

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

PETITION NO. 606 OF 2014

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL RIGHTS UNDER  
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 19, 20, 21,  
25, 27, 28, 29, 31, 33, 35 43, 45 AND 46 OF THE  
CONSTITUTION OF KENYA (2010).

BETWEEN

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

AND

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

AND

L.A.W. & 2 Others  
-Versus-  
Marura Maternity & Nursing Home & 7 Others  
1<sup>st</sup> Respondent's Submissions

OJIENDA & CO. ADVOCATES FOR THE 1<sup>ST</sup> RESPONDENT

THE SECRETARIAT OF THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS  
(UNAIDS SECRETARIAT).....1<sup>ST</sup> AMICUS CURIAE

PROFESSOR ALICIA ELY YAMIN.....2<sup>ND</sup> AMICUS CURIAE

NATIOANL GENDE AND EQUALITY COMMISSION.....3<sup>RD</sup> AMICUS CURIAE

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

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**1<sup>ST</sup> RESPONDENT'S SUBMISSION**

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**OUTLINE OF THE SUBMISSIONS:-**

- A. *The Background*
  - B. *Issue(s) for Determination*
  - C. *Applicable Laws*
  - D. *Analysis of the Issues*
  - E. *Conclusion and Final Thoughts*
- 

If it may please **YOUR LORDSHIP,**

**A. THE BACKGROUND**

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**YOUR LORDSHIP,**

1. The Petitioner approached this Court vides an amended Petition dated 11<sup>th</sup> September 2015 seeking for the **ORDERS THAT:-**
  - a) *This Honourable Court declares that the act of sterilization of the 1<sup>st</sup> Petitioner by way of bilateral tubal ligation as done by the 1<sup>st</sup> Respondent amounted to a violation of the human and constitutional rights of the 1<sup>st</sup> Petitioner as outlined in the Petition herein.*
  - b) *This Honourable Court declares that it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when and how often to bear children.*

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L.A.W. & 2 Others

-Versus-

Marura Maternity & Nursing Home & 7 Others

1<sup>st</sup> Respondent's Submissions

**OJIENDA & CO. ADVOCATES FOR THE 1<sup>ST</sup> RESPONDENT**



- c) This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to put in place guidelines, measures and training for health care providers and social workers that are in line with FICO Guidelines on sterilization and informed consent.*
- d) This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to conduct in depth mandatory training of all practicing gynecologists and obstetricians on the revised FICO ethical guidelines on the performance of tubal ligation.*
- e) This Honourable Court issues an order directing the 3<sup>rd</sup> Respondent to review the National Family Planning Guidelines for Service Providers to address the provisions that are discriminatory.*
- f) This Honourable Court issue an order directing that there be instituted a mandatory forty eight (48) hours waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery.*
- g) This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to conduct public awareness campaigns to educate patients and citizens about their rights to informed consent, privacy and information and ensure that information on patients' rights is immediately accessible within health care facilities.*
- h) This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to establish clear procedural guidelines for following up on complaints of rights violations and strengthen administrative accountability at hospitals.*
- i) This Honourable Court issues an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to create a monitoring and evaluation system to ensure full implementation of laws and policies regarding the performance of Tubal Ligation.*
- j) This Honourable Court issues an order directing the 3<sup>rd</sup> Respondent to issue a circular directing all medical and health facilities (both public and private) that forceful or coercive sterilization of women living with HIV is not a government policy.*
- k) This Honourable Court is pleased to order the 1<sup>st</sup> Respondent to pay general and exemplary damages on an aggravated scale to the 1<sup>st</sup> Petitioner for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.*
- l) This Honourable Court issues an order that since this Petition is in the Public Interest, each party should bear their own costs.*

*m) This Honorable Court issues an order directing the Respondents within 90 days of the Court Judgment to file affidavits in this Court detailing out their compliance with orders d, e, f, g, h, I, j, k and l.*

*n) This Honorable Court be pleased to make such other orders as it shall deem fit and just.*

2. The 1<sup>st</sup> Respondent responded vides the replying affidavit of **SOPHIA WANJIKU** dated 13<sup>th</sup> April, 2015 and a further supporting affidavit of 14<sup>th</sup> March, 2018.
3. She deposes that, the contents of paragraph 5, 6 and 7 of the Petition do not concern the 1<sup>st</sup> Respondent as they do not particularize or attribute any action or omission to the 1<sup>st</sup> Respondent and also that the 1<sup>st</sup> Respondent is not in a position to verify their veracity. The 1st Respondent avers that it does not run Babadogo Health Centre and the Community Health worker at Korogocho has not been identified.
4. She further averred that the 1<sup>st</sup> Respondent was contracted by Price Water House Coopers for the provision of medical services (screening and education of patients with HIV with a view of stemming down its spread) as set out in the contract under the Programme by a German NGO known as **OBA-RH**.
5. It was after screening that the 1<sup>st</sup> Respondent further averred, it would choose the type of medical services they deserve then they purchase the vouchers at the point of screening at which point, the 1<sup>st</sup> Respondent is not involved. Its role was primarily to execute its mandate as an independent contractor.
6. It was **SOPHIA WANJIKU**'s testimony that, patients would purchase the vouchers and pay to **OBA-RH** programme choosing the hospital they desired to have any such procedures carried out. The services the 1<sup>st</sup> Respondent was tasked to offered included, family planning, caesarean section (CS), Tubal Ligation and others.
7. As regards the voucher in question, the **SOPHIA WANJIKU** deponed that, they were bought at Korogocho screening centre whereas the 1<sup>st</sup> Respondent is based in Mathare North. So, it was her statement that, the 1<sup>st</sup> Respondent only performed that which the vouchers presented to it by the Petitioner dictated.
8. On the question of consent, it was her statement that, '*informed consent*' by the 1<sup>st</sup> Petitioner was given at Korogocho to **OBA-RH** and at the 1<sup>st</sup> Respondent before the procedures were conducted.



- 9.** To reiterate the above position, in response to paragraph 13 of the Petition, it was her statement that, the 1<sup>st</sup> Respondent was only contracted to carry out the tubal ligation which it so did with the consent of the 1<sup>st</sup> Petitioner. This procedure was conducted on the advice of the community health worker with whom the issues of tubal ligation were conversed.
- 10.** She went further to deny any links that the Petitioner tried to create between the 1<sup>st</sup> Respondent and the community health worker who made the recommendations for Caesarean and tubal ligation. The consent was given on the **6<sup>th</sup> September, 2006.**
- 11.** In response to **paragraph 14** of the aforesaid affidavit it is true that on 15<sup>th</sup> September, 2006 the 1<sup>st</sup> Petitioner was admitted at the **MARURA MATERNITY & NURSING HOME**, the 1<sup>st</sup> Respondent, where she was prepared for theatre and before the operation she was asked her marital status, her age and whether all her children are alive but was never asked about her number of children as she has indicated in her affidavit.
- 12.** In response to **paragraphs 15, 16 and 17**, she stated that the issue of public interest ligation mentioned therein does not arise as the 1<sup>st</sup> Respondent does not carry out bilateral tubal ligation or any surgical operation in its patient without their consent. She rubbished any such insinuations actuated by the 1<sup>st</sup> Respondent terming them malicious and orchestrated towards lowering the standing of the 1<sup>st</sup> Respondent.
- 13.** The 1<sup>st</sup> Respondent also went ahead to vehemently deny **paragraphs 16** of the Petition in addition to the above as there was no evidence in support of the same. In fact, she stated that, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners have not tabled any credible evidence of allegations that is verifiable. What they did **SOPHIA WANJIKU** responded, was just a report prepared by the 3<sup>rd</sup> Petitioner purporting to back their allegations that the 1<sup>st</sup> Petitioner and other institutions of that kind, conduct non- consensual tubal ligation.
- 14.** That in response to **paragraph 18** of the petition herein, the 1<sup>st</sup> Respondent avers that the Petitioners Petition has not demonstrated any wrong doing on the by the 1<sup>st</sup> Respondent hence there is no basis upon which the orders of relief sought can be granted by this Honorable Court.
- 15.** The 1<sup>st</sup> Respondent denied the **paragraphs 19, 22, 23 and 24** of the Petition to the extent that they purport to state that the 1<sup>st</sup> Respondent conducted the alleged bilateral tubal ligation on the 1<sup>st</sup> Petitioner without their informed consent. The 1<sup>st</sup> Respondent further



traversed that 1<sup>st</sup> Petitioner underwent the bilateral tubal ligation upon her informed and express consent.

