

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

PETITION NO.605 OF 2014

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 19, 20,21 AND 2 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26,27,28,29,31,33,35,43,45 AND 46 OF THE CONSTITUTION OF KENYA

BETWEEN

SWK.....1ST PETITIONER
PAK.....2ND PETITIONER
GWK.....3RD PETITIONER
AMM.....4TH PETITIONER
KENYA LEGAL & ETHIC ISSUES NETWORK
ON HIV AND AIDS (KELIN).....5TH PETITIONER
AFRICAN GENDER & MEDIA
INITIATIVE TRUST (GEM).....6TH PETITIONER

AND

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

3RD RESPONDENT'S SUBMISSIONS

Your Lordship,

A. INTRODUCTION

- I. The following submissions relate to the 3rd Respondent's Defence to the amended Petition duly amended on 10th September 2015. The Petitioners filed an amended Petition seeking the following orders:-
- a. *This Honourable Court declares that the act of sterilization of the 1st, 2nd, 3rd and 4th Petitioners by way of bilateral tubal 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.*
 - b. *This Honourable Court declares that the act of threatening to withhold the provision food portions and formula milk and lifesaving ingredients by the 1st and 2nd Respondents is a violation of the human and constitutional rights of the 1st-4th Petitioners as outlines in the Petition herein.*
 - c. *The 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.*
 - d. *The Honourable Court issues an order directing the 4th and 5th Respondents to put in place guidelines, measures training for health care providers and social workers that are in line with FIGO Guidelines sterilization and informed consent.*
 - e. *This Honourable Court issues an order directing the 4th and 5th Respondents to conduct in depth mandatory training of all practicing gynecologist and obstetrician on the revised FIGO ethical guidelines on the performance of tubal ligation.*
 - f. *The Honourable Court issues an order directing the 5th Respondent to review the National Family Planning Guidelines for service providers to address the provisions that are discriminatory.*
 - g. *The Honourable Court issues an order directing that there be instituted a mandatory forty eight (48) hours waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery.*
 - h. *The Honourable Court issues an order directing the 4th and 5th 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.*
 - i. *This Honourable Court issues an order directing the 2nd – 5th Respondents to establish clear procedural guidelines for following up on complains of rights violations and strengthen administrative accountability at hospitals.*

- j. *This Honourable Court issues an order directing the 4th and 5th Respondents to create a monitoring and evaluation system to ensure full implementation of laws and policies regarding the performance of tubal ligation*
 - k. *This Honourable Court issues an order directing the 5th 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.*
 - l. *This Honourable Court is pleased to order the 1st, 2nd, 3rd, 4th and 5th Respondents to jointly and severally pay general and exemplary damages on an aggravated scale to 1st, 2nd, 3rd and 4th Petitioners for the physical and psychological suffering by the unlawful and unconstitutional sterilization.*
 - m. *This Honourable Court issues an order that since this Petition is in the public interest, each party should bear their own costs.*
 - n. *This Honourable 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 Honourable Court be pleased to make such other orders as it shall deem just and fit.*
2. The 3rd Respondent responded to the amended Petition vide a Replying Affidavit sworn by Dr. Fred Oyombe Akonde on 10th April 2018 and filed on even date. The hearing proceeded through *viva voce* evidence.
 3. It is noteworthy that the 3rd Respondent filed a Preliminary Objection dated 27th November 2015 seeking that the Petition be struck out principally because the main issue for determination is purely an ordinary civil dispute for which remedies are available in civil law. The Preliminary Objection is yet to be determined by this Honourable Court as the presiding Judge directed that the same will be determined together with the main Petition.
 4. The 3rd Respondent filed its written submissions as directed by the Court. The Submissions are dated 4th April 2017 and filed on 5th April 2017 and urge this Honourable Court to allow our Preliminary Objection and refer this matter to the appropriate Court for determination.

