

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 605 OF 2014

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 19, 20, 21 & 22 OF THE CONSTITUTION OF KENYA**

(2010)

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
26, 27, 28, 29, 31, 33, 35, 43, 45, AND 46 OF THE CONSTITUTION OF**

KENYA (2010)

BETWEEN

SWK1ST PETITIONER
PAK.....2ND PETITIONER
GWK.....3RD PETITIONER
AMM.....4TH PETITIONER
KENYA LEGAL & ETHICAL ISSUES NETWORK
ON HIV AND AIDS.....5TH PETITIONER
AFRICAN GENDER & MEDIA INITIATIVE
TRUST (GEM).....6TH PETITIONER

AND

MEDECINS SANS FRONTIERE-FRANCE.....1ST RESPONDENT
PUMWANI MATERNITY HOSPITAL.....2ND RESPONDENT
MARIE STOPES INTERNATIONAL.....3RD RESPONDENT
COUNTY EXECUTIVE MEMBER IN CHARGE OF
HEALTH SERVICES, NAIROBI CITY COUNTY.....4TH RESPONDENT
CABINET SECRETARY MINISTRY OF HEALTH.....5TH RESPONDENT
THE HON ATTORNEY GENERAL.....6TH RESPONDENT

AND

THE SECRETARIAT OF THE JOINT UNITED NATIONS
PROGRAMME ON HIV/AIDS

(UNAIDS SECRETARIAT).1ST AMICUS CURIAE

PROFESSOR ALICIA ELY YAMI.....2ND AMICUS CURIAE

NATIONAL GENDER AND EQUALITY COMMISSION

(NGEC).....3RD AMICUS CURIAE

THE INTERNATIONAL COMMUNITY OF WOMEN

LIVING WITH

HIV(ICW).....INTERESTED PARTY

2ND AND 4TH RESPONDENTS' WRITTEN SUBMISSIONS

AGAINST THE PETITION

May it please your Lordship,

A. BACKGROUND

Before this court is a Petition, seeking orders that;

- a) *That this court declares the act of sterilization of the 1st 2nd 3rd and 4th Petitioners by way of bilateral ligation as done by the 2nd and 3rd Respondents amounted to a violation of the human and constitutional rights of the 1st -4th Petitioners as outlined in the Petition herein;*
- b) *This Honorable court declares the act of threatening to withhold the provision food portion and formula milk and lifesaving ingredients by the 1st and 2nd Respondents us a violation of the of the human and constitutional rights of the 1st -4th Petitioners as outlined in the Petition herein;*
- c) *This Honorable 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 voluntary determine if when and how often to bear children;*

- d) *This Honorable court issues an order directing the 4th and 5th 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;*
- e) *This Honorable court issues an order directing the 4th and 5th 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;*
- f) *This Honorable court issues an order directing the 5th Respondents to review the National Family Planning Guidelines for Service Providers to address the provisions that are discriminatory;*
- g) *This Honorable court issues an order directing that there be instituted a 48 Hours waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery;*
- h) *This Honorable court issues an order directing the 4th and 5th Respondents to conduct public awareness campaigns to educate patients and citizen about their rights and ensure that information on patients' rights is immediately accessible within health care facilities;*
- i) *This Honorable court issues an order directing the 2nd-5th Respondents to establish clear procedural guidelines for follow up on complaints of rights violation and strengthen administrative accountability in hospitals;*
- j) *This Honorable court issues an order directing the 4th and 5th Respondents to create a monitoring and evaluating system to ensure full implementation of laws and policies regarding the performance of tubal ligation;*
- k) *This Honorable court issues an order directing the 5th Respondents 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;*

- l) *This Honorable court issues an order directing the 1st, 2nd, 3rd, 4th and 5th Respondents to jointly and severally pay general and exemplary damages on an aggravated scale to the 1st, 2nd, 3rd and 4th Petitioners for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization;*
- m) *That this Honorable court issues an order that since the petition is in the Public Interest, each party should bear their costs;*
- n) *That 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;*
- o) *This honorable court be pleased to make such other orders as it shall deem just and fit.*

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 2015², National Adolescent and Youth Friendly Services Guidelines 2016³ 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. FACTUAL BACKGROUND

1. The Blue House Clinic

1. Blue House was an extension of Upendo Dispensary project, whose objective was to provide affordable health care for the destitute population in Mathare. It came into operation in July 2001, in the form of a HIV/TB project, whose main objective was to improve the quality of care given to HIV and TB patients in Mathare Valley. It runs HIV/TB testing, ARV treatment, hospital referrals and support for HIV patients. Blue House is organized into a triage room, consultation rooms, social rooms, Prevention of mother to child transmission (PMTCT) room and pharmacy.

