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

IN THE MATTER OF
THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 19, 20, 21 AND 23 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 & ETHICAL
ISSUES NETWORK ON HIV AND AIDS (KELIN)…..……5TH PETITIONER
AFRICAN GENDER &
MEDIA INTIATIVE TRUST (GEM)……...6TH PETITIONER

AND

MEDECINS SANS FRONTIERES-FRANCE….....1ST RESPONDENT
PUMWANI MATERNITY HOSPITAL……..……..…2ND RESPONDENT
MARIE STOPES INTERNATIONAL…..……...….3RD RESPONDENT
COUNTY EXECUTIVE
MEMBER IN CHARGE OF
HEALTH SERVICES (NAIROBI CITY COUNTY) ……..4TH RESPONDENT
CABINET SECRETARY MINISTRY OF HEALTH…….5TH RESPONDENT

THE HON. ATTORNEY GENERAL……...……6TH RESPONDENT

SUBMISSION OF THE PETITIONERS

INTRODUCTION

1. These submissions relate to the amended petition, amended on the 10th September 2015, which challenges the unconstitutional and unlawful sterilization of the 1st - 4th petitioners herein. The 1st – 4th petitioners are supported by the Kenya Legal and Ethical Issues Network (KELIN) as the 5th petitioner and the African Gender and Media Initiative Trust (GEM) as the 6th petitioner.

2. The petitioners have filed the Amended Petition challenging the unlawful, forced and coerced sterilization of the 1st – 4th petitioners all of whom are living with HIV, through a procedure known as Bilateral Tubal Litigation (BTL) without their informed consent. Sterilization is a process that renders an individual incapable of bearing children. Forced sterilization occurs in instances where: a person has expressly refused the procedure; it is done without their knowledge; or where a person is not given an opportunity to provide consent to the procedure. Coerced sterilization occurs when financial or other incentives (such as food), misinformation, or intimidation tactics are used to compel an individual to undergo the procedure.

3. The 1st – 4th petitioners are indigent women who, at the time of the unlawful sterilization, were receiving aid in the form of free medical care and food aid from the respondents. While they were receiving antenatal care from Medicins San Frontiers (the 1st respondent) and Pumwani Maternity Hospital (the 2nd

respondent), the 1st – 4th petitioners were repeatedly told that due to their HIV status, they should not get any more children. They would then be given food aid in the form of food stuffs or milk formula for their babies. After their respective deliveries, the 1st respondent demanded proof that the 1st - 4th petitioners had undergone a bilateral tubal ligation. When the 1st- 4th petitioners could not show that they had had the procedure done, the personnel at the 1st respondent would threaten to stop giving food aid to them.

4. The 1st and 3rd petitioners were sterilized at Pumwani Maternity Hospital (the 2nd respondent) during delivery of their children. The 1st petitioner was forcefully sterilized in May 2010, while the 3rd petitioner was forcefully sterilized in June 2010. The 2nd respondent is a public health facility within the control of the Nairobi City County, the 4th Respondent.

5. The 2nd and 4th petitioners were sterilized by agents of Marie Stopes International (the 3rd respondent), a private health facility within Nairobi County. The 2nd petitioner and 4th petitioners were coerced by personnel of the 1st respondent into attending a family planning drive at the Lions Health Center in Huruma where family planning services were being offered by doctors from the 3rd respondent. The 2nd petitioner attended the Lions Health Centre on 8th June 2005, and was sterilized on the same day, while the 4th petitioner attended the Clinic on 4th May 2005, and was also sterilized on the same day.

6. The national government through the Minister of Health is sued as the state organ responsible for formulating health policies, a role that it continues to play as stipulated under the Fourth Schedule to the Constitution of Kenya,

2010, while the Attorney General was sued in his capacity as the legal representative and advisor to government.

7. In their Amended Petition, the petitioners allege that the manner in which the bilateral tubal ligation procedure was conducted was in violation of their fundamental rights and freedoms as stipulated under Articles 26, 27, 28, 29, 31, 33, 35, 43, 45 and 46 of the Constitution.

8. The petitioners rely on the following pleadings and evidence in support of their petition:

   a. Amended petition dated 10th September 2015 and filed in court on 1st October 2015;
   b. Affidavits of the 1st- 6th petitioners all sworn on the 10th September 2015, as well as the supporting annexures;
   c. Supplementary affidavits of the 2nd and 4th petitioners sworn on 27th November 2017 and filed in court on the 30th November 2017;
   d. Affidavit of Dr Khisa Weston Wakasiaka sworn on 30th December 2017 and filed on the 28th February 2018; and
   e. Oral testimony of the 1st, 2nd, 3rd, 4th and 6th petitioners, as well as the testimony of the expert witness, Dr Khisa Weston Wakasiaka.