Without prejudice to the above, the 3rd Respondent submits as follows:-

B. BRIEF STATEMENT OF FACTS

i) 2ND & 4TH PETITIONER'S CASE

5. The Petition against the 3rd Respondent emanate from the 2nd and 4th Petitioners. The 2nd Petitioner claims that she tested HIV positive in the year 2001 and lost her husband and first-born child through HIV related complications. The 2nd Petitioner had four (4) children prior to receiving treatment for HIV. When the 2nd Petitioner became pregnant in the year 2004, she was prescribed ARV treatment at Blue House Clinic, a clinic run by the 1st Respondent which would protect the fetus from contracting the HIV virus.
6. On 29th October 2004, the 2nd Respondent gave birth to twin boys at the 2nd Respondent hospital and the maternity bills settled by the 1st Respondent. The 2nd Respondent was advised not to breastfeed to avoid contracting the children with the HIV virus and during this period was provided with food portions for six (6) months and formula milk for the children for one (1) year. The 2nd Respondent alleges that everytime she went to collect the formula and food portions, the 1st Respondent's nutritionist would tell her that she would not qualify for the food portions and formula unless she had proof of having undergone bilateral tubal ligation (herein after referred to as "BTL"). The 2nd Petitioner in her Affidavit refers to the procedure as "*Kufungwa kuzaa*".
7. The 2nd Petitioner alleges that she was referred to a family planning drive on 8th June 2005 undertaken by the 3rd Respondent at Huruma Lions Health Centre.
8. The 2nd Petitioner alleges that at Huruma Lions Health Centre there were other around 20 women and BTL was performed on her on that day. She went for a review at the Marie Stopes Clinic at Eastleigh on 15th June 2005 and was informed by personnel that she was healing well and at that point presented the card issued.
9. At the hearing, during cross examination by the 1st Respondent's counsel, the 2nd Petitioners stated that she was asked by the doctor whether she had agreed to undergo BTL and she said yes. She also testified that she did not tell the doctor at the 3rd Respondent that she had been forced by one Benta. She testified that it was her decision not to tell the doctor and also she did not talk to the other women at the Clinic.

10. The 2nd Petitioner case is that she was not informed about the procedure and its implications, what other options of family planning were available to her and to chose the most appropriate family planning method for her.
11. The 4th Petitioner prior to contacting the HIV virus had three (3) children and on or about August 2004, she tested positive for HIV. Sometimes in 2005, she delivered normally at the 2nd Respondent Hospital and while being discharged she was informed that she should continue collecting food portions, medication and formula. The formula stopped when the baby was six (6) months.
12. In the year 2005, the 4th Petitioner was advised to start on ARV's which were provided at the 2nd Respondent Hospital which she continues to take to date. The 2nd Respondent alleges that at the 2nd Respondent Hospital she was informed that she would not eb given formula milk unless she had proof of having undergone BTL. The 4th Petitioner stated that every time she was at the 2nd Respondent's hospital, she would be told about the BTL procedure.
13. Subsequently, the BTL procedure was undertaken on 4th May 2005 when she attended the family planning drive at Huruma Lions Health Centre undertaken by health care professionals from the 3rd Respondents. The 2nd Petitioner states that she was asked to signa form whose contents she did not know. She was thereafter issued with a follow up card which she attended Marie Stopes Clinic at Eastleigh in May 2005.
14. It is the 4th Petitioner's case that she did not give her informed consent for the BTL procedure and did not even request for any family planning procedure to be done on her.
15. During cross -examination by the 3rd Respondent's Advocates, the 4th Petitioner testified that she went to the family planning drive on her own volition, that while signing the documents she was given she did not bother to ask what it was about and what she was signing even after the procedure she did not ask anyone anything.

ii) 3rd Respondent's case

16. The 3rd Respondent filed its Replying Affidavit in response to the Petition and its witness Dr. Fred Oyombe Akonde duly testified on behalf of the 3rd Respondent. The 3rd Petitioner is a family planning organization present in 42 Countries around the world and believes in the principles of voluntarism, informed choice and consent. The 3rd Respondent is now referred to as MSI Reproductive Choices and as the name suggest they promote reproductive

choices. The 3rd Respondent believes that by providing high-quality, client-centred care they could support women to pursue the future of their choice – on their terms.

17. The 3rd Respondent being a family planning organization is guided not only by the Constitution of Kenya and International Instruments but with the National Family Planning Guidelines for Service providers (herein after the “the FP Guidelines”). The FP Guidelines provide that the service providers should ensure that:-

- They develop and implement communication strategies that facilitate advocacy for the use of FP services among the communities they serve;
- To provide adequately trained and competent providers in accordance with approved method specific guidelines.
- They should be able to provide clients with a wide range of methods (method mix) from which to choose.
- To continuously update themselves on new developments on FP methods, skills and services as well as transferring acquired skills to other service providers through mentorship.
- Their facilities should strive to have client examination couches, blood pressure machines, ward screens, weighing scales, trolleys, infection prevention supplies and data tools.
- Adequate infrastructure is also needed in order to avail private and confidential areas in which clients can receive quality FP services.
- To ensure that all clients who choose an FP method must be informed of the appropriate follow-up requirements and encouraged to return to the service provider if they have any concerns or experience adverse effects
- To keep in mind that provision of FP services involves both financial and opportunity costs. If the cost of a method will impose a major financial hardship on the client, then the provider should discuss an alternative contraceptive or a means of obtaining the desired contraceptive less expensively. The provider should also inform the client that FP methods are part of the health services covered by the existing national health insurance schemes, including NHIF.