2. The PMTCT Room was set up to manage the prevention of transmission of the HIV/AIDS virus from mothers to infants. It focused on treatment, adherence to good nutrition and delivery methods that reduced the transmission of the virus. The duties of a nutrition assistant in the PMTCT included offering nutritional assistance, providing education on nutrition and feeding options, preparing dry rations in hygienic conditions and distributing dry rations to children and adults according to their needs.
3. The PMTCT room offered antenatal and post natal services. Food support was also offered. The nature of the food support offered was different between the social room which was need based.
4. During antenatal sessions, clients were advised on infant feeding options. The clients had the option of replacement feeding or breast feeding. Replacement feeding involved replacing breast milk with milk formula in order to lower the risk of transmission of the HIV virus from the mother to the child. This is according to the MSF Protocol of HIV detailing risk of transmission posed by varying methods of feeding.
5. Before 2007, all PMTCT clients received food packages. Where a client opted to do replacement feeding, she additionally received milk formula after delivery. The milk formula was supplied in accordance with the dosage specifications.
6. After 2007, the clients doing replacement feeding only received milk formula, while those doing exclusive breastfeeding received food support in the form of floor and cooking oil.
7. Food support given in the PMTCT room differed from that offered in the Social Room. For the social room, a team of clinical officers, nurses, counselors and

social room staff made the decision as to which clients received food packages, and for what period. The decision depended on various circumstances, for instance if they were malnourished. Once the decision was made a prescription note was filed and by the clinical officer and placed in the client's file.

8. Social workers and traditional birth attendants would carry out home visits to engage clients and find out their progress and challenges faced. They would also find out if the clients were having challenges preparing the milk formula, and if food packages were appropriately used.
9. Food support offered could be discontinued upon the decision of a team of social workers, clinical officers, counselors and nurses depending on changes, for instance if the patient attained the required Body Mass Index, and therefore support wasn't necessary. It would also be discontinued if the client sold the food support.
10. Food support offered to breastfeeding mothers was never withdrawn, as it would not only affect the mother's health. But the baby's as well. Further if it was discovered that a client practicing replacement feeding was not using the formula as directed, she was placed on direct observation, where she was to attend the clinic daily to receive milk formula for the day.
11. Counseling services were also provided to PMTCT clients. These were conducted as a group session, under the supervision of a family planning nurse. Numerous matters were discussed including safe delivery and infant feeding options. At the request of a client, or if it became clear that a client was having issues explaining herself, individual counseling sessions were conducted. A nurse was always available. If the assistance of a superior was required, she was always called.

2. Marie Stopes International

12. The 3rd Respondent is present in 42 countries around the world and it believes in and abides by the principles of voluntarism, informed choice and informed consent. It undertakes continuous on-going training and monitoring to ensure the highest standards contained in the National Family Guidelines for Service Providers at all times.
13. Its policies ensure that all women who are considering whether to undergo BTL are subjected to counseling by qualified staff. The counseling sessions are conducted universally as a group, and then individually, and a person then chooses to undertake any of the various family Planning options.
14. The 3rd Respondents informs all its clients of the full range of family planning options in a language that the client understands. The mode of application of each option and the pro and cons of each is explained to enable the client make an informed choice.
15. Whenever a referral is made from another medical institute, the prospective client is taken through the counseling session, notwithstanding it was done at the referring facility. The facility operates on a non-discriminatory policy.
16. Prior to any surgical procedure, it is mandatory for a patient to be informed of the procedure, the potential risk, after which the patient is given the opportunity to either accept to decline to have the procedure. If the patient asks for a surgical intervention, informed consent is obtained, vitals are taken and the attendant is prepared for the procedure.

17.If surgical intervention is taken, upon discharge, the patient is given a card, a discharge summary, and a prescription for any required medicine.

18.In case the patient does not give her consent, no surgery is performed.

19.The 3rd Respondent indicates that it keeps all its medical records, and if at all the BTL was conducted upon the 3rd and 4th Petitioners, then he records would be available.

3. S.W.K

20.The 1st petitioner attended Blue House in 2005. She attended 4 antenatal and 12 postnatal sessions at the PMTC room. In addition to being recognized by the 1st Respondent's witness, proof of her attendance has been adduced before this court.

21.She indicates that she was referred to Pumwani Hospital from Blue House. She further states that just as she was about to give birth, a nurse came in and began to talk to her about family planning, and advised her to undergo BTL, especially as she was 36 years old, with 3 children and HIV positive. She also indicates that before she was wheeled into the theater, she was given a form, which contents she did not read, but signed. She did not indicate whether or no she was in labor during this interaction.

