

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 428 OF 2018

BETWEEN

NETWORK FOR ADOLESCENTS AND YOUTH OF AFRICA.....1st PETITIONER
JACKLINE MARY KARANJA.....2nd PETITIONER

AND

THE ATTORNEY GENERAL.....1st RESPONDENT
THE CABINET SECRETARY, MINISTRY OF HEALTH.....2nd RESPONDENT
THE DIRECTOR OF MEDICAL SERVICES,
MINISTRY OF HEALTH3rd RESPONDENT
THE KENYA MEDICAL
PRACTITIONERS AND DENTISTS BOARD.....4th RESPONDENT
KENYA FILM CLASSIFICATION BOARD.....5th RESPONDENT

AND

KENYA CONFERENCE OF CATHOLIC BISHOPS (KCCB)...1ST INTERESTED PARTY
KENYA CHRISTIAN PROFESSIONAL FORUM (KCPF).....2ND INTERESTED PARTY
PEARLS AND TREASURES TRUST.....3RD INTERESTED PARTY
REPRODUCTIVE HEALTH NETWORK.....4TH INTERESTED PARTY
FEDERATION OF WOMEN LAWYERS (FIDA-KENYA) 5TH INTERESTED PARTY
KENYA LEGAL & ETHICAL
ISSUES NETWORK ON HIV & AIDS (KELIN).....6TH INTERESTED PARTY
KENYA NATIONAL
COMMISSION ON HUMAN RIGHTS (KNCHR).....7TH INTERESTED PARTY
KENYA CATHOLIC DOCTORS ASSOCIATION.....8TH INTERESTED PARTY

AND

WOMEN'S LINK WORLDWIDE.....1ST AMICUS CURIAE
CENTRE FOR THE STUDY OF ADOLESCENCE.....2ND AMICUS CURIAE

REPLYING AFFIDAVIT OF THE 6TH INTERESTED PARTY

(in response to the Petition dated 30th November 2018)

I, **GEORGE MAKAU MUTINDA**, a Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya do hereby make oath and state as follows;

1. **THAT** I am an adult male and the Programme Manager of the HIV, TB and Key and Affected Populations thematic area at the Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN), the 6th Interested Party herein, and I am duly authorised to sign this affidavit on behalf of the 6th Interested Party.
2. **THAT** I am a nurse by profession, with a Bachelor of Science in Nursing from the University of Nairobi. I am also currently licenced to practice for the year 2020. *Annexed hereto and marked GM1 is a copy of my licence from the Nursing Council of Kenya for the year 2020.*
3. **THAT** I have experience working as a nurse at various health care institutions. In particular, I have over 8 years' experience working as a nurse at the Obstetrics and Gynaecology department at Kenyatta National Hospital as well as over 10 years' experience working in various public health programmes on HIV. *Annexed hereto and marked GM2 is a copy of my curriculum vitae showing the various positions that I have held.*
4. **THAT** in the course of my career as a nursing officer, I have engaged in the care of patients who had undergone various kinds of abortions, including spontaneous miscarriages and unsafe abortion, as well as care of patients who have been infected and affected by HIV/AIDS.
5. **THAT** I swear this affidavit on my own behalf as a health care professional, as well as on behalf of the 6th Interested Party herein.
6. **THAT** I have read the contents of the Petition No 428 of 2018 presently before this Court and I fully understand the issues in question.
7. **THAT** I swear this affidavit in support of the Petition and hereby wish to draw the Court's attention to the fact that abortion is a public health issue of concern

which requires a comprehensive and rights-based approach which puts women and girls at the centre.

8. **THAT** the term 'abortion' refers to the expulsion or removal of a foetus or embryo from the uterus. An abortion can either be spontaneous, also called miscarriage, or induced.
9. **THAT** in my experience there are many cases where abortion is indicated as an emergency treatment, such as where a woman has an ectopic pregnancy or in the instance of miscarriage, and in such a situation, a health care worker is compelled to perform a safe abortion to save the life of the woman.
10. **THAT** all types of abortion require post abortion care in order to ensure that any complications arising are treated.
11. **THAT** post abortion care involves a spectrum of care, including, but not limited to medical treatment of bleeding and complications that arise from abortion. It also includes the provision of further reproductive health services and psychosocial support following an abortion.
12. **THAT** in many cases, post abortion care also consists of emergency treatment for complications that arise after abortion, related to spontaneous or induced abortions. This emergency treatment is necessary to preserve the health status of the woman, address any emergent complications and save the life of the woman.
13. **THAT** one of the most prevalent forms of abortion in Kenya are unsafe abortions, which are those abortions carried out by persons who do not have the correct skills, or in an environment that does not conform to minimal medical standards.
14. **THAT** in my experience the main reason why there are a high number of unsafe abortions is due to a high level of stigma and misinformation about abortion, as well as a lack of information about available options for sexual and reproductive health and services.
15. **THAT** in my experience as a nurse working with obstetric and gynaecological patients, a majority of women who undergo unsafe abortions must get access

to emergency post abortion care in order save their lives. Post abortion care is therefore lifesaving and emergency treatment.