18. During the period of the alleged bilateral tubal ligation undertaken on the 2nd and 4th Petitioners and all period before and after the 3rd Respondent was compliant with the FP Guidelines to the letter through undertaking on-going trainings, education and monitoring

to ensure the staff adhere to the highest standards contained in the FB Guidelines, providing adequate information on all FP services, counselling and follow up procedures in a language the clients understand, providing adequate facilities and infrastructure as well as informing the patients of the financial implications if any.

19. The 3rd Respondent having provided family planning services to more than one million men and women in Kenya, is very strict to adherence of the FP Guidelines to the letter as well as the policy of provision of non-discriminatory access to high quality, voluntary family planning services to clients whose status is seropositive and seronegative.
20. The 3rd Respondent was unable to conduct its own investigations and assessment into the alleged bilateral tubal ligation as the 2nd and 4th Petitioners declined a second medical examination. The 3rd Respondent's witness, Dr. Akonde was therefore only able to examine the medical records provided by the Petitioner. The 3rd Defendant was therefore unable to confirm this act.
21. The 2nd and 4th Petitioners save for a referral card written "BTL done on.....and review on...." Both cards have the date of the year 2005.
22. The 3rd Respondent's position is that no proper records were provided in proof that the alleged BTL was performed on them by the 3rd Respondent or which doctor or health physician. And in the event, the 3rd Respondent undertook the procedures, as per the 2nd and 4th Petitioners they were undertaken at Huruma Lions Health Centre then that should be the facility that kept the records. In any event, being more than six (6) since the alleged action, neither Huruma Lions Health Centre nor the 3rd Respondent could retain medical documents during the year 2005 or prior.
23. In the absence of any records, the 3rd Respondent only responded and defended these allegations on a general overview of the services issued by it to its clients. It was Dr. Akonde's testimony that the 3rd Respondent through its qualified and trained health care workers conducts family planning drives at the grass root level to reach the wanainchi. The FP Guidelines refer to these family planning drives as community-based distribution which entails the process of providing family planning information and services to the communities where they live through the community health strategy. The 3rd Respondent's personnel are expected to conduct counselling giving full information of the available family methods available and also those they do not offer but are available in other health facilities.

24. Dr. Akonde testified that the trained staff from the 3rd Respondent always do the counselling in a language the patients or those interested to listen understand. The 3rd Respondent ensures that its staff conducts both group counselling and individual counselling where after the patient choses from the array of FP methods discussed about. The patient is then again informed of the pros and cos of the selected procedure and once the confirm having understood the benefits and effects of the method then the patient is required to sign a consent and thereafter the procedure is performed. In the event the patient changes their mind then the procedure will not be undertaken.
25. After the procedure, the patient is explained to what to expect, a brochure to read and a follow up card for future consultation. However, the follow up card usually has a number at the top left therefore when a patient comes up it becomes easier to retrieve the file number. Dr.Akonde upon observing the Petitioner's Follow Up Cards could not ascertain that they were issued by the 3rd Respondent as they did not bear a number. Dr.Akonde testified that the 3rd Respondent was not in partnership with any hospital but would request hospitals for use of their facilities, the 3rd Respondent's staff were also required to ensure that the hospital is well equipped for the procedures to be undertaken. However, it was very likely that patients would be referred to the 3rd Respondent as it is a well-known organization that offer family planning services. Dr. Akonde confirmed that the 3rd Respondent offers family planning services to all patients who require the services and not only to HIV affected patients. The 3rd Respondent also does not gain either in monetary or any other means when a patient is referred to them.
26. On cross examination, the 3rd Respondent's witness stated the following:-
- (a) That he did not agree with the contents of the Medical Report prepared by Dr. Khisa as the report was not conclusive in what could have blocked the tubes. A lot of things can lead to blockage.
 - (b) Dr. Khisa should have written his findings as bilateral tubal blockage and not ligation.
 - (c) That the 3rd Respondent relies on the FP Guidelines on the procedure which is a document available everywhere even in the internet.
 - (d) He did not bring sample consent forms available at the 3rd Respondent's clinic but they are usually available and if requested they would have been brought.
 - (e) That the 3rd Respondent does not have internal guidelines but they follow the national FP Guidelines.