- 16.** As regards **paragraph 23 and 24** of the 1<sup>st</sup> Petitioners Supporting Affidavit, the 1<sup>st</sup> Petitioner stated that on **8<sup>th</sup> September, 2014**, she wrote to the 1<sup>st</sup> Respondent requesting for her hospital and medical records and annexed **LAW-002** a copy of the said letter and did a reminder on **24<sup>th</sup> November, 2014** marked **LAW-003** but the exhibits have the same dates which is 8<sup>th</sup> September 2014.
- 17.** That in response to paragraph 26, the 1<sup>st</sup> Petitioner states that she did not give her informed consent for the procedure of bilateral tubal ligation to be performed on her. However, according to the medical report, there is a signed hospital form of consent for operation and the type of operation being caesarean and Bilateral Tubal Ligation dated **10<sup>th</sup> September, 2006** and **16<sup>th</sup> September, 2006**.
- 18.** That in response to **paragraph 32**, the 1<sup>st</sup> Petitioner states that the bilateral tubal ligation operation done on her is an infringement of her reproductive rights but since she had signed the consent form to undergo the operation her rights have not been contravened whatsoever.
- 19.** In **Article 43** of the Constitution of Kenya every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care which she claims she was denied at the hospital.
- 20.** That in response to **paragraph 34** of the 1<sup>st</sup> Petitioner's affidavit the doctor had standard of care to the patient and there was no mistake or omission since the petitioner had signed a consent form to undergo the said operation.
- 21.** **SOPHIA WANJIKU** went further to appreciate the fundamental duty of this Honorable Court in the promotion of respect, protection and fulfillment of the rights and fundamental freedoms in the Bill of Rights in terms of **Article 21(1) of the Constitution of Kenya 2010**. However, she averred that, the Petitioners have not demonstrated grounds upon which this mandate can be exercised.
- 22.** As regards the contention by the 1<sup>st</sup> Petitioner to the right to given the highest attainable standard of health care in the 1<sup>st</sup> Respondent's Hospital according to Article (43) (1) (a) of the Kenyan Constitution, SOPHIA WANJIKU averred that the was no discrimination



due to her health status nor any violation of her human and constitutional rights, since there was no coercion or forceful sterilization by the hospital. To add, **SOPHIA WANJIKU** stated, the 1<sup>st</sup> Petitioner voluntarily signed the consent form to undergo the bilateral tubal ligation giving up her rights in relation to her reproductive health.

- 23.** **SOPHIA WANJIKU** also responded on behalf of the 1<sup>st</sup> Respondent to prayer (f) of the prayers that, the Petitioner's sought for an order for mandatory 48 hours waiting period is unconstitutional and a violation of **Article 24(1) and 43** of the Constitution. She stated that, the decision of when sterilization should be performed should be an autonomous decision made voluntarily by the patients following a medical doctor's opinion and consulting with other medical practitioners if need be.
- 24.** On the prayer specifically against the 1<sup>st</sup> Respondent in paragraph (k) to pay for damages, she, **SOPHIA WANJIKU**, stated that, the 1<sup>st</sup> Respondent should not pay any damages for physical and psychological suffering that were consented to.
- 25.** In the further affidavit dated 14<sup>th</sup> March 201, the 1<sup>st</sup> Respondent stated that with respect to the subject matter herein, it acted as independent contractor of the intended interested parties and that they were independent contractors as per the annexed agreement.

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**HEARING**

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**THE PETITIONERS CASE**

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**EXAMINATION OF P.W.1: L.A.W.**

- 26.** She stated that she is the 1<sup>st</sup> Petitioner, married (around January, 2010, but now separated) and about 31 years old. She stated that she is a resident of **Korogocho** Nairobi. She stated she has two children aged 15 and 11 years old. She averred that she is a businesswoman selling a few items to survive and earning about 150/=per day, stays with the children and solely responsible.
- 27.** It was her testimony that, in 2006 when she realized that she was pregnant, she went to Kariobangi clinic. The nurse took her blood samples and the result was positive. She went to **Babadogo** Health Centre for a second opinion and which also confirmed that she was HIV

- positive. At the Health Centre, she was attended to by a nurse called **Hellen** who talked her and advised her how to live with the challenge.
- 28.** She confirms that she was advised that it will be proper that she does not conceive again as it would affect her health. It was her testimony that she believed the nurse. The nurse she stated, advised her that if she wanted to have a child who was HIV free it was desirable to undergo caesarian (CS) which would cost Kshs.10, 000/= but which she did not have at the moment.
- 29.** Not being able to pay that amount, the nurse, Hellen, took her to **Nancy Wanjiku** a Community Health Worker who gave me a voucher "**LAW 001**". With the voucher, she stated, she was advised to go to the 1<sup>st</sup> Respondent once she experienced labour pain.
- 30.** On 15.9.2006, she stated she went to the 1<sup>st</sup> Respondent in company of her late husband at about 10.00am. She was given a card and taken to the Doctor who examined her and told her that she should be taken to the ward in readiness for the theatre the following day as the labour pains experienced were pre-mature.
- 31.** The following day, the nurse came and told her that she would go to theatre at 4 pm. She averred that she was not told anything about family planning. The Doctor came and injected her on her back and then asked to lie on the bed. She was operated on. She stated that the Doctor asked her if she knew whether she was being sterilized and she answered in the affirmative. She however confirms that, she did not sign anywhere.
- 32.** After operation she states that, she was taken back to the ward and was discharged after 3 days. She maintains that she did not sign consent from the 1<sup>st</sup> Respondent. She was given a document dated 10.9.2006 which though she did not know. She denied going to the 1<sup>st</sup> Respondent on 10.9.2006 but on 15.9.2006. She denied knowledge of Isaac as he sworn her own affidavit sworn on 10.9.2015. She confirms that it is her signature that was appearing on that document.
- 33.** She stated, she filed this petition because after the death of her husband, she got another man to marry her. They stayed with him for 3 months and tried having a child without success. She states she went to German Doctor's Hospital and who after investigation informed her that she had been sterilized. She was advised to go back to the 1<sup>st</sup> Respondent and find out what type of Tubal Ligation was done on her.