9. The respondents also filed pleadings as follows:

   a. The 1st respondent filed affidavits of Beatrice Runo, Benta Awuor Onyango, MA, SW, EAM and PB filed on 22nd April 2015;
   b. The 2nd and 4th respondents filed grounds of opposition out of time and without leave, on 19th November 2020; and

c. The 3rd respondent filed a replying affidavit of Dr Fred Oyombe Akonde sworn on 10th April 2018.

PRELIMINARY OBJECTION BY THE 3RD RESPONDENT

10. On 18 January 2016, the 3rd respondent, Marie Stopes International, filed a Preliminary objection dated 27 November 2015 on the Petitioners' Amended Petition dated 10 September 2015. This preliminary objection is yet to be determined by this court as the then presiding judge directed that it be decided alongside the main petition.

11. In its Preliminary Objection, the 3rd respondent raised four points of law which can be condensed into three. Firstly, it contends that the Amended Petition is a civil dispute disguised as a constitutional issue contrary to statutory procedures laid down in the Civil Procedure Act, Cap 21 of the Laws of Kenya. It further contends that civil remedies would be available to the petitioners should they be successful. Lastly, it contends that the Amended Petition does not disclose any infringement of petitioners' fundamental rights and freedoms.

12. The petitioners addressed each of the points of law raised by the 3rd respondent through written submissions dated 22nd March 2017 and filed in this Court on 23rd May 2017. In those submissions, we submitted that:

a. The issues raised in the Amended Petition are not matters purely of a civil nature. The issues raised by their Petition turn on the proper interpretation of Articles 26, 27, 28, 29, 31,33,35, 43(1)(a), 45 and 46 of the Constitution.

b. Should the petitioners succeed in proving that their fundamental rights and freedoms have been violated, that in itself would be a powerful vindication of their rights in question. Moreover, any remedies granted by this Court under Article 23(3) of the Constitution would be forward looking. For instance, these would require the respondents to avert future and further violations of the rights of women who are in similar situations as the 1st to 4th petitioners by enacting, amending or reviewing the relevant legal and policy frameworks to ensure fundamental rights and freedoms are safeguarded. Such remedies are not available in civil law, as they are constitutional in nature.

13. The Amended Petition before this Court raises serious constitutional issues that require determination by this Court. This Court is clothed with the jurisdiction to determine the petition in fulfilment of its constitutional duty under Articles 22 and 165(3)(b). We therefore urge this Court to dismiss the Preliminary Objection with costs as it is without basis and is an abuse of the Court process.

SUBMISSIONS ON THE AMENDED PETITION

14. The amended petition was filed on 10th September 2015. Oral testimony was taken from 30th April 2018 to 8th December 2020.[1]

15. These submissions are structured as follows:

[1] From page 23 of the typed proceedings.

a) Brief summary of the facts and evidence;
b) Agreed issues for determination;
c) The violations of the constitutional and human rights of the petitioners;
d) Government's obligations and responsibilities; and
e) The appropriate remedy.

BRIEF SUMMARY OF THE FACTS AND EVIDENCE

The 1st Petitioner

16. The 1st petitioner is a woman living with HIV. She is unemployed and engages in small scale farming in Nyandarua County in order to sustain herself. When she was 40 years old, in 2009, she conceived and was receiving pre-natal care at the Blue House Mathare Clinic (now known as the AIDS Health Care Foundation Clinic), which was ran by Medecins Sans Frontiers – France (the 1st respondent). While here, she was given information on how to prevent transmission of the virus to future children she may elect to have. One of the issues that was discussed with her was in regard to breastfeeding her child. She elected to breastfeed her child and was promised food portions to be collected every two weeks at the Blue House Mathare Clinic.

17. In May 2010, the 1st respondent gave the 1st petitioner a referral to the Pumwani Maternity Hospital (the 2nd respondent) for delivery. At the time of referral, the 1st petitioner was informed by a nutritionist at Blue House Mathare Clinic called Benta Anyango Owuor (DW2) that she was required to show proof of having undergone a family planning procedure if she was to

continue to receive food portions and have her maternity bill at the 2nd respondent paid.