- (f) He confirmed that the 3rd Respondent engages in family planning drives to take services to the grassroots
- (g) He was not sure 100% that the follow up cards were issued by the 3rd Respondent since it lacks a number that gives it its uniqueness and ease of tracing the patient's file when they come back to the hospital. He however did not find a sample card to differentiate.
- (h) He confirmed that attending the drive does not mean consent but signing the form means consent.
- (i) The services are explained in native language if need be for those who do not understand English or Kiswahili. And in the event one is illiterate then services are not offered until the person understands fully.
- (j) Family planning procedures could be carried out in any health facility that is well equipped and prior inspection has been done.
- (k) The 3rd Respondent does not keep medical records after 7 years since recording according to WHO standards.
- (l) To confirm that a BTL was done, one must establish that the tubes are blocked through an examination. He did not see a physical examination done by Dr.Khisa.
- (m)The National Guide on Family Planning in the 1st Respondent's documents was shown and confirmed that the 3rd Respondent is guided by it.
- (n) He confirmed that counselling is done, no coercion it was voluntary and a consent must be signed before. In the event the patient says that they were coerced then the procedure is not undertaken. There was no evidence of coercion.
- (o) The 3rd Respondent does not benefit even in monetary through referrals of patient by other health facilities.
- (p) The 3rd Respondents' health staff are qualified and regularly undertake training on family planning.
- (q) The 3rd Respondent offers voluntary family planning and consent is obtained first even upon referrals.
- (r) There was no collusion between the 2nd and 3rd Respondent.
- (s) The number on the follow up card is missing and is very important for identification.
- (t) Coercive family planning is not allowed in the medical practice and the national guidelines do not allow for it.
- (u) He did not recall interacting with the 2nd nor 4th Petitioners and neither has there been a trace of their records.

C. ISSUES ARISING FOR DETERMINATION

- i) Whether the 2nd and 4th Petitioners have discharged to the required standards, the evidentiary burden required to prove that they underwent Bilateral Tubal Ligation without their informed consent.
- ii) Whether the Constitutional rights and freedoms of the 2nd and 4th Petitioners were violated
- iii) Whether the Petitioner is entitled to compensation

D. ANALYSIS

- i) WHETHER THE 2ND AND 4TH PETITIONERS HAVE DISCHARGED TO THE REQUIRED STANDARDS, THE EVIDENTIARY BURDEN REQUIRED TO PROVE THAT THEY UNDERWENT BILATERAL TUBAL LIGATION WITHOUT THEIR INFORMED CONSENT.

a) INFORMED CONSENT

27. The Petitioners are all HIV-positive women, who have alleged that they were sterilized by the Respondents without their informed consent. They further allege that the reason that they were coerced into being sterilized was because they were HIV positive. The 3rd Respondent in its response to the Petition that if the BTL was conducted by them of which sufficient records were lacking from the Petitioner to prove this fact then it goes without saying that they adhered to the National Family Planning Guidelines for Service Providers where informed consent is mandatory.
28. As a form of introduction, BTL is a minor surgical operation that involves cutting and tying the fallopian tubes in order to prevent the sperm from fertilising the ovum that was released from the ovary, and reaching the uterine cavity. It is a highly effective method of contraception, with a pregnancy rate of less than one percent of women in the first year after surgery. BTL can be performed on a conscious client using local anaesthesia, and it is generally a safe procedure when performed by a trained provider. It is a permanent family planning method. (**National Family Planning Guidelines for Service Providers**)
29. Peter M. Murray in the book, *The History of Informed Consent, 1990* defines informed consent as the permission which a patient gives to a physician to perform a certain healthcare intervention to include examinations, tests and treatments. The primary goal of Medical practice is “first to do no harm “and a physician has the role to inspire confidence to the patient, provide details of side effects, risks of any intervention, any undesirable effects and the mandate to seek an alternative opinion.

