard of healthcare including reproductive health. In 2017, the president signed into law the Health Act (The Health Act No 21 of 2017) that provides for an overarching legal framework for health.
4. Further, The Health Policy 2014-2030 provides for inclusive and non-discriminatory services to health for all Kenyans. In addition, Kenya is a signatory to the Eastern and Southern Africa Ministerial Commitment on Comprehensive Sexuality Education (ESA) 1, where nations committed to step up efforts to ensure adolescents' and young people's access to good quality CSE and youth-friendly SRH services.
5. The Ministry of Health further developed the National Adolescent Sexual and Reproductive Health Policy 2015<sup>2</sup>, National Adolescent and Youth Friendly Services Guidelines 2016<sup>3</sup> and the National Adolescent Sexual and Reproductive Health Implementation Framework 2018-2022 that provides guidance in realizing the constitutional guarantee of the highest attainable standard of healthcare on sexual and reproductive health.
6. The National Guidelines for Adolescent and Youth Friendly Services in Kenya defines Adolescent and Youth Friendly services as services that appeal and are respectful to adolescents and youth, are provided in a non-judgmental and considerate manner, have service delivery points in an environment where adolescents and youth can obtain health services they need with the support of community members. Further, the Guideline lists key characteristics of youth friendly services as equitable, accessible, acceptable, appropriate and effective.
7. In line with devolution, and the County Governments Act, 2012, County Health Management Teams have the prerogative to develop auxiliary legislations and

frameworks on health. A number of Counties have developed County Specific Health Implementation Frameworks.

8. The General Comment 22 on the right to sexual and reproductive health under the Covenant on Economic, Social and Cultural Rights, CESCR, which has stated that the “right to sexual and reproductive health is an integral part of the right to health enshrined in article 12.

**C. ISSUES FOR DETERMINATION**

- a. Whether the 1<sup>st</sup> petitioner underwent Bilateral Ligation without her consent*
- b. Whether the rights of the 1<sup>st</sup> Petitioner were violated*
- c. Whether the Petitioner is entitled to any of the reliefs sought*

**D. WHETHER THE 1<sup>ST</sup> PETITIONER UNDERWENT BILATERAL LIGATION WITHOUT CONSENT**

**I. WHO BEARS THE BURDEN OF PROOF?**

11. The 2<sup>nd</sup> respondents herein maintain that the Petitioners have not discharged the burden of proving the alleged violations to the requisite standard. The requisite standard of proof is proof on the balance of probabilities. This means that all that the Petitioners are required to do is to prove that it is more likely than not that the allegations the 1<sup>st</sup> Petitioner is making are true. The 1<sup>st</sup> Petitioner, has an obligation to convince this court that all the allegations made in the petition are well founded both in law and in fact. We urge this court to regard the burden and standard of proof that is required of the Petitioner herein, especially when there is evidence that the 1<sup>st</sup> Petitioner actually consented to undergoing a bilateral ligation procedure.

12. We further submit that it is a fundamental principle of law that a litigant bears the burden or onus of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. The presentation of clear evidence in support of such prejudice is a prerequisite to a favorable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.

13. The question we put forth at this point is whether the Petitioners proved that the 1<sup>st</sup> Petitioner was sterilized **WITHOUT** her informed consent. The answer is in the negative. Not only because a consent has been produced, that was signed by the 1<sup>st</sup> Petitioner, but because her entire claim is unsubstantiated. The Petitioners have only alleged. No proof whatsoever has been tabled to back their coercion allegation. No witnesses nor documentation proving this coercion has been provided.

14. The legal basis for the legal burden of proof is provided in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya. The said section states as follows:

-  
*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

15. The onus is therefore upon the Petitioners to prove that indeed the 1<sup>st</sup> Petitioner underwent BTL under coercion by the respondents. That is the burden of proof. This matter is now 7 years old, yet the petitioners have not called any witnesses to support their case. It cannot be that the 1<sup>st</sup> Petitioners case was an isolate, when the healthcare facilities attend to numerous women living under the same

circumstances. We submit that there is a significant loophole in the 1<sup>st</sup> Petitioners story, and therefore the petition must fail.

16. We further submit that there has been no report to the Medical Practitioners and Dentist Board on this issue for the reason that the procedure was conducted after informed consent was received. If the Petitioners allegations were indeed true, they would have been able to call witnesses and went ahead to report the particular doctor responsible.