- 34.** She stated again that she was never given information on the type of Tubal Ligation she underwent. However, she wrote a letter dated 8.9.2014 but which letter was never responded. She wrote another one **L.A.N No. 3** to no avail. She decided to come to court after she learnt that other women living with HIV still gave birth to children. That is when she realized that her rights were violated. She went to Dr. Khisa who informed her that she had undergone Tubal Ligation. She produced Dr. Khisa's medical report dated 8.10.2014 from Hurligham Family Clinic. She produced this as "**LAN 004**".
- 35.** She also saw another Doctor, who she did not name, after my new husband declined to support her children on the basis that he would not support other man's children. She claims to have undergone mental torture and my new husband left her and ran away. The new Doctor she says told her that she was under stress and her prescription for drugs. She produced this as "**LAN 005**".
- 36.** She laments was done on her because she was positive. She, she claims, she was not HIV positive during her first child's birth. After the "**TL**" her life changed. She prayed that the court should not allow other women to go through what she had gone through. She prayed that, the violation to her rights be compensated. She relied on her affidavit in support of the Petition
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**CROSS - EXAMINATION OF P.W.1: BY MR. OJIENDA FOR THE 1<sup>ST</sup> RESPONDENT**

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- 37.** It was her testimony in cross-examination that, she went to hospital having one child and was expecting the second. She stated that it is not true that she had four children as the hospital record shows. She referred counsel to **SN - In patient file**.
- 38.** She states that her first born was born in 2002. She went to hospital in the company of Eric Ochieng who was her first husband. She was informed by a community worker that she could go to Marura Nursing home, the 1<sup>st</sup> Respondent. The Community Health Worker gave her a voucher that she had been sent to collect by a sister/nurse from Babadogo Health Centre; Hellen. She went to Korogoco where she met **Nancy Wanjiru** whom she gave Khs.300/= . She identified correctly that, Hellen is a nurse while Nancy is a Community Health Worker.

- 39.** She confirmed having met Hellen at Babadogo Health Centre in her office where she was tested and found to be positive. She confirms having been counseled by the nurse and advised that to avoid mother to child transmission, she should not get more children. By this time, she stated that she was already pregnant and had just gone for antenatal clinic.
- 40.** At the clinic, Hellen asked her if she could raise Kshs.10, 000/= which she said she could not and was instead asked to pay Kshs.300/=. Since her first child was delivered through CS. She stated that, at her first pregnancy, she was not HIV positive during the first delivery due to blood pressure. This was the Doctor's advice at Jamaa Hospital.
- 41.** When she came with Kshs.300/=:, she was introduced to the Community Health Worker at Babadogo Clinic. Hellen asked her to pay the Kshs.300. Hellen then took her to Nancy with the 300/=. Nancy then gave her a voucher and told her to go to Marura where she would deliver without paying any money
- 42.** She claimed knowledge of the vouchers being for an operation. When asked to show them, she only produced one and could not tell where the other was. She said she was told the vouchers were in place of money. She claims that she went to Nancy's house to collect the second voucher and went to the 1<sup>st</sup> Respondent's.
- 43.** The first voucher she claimed was written "*Kadi ya Jamii*" and the other one "*Kadi ya kuzaa*". She confirms that Nancy, the community health worker was not employed at the 1<sup>st</sup> Respondent. She was admitted on 15.9.2006 for "CS" operation on which day, a nurse wrote a card and gave her and she went to see a doctor who examined her.
- 44.** She was then informed that, a doctor would come from Kenyatta National Hospital. When the Doctor came, she says she was injected and at which point she was asked if she knew whether she knew whether she was being sterilized. She states, **she answered the said in the affirmative.** And further stated she knew the consequences which is she would not get another child/children.
- 45.** She made it known to the Court that, it was Hellen who informed her that it was not good to get children. She said she knew she would undergo family planning but did not know it would be permanent. At this point, she says she did not know the method that would be used as she never asked.



- 46.** As regards sterilization which she earlier responded to be having knowledge of being done to her, she claimed not to have given consent. Her complaint she said was that she sterilized due to her HIV status. She confirmed that, her other husband and her wanted to have a child without success.
- 47.** After trying without success, she claimed that she went to a doctor who after running tests, told her that she had been permanently sterilized. She claims she was sent to the hospital which had performed the operation but she did not get the file but maintained that she did not know which type of operation it was.
- 48.** However Dr. Khisa told her that it was irreversible. She states that it is the 2<sup>nd</sup> Petitioner who advised her to go to Dr. Khisa. The 2<sup>nd</sup> Petitioner she states knows is a support group who inform people about their rights. The group told her that, she was able to get a child but she could not due to sterilization. Throughout the process from Hellen to Nancy, she knew she would get a child who would not contract HIV.

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**CROSS EXAMINATION BY 2<sup>nd</sup> RESPONDENT**

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*Nil.*

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**CROSS EXAMINATION MR. MWIBO**

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- 49.** She confirmed that, it is true Hellen talked to her about her HIV status. She said she was told that at her young age (20) years she had more years to live. She was advised that she should not get more children. She says she was told by Hellen, that she should be sterilized but was not told how long it would be to be without getting a child. She denied being told how long she will not get children.
- 50.** She testified that she was in a confused mode having been found to be HIV positive. She referred counsel to the voucher "L.A.N 001" at page 33 of Amended Petition. She has said that she was given two vouchers for **Kshs.200** and **100**. She states that, the voucher for **Kshs.200** was for deliver whereas the one for **Kshs.100** was "Kadi ya Iamu" referred to the exhibit in **paragraph 13** of her Supporting Affidavit one card was "CS" and "TL". The cards were in two different colors; blue and brown. Brown card was for delivery while the blue one was marked "TL".

- 51.** She said it is true she deponed at paragraph 13 of her supporting affidavit that she was given two cards she referred to L.A.W 005 being the psychiatric evaluation at page 38 of the Amended Petition. She claimed to have first heard of the letters "TL" in 2014 at Dr. Khisa's Clinic although the voucher was given in 2006.
- 52.** She was shown L.A.W 001 which was a voucher "*kadi ya Jamii*" which appeared at page 33. She states was given the card but was not told what the writings on them were. She claimed the cards did not have the letters "TL". She was taken to the doctor by the 2<sup>nd</sup> Petitioner who also assisted her get an advocate. She met Gladys who works with the 3<sup>rd</sup> Petitioner. She was informed her she had gone through and advised to take the matter to Court.

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## CROSS-EXAMINATION BY MISS ODUOR

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*Nil.*

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## RE-EXAMINATION

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- 53.** She stated that she went to Marura in 2006 at which time, she had one child and was expecting the second. She confirmed that she had gone to see Hellen who was at Babadogo clinic and who counseled her and sent her to Nancy. Nancy gave her cards which she later used at the 1<sup>st</sup> Respondent. She denies having been told the relationship Nancy or Hellen had with the 1<sup>st</sup> Respondent. She referred to annexure L.A.N - 1 (card) which she was given by Nancy and was told was acceptable at the 1<sup>st</sup> Respondent and were to stand for the CS operation as hospital bill.
- 54.** She says she was never told anything else. She denied Nancy having read her the writings on the card neither did not ask her either. She said for the first pregnancy, she delivered through CS at Jamaa Hospital. The doctor decided to do CS because her blood pressure was high. As of 2002 she was HIV negative and no one told her about being sterilized in 2002.
- 55.** Later, a friend only advised her to get an injection so that she does not get another child before she fully recovered. She said, she used to get family planning injection every 3 months. The doctor from Kenyatta asked her whether she was aware she was being sterilized and said yes. **She says she knew this was to prevent pregnancy minus desire.** She denied having signed a form at Marura; she did not know whether her husband signed one.