18. At the 2nd respondent, a nurse told the 1st petitioner that due to her age and HIV status, she should not have any more children as this would be a risk to her life due to her increased risk to opportunistic infections. The nurse further told her that she should undergo a bilateral tubal ligation to ensure that she would not conceive again. Bearing in mind the level of education of the 1st petition, she had no reason to doubt that the nurse had given her correct information. However, at no point did she indicate or give consent to undergo a bilateral tubal ligation.

19. Thereafter as the 1st petitioner was being wheeled into theatre for her caesarean delivery, she was given a form and instructed to sign it. She did not read the form, and neither was it explained to her. A copy of this form has not been provided to her, and neither was it produced in court. While the 2nd and 4th respondents did file a response to the amended petition, they did not deny having conducted the procedure on the 1st petitioner; in fact, they stated that any procedures conducted on the 1st petitioner were done with her consent, but they did not produce any evidence to demonstrate that she did indeed provide her free and informed consent.

20. After delivery when the 1st petitioner returned to the Blue House Mathare clinic to pick rations as she had been advised, Benta (DW2) informed the 1st petitioner that she would not qualify for the food portions if she had no proof of undergoing the bilateral tubal ligation. The 1st petitioner was not aware if the bilateral tubal ligation had been done and she was advised by Benta (DW2)

to return to the 2nd respondent's facility and get written confirmation, or proof that she had undergone the bilateral tubal ligation. It was at this point she discovered that the procedure had been conducted on her. She returned to the 2nd respondent's facility and requested proof; this was provided by way of a document[2] which she took to the Blue House clinic in Mathare. It was only after presenting the evidence that she had undergone the tubal ligation that she was given a cash voucher to collect flour and cooking oil.

21. After discovering that she had been forcefully sterilized, the 1st petitioner attended Dr. Khisa Weston Wakasiaka for an examination, and he confirmed that both her fallopian tubes had been ligated, and that the procedure was permanent in nature.[3] The 1st petitioner has suffered extreme distress due to the forced sterilization. She continues to live in fear that her husband will desert her due to her inability to conceive. She underwent a psychological and psychiatric evaluation that was conducted on her by Elizabeth Khaemba and Dr David Bukusi who diagnosed her with depression and anxiety, and recommended that she treats this with anti-depressants, anxiolytics and continuous therapy.[4]

The 2nd Petitioner

22. The 2nd petitioner was similarly receiving food portions from the 1st respondent. She is also a woman living with HIV. She only managed to

[2] Annexed to the 1st Petitioners affidavit as SWK-002.

[3] This report is annexed to SWK's affidavit as SWK 005.

[4] The psychological and psychiatric report is annexed to SWK's affidavit as SWK-006.

receive a primary school education and works as a casual labourer within the Mathare area of Nairobi. She began attending the Blue House Mathare Clinic in 2002 for anti-retroviral (ARV) therapy and treatment. In 2004, when she was 35 years old, she conceived and also started receiving antenatal care at the Blue House Clinic. The midwife assigned to her at the Blue House Clinic gave her a referral to the 2nd respondent's facility where she gave birth to twin boys on 29th October 2004. The cost of the delivery was borne by the 1st respondent through the Blue House Clinic.

23. After the birth, the 2nd petitioner was instructed not to breastfeed but to give the children formula milk. She was further advised that she would be provided with food rations for herself, to last a period of six months, as well as formula milk for her children, which would last a period of one year. These food portions were provided every week at the Blue House Clinic by the nutritionist Benta Anyango Owuor (DW2). However, whenever the 2nd petitioner would go to collect the food portions, Benta (DW2) would threaten to withhold the portions because she did not have any proof of having undergone a bilateral tubal ligation. The fact that the 2nd petitioner had not undergone the procedure became a source of disagreement between her and Benta (DW2). The 2nd petitioner, afraid of losing the food portions, gave in to the demands by the nutritionist. Benta directed a community health worker to tell her where to go for the bilateral tubal ligation procedure. She was directed to attend a family planning drive on 8th June 2005 which had been organized by the 3rd respondent at the Lions Health Centre in Huruma.

24. At the Lions Health Centre in Huruma, the 2nd petitioner's name was taken down and she was taken in for a bilateral tubal ligation which was done on

her by personnel of the 3rd respondent. She was not counselled, and neither was she given any forms to sign. Personnel of the 3rd respondent conducted the bilateral tubal ligation procedure on her, and they gave her a follow up card[5] to go for review at a clinic operated by the 3rd respondent. Despite her having undergone an invasive surgical procedure, the 2nd petitioner was only given paracetamol for pain relief, so she was in pain for a considerable amount of time afterwards.[6] It was only after she showed the follow up card to Benta (DW2) that continued to receive food portions without any threats. It is also after she proved that she had undergone the sterilization that the constant disagreements with Benta (DW2) came to an end.