17. The legal burden of proof is consciously or unconsciously the test applied when coming to a decision in any particular case. This fact was put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*:-

*“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”*

18. The **Black’s Law Dictionary**, (9<sup>th</sup> Edition, 2009) at page 1535 defines *‘the standard of proof’* as *‘[t]he degree or level of proof demanded in a specific case in order for a party to succeed.’* We submit that the Petitioners in this case have presented a petition that cannot succeed. The instant petition invites the court to interpret the law without any supporting evidence.

19. The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant. Did the Petitioners discharge the evidential burden of proof herein? We submit that in this case the petitioners failed to provide evidential evidence, to ensure that the burden of proof shifts to the Respondents as illustrated below.



## II. UNDUE INFLUENCE

20. We submit that the Petitioners have not proved in any manner that it was not on the 1<sup>st</sup> Petitioner's own volition that she underwent the procedure. In other words, they did not show that indeed she intended or had the desire to have more children. It therefore becomes impossible for them to now allege that the 1<sup>st</sup> Petitioner were coerced.

21. The **Black's Law Dictionary**, 10<sup>th</sup> Edition, Thomson Reuters Publishers at page 1760 defines the term '*undue influence*' as follows: -

*The improper use of power or trust in a way that deprives a person of free will and substitutes another's objective; the exercise of enough control over another person that a questioned act by this person would not have otherwise been performed, the person's free agency having been overmastered.*

22. "Coercion" is also defined as '*browbeating, bullying, compulsion, constraint, duress, force, intimidation, pressure, strong-arm tactics, threats*' – Collins Concise Thesaurus, 1997 ed. We also place reliance on the Court of Appeal's decision in Ngengi Muigai & Another v Peter Nyoike Muigai & 4 Others (2018) eKLR quoted from Mwathi v. Mwathi (1996) eKLR that: -

*...Undue influence is proved if it can be shown that the testator was induced or coerced into making the dispositions that he did not really intend to make...*

We submit that there is no proof of coercion in this case, and therefore the petition must fail.

23. The equitable doctrine of undue influence, which is stated by Lindley L J in All Card v Skinner, [1887] 36 Ch D 145 at p 181 as follows:-

*"The doctrine relied upon by the appellant is the doctrine of undue influence expounded in Huguenin v Baseley and other cases of that class. These cases may be subdivided into two groups, which, however,*

often overlap. First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor, Morton v Rally; Nottige v Prince, Lyon v Home, and Whyte v Meade all belong to this group. In Whyte v Meade a gift to a convent was set aside, but the gift was the result of coercion, clearly proved. The evidence does not bring this case within this group...”

24. The Petitioners have once again failed to prove this particular limb. They have not shown that the Respondents gained in any manner, by coercing the 1<sup>st</sup> Petitioner into undergoing the BTL. There was no substantial financial gain that was attained from the alleged coercion. It would therefore make no absolute sense for the 1<sup>st</sup> Petitioner to have been coerced into the procedure. The court further stated;

*The second group consists of cases in which the position of the donor to the donee has been such that it has been duty of the donee to advise the donor, or even to manage his property for him. In such cases the court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. Huguenin v Baseley was a case of this kind. The defendant had not only acquired considerable spiritual influence over the plaintiff, but was entrusted by her with the management of the property.”*

Similarly, in this second limb the Petitioners failed to demonstrate that the 1<sup>st</sup> Petitioner was not advised accordingly. Not only is there a signed consent form, but there is also a voucher, that was issued to the Petitioner, and was in her possession for a while. We submit that the Petition must fail on these grounds.

25. Huguenin v Baseley [1807] 33 English Reports, 526 was a case where a clergyman was said to have used his position and influence over a widow who was entitled to large estates, to convey one of the estates to him. At page 533 of the Report, Lord Eldon L C said:

*“But the view I take in this case is that, attending to the effect of the letter, the evidence of transactions among these parties, and attending more especially to the evidence of the attorney, the defense rests in a great measure upon this, that the court is by the nature of the defense required to look at this deed, not merely by itself, but as being more or less justified with reference to the transactions, in the course of which it was executed.”*

26. The later part of this citation forms a part of our argument in this case, namely that in order to decide coercion in the instant case, it is incumbent upon the court to look at the whole set of transactions which occurred. We urge this court to look at whether the entire story as presented by the Petitioners leads to the conclusion that, all the 1<sup>st</sup> Petitioner did not intend to undergo BTL, as she intended to have more children. Lord Eldon said:

*To the question, whether, these instruments being such as I have represented them, the consequences is, that this court shall undo them, I answer, no; if they are the pure, voluntary, well understood, acts of her mind: but if they have not that character, if they are the result of her notion, that this is the true effect of that friendly assistance, that kind, providential, interference, to which she was looking for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that, which has always been considered in this court as undue influence, if the deeds themselves, which are the best evidence, demonstrate and if they are*

*confirmed by extrinsic evidence, that they are not the pure, well understood, acts of her mind, this court will undo them.”*

### III. CONSENT

27. We submit that consent was obtained from the 1<sup>st</sup> Petitioner, and rely on the evidence provided by the 1<sup>st</sup> Respondent. The definition of consent under the ***Black’s Law Dictionary*** as-

*“a concurrence of informed and freely given will which is not obtained by coercion or undue influence.”*

28. It is generally true that he who asserts must prove. That much is contained in Section 107 of the *Evidence Act*. However, Section 112 of the *Evidence Act* further provides that:

*“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”*

29. In the case of Munyu *Maina v Hiram Gathiha Maina [2013] eKLR (Civil Appeal No. 239 of 2009)* this Court, differently constituted held that:

*“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”*

*In the appeal before us, it was the respondent bank which fell within Section 112 and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because Section 44 of the Banking Act places the burden on the bank to seek the approval. How would the*

*applicant be able to tell if indeed the bank had sought approval from the Minister?*

*To illustrate this point, we find persuasive authority in the **High Court case of John Gatu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR (Civil Case No. 55 Of 2001)** where Serгон J. found that it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with Section 44 of the Banking Act. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate. To our knowledge, the principle stated in that High Court decision was not challenged on appeal.”*

30. In the instance case, in reply to the Petition, the 1<sup>st</sup> Respondent indicated that it did not coerce or even direct the 1<sup>st</sup> Petitioner to undergo BTL. The 1<sup>st</sup> respondents went ahead and provide all the documents they have available on the Petitioners, as their defense before this honorable court. There is no indication that the Respondents required the Petitioners to undergo BTL. They explained and disclosed all valuable information they had regarding each of the Petitioners. From the aforementioned, whatever information was in possession of the Respondents was disclosed. It was only upon such disclosure that the Petitioners indicate that they did sign consent forms.

31. The issue of consent was also discussed by the court in the case of **PBS vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 others (2016) eKLR** in which the court cited the medical journal thus;

*“Expectations of a patient are twofold. Doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness or recklessness or altitude of their staff. Though a doctor may not be in a position to save his patient’s life at all times, he is expected to use*

*his special knowledge and skill in the most appropriate manner keeping in mind the interest of the patient who has entrusted his life to him. Therefore, it is expected that a doctor carryout a report from the patient. Furthermore, unless it is an emergency, he obtains informed consent of the parties before proceeding with any major treatment, surgical operation even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortuous liability.”*

32. In the instant case, there is evidence that a written consent was obtained from the 1<sup>st</sup> petitioner before the procedure was carried out. Counselling sessions were also carried out before the procedure. Evidence was led that both group and private counseling sessions are carried out way before they decide they need a procedure.

#### **IV. MEDICAL REPORT**

33. The petitioners herein produced a medical report by one Dr. Khisa. We submit that the medical report does not say much to assist in determining this case. It is not clear from the medical report when the procedure was allegedly carried out, and at whose instance, and whether the procedure was done under coercion. It merely states an existing fact. In fact, the reports did not indicate an exact reflection of what was seen during the examination.

34. The opinion of an expert witness is just that - an opinion. It is not binding on the court. Therefore, in a case such as the present one where certain crucial information cannot be derived from the medical report, it ceases to be of any substantive assistance to the Court. In *Shah & Another -vs- Shah & Others (2003) I EA 290*, the court held:

*“The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final*

*decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so---*"

35. It further went on to state that:

*"...if there is a conflict of expert opinion, acceptance of the expert evidence is the responsibility of the court – properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach his own opinion."*

36. In **Dhalay -vs- Republic (1997) KLR**, the Court of Appeal rendered that:

*"It is now trite law that while the courts must give proper respect to the opinion of experts, not, as it were such opinions are binding in the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."* [own emphasis]

We urge this court not to accept this evidence as it merely states a fact. It does not help determine the issues at hand at all.