- 56.** She says she met the 3<sup>rd</sup> Petitioner at Korogocho when they came to their support group. That is when the 3<sup>rd</sup> Petitioner came to learn how she was treated and agreed to assist her get an advocate. When asked about the Women Doctors, she said, they are at Mathare where she went to enquire whether she would get a child. They told me that I could not get a child since my uterus has been closed.
- 57.** She went to Marura but they did not give me my file. She wrote a letter dated 5.9.2014 "LAN 002" but which letter she states was not responded to. She was given two vouchers by Nancy. One is in court the other got lost. She maintains that she "TL" until Dr. Khisa told me its meaning in 2014. I swore the affidavit in 2014. She stated that she filed a second affidavit in 2015. She confirmed that it is true she went on to state that, it is true she went to see Dr. Khisa whose report she produced as "LAN S" in the supporting affidavit. I have seen the replying affidavit by 1<sup>st</sup> Respondent at **paragraph 37** producing consent for Operation at Marura Nursing Home.
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### THE RESPONDENT'S CASE

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#### RW1 SOPHIA WANJIKU SWORN AND TESTIFIED IN ENGLISH

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- 58.** Nancy was sworn and stated that, she is the proprietor of the 1<sup>st</sup> Respondent. She confirms to have sworn two affidavits. One sworn on 13.4.2015 and filed on 14.4.2015 and supporting affidavit sworn on 11.3.2018 and filed on the same day. She stated that they ARE her affidavits. She says that there are also documents attached to the affidavits and which she produced as exhibits. The documents were, a copy of inpatient file, consent for operation dated 10.9.2006, cardex form, observation chart, anesthetic record, among charts produced as **R. Ex 1-6** and Reproductive Health Aid – **R. Ex 1**.
- 59.** She stated that she heard the evidence of the Petitioner. She furthered that there was a person called **OBA-RH** with whom the 1<sup>st</sup> Respondent entered into an agreement with and they were to send clients to the 1<sup>st</sup> Respondent's facility for medical services; maternity, maternal health children and family planning. These services also included antenatal, delivery and post natal care. It was her testimony that the facility would receive referrals for the above stated services from different clinics.

- 60.** It was understood, she stated that a client would get to the facility having obtained a voucher for this services they required she showed the Court **R Ex 7**, per the agreement parties had. **OBA-RH** had identified health workers on different facilities that would give out the vouchers. She stated that they were not involved in selecting those to be served. The vouchers were for specific services. There was one for delivery - maternity care and family planning.
- 61.** The petitioner went to the 1<sup>st</sup> Respondent with vouchers seeking services of “CS” and “TLB”. These are the vouchers that were identified by the Petitioner upon production of the voucher, a client, treated like any other client and is taken through the process of treating the client. With regards to the Petitioner, a file was opened **R.Ex 1**. She came on 10.9.2006 at about 10 pm. The 1<sup>st</sup> Petitioner complained of back ache and was diagnosed to be in labour she had requested for “CS” and “BTL” per the vouchers. At the time, she had two (2) scars which meant she was candidate for CS. That is, she had other children by CS.
- 62.** The Petitioner was admitted at the 1<sup>st</sup> Respondent’s facility, the doctor was informed; she was prepared for operation and consent obtained. After all the preliminaries, she was put on relevant medication.
- 63.** The witness stated that, the consent meant that the patient was aware what she was to go through. The patient, the witness stated, had given oral consent to indicate that she is aware of what is going on. She showed page 11 of **R. Ex 7**. She admitted that it was their duty to counsel the patients who came to the facility for services. She made reference to exhibit **R. Ex 3**.
- 64.** The petitioner was admitted for CS and BTL. She was given medication before surgery. The patient went through the process for CS and BTL. She was discharged on 20.9.2006. She did not pay for the services. **OBA-RH** paid for treatment through the vouchers. The patient did not come back and did not complain of the 1<sup>st</sup> Respondent’s services. She stated that, she only got to know about the complaint through this petition.
- 65.** She stated that she is a medic (nurse by profession). She maintains that the petitioner understood the process she was undergoing. Having gone to the facility with the vouchers, the Petitioner must have chosen the method she wanted. She stated that, the 1<sup>st</sup> Respondent had no role to play in terms of the choice of method because she was referred to them



having already chosen the method she preferred. The 1<sup>st</sup> Respondent had no default in the process. The witness maintained that, the 1<sup>st</sup> Respondent does not do "BTL" because of one's status. **NEVER!**

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**B. ISSUE(S) FOR DETERMINATION**

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**YOUR LORDSHIP,**

The 1<sup>st</sup> Petitioner has framed four issues for determination in line with the prayers sought of; Constitutional declarations amongst other positive orders, as **FOLLOWS**;

- (a) *Whether the Sterilization of the 1<sup>st</sup> Petitioner by way of bilateral tubal ligation was done without her informed consent.*
- (b) *Whether the sterilization of the 1<sup>st</sup> Petitioner by way of bilateral tubal ligation amounted to a violation of her constitutional rights.*
- (c) *Whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents violated their statutory and Constitutional obligations to protect the constitutional rights of the 1<sup>st</sup> Petitioner.*
- (d) *Whether the Petitioners are entitled to the remedies sought.*

The 1<sup>st</sup> Respondent shall submit on issues; (a), (b) and (d) as they are the only issues that affect it.

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**C. APPLICABLE LAWS**

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**YOUR LORDSHIP,**

The 1<sup>st</sup> Respondent shall rely on the following laws;

- i) The Constitution of Kenya, 2010.
- ii) The Evidence Act, Cap 80 Laws of Kenya.
- iii) The Jurisprudence available from our Courts.

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**D. ANALYSIS AND ARGUMENTS**

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**YOUR LORDSHIP,**

**NOTABLE INCONSISTENCIES**

- i. The procedure complained of; Bilateral Tubal Ligation was undertaken in 2006. The 1<sup>st</sup> Petitioner has asserted that she realized the same around July 2010 when she went to Mathare where there was free screening. **There has not been tendered any evidence from the Doctors who screened her in 2010.**
- ii. After attending to **Kariobangi Health Centre** where she was diagnosed with HIV, she went to **Babadogo Health Centre** where the positive HIV status was confirmed. It is at this point that a nurse at this health centre, **Hellen**, advised her to attend to a community health worker called **Nancy Wanjiku**. **Neither Hellen nor Nancy Wanjiku, were named as parties to the Petition.**
- iii. Nancy Wanjiku, the Community Health worker who recommended and got the consent of the 1<sup>st</sup> Petitioner at the initial stage and her two vouchers one for Tubal Ligation and another for Caesarean and advised her to attend to 1<sup>st</sup> Respondent for the procedures, **has not been named as a party to this Petition.**
- iv. The 1<sup>st</sup> Petitioner has alleged that the signature(s) appearing on the consent form(s) is/are not her. **However the 1<sup>st</sup> Petitioner did not endeavour to call and expert to give his opinion for comparison of signatures requires a skillset reserved for those that have trained in that scientific field of study.**
- v. The 1<sup>st</sup> Petitioner has placed weight on the screening and findings of Dr. Khisa, a scan that was done in 2014, eight (8) years since she went for the tubal ligation and caesarean. **A report of the screening during the medical field day was not presented neither was evidence of what transpired in those eight years. The latter evidence is an afterthought.**
- vi. The Petition it is contended does not meet the tests in *Anarita Karimi case* as shall be exposed in the discussion hereunder.