22.Later on, she visited Blue House to collect baby formula and food portions, when she was asked whether she was on any family planning. She was also told that without written confirmation of this, she would not be given any food portions of formula. She didn't have any evidence proving this. It's not clear whether she was denied food portions and formulae on that day.

23. She later visited Pumwani Hospital who confirmed that she underwent the procedure, to which a written confirmation was issued.
24. The 1st Respondents denied the above. They state that during antenatal sessions, group sessions were conducted, where information on infant feeding options and nutrition was given. The Petitioner attended the sessions and made the informed decision to breastfeed her child. As she chose this decision, she received food support in the form of flour and cooking oil. Proof of this feeding election has also been produced before this court.
25. They also state that the PMTC room offered clients practicing exclusive breast feeding food support, while those on replacement feeding received milk formula. At the time the Petitioner gave birth, it was not possible for clients to receive both food support and milk formula unless the food support was being provided by the social room, clients were never advised that they could get both.
26. Food support cannot be withdrawn on basis that the client was not practicing any form of family planning.

4. P.A.K

27. The 2nd Petitioner, class 8 drop out, attended Blue House in 2003. She attended post-natal sessions but not ante-natal sessions. Proof of her attendance has been provided to this court.
28. She indicates that she was told not to breast feed her children and that she would be provided with food portions and formula. She is not clear on whether one depended on the other. The Respondents deny this and state that, at no point was she advised not to breastfeed her child. In fact majority of the clients opted to breastfeed their children.

29. She further states that a specific nurse Benta Anyango Owuor always kept telling her that unless she provided proof that she had undergone BTL, she would not qualify for the food portions and formula. She indicates that she eventually gave in and underwent the procedure.

30. The 1st Respondent deny this and state that it was inquired from her, as with all other patients as to whether they were on any Family planning method, though it was never a precondition as alleged. She was never threatened that the milk formula would be withdrawn, as the 1st Respondent has no such authority.

31. The Petitioner also states she did not give her informed consent to Marie Stopes, and that she was not given enough information on the family planning methods available.

32. The 1st and 3rd Respondents contend that the 2nd Petitioner was never instructed to undergo BTL, though the services were conducted at Marie Stopes. Such fliers were available at Blue House. Never were her supplies withheld as is evident from the records produced.

33. During the pendency of the proceedings, the 3rd Respondent invited the Petitioners for examination in order to ascertain the position, which invite was declined.

5. GWK

34. The petitioner attended Blue House in 2005 and began attending the PMTC Room in 2009, evidence of which has been produced.

35. She indicates that based on the information given, she made the informed decision to deliver at Pumwani Hospital, through cesarean , and further that she would not breastfeed her child.

36. She indicates that as she was in labour, she was given consent form which she signed as, according to her, it was for the cesarean section.

37. Later after she delivered, she indicated that as she was recuperating after the surgery, she was in pain. Upon inquiry, she was told it was because she had also undergone BTL. Upon her visit to the Blue House, she was asked to provide proof she was on family planning. She collected it from the hospital and provided it to Blue House.

38. The Respondents case is that it was not possible for clients to be collecting both food support and milk formula from the PMTC Room as she alleges. After she delivered, it was inquired from her as to whether she was on any Family Planning method. She was not sure. This answer was entered into the register, and she was advised to get documentation. Despite not being sure as to whether she was on any Family Planning, she still continued to receive milk formula.

39. During the pendency of the proceedings, the 3rd Respondent invited the Petitioner for examination in order to ascertain the position, which invite was declined.

6. A.M.M

40. She indicates that she attended antenatal clinic at Pumwani hospital and delivered normally. She was then given formula and food portions and asked to continue collecting the same weekly from the 2nd Respondent. However, when she visited the facility, she states that she was informed that she would not receive food portions the next time, unless she had proof that she had undergone a BTL.

41. She states that every time she visited the facility, she was issued with the same threat, until she finally gave in, and underwent the procedure at Marie stopes. She

indicates that before the procedure, she and other women were given forms to sign. She did not understand the contents.

42. After she delivered, it was inquired from her as to whether she was on any Family Planning method. She was not sure. This answer was entered into the register, and she was advised to get documentation. Despite not being sure as to whether she was on any Family Planning, she still continued to receive milk formula.

43. The Respondents case is that it was not possible for clients to be collecting both food support and milk formula from the PMTC Room as she alleges.

44. During the pendency of the proceedings, the 3rd Respondent invited the Petitioner for examination in order to ascertain the position, which invite was declined.