## **E. WHETHER THE RIGHTS OF THE 1<sup>ST</sup> PETITIONER WERE VIOLATED**

37. This entire petition is hinged on the fact that the 1<sup>st</sup> petitioner were sterilized without consent. However, having demonstrated above that no coercion or undue influence was applied in getting the 1<sup>st</sup> Petitioner to undergo the BTL procedure, we submit that no rights were violated in this case as they underwent the procedure voluntarily.

38. The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion. The disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the

case at hand and is applicable to all comparable cases. Court decisions cannot be ad hoc. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case before the court. The privy council in the case of Minister for Home Affairs and Another vs Fischer stated that: -

*“A constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation... It is important to give full recognition and effect to those fundamental rights and freedoms.....”*

39. Lord Wilberforce, while delivering the considered opinion of the court in the above case observed: -

*“A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.....”*

40. The 1<sup>st</sup> Petitioner cannot therefore claim to have had their Rights violated without proving the same before this court. It is not enough to just allege. This was their chance to demonstrate how when and who violated their rights. We submit that they failed to this and therefore their petition fails.

41. Further, the notion in the Petitioners claim seems to be that the 1<sup>st</sup> Petitioner has been permanently sterilized. This is not the case as the procedure is reversible. Tubal ligation is a surgical procedure where the doctor cuts or blocks your



fallopian tubes through a cut in your skin on your belly. With a tubal ligation, the doctor will either block or remove small sections of your fallopian tubes. With a bilateral salpingectomy, the doctor will remove your tubes completely.

42. A tubal reversal on the other hand, is an outpatient, same-day surgical procedure resulting in just a small, 2-to-3-inch bikini incision. The recovery period is short, and most patients can go back to normal activity quickly (and get back to work within 7 to 10 days). After a tubal reversal procedure, patients can start trying to get pregnant with their next menstrual cycle.

43. We therefore submit that if the 1<sup>st</sup> Petitioner is indeed keen on having more children and is really aggrieved by the procedure, she has always had a remedy that she would have sought and followed up on all through the years. The main question is why she has not sought for this remedy in this petition.

**F. WHETHER THE PETITIONERS ARE ENTITLED TO ANY OF THE RELIEFS SOUGHT**

44. A careful consideration of the petitioners' case and the relevant law brings to light the fact that the 1<sup>st</sup> petitioner's rights were not violated and that they are not entitled to any of the reliefs sought before this court.

**G. WHETHER THIS PETITION RAISES CONSTITUTIONAL ISSUES OR CONTRACTUAL OBLIGATIONS**

45. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. In *John Harun Mwau vs Peter Gastrol & 3 Others* the court made the following observation:-

*"Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it... ..It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all."*

46. It is trite law that a doctor who operates without the consent of his patient is, save in cases of emergency or mental disability, is guilty of the civil wrong of trespass to the person and he is also guilty of the criminal offence of assault.

*"...a patient has the right to be informed of the risks inherent in the treatment which treatment is proposed. This was the holding in the case of Sidaway vs. Bethlem Royal Hospital Governors & others (1985) 1 All ER 643 by Lord Scarmon at Page 649..."*

47. According to Medical Malpractice Law by John Healy (Barrister at law) the common law has drawn a distinction between the failure to obtain a patient's basic or real consent (attracting civil liability in trespass for battery) and failure to provide sufficient information to enable a patient to understand the broader implication of the proposed intervention (attracting liability in negligence as a breach of doctor's duty of care in and around the giving of medical advice). The law on trespass has established that to obtain a patient's consent to a medical intervention, it is both necessary and sufficient to explain the "nature and purpose" of the intervention.

48. It is important to note that the cause of action herein is therefore that of trespass, assault and illegal confinement on account of lack of consent and not one of medical negligence.

49. It is therefore our submission that this petition does not raise constitutional issues at all and on this ground, the petition fails.

## **H. CONCLUSION**

My Lord, it is then our prayer that the Petition herein be dismissed with costs for the following reasons;

- a) *There is no proof of coercion of the 1<sup>st</sup> Petitioner to undergo BTL;*
- b) *Informed consent was obtained as required;*
- c) *The Petitioners are not entitled to the reliefs as claimed.*

**DATED** at **NAIROBI** this 16<sup>th</sup> day of July 2021



**KITHI & COMPANY**

**ADVOCATES FOR THE 2<sup>ND</sup> RESPONDENTS**

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