30. It is now widely accepted today that informed consent is an integral element of patient's rights. The law now requires a doctor 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.
31. In expounding on the meaning of 'informed consent', the 3rd Respondent refers to the case of *CNM –vs- The Karen Hospital Ltd, HAT No. 008 of 2015 (unreported)*, in which the HIV & Aids Equity Tribunal addressed itself to the meaning of informed consent.

"Informed consent refers to the consent given with the full knowledge of the risks involved, probable consequences and the range of alternatives available. ..in medical treatment requiring invasive procedures, the doctor or healthcare personnel are required to disclose sufficient information to the patients to enable them give an informed consent. Informed consent for HIV testing means that the person being tested agrees to undergo the test on the basis of understanding the testing procedures, the reasons for the testing, and is able to assess the personal implications of having or not having the test performed. The requirement of informed consent is intended to uphold the dignity of the patient. It proceeds on the theory that the patient does not lose his dignity simply because he has fallen sick or because he does not know what his treatment will entail, which treatment option is better than the other, of others, and what risks are associated with any or all the available treatment options. ..."

32. Also, the National Family Planning Guidelines, (2010) provides that **"Informed consent must be obtained and the client must sign a standard consent form for the procedure. Spousal consent is not mandatory, but counselling should be provided to both partners and consent obtained from both, if possible, and where appropriate."** The Guidelines go ahead to provide a sample Consent Form.
33. The elements of Informed valid Consent are essentially that it must be voluntary, the patient must have had the capacity to consent and the patient must have been properly informed. Therefore, the Court has to be satisfied that Firstly. Was there adequate information provided to the Petitioners in order for their consent to the sterilization to be informed? Secondly, was consent provided in circumstances which facilitated the Petitioner's making a voluntary decision regarding their sterilization?
34. The Petitioners therefore conclude that whereas informed consent was not sought, the inaction amounted to coercion of the Petitioners to undergo sterilization by way of BTL.

b) ASSESSMENT OF THE EVIDENCE

35. The legal basis for the legal burden of proof is provided in **Section I07** 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."

Section I08 on the incidence of burden states:-

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section I09 legislates on the proof of a particular fact thus:-

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

36. The starting point from the above provision is that *whoever desires* any Court to give *judgement* as to any legal right or liability, dependent on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceedings *lies* on that person *who would fail if no evidence at all were given on either side*. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

37. This standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the Court of Appeal case of **Ignatius Makau Mutisya v Reuben Musuoki Muli (2015) eKLR**, the Judge relied on the decision in **Miller vs Minister of Pensions, (1947) 2ALL ER 37** Lord Denning said the following about the standard of proof in civil cases:-

The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

38. Your Lordship, it is the 3rd Respondent's position that the Petitioners have failed to prove that BTL was conducted on them by the Respondents without their informed consent. The Petitioners' positions remain an allegation as no proof has been provided. It is not enough

to state that the BTL was conducted on them without consent but by the 3rd Respondent but specificity is lacking. The 2nd Petitioners alleges that all through since 2004 until the day of the procedure in 2005, she was informed that she was required to undertake BTL. The 2nd Petitioner alleges that she gave in and went to the Family Drive and further the procedure was referred to her as “kufungwa kuzaa”. The Court will take notice that the 2nd Petitioner was well aware of the procedure she was going for and being an adult of sound mind agreed to have the procedure.

39. The Petitioners at the hearing failed to call any witness to support its assertions that indeed BTL was conducted on them. The Petitioners actually allege that there were other women at the Family Planning Drive and even healthcare workers from the Clinic but none was called to confirm the Petitioner’s averments which is very suspicious.
40. Noting that the alleged BTL was conducted in 2005, one wonders why the Petitioners waited for 9 years to lodge this suit. The Petitioners equally sought psychological and psychiatric evaluation in 2014 in preparation for this case and not earlier. The Petitioners also waited for 9years to request for its medical records. It is trite fact that medical records are always available and a patient has a right to request for copy thereof if they do not hold a copy of the same. However, the Petitioner’s Advocates while requesting for medical records 9 years later was well aware that medical records can only be kept for 6 years since the date of treatment. The Petitioner’s should have had their own medical records to prove that indeed they were attended to by the 3rd Respondent’s healthcare workers.
41. The document annexed in the Petitioner’s documents showing the name “Marie Stopes” is not sufficient proof. The card is neither signed nor does it bear the card number. The 3rd Respondent’s declines that it issued the card. And even if BTL was conducted on them, the same was done on the patient’s request, upon being fully informed of the procedure, other options available and consequences of the procedure. It is not enough to just state that BTL was done. It is not enough!
42. The Petitioner’s are prohibited from claiming that they requested for medical records (which was in 2014) and was denied. There is no proof of receipt by the 3rd Respondent which in any event would have been responded to indicating that no such records existed. As submitted above, medical records can only be kept for a maximum of 6 years. The request was made 9 years later as alleged.