The 2nd and 4th Respondent oppose the Petition and will be relying on the court record, Grounds of Opposition dated 19th November, 2020, and the submissions hereunder;

We submit as follows:

D. ISSUES FOR DETERMINATION

- a. Whether the 1st -4th petitioners underwent Bilateral Ligation without consent*
- b. Whether the rights of the 1st -4th Petitioners were violated*
- c. Whether the Petitioners are entitled to any of the reliefs sought*

E. WHETHER THE 1ST -4TH PETITIONERS UNDERWENT BILATERAL LIGATION WITHOUT CONSENT

I. BURDEN OF PROOF

45. 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.

46. The question we put forth at this point is whether the Petitioners proved that they were sterilized **WITHOUT** their informed consent. The answer is in the negative. 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. 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."

47. The onus is upon the Petitioners to prove that indeed they 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 they were the only isolated cases, when the healthcare facilities attend to numerous women living under the same circumstances.

48. We 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.

49. 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”

50. On the standard of proof, the **Black’s Law Dictionary**, (9th 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.’*

51. The standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt. In election petitions the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, the standard of proof is proof beyond reasonable doubt.

52. 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

53. The **Black's Law Dictionary**, 10th 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.

54. "Coercion" is also defined as '*browbeating, bullying, compulsion, constraint, duress, force, intimidation, pressure, strong-arm tactics, threats*' – Collins Concise Thesaurus, 1997 ed.

55. Dealing with the subject, **Mwongo, J. in Benson Owenga Anjere v. Kivati Nduoto & Another (2013) eKLR** referred to the English case of **Pao On v. Liu Yiu Long (1980) AC 614** thus: -

"In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are Relevant in determining whether he acted voluntarily or not... "

56. From the Petitioners case, there is no demonstration of the attempt to protest. This is clear from the fact that each of them have stated to have signed a consent form. The fact also remains that they were never at any point denied either food portions or baby formula. Further, if indeed they were threatened, there was no indication that any of them tried to report or speak to a superior in protest. It is also not clear whether the Petitioners have no friends or family members, whom they spoke to or expressed their concerns if any. If they did, they did not present such testimony before this court to prove their cases as required. We therefore submit that the Petitioners in this case were never coerced into undergoing BTL.

57. We 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...

The Petitioners have not proved in any manner that it was not on their own volition that they underwent the procedure. In other words, they did not show that indeed they intended or had the desire to have more children. It therefore becomes impossible for them to now allege that they were coerced.

58. 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... ”

59. The Petitioners have once again failed to prove this particular limb. They have not shown that the Respondents gained in any manner, by coercing them 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 Petitioners 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 how the Respondent b

used their position, and what was gained from doing this.

60. 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.”

61. 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 Petitioners did not intend to undergo BTL, as they all collectively, 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

62. 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."

63. 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."

64. 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 Sergon 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.”

65. In the instance case, the 3rd Respondent indicated that it did not coerce or even direct the Petitioners to undergo BTL. The respondents went ahead and provide all the documents they have available on the Petitioners, as their defence before this honorable court. There is no indication that the Respondents required the Petitioners to undergo BTL. The 1st Respondent even went ahead to provide the Petitioners attendances register, which indicated where they visited, and what services are offered there. 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. The main issue by the petitioners was that they did not understand what was being signed.

66. 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."

67. In the instant case, there is evidence that a written consent was obtained from each of the petitioners before the procedure was carried out. Counselling sessions were also carried out before the procedure, and a follow up card issued after the procedure. Evidence was led that both group and private counseling sessions are carried out way before the decides they need a procedure. We therefore submit that by the time the client decides to have the procedure done, they are already well aware of the pros and cons of the procedure to be undertaken.

IV. MEDICAL REPORT

68. The petitioners herein produced a medical report from Hurlingam Family Health clinic dated 8th October, 2014. 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. As per the testimony of the 3rd Respondent, the reports did not indicate an exact reflection of what was seen during the examination.

69. 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---”

70. 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.”

71. 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.

F. WHETHER THE RIGHTS OF THE 1ST -4TH PETITIONERS WERE VIOLATED

72. This entire petition is hinged on the fact that the petitioners were sterilized without consent. However, having demonstrated above that no coercion or undue influence was applied in getting the Petitioners to undergo the BTL procedure, we submit that no rights were violated in this case as they underwent the procedure voluntarily.

73. 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 had 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.....”

74. 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.....”

75. The 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.

76. Further, the notion in the Petitioners claim seems to be that they have 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.

77. 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.

78. We therefore submit that if the Petitioners are indeed keen on having more children and are really aggrieved by the procedure, they have always had a remedy that they would have sought and followed up on all through the years. The main question is why none of the Petitioners has sought for this remedy in this petition.

G. WHETHER THE PETITIONERS ARE ENTITLED TO ANY OF THE RELIEFS SOUGHT

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

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 Petitioners 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 10th day of March 2021



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