25. At no point was the 2nd petitioner informed of what other family planning options were available to her, and neither was she given her medical records to show what happened to her, despite her requests to the 3rd respondent.[7] The fact that she was coerced by the 1st respondent into undergoing the procedure, and then forcefully sterilized without being given the option choosing other family planning options or without getting an explanation about the consequences of the procedure that was undertaken on her continues to cause the 2nd petitioner great emotional distress.[8] She requested the 3rd respondent to provide her with information on the procedure that was undertaken on her, but these requests for information have never been honoured to date.

[5] Annexed to the 2nd Petitioners affidavit as PAK-001.

[6] See the 2nd petitioner's supplementary affidavit.

[7] See the letters to the 3rd respondent that remain unanswered to date, annexed to the 2nd petitioner's affidavit as PAK-003(a and b).

[8] See the testimony of PAK.

26. The 2nd petitioner also attended Dr Khisa Wakasiaka to confirm if she had indeed been sterilized. He conducted a test and confirmed that both her fallopian tubes were ligated. He also informed her that the procedure was permanent and irreversible.

The 3rd Petitioner

27. The 3rd petitioner, a woman living with HIV, was also attending the Blue House Mathare Clinic, for ARV therapy. She was 35 years old in August 2009 when she conceived. She started antenatal care at the clinic and was referred to the 2nd respondent to give birth. She went to the 2nd respondent facility on 13th June 2010, and while in protracted labour, she was advised to undergo a caesarean section.

28. The evening before she was to undergo the operation, a nurse told her that, as a woman living with HIV who already had three children, she should undergo a bilateral tubal ligation. She was then given a form to sign, but she was in labour and therefore in a lot of pain. She signed the form although she could not read it, and the nurse never explained the contents of the form to her. After delivery, while still recuperating at the 2nd respondent, a community health worker from Blue House Clinic brought the 3rd petitioner some formula milk and advised her not to breastfeed and to be collecting weekly formula and food portions from Blue House. It was during her recuperation when she inquired from nurses at the 2nd respondent as to why she was in so much pain, that she was informed that she had undergone bilateral tubal ligation.

29. At no point did the 3rd petitioner receive any information about family planning options prior to the caesarean section. In their response to the amended petition, the 2nd and 4th respondents did not deny having conducted the procedure on the 3rd petitioner; in fact, they stated that any procedures conducted on the 3rd petitioner were done with her consent, but they did not produce any evidence to demonstrate that she provided her free and informed consent. Your Lordship will note that the 2nd and 4th respondent did not call any witnesses who could cast any aspersions on the 3rd petitioner's evidence, and thus the evidence against them remains unchallenged.

30. After the 3rd petitioner left the hospital, she went back to the Blue House Clinic for food rations, where she was informed that this would only be provided if she provided proof that she had undergone a bilateral tubal ligation. This is what prompted her to return to the 2nd respondent facility to inquire as to what procedure had been conducted on her. It was then, that, going through her medical records, she learnt that a bilateral tubal ligation had been performed on her by one Dr Langat.[9] The 3rd petitioner was shocked to learn that she had been forcefully sterilized, and she sought an opinion from Dr Khisa Weston Wakasiaka who confirmed that she had undergone the procedure. Dr Khisa also confirmed that the bilateral tubal ligation was permanent in nature.[10] This caused her extreme distress and has affected her marriage as her husband has indicated that he wants more children, but she cannot bear others. She

[9] See the affidavit of GWK at paras 22 – 25.

[10] See the affidavit of GWK at paras 25-28.

therefore lives in fear that he will desert her in favour of another woman who can bear children.[11]

The 4th Petitioner

31. The 4th petitioner is also a woman living with HIV who did not finish her primary education and is engaged in small scale farming within Kitui County. Between 2004 and 2005, the 4th petitioner was attending the 2nd respondent for both antenatal care as well as anti-retroviral therapy. She gave birth early in 2005, at the 2nd respondent. Upon discharge, she was given baby formula by staff of the 2nd respondent; she was advised to continue collecting this until her baby was six months old.