43. Further your Lordship, the Petitioners very well remember the Hospital where the voluntary sterilization occurred but chose not to either include them in these proceedings or call the attendants therein as witnesses. Whereas they remember the Clinic, no records have adduced in proof of their presence in the said clinic. In any event your Lordship, being a hospital if any coercion of individuals to undertake permanent procedures they would not allow it and even would have a record of complaints if at all there was any violations. The 2nd and 4th Petitioners case remain unsubstantiated.
44. The Petitioners did not in any way provide proof of a report or complaint made to the Police, any of the Respondents nor the Medical Practitioners and Dentist Board. If indeed these allegations were true then the Petitioners would provide such proof. The evidence act requires the Petitioners to produce evidence in support of their pleadings and to adduce facts in support of averments.
45. The 3rd Respondent's witness on the other hand testified that if at all BTL was conducted by them, in the absence of medical records to confirm the Petitioner's allegations, then the 3rd Respondent adhered to the National Family Planning Guidelines in ensuring that adequate information was provided to the patient. It was his testimony that in all family planning drives conducted by the 3rd Respondent it involved a group counselling and thereafter individual counselling once a patient accepted the BTL to be done as well as signing of the consent forms. Thereafter, before the procedure, the Doctor would counsel the patient again. The 3rd Respondent's practice also dictated that if the patient refuses at any stage before the procedure the Doctor was required to stop immediately. The 3rd Respondent's advocate for **choice** above all other values.
46. The Petitioners on the other hand failed to provide proof that informed consent was not sought. The Petitioners have only alleged being coerced into undergoing the procedure, no proof has been presented to this Honourable Court, they remain mere allegations. The Petitioners failed to call witnesses who were present during the period and or other patients in the clinic to corroborate their testimonies
47. Your Lordship, the burden of proof was elaborated on in the case of **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** where the learned Judge posited that:-

“Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular

case. This fact was succinctly put forth by Rajah JA in *Bristone 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.”

48. Your Lordship, it is immaterial whether the opposing side has placed any material before the Court to rebut the proponent’s case. This was stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR when it held that:-

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

49. The law as stated in the cited legal provisions and the decided cases is what will guide the Court in arriving at its decision. It is clear from the stated law that even in constitutional cases the standard and burden of proof remains the same. It is for the party alleging the existence of certain facts to prove the same by presenting to the court the evidence in support of the allegations in order to aid the court in arriving at a just and fair decision.

50. In the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR, the Judge relied on the decision in *Lt. Col Peter Ngari Kagume and 7 others v AG, Constitutional Application No. 128 of 2006* where it was held that:-

“23. ...[I]t is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the petitioners to provide evidence of long

incarceration beyond the allowed period and not to be presumptuous that the court knows what happened...."

The learned Judge proceeded to hold as follows:-

"24. I am alive to the fact, that the petitioner in his petition alluded to various constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought."

51. Your Lordship, looking at the evidence available, the Petitioners cannot fully satisfy to the Court that the 3rd Respondent conducted BTL without their informed consent. The Petitioner was required to produce both evidentiary proof and corroborative evidence that their informed consent was not sought prior to the procedure. No evidence has been produced. The Petitioners basically pleaded informed consent was not sought and came to Court empty handed and urged the Court to rely on their word of mouth. It is not enough that the Petitioners submitted that BTL was performed on them without informed consent. Such a claim needed to be corroborated, and in this case it was necessary that the same be proven by way of documentary evidence and witness evidence. Without the required documentation and testimony in support, the Honourable Court should not consider this Petition.

ii) WHETHER THE CONSTITUTIONAL RIGHTS AND FREEDOMS OF THE 2ND AND 4TH PETITIONERS WERE VIOLATED

52. Your Lordship, the Petitioners petition is grounded on the fact that they were subjected to coercive and/or forceful sterilization through bilateral tubal ligation being women living with HIV without informed consent. That the Respondents withheld formula milk for the Petitioners' babies and food portions without proof of sterilization in violation of the Constitution. The 3rd Respondent has submitted above that the Petitioners have failed to

provide evidence in proof that BTL was undertaken by the Respondents without the Petitioners' informed consent.