**NATURE OF THE PETITION**

66. The Petitioners have cited several provisions of the Constitution, Acts of Parliament of Kenya and international Law extensively in a bid to convince this Court of the violations and/or infringements allegedly meted on the 1<sup>st</sup> Petitioner.
67. Underlying all the issues identified above, the 1<sup>st</sup> Petitioner is challenging the Respondent's actions *inter alia*, tubal ligation, and violation of statutory and constitutional obligation by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
68. In Constitutional matters, the burden of proof as would in other words be reckoned by **Section 107 of the Evidence Act** is on the Petitioner(s). The burden simply put is on the party who alleges violation of Constitutional rights under **Article 22 of the Constitution of Kenya, 2010**, and who seeks redress from the court in respect of such violations.
69. It's now trite law that, a person who seeks redress under the Constitution must state, his or her or its claim (alleged violations) with precision and demonstrate which provisions of the Constitution have been violated or infringed, and in what manner.
70. The foregoing principle was established in the case of ***Anarita Karimi Njeru v Attorney General (1979) KLR 154***; an authority that has been extensively been cited with approval by Constitutional Courts in this Country. The Court in *Anarita case* had this to say;

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

71. The principles in *Anarita case* have been reiterated by the High Court in ***Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR***<sup>1</sup> where the Court of Appeal cited with approval the decision in ***Mumo Matemu v Trusted Society of Human Rights Alliance and others [2013] eKLR***, and went on to state:-

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due

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<sup>1</sup> Petition No. 295 of 2018, available at: <http://kenyalaw.org/caselaw/cases/view/175115/>.



process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in ligation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

72. The 1<sup>st</sup> Respondent submits that the 1<sup>st</sup> Petitioner has done nothing closer to the identification and citing with exactness the alleged violation. What the 1<sup>st</sup> Petitioner has done is basic citing of provisions of the Constitution of Kenya 2010 in the matter; elaborately cited the violations in the manner, THE ALLEGED CONTRAVENTION OF ARTICLES 19, 20, 21, 25, 27, 28, 29, 31, 33, 35 43, 45 AND 46 OF THE CONSTITUTION OF KENYA (2010).

73. The Petitioner has gone ahead in the body of the Petition to reproduce the text and texture of the said provisions without any such indication as to the manner in which they were violated and or infringed upon.

74. The said style, the Petitioner has adopted in her submissions. Provisions of law have been cited beyond borders without precision. She has not addressed adequately the issues formulated. On this account alone, the 1<sup>st</sup> Respondent shall submit that the Petitioner is forum shopping; the Petition lacks merit and should forthwith be dismissed.

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**ISSUE ONE:**            *Whether the Sterilization of the 1<sup>st</sup> Petitioner by way of bilateral tubal ligation was done without her informed consent.*

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**YOUR LORDSHIP,**

75. The 1<sup>st</sup> Respondent submits that the 1<sup>st</sup> Petitioner was sterilized having given her express consent to the said sterilization to the community health worker, Nancy, before she was recommended for the said procedure and caesarean at the 1<sup>st</sup> Respondent.



**76.** May it not be lost that at the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Petitioner was also engaged by the Doctor who operated her whether she had agreed to the procedure and/or knew what was going on or was being done and which she agreed yes.

**77.** It shall therefore be the 1<sup>st</sup> Respondents submission on one hand that, the 1<sup>st</sup> Petitioner before even setting foot on the 1<sup>st</sup> Respondent had been counseled by Hellen on her HIV status and advised on the health risks associated with the said positivity and she agreed to be sterilized before Nancy, the community health worker, could issue her with the BTL voucher.

**78.** On the other hand, and in addition to paragraph 77 above, the Doctor who operated the 1<sup>st</sup> Respondent asked to confirm if she knew what procedure she was to undergo and she answered in the affirmative. The 1<sup>st</sup> Respondent's Director, **Sophia Wanjiku** in her testimony confirmed that, the 1<sup>st</sup> Petitioner on admission, was asked her details and her knowledge of the procedure she was to undergo and all which boxes she checked to the satisfaction of the nurse and the doctor and in no way therefore that the 1<sup>st</sup> Petitioner can claim not to have given consent.

**79.** What then constitutes consent the question begs? In the medical field, consent is construed as, the process of understanding the risks and benefits of a particular treatment or procedure having been given the relevant information associated to it by a medical practitioner.<sup>2</sup>

**80.** Dr. Richard<sup>3</sup> goes ahead to provide four (4) principles of informed consent as follows;

- *You must have the capacity (or ability) to make the decision.*
- *The medical provider must disclose information on the treatment, test, or procedure in question, including the expected benefits and risks, and the likelihood (or probability) that the benefits and risks will occur.*
- *You must comprehend the relevant information.*
- *You must voluntarily grant consent, without coercion or duress.*

**81.** In this case, the patient; the 1<sup>st</sup> Petitioner, having been advised by the community health worker, Nancy, went to the 1<sup>st</sup> Respondent for the medical procedures. She was in her right

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<sup>2</sup> Richard A, Wagner, *Informed Consent and Important*, (reviewed 9<sup>th</sup> November, 2020), available at: [https://www.emedicinehealth.com/informed\\_consent/article\\_em.htm](https://www.emedicinehealth.com/informed_consent/article_em.htm) (accessed on 18/06/2021).

<sup>3</sup> Ibid.

state of mind at least that is not contested as she deponed and can vividly remember almost all the events from start to the end. She thus can be said to have passed the 1<sup>st</sup> test above.

**82.** She then was booked for the medical procedure at the 1<sup>st</sup> Respondent and was treated/operated on by a doctor from Kenyatta Hospital. She deposed that, before the doctor performed the said procedure, she stated that, she was asked if she knew what that procedure was. She answered, YES.

**83.** Going by the 1<sup>st</sup> two tests being fulfilled, the 1<sup>st</sup> petitioner can properly be said to have passed the 3<sup>rd</sup> test as it is that information that led to her admitting knowledge of the procedure and allowed the performance of the same. As such, it cannot be said, she did not appreciate all such information.

**84.** Lastly, this consent was again given freely without coercion. If she was coerced, she would have given that in her statement and testimony. Since it has been, and from the chain of facts raw and in affidavit form, there is no proof of coercion or duress. Perhaps at this point, there is need to define what duress really means.

**85.** Duress has been defined in legal terms as, The legal concept on duress has been defined by Hallsburys Laws of England 4<sup>th</sup> Edition Volume 9<sup>4</sup> as:

**“The compulsion under which a person acts through fear of personal suffering”  
Whereas undue influence has been defined as the conscientious use by one person of power possessed by him over another to induce the other enter into a contract.”**

**86.** The 1<sup>st</sup> Respondent has submitted as can be seen above that, there is no proof that 1<sup>st</sup> Petitioner's consent was illegally obtained or under duress, it is the 1<sup>st</sup> Respondent's submission thus that, the 1<sup>st</sup> Petitioner has failed in every regard to prove her claim and so should it fail.

**87.** In *P B S vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016)e KLR* as cited in *JOO & 2 others v. Praxedes P Mandu Okutoyi & 2 others [2018] eKLR*<sup>5</sup> 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**

<sup>4</sup> See Murtaza Hassan & Another v Ahmed Slad Kulmiye [2020] eKLR, available at, <http://kenyalaw.org/caselaw/cases/view/193301>.