16. **THAT** I am aware that unsafe abortion has been identified as a serious public health concern that endangers the life and health of many women in Kenya. This has been admitted by the 2nd and 3rd respondents after a nationwide study that culminated in a report titled *Incidence and Complications of Unsafe Abortion in Kenya Key Findings of a National Study (2013)* that was published by the 2nd Respondent in August 2013. *A copy of the said report is annexed hereto and marked GM3.*
17. **THAT** in that report, the 2nd respondent acknowledges that there is a high proportion of women who present with complications and require immediate post abortion care, which is an indication that unsafe abortion continues to pose major public health challenges in Kenya.
18. **THAT** it has been noted by the 2nd respondent that a majority of unsafe abortions are treated and managed by nurses and clinical officers within public health facilities. *Annexed hereto and marked GM4 is a report by the 2nd respondent on The Costs of Treating Unsafe Abortion Complications in Public Health Facilities in Kenya (2018)* indicating that 157,762 women received care for complications from induced and spontaneous abortions in health facilities in 2012 alone.
19. **THAT** further, the 2nd respondent acknowledges that the main way to comprehensively address the question of unsafe abortion is to improve access to high quality comprehensive abortion care, including safe and accessible abortion care, and ensure the immediate and accessible treatment of complications which arise out of abortions. This approach is important to ensure that the lives of women and girls are safe.
20. **THAT** the 6th Interested Party has, in the course of its advocacy in the context of HIV and AIDS, learnt that when interventions to address public health issues are exclusionary, these result in stigma and discriminatory attitudes which only push those who require services away from seeking them, and this negatively affects the health and rights of those concerned.

21. **THAT** the blanket ban such as what was witnessed in this case on all forms of abortion services, negates the constitutional and legal responsibility of health care workers to provide emergency post abortion care as outlined under section 7(3) of the Health Act.
22. **THAT** the responsibility of health care workers is to provide lifesaving treatment in the form of post abortion care irrespective of whether the abortion was lawful or not because the treatment of abortion complications or post-abortion care is considered as an essential component of emergency obstetrical care.
23. **THAT** of note is that where an unsafe abortion has taken place, women who experience complications from unsafe abortion need immediate post abortion care to save their lives and improve their outcomes in treatment.
24. **THAT** consequently, when all forms of abortion services are banned in any health care facility, then it limits the ability of women to access quality care from health care providers who are qualified to perform post-abortion care procedures, as well as to identify and manage post-abortion complications.
25. **THAT** moreover, by limiting access to information on reproductive health services only serves to create high levels of stigma, disinformation and fear around reproductive health care services.
26. **THAT** the 2nd and 3rd respondents have admitted in its report on the *Incidence and Complications of Unsafe Abortion in Kenya* that stigma related to the provision of reproductive health care services has led to misinformation, an increase in unsafe abortions as well as hindered access of services to women and young girls in Kenya.
27. **THAT** further the 2nd respondent has itself noted the need to ensure that such misinformation particularly on abortion is eradicated by engaging communities and users of reproductive health services and providing them with accurate and lifesaving information on prevention of unintended pregnancy, unsafe abortion and the availability of quality services.
28. **THAT** we now know from lessons learnt in advocacy work surrounding other public health issues such as the HIV response, that one of the major barriers

identified in access to HIV testing and treatment, care and support services is a lack of information, stigma and discrimination. It is therefore possible to draw parallels between stigma and the HIV response and the stigma surrounding abortion issues.

29. **THAT** the 2nd and 3rd respondents have in fact noted that stigma and discrimination are barriers to access to services in the HIV response, and has committed to take measures to address and reduce stigma and discrimination in order to improve access to services in the *Kenya Aids Strategic Framework (2014/2015 - 2018/2019)* by, among other measures increasing information on and access to sexual and reproductive health services for adolescents and young women. *Annexed hereto and marked GM5 is the Strategic Framework.*
30. **THAT** the decisions of the 2nd, 3rd, 4th and 5th respondents have caused stigma surrounding abortion services, and such stigma creates a culture of silence and fear, and means that women who need safe services often lack essential information on where to access them.
31. **THAT** in addition, such stigma results in delays in women seeking post abortion care where it is needed, and this increases the risks of severe complications and even death in women who require post abortion care.
32. **THAT** I believe that the 2nd and 3rd respondent should take the approach in the HIV response where stigma was identified as a major barrier to access to treatment, and specific measures taken to address it, which includes provision of information, elimination of gender based violence and discrimination in provision of health services.
33. **THAT** learning from the successes that the country has so far the HIV response, the 2nd and 3rd respondents have a responsibility to enhance access to reproductive health services and address abortion stigma by ensuring:
 - a. The elimination of all barriers to accessing all abortion services;
 - b. The provision of accurate information to increase knowledge on the availability of quality and safe reproductive health services, as well as correct the misconceptions and stigma surrounding abortion;
 - c. Ensuring that personnel in health care institutions are able to provide quality care to women and girls without victimization.

34. **THAT** given the foregoing, and in the interest of safeguarding the Constitutional rights to life, health and information of women and girls, I pray this Honourable Court to grant the orders set out in the Petition

35. **THAT** what is deponed to herein is true to the best of my knowledge, information and belief, save for information whereof sources of information have been disclosed.

SWORN in NAIROBI by the said
GEORGE MAKAU MUTINDA)
This 5th day of December 2020)
BEFORE ME)
ADVOCATE &)
COMMISSIONER)
FOR OATHS)
COMMISSIONER FOR OATHS)



(Handwritten signature)
.....
DEPONENT

DRAWN AND FILED BY:

Nyokabi Njogu
C/O KELIN
Karen C, Kuwinda Lane, Off Langata Road.
P O Box 112 - 00202 Knh
NAIROBI
Mobile No: +254 790 111 578
E-mail: vnjogu@kelinkenya.org
Practice No: LSK/2020/04771