53. The Petitioners have failed to prove that BTL was undertaken by the Respondents without informed consent, we submit that no rights were violated. The Petitioners also contend that they were coerced into undergoing the sterilization.
54. The Petitioners claim that the act of coercive and forceful sterilization violated the rights under the Constitution. The Petitioners have proceeded to submit and articulate the provisions of the Constitution on the following rights, The Right to life, Right to freedom and security of the person, Right to Dignity, Right, Right to the highest attainable standard of health, Right to freedom from discrimination and Right to access information. The 3rd Respondent submits that it did not in any way whatsoever violate the Petitioners' rights.
55. The 2nd and 4th Petitioners contended that the action of the 2nd and 3rd Respondent in not obtaining informed consent from them amounted to cruel, inhumane and degrading treatment. The 2nd and 4th Petitioners have also contended that the procedure of BTL performed on the Petitioners affected their private life and family lives to date. Further failure to obtain informed consent prior to the sterilization was in breach of their right to the highest attainable standard of health care services. The Petitioners also submit that the consequences of the forced and coerced sterilization have been detrimental to the quality of life of the Petitioners.
56. Your Lordship, the right to freedom and security of person as submitted by the Petitioners has not been established. The Petitioners submit that since they were coerced into being sterilized this amounted to cruel, inhuman and degrading treatment. We rebut this point on the position that the Petitioners have failed to provide sufficient evidence to prove coercion thus the BTL was undertaken under instructions from the Petitioners themselves and after advise from the health workers on the said date. Your Lordship, the 2nd and 4th Petitioners understood the procedure as "*kupanga uzazi*", this means the procedure was explained to them in Kiswahili a language they understood well. We submit that there was no coercion but individuals who want to reap from their own decisions which is unjustly.

The Petitioners claim violation of their rights to privacy and dignity. They however have failed to prove how the Respondents violated their rights to dignity. Article 28 provides no definition of dignity. However, its role and importance as a foundational constitutional value has been

emphasized in a number of cases. In the case of *Kituo cha Sheria & 8 Others v Attorney General (2013) eKLR*, the High Court further cited with approval of the South African case of *S v Makwanyane* where O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:-

"The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3."

57. As David Feldman wrote, "there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity." (David Feldman, Human Dignity as a Legal Value -Part I, 1999 Pub. L. 682, 690-91.) Your Lordship, the Petitioners have failed to show to this Court and the parties how the Respondents violated their right to dignity. There is no evidence whatsoever. Such a right requires proof. The Court has been invited to decide this right where in no way has there been proof tendered to show that their dignities were violated. Your Lordship one's dignity goes to how one was treated in a cruel, degrading manner unfortunately no such evidence has been put forth to prove this allegation.

58. Article 31(c) deals with privacy and it is categorical that everyone has the right to privacy which includes the right not to have the privacy relating to their family or private affairs unnecessarily required or revealed. The Petitioners allege that the failure to obtain their informed consent violated their right to privacy as the choice was taken from them. In the case of a constitutional invasion of privacy the following questions need to be answered:

- (a) Has the invasive conduct infringed the right to privacy in the Constitution?
- (b) If so, is such an infringement justifiable in terms of the requirements laid down in the limitation clause of the Constitution?

59. The Petitioners being adults of sound mind made the decision to have BTL performed on them and after having been advised on all available family planning methods. The procedure did not infringe on the Petitioners right to privacy. The Petitioners having access to family planning methods does not prove any infringement of their rights to the highest attainable health nor discriminated due to their status. To prove discrimination due to their HIV Status then the Petitioners were required to show how other women were treated viz a viz them, its not just enough to claim discrimination just because of one's health status. Discrimination

requires comparison none has been put forth. There was no special treatment to other patients that has been adduced.

60. On the right to life your Lordship, the Petitioners cannot claim almost 9 years later that they wish to have more children. The Petitioners consented to the family planning method out of their own reasons and should be prohibited from coming back to claim violation of their right to have more children. The 2nd and 4th Petitioners have their lives, in good health and taking medication and in good health. The Petitioners cannot claim a violation of their right to health.

61. Your Lordship, the Petitioners have failed to show that their rights were violated and/or breached and therefore no remedies can be available to them. He who alleges must prove.