<sup>5</sup> Civil Case No. 25 of 2008, available at: <http://kenyalaw.org/caselaw/cases/view/166015>.



of their negligence, carelessness, or reckless attitude 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, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortuous liability..."

**88.** In this case, the 1<sup>st</sup> petitioner claims that the 1<sup>st</sup> Respondent did not secure her consent before subjecting her to the procedures. It is the 1<sup>st</sup> Respondent's view that, that once she was asked by the Doctor who operated her, they were assured by she was comfortable with and had no objection to the procedure.

**89.** In this regards, it can be said and so we submit that, in all fronts, the 1<sup>st</sup> Petitioner gave her consent to the sterilization procedure freely without any coercion or undue influence.

**90.** It is not to be forgotten that, the 1<sup>st</sup> Petitioner admitted to having given consent to the sterilization it is only that she did not know the length of the period for sterilization. Further to this, there is a consent document that her guardian *Isaac* had signed.

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**ISSUE TWO:** *Whether the sterilization of the 1<sup>st</sup> Petitioner by way of bilateral tubal ligation amounted to a violation of her constitutional rights.*

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**YOUR LORDSHIP,**

**91.** Today, Kenya prides itself today as having joined the ranks of countries with a modern and progressive Constitution. The Constitution of Kenya, 2010 (hereinafter the Constitution) has been lauded as '*progressive*', '*historic*' and '*revolutionary*' for the manner in which it has reconfigured the public sphere and laid much pre-eminence 'on the *Bill of Rights* as one of the tools and vehicles through which society is to be transformed.'<sup>6</sup> The imprint of human rights is a predominant pillar etched throughout its legalistic text.<sup>7</sup>

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<sup>6</sup> Japheth Biegon and Godfrey Musila, "Introduction: Socio-economic Rights as One Promise of a New Constitutional Era" in Japheth Biegon and Godfrey Musila (eds) *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya*, (2012), 3; available at <<http://erepository.uonbi.ac.ke/bitstream/handle/11295/74238/THESIS%20FINAL%20G62-69047-2011.pdf?sequence=3>> (accessed on 11<sup>th</sup> May 2021).

<sup>7</sup> Jackton B. Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Nairobi: Strathmore University Press, 2013) 36: available at

L.A.W. & 2 Others

-Versus-

Marura Maternity & Nursing Home & 7 Others

1<sup>st</sup> Respondent's Submissions



- 92.** From the very moment the Constitution was promulgated on 4<sup>th</sup> August 2010 it was branded “*the new Constitution*” something that is still on the Kenyans’ minds to-date. Additionally so to speak, it provides a compendium of rights with very exhaustive provisions on the entitlements ranging from Articles 19 to 59<sup>8</sup> with the fourth schedule therewith attached providing for the timeline within which legislations on the said are to be enacted and or their realization achieved.
- 93.** It is noteworthy, that the inclusion of a bill of rights in a Constitutional order as a mechanism of ensuring the rights and freedoms of the individual is as a means of regulating the State’s authority over its subjects.<sup>9</sup>
- 94.** At hand, we have a case on allegations of the violations of reproductive health rights. This allegation spews from the sterilization of the petitioner at the 1<sup>st</sup> Respondent’s facility as alleged when she was operated on to birth her baby free of the deadly virus; HIV.
- 95.** To mind and to the best of the submissions on the first issue, it is the 1<sup>st</sup> Respondent’s argument that, the 1<sup>st</sup> Petitioner as has been established in her testimonies above and further under the first issue immediately above that, she consented to the sterilization but which, we submit, came after proper advice was given by qualified health professionals. The 1<sup>st</sup> Respondent’s work was to actualize the said.
- 96.** The 1<sup>st</sup> Petitioner has in these case through her pleadings and in the submissions asserted the violation of her rights to;
- i. right to freedom and security of the person;*
  - ii. right to dignity;*
  - iii. right to privacy;*
  - iv. right to the highest attainable standard of health;*
  - v. right to freedom from discrimination;*

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<<http://www.worldcat.org/title/ascendant-judiciary-in-east-africa-reconfiguring-the-balance-of-power-in-a-democratizing-constitutional-order/oclc/889425084>> (accessed on 6<sup>th</sup> May 2021).

<sup>8</sup> (n1).

<sup>9</sup> The only exceptions today are Britain and Israel, which do not have written constitutions. In the past three decades, countries which previously had written constitutions but no bills of rights or with rights proclaimed but not justiciable, have adopted justiciable bills of rights, notably Canada, New Zealand and Tanzania. Cited by: Antony Wambugu Munene, *The Bill of Rights and Constitutional Order: A Kenyan Perspective* page 1: Published in African Law journal 2002:

<[https://www.researchgate.net/publication/236164199\\_The\\_bill\\_of\\_rights\\_and\\_constitutional\\_order\\_A\\_Kenyan\\_perspective\\_2002\\_2\\_African\\_Human\\_Rights\\_Law\\_Journal\\_135](https://www.researchgate.net/publication/236164199_The_bill_of_rights_and_constitutional_order_A_Kenyan_perspective_2002_2_African_Human_Rights_Law_Journal_135)> (accessed on 16<sup>th</sup> May 2021).

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L.A.W. & 2 Others

-Versus-

Marura Maternity & Nursing Home & 7 Others

1<sup>st</sup> Respondent’s Submissions

**OJIENDA & CO. ADVOCATES FOR THE 1<sup>ST</sup> RESPONDENT**



*vi. right to access of information; and*

*vii. right to life*

**97.** These allegations have been anchored on the aspect of the 1<sup>st</sup> Petitioner being sterilized and which sterilization, the 1<sup>st</sup> Respondent has submitted to that, was attributed to her consent to the said procedure. It should thus be known that the rights claims should fail pronto.

**98.** A read at the Petition and the submissions, there is too much generalization of the claims. The Provisions of the constitution without substantiation have been thrown to the court to try and decipher which of those is applicable and relevant in the circumstances of the case.

**99.** Over and above these, the 1<sup>st</sup> petitioner has gone as far as quoting and borrowing a lot of jurisprudence and policies and scholarly articles in a bid to address the court, much about sterilization. Ultimately, we pray that the rights have not been proved.

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## **THE RIGHT TO SECURITY OF THE PERSON**

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### **YOUR LORDSHIP,**

**100.** It is true that **Article 29** of the Constitution of Kenya, 2010, provides every person with the right to freedom and security of person. This right, is on the one hand as will be submitted by the 1<sup>st</sup> Respondent in agreement, is an absolute right. On the other hand, the said right was never violated by the 1<sup>st</sup> Respondent at any one point by the 1<sup>st</sup> Respondent.

**101.** It is admitted by the 1<sup>st</sup> Respondent that, any form of treatment that debases the human dignity, threatens his life and diminishes his respect is cruel. In the circumstances of the case, the 1<sup>st</sup> Petitioner, out of her own volition, visited all these hospitals and attended to by all these parties without threats, cruelty, inhuman treatment and cannot therefore come and say that, she was subject to inhuman treatment.

**102.** There has been no evidence shown to prove to the court the actual cruelty or such other acts that can be attributed to mean that indeed there was a violation.

**RIGHT TO HUMAN DIGNITY RIGHT TO PRIVACY**

**103.** The right to dignity is encapsulated under **Article 28** of the Constitution of Kenya, 2010. For this right, every person has inherent dignity and the right to have that dignity respected.

**104.** The right to privacy is a right protected under **Article 31** of the Constitution of Kenya, 2010 in the manner that, every person has a right to privacy, which includes the right to have, (a) *their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.*

**105.** In *Moses Tengeya Omweno v Commissioner of Police & another Civil Appeal 243 of 2011 [2018] eKLR* as cited with approval by Nyakundi J in, *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR*<sup>10</sup> where it was held that:

“39. As regards violation of the right to human dignity, the East African Court of Justice in Samuel Mukira Mohochi -v- Attorney General of Uganda, EACJ Reference No. 5 of 2011 expressed that detention is indeed deprivation of liberty. When it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one’s dignity...”

**106.** In the instant case, evidence has not been adduced as to how, when and where the right to dignity of the 1<sup>st</sup> Petitioner was breached. There has been no proof of any such acts, the sterilization, being illegal or any such consequential acts.

**107.** To determine whether the dignity of the 1<sup>st</sup> Petitioner was impaired, the question that should be asked is whether the conduct or the act of sterilization diminishes the feelings of her self-worth.

**108.** The search of a person or stripping her would generally have made her feel humiliated, make uncomfortable, and of an invasive nature, and in the instant case it affected her dignity. If her photographs for example were released or her information for all the ill-intentions was released, it the 1<sup>st</sup> Respondent would have been wrong. In the case at hand

<sup>10</sup> Constitutional Petition No.14 of 2017, available at; <http://kenyalaw.org/caselaw/cases/view/166361/>.



however, that wasn't the case and so, there cannot be said to be a violation of the right to dignity.

**109.** The 1<sup>st</sup> Petitioner recognised that, the right to dignity is at the heart of the Constitution of Kenya, 2010. It is the basis of many other rights. The basis is that of recognizing that every person has worth and value and must be treated with dignity. This is also highlighted in the international treaties Kenya has assented, some of which correctly have been mentioned the 1<sup>st</sup> Petitioner.

**110.** This right to dignity is further relevant to the specific social context in Kenya. In many instances, past and present, Children and women's basic rights have been violated within society. Women and children are vulnerable to violence and unjust treatment due to economic inequalities and gross abuse of power. However in the instant case, upholding the 1<sup>st</sup> Petitioner's claim to the right to privacy would mean,

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## **RIGHT TO HIGHEST ATTAINABLE STANDARD OF HEALTH**

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**111.** Per Article 43 (1)(a), every Kenyan, has a right to the highest attainable standard of health, which right includes the right to health care services, including reproductive health care as contested to have been violated herein.

**112.** This right enjoins every Kenyan to its protection be it private or public hospitals, no person shall be denied of the right most importantly in emergency situations and which situations, the state is called upon by Article 43 (3) to ensure that it provides security of persons as appropriate in every circumstance.

**113.** In the instant case, the 1<sup>st</sup> Respondent is a private hospital but whose does is open to the public for it is from there, that it raises its revenue to keep going.

**114.** The 1<sup>st</sup> Respondent, entered into an agreement with **OBA-RH** with whom the 1<sup>st</sup> Respondent entered into an agreement with and they were to send clients to the 1<sup>st</sup> Respondent's facility for medical services; maternity, maternal health children and family planning. These services also included antenatal, delivery and post natal care. It was her testimony that the facility would receive referrals for the above stated services from different clinics.

**115.** Its role, the 1<sup>st</sup> Respondent submits, was reduced to act upon such referrals from health facilities and community health workers that the **OBA-RH** had approved. Patients would approach the 1<sup>st</sup> Respondent with vouchers for specific treatments or medical attentions and so did it act.

**116.** The 1<sup>st</sup> Respondent may it not be lost open its doors because it has necessary approvals from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and has the capacity with a human resource in the satisfaction of the government conditions in place of running a hospital. With that established, it is so grave to accuse it, and its employees of not being professionals and offering services which are against the wishes its patients.

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**RIGHT TO FREEDOM FROM DISCRIMINATION**

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**117.** Under **Article 27** of the Constitution of Kenya, every person has a right to freedom from discrimination. **Article 27 (4)** specifically states, **(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**118.** In the case of ***H.O.O. (a child suing through his father and next friend) P.O.O. vs. Board of Management N School & 2 others [2018] eKLR Justice Okwany*** cited with approval the case of ***Andrews v Law Society of British Columbia [1989] 1 SCR 321***, in which ***Wilson J*** defined discrimination as

**“distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group [which] has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of Society.”**

**119.** A Petitioner is often needed in a claim for/of discrimination, to point to the treatment of other individuals who do not share their protected characteristic to make good their assertion that they have been treated less favourably because of the protected characteristic.

**120.** The 1<sup>st</sup> Respondent submits that, the Petitioner is expected which she has failed, to identify an apparently neutral provision, criterion or practice which placed her at a disadvantage. She was expected to demonstrate that other people who share her protected characteristic may be similarly disadvantaged.



**121.** Lastly, to justify any prima facie discriminatory treatment, the 1<sup>st</sup> Petitioner, the 1<sup>st</sup> Respondent submits was faced with the task of unpicking or challenging the responses with limited direct knowledge of the relevant matter.

**122.** Regrettably, in the instant case, the 1<sup>st</sup> Petitioner has not proven the case of discrimination. In no way was she discriminated along the lines of her health status or her being a woman.

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## RIGHT TO ACCESS OF INFORMATION

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### YOUR LORDSHIP,

**123.** The 1<sup>st</sup> Petitioner has alleged to have been denied the information she so needed and has sought this Courts intervention and declaration of the said as per Article 35 (1) of the Constitution. Perhaps at this point therefore, there is need to critically speak to the right in question. In this regard the 1<sup>st</sup> Petitioner relies on the case of *Timothy Njoya v Attorney General & another [2014] eKLR*<sup>11</sup> where *Justice Lenaola* cited with approval the case of *Nairobi Law Monthly v Kengen* at paragraph 36 where it was held;-

"36. The recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

**124.** With the above in mind, Section 8 of the Access to Information Act lays out the requirements for a request to access information as follows: -

"(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in a manner that meets their needs.

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<sup>11</sup> Petition No. 479 of 2013, available at: <http://kenyalaw.org/caselaw/cases/view/102921/>.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.”

**125.** Applying the foregoing to the instant case, the 1<sup>st</sup> Respondent submits that, there has not been produced any evidence as to the request to access information within the knowledge and/or custody of the 1<sup>st</sup> Respondents and denied for the said to be clustered to have met the requirements of **Section 8 (1)**.

**126.** The 1<sup>st</sup> Petitioner simply as a n afterthought, is telling the court as a by the way, and expects it to believe that, she was entitled to any such information held by the 1<sup>st</sup> Respondent.

**127.** The 1<sup>st</sup> Respondent submits that, once such an application has been made, and which the 1<sup>st</sup> Petitioner never did, she cannot in a blanket way tell the Court that she needed information that was denied.

**128.** To added, our memory are not that tied to remember the testimony of the 1<sup>st</sup> Petitioner under oath. She detailed the manner, steps and in fact, the engagements she had with the 1<sup>st</sup> Respondent's and the medical facilities she visited before arriving at the 1<sup>st</sup> Respondent for the ultimate procedure.

**129.** The 1<sup>st</sup> Petitioner must be remembered stating that, she stated the journey at Kariobangi Clinic where she was tested for HIV in the routine medical checkup she went to for her pregnancy. She later went to Babadogo Health Centre for a second HIV test, at this facility, she met **Hellen** who counseled her and advised based on her condition to undergo a Caesarean for the delivery of her baby to avoid the risk of mother to child transmission of HIV.