62. Your Lordship, the Court in Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 others [2016] eKLR held that, “**There is no doubt that it is for the Petitioner to satisfy the evidential burden that a specific right exists and which right has been violated or restricted besides pleading the same with reasonable particularity and precision**”. The Petitioners have submitted that the rights do exist however they have failed to discharge the evidentiary burden expected in constitutional cases. The Petitioners’ main ground is that informed consent was not sought prior to the procedure and they did not know that it was a permanent procedure. Your Lordship, for a whole year prior to the procedure the Petitioners were told of this procedure and they understood it to mean “*kufungwa uzazi*” they are therefore prohibited now to claim that they did not know anything about the procedure they went voluntarily to have undertaken. The 2nd and 4th Petitioners further said that they attended the 3rd Respondent’s Family Planning Drive and according to Dr. Oyombe all planned Family Planning Drives constituted a group counselling and individual counselling prior to the surgery.

63. The Petitioners failed to prove this fact at all. The Petitioners failed to give proper and clear cycle of events which led to the procedure of the BTL as well as proof that informed consent was not sought. There is just no sufficient evidence produced that proves that informed consent was not sought. The petitioners bear the burden of proving, on the balance of probabilities, that their rights were violated.

64. Honourable Lenaola J. while referring to the Anarita Karimi and Mumo Matemu Cases in Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013 stated:-

“The Petitioner cannot come to Court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”

65. Looking at the Petitioner’s pleadings, the evidence as well as the submissions of the parties, it is my conserved view that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. He has not adduced any evidence to demonstrate the alleged violations.

66. Your Lordship, we submit that this Petition has not passed the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case Leonard Otieno Vs. Airtel Kenya Limited [2018] where Mativo J. held that:-

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

67. It is the 3rd Respondent’s case that its main value is choice, that women have the choice to choose which family planning method is suitable to them upon being advised by the trained physician. The Petitioners are adults and had the capacity to chose and decide what happens to their bodies and should have asked whatever questions they had if they did not. However, the norm with the 3rd Respondent is that the family planning drive was conducted by well

trained healthcare professionals and community workers. The different methods available were explained to all the women who attended in a language they understood both in groups and individual. The Petitioners cannot be heard to say that until 9 years later is when they realized they could not have any more children or known exactly what happened to them.

68. Your Lordship, the presentation of evidence is not a mere technicality but essential to a proper consideration of constitutional issues. The Petitioners cases have wholly been bases on the hypothesis that since they were HIV positive women and of low income position then they did not have a say and the Respondents took advantage of their situation. Your Lordship, the 3rd Respondent has never and does not gain in any way either monetary of other means in assisting women chose their family planning options. having failed to prove that informed consent was sought and given by the 3rd Respondent is prohibited from claiming any violations of their rights.

iii) WHETHER THE PETITIONERS ARE ENTITLED TO THE RELIEFS SOUGHT

69. Your Lordship, the Petitioners are not have failed to discharge the burden of proof to the required standard. This Honourable Court cannot be expected to decide on speculation and imaginations but must be guided by evidence of probative value. It was therefore incumbent upon the 2nd and 4th Petitioners to provide evidence to prove their allegations of coercion and lack of informed consent prior to the procedure. The Bilateral Tubal Ligation was performed after informed consent was sought and therefore there was no violation of the Petitioners' rights in any way. The 2nd and 4th Petitioners are therefore not entitled to any of the reliefs being sought and more specifically any general and exemplary damages.

70. Further, your Lordship, the National Family Planning Guidelines for service providers are available for use by all family planning service providers including the 3rd Respondent as well as the Constitution of Kenya which is the

E. CONCLUSION


71. Your Lordship, the entire Petition is lacking of evidence. The Petition therefore remains mere allegations. The Petitioners' assertion that until 2014 when Dr. Khisa examined them in preparation for this case they did not know what had happened to them almost 9 years

ago is suspicious and a fallacy at best. Further, until the year 2014 just before filing of the suit is when the Petitioners requested for their medical records no efforts had been made before or even a complaint lodged either with the Respondents, police or the Medical Practitioners and Dentist Board.

72. Your Lordship, the upshot of the 3rd Respondent submissions is that the Petitioners have failed to prove coercion to undergo BTL, no proof that informed consent was not sought nor any violation of their human rights. The 3rd Respondent submits that in the absence of evidence this Honourable Court should dismiss this Petition.

We humbly submit.

DATED at NAIROBI this 14th day of July 2021


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