**130.** Hellen, she noted advised her to proceed to a community health worker at Korogocho who would give her vouchers to stand in place of the Kshs. 10, 000 cash that she needed but did not have for the Caesarean delivery procedures.

**131.** The 1<sup>st</sup> Petitioner also confirmed that she later went to the 1<sup>st</sup> Respondent and the Doctor who was to help her with the procedures asked her if she knew that she was being sterilized and Lo and Behold, she affirmatively confirmed the said with a resounding **YES**.



**132.** Article 35 1(b) of the Constitution states that *“Every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom”*.

**133.** The 1<sup>st</sup> Respondent sums up these submissions by echoing the sentiments of *Justice Mumbi Ngugi* in *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others [2013] eKLR*<sup>12</sup> wherein the good Judge addressed herself thus,-

“... [H]owever, this petition succeeds to the extent that I have found that the 1st respondent has an obligation, on the request of a citizen, to provide access to information under Article 35(1) (a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1) (a) from the respondent, and the respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a constitutional obligation to provide the information sought.”

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## THE RIGHT TO LIFE

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### YOUR LORDSHIP,

**134.** The right to life has been provided for under **Article 26** which Article so to speech is framed in a drawback like manner. It gives life and provides for the circumstances when the said life is to be curtailed. A constitutional scholar would call it a self-servicing Article.

**135.** Away from the nature, the 1<sup>st</sup> Petitioner has wildly put fourth three arguments; one, she “wishes to have more children’ who she now cannot have having been sterilized and secondly, her husband has since deserted her and lastly, she has been denied the dignity of accessing any such medical information and medication a HIV positive person would primarily be accessible to.

**136.** To my comes the question how do the three claims under this head of ‘*right to life*’ amount to a violation of **Article 26** of the Constitution of Kenya, 2010. All these claims it must be remembered again are anchored on the sterilization procedure that the 1<sup>st</sup> Petitioner underwent very many years ago and which the 1<sup>st</sup> Respondent has submitted to be out of her own volition as she consented to. *See **issue one above.***

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<sup>12</sup> Petition No. 278 of 2011, available at: <http://kenyalaw.org/caselaw/cases/view/88569/>.

**137.** It is now obvious that the 1<sup>st</sup> Petitioner is a user of generic drugs which are taken like daily, and this daily usage guarantees her right to life the Constitution. In recognition of the special status of persons affected and living with HIV and AIDS, the government enacted the **HIV and AIDS Prevention and Control Act, 2006** whose object was to extend to persons affected by HIV full protection of their human rights and civil liberties. This required that the government ensures availability of resources to ensure access to HIV drugs including engaging community health workers to, in the interest and respect of the said class of persons, they be delivered at their door steps.

**138.** In no way, the 1<sup>st</sup> Respondent submits has the sterilization by and at the 1<sup>st</sup> Respondent, affected the 1<sup>st</sup> Petitioner's right to life. She is alive and it's assumed and rightfully so the 1<sup>st</sup> Respondent submits to be on drugs. Secondly, life as actualized by **Article 26 (2), begins at conception**, in this regard, no evidence has been produced to show case a life of an unborn child that has been terminated by the sterilization.

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**ISSUE THREE:**

*Whether the Petitioners are entitled to the remedies sought?*

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**YOUR LORDSHIP,**

**139.** In ***Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004*** as cited with approval by *Justice Nyakundi* in ***Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR<sup>13</sup>*** where the Privy Council held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. **Per Lord Nicholls** at **Paragraphs 18 & 19:** -

**“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section**

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<sup>13</sup> n10.



14 is discretionary and, moreover, the violation of the constitutional right will not always be conterminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.

All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award." (Emphasis supplied)

**140.** Based on the submissions on the first and the second issues as seen above, the 1<sup>st</sup> Respondent submits that, the 1<sup>st</sup> Petitioner has failed to satisfy the standard of proof in her claims for violation of rights and as such without further ado, the 1<sup>st</sup> Respondent submits that, the petitioner is not entitled to the remedies sought against it.

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**E. CONCLUSION AND FINAL PRAYERS**

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**YOUR LORDSHIP,**

**141.** When a constitutional right is infringed, it is important to determine whether such infringement is justified in terms of **Article 24** of the Constitution which provides that the rights in the Bill of Rights may be limited only in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — The nature of the right; The importance of the purpose of the limitation; The nature and extent of the limitation; The relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

**142.** In the instant case, allegations have been made, several in fact, that the 1<sup>st</sup> Respondent has violated the 1<sup>st</sup> Petitioner's rights. However, the 1<sup>st</sup> Petitioner has not met the required standards of proof arising right from the aspect of duty owed to her and to the

extent of damage caused and it is as a result that the 1<sup>st</sup> Respondent has established the following:-

- a. *The Petition is a fallacy of a Constitutional Petition as it has not met the required standards set out in **Anarita Karimi case**;*
- b. *That the allegations brought about by the 1<sup>st</sup> Petitioner if at all have not been substantiated;*
- c. *That the 1<sup>st</sup> Petitioner have her informed consent to all the parties involved in the entire process of her sterilization;*
- d. *The contention by the petitioner that the signature that appears on the consent form produced in evidence by the 1<sup>st</sup> Respondent is not her signature, has not been fully backed up with evidence from an expert to show the distinction from which the court can draw an inference and adjudicate.*
- e. *The procedure complained of; Bilateral Tubal Ligation was undertaken in 2006. The 1<sup>st</sup> Petitioner has asserted that she realized the same around July 2010 when she went to Mathare where there was free screening. **There has not been tendered any evidence from the Doctors who screened her in 2010.***
- f. *After attending to **Kariobangi Health Centre** where she was diagnosed with HIV, she went to **Babadogo Health Centre** where the positive HIV status was confirmed. It is at this point that a nurse at this health centre, **Hellen**, advised her to attend to a community health worker called **Nancy Wanjiku**. **Neither Hellen nor Nancy Wanjiku, were named as parties to the Petition.***
- g. *Nancy Wanjiku, the Community Health worker who recommended and got the consent of the 1<sup>st</sup> Petitioner at the initial stage and her two vouchers one for Tubal Ligation and another for Caesarean and advised her to attend to 1<sup>st</sup> Respondent for the procedures, **has not been named as a party to this Petition.***
- h. *The 1<sup>st</sup> Petitioner has alleged that the signature(s) appearing on the consent form(s) is/are not her. **However the 1<sup>st</sup> Petitioner did not endeavour to call and expert to give his opinion for comparison of signatures requires a skillset reserved for those that have trained in that scientific field of study.***
- i. *The 1<sup>st</sup> Petitioner has placed weight on the screening and findings of Dr. Khisa, a scan that was done in 2014, eight (8) years since she went for the tubal ligation and caesarean. **A report of the screening***



during the medical field day was not presented neither was evidence of what transpired in those eight years. The latter evidence is an afterthought.

143. As consequence of the above, the 1<sup>st</sup> Respondent prays that, the petition be and is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED** at **NAIROBI** this 14<sup>th</sup> day of June, 2021.

**SETH OJIENDA - PRACTICE NO: LSK/2021/00974**

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**NAIROBI**

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L.A.W. & 2 Others

-Versus-

Marura Maternity & Nursing Home & 7 Others

**1<sup>st</sup> Respondent's Submissions**

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