32. Two weeks later, her stock of formula was almost finished, and she went to collect from the 2nd respondent as advised. She met a nurse at the 2nd respondent who informed her that she would not receive the formula unless she had proof of having undergone a bilateral tubal ligation. This threat of losing provisions if she had not undergone the procedure was constantly repeated to her by a nurse every time the 4th petitioner would go to the 2nd respondent to replenish her stock of baby formula. The nurses at the 2nd respondent would constantly tell the 4th petitioner that she needed to undergo a bilateral tubal ligation procedure because she was living with HIV and she had three other children already.

[11] See the psychological and psychiatric evaluation of the 3rd Petitioner carried out Elizabeth Khaemba and Dr David Bukusi annexed to the affidavit of GWK as GWK006.

33. Fearful of losing the provisions, the 4th petitioner gave in and attended the Huruma Lions Health Centre on 4th May 2005. There, health care workers from the 3rd respondent asked her to sign a form. She was unable to read the form as she is illiterate and so not knowing what the form was for, she signed it anyway because she was instructed by personnel of the 3rd respondent to sign. On the same date, she underwent the procedure, was issued with a follow up card, and was discharged.[12] She later went for a review at the Marie Stopes Clinic in Eastleigh, a clinic that is operated by the 3rd respondent. The 4th petitioner was not given information prior to the procedure and had not been informed about the permanent nature of a bilateral tubal ligation. She therefore could not give informed consent to the surgery.

34. The 4th petitioner thereafter asked the 3rd respondent for information about the procedure that they conducted on her. The 3rd respondent refused to provide this information despite a reminder being sent to them. The 4th petitioner thereafter attended Dr. Khisa Weston Wakasiaka who conducted an examination that confirmed that a bilateral tubal ligation had been conducted on the 4th petitioner. Dr. Khisa also confirmed that the procedure was permanent.[13]

35. The fact that the procedure was carried out on the 4th petitioner, without her knowledge and consent, caused her extreme psychological distress and has had far reaching effects on her life. Due to her inability to bear more children, she was chased away from her matrimonial home by her then husband. She

[12] Annexed as AMM-001.

[13] See the report of Dr Khisa Weston Wakasiaka showing the examination carried out on the 4th petitioner, annexed to the affidavit of AMM as AMM-004.

was examined by Dr David Bukusi and Elizabeth Khaemba, and in their report, they detail the effects of the forceful sterilization of the 4th petitioner: her husband went on to marry another wife and he claimed to consider her as less of a woman, and less of a human being. The 4th petitioner also suffered from depressive disorder which started as a result of her husband chasing her away due to her inability to conceive.[14]

The Implications of the Evidence

36. The fact that each of the petitioners was sterilized by way of bilateral tubal ligation was confirmed by Dr. Khisa Weston (PW4). Dr. Khisa is an obstetrician/gynaecologist with a specialization in among other fields, women's reproductive health and HIV and AIDS, and was in a unique position to give an expert opinion as to whether the 1st – 4th petitioners had indeed been sterilized. He produced in evidence his medical reports all of which show that the petitioners underwent a procedure called the bilateral tubal ligation which has rendered the women permanently sterile.[15]

37. It is trite that expert evidence is of opinion, and thus cannot be elevated above all other evidence. In ***Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR (Petition No 22 of 2012)*** this court stated that expert evidence must be *"tested against known facts, as it is the primary factual evidence which is of the greatest importance*." The Court further held that "*the*

[14] Annexed as AMM-005.

[15] Produced in evidence as KWWW 2-6, and which are also attached to the affidavit of Khisa Weston sworn on the 30th December 2017.

weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues require specialized, technical or scientific knowledge only an expert in the field is likely to possess…."

38. However, there was no evidence led by the respondents to controvert the expert medical opinion given by Dr Khisa. The 2nd and 4th respondents did not question the validity of the medical opinion; and while the 3rd respondent did request to conduct its own examination on the 2nd and 4th petitioners, it instead opted to cross-examine these witnesses, which cross-examination did not dislodge their evidence that they had been forcefully sterilized at Lions Huruma Clinic by medical personnel from the 3rd respondent.

39. Dr Fred Oyombe, who testified on behalf of the 3rd respondent, confirmed during cross examination that with the history of the 2nd and 4th petitioners alongside the medical cards given and the medical reports provided to him, he would reach the conclusion that the women had undergone bilateral tubal ligation.

40. The facts also demonstrate that the 1st and 2nd respondents coerced the 1st-4th petitioners by promising to provide them with food rations for themselves and their new-born children, and by paying for their maternity fees, and then threatening to withhold those rations when the petitioners could not prove having undergone bilateral tubal ligation. It is clear that the 1st and 2nd respondents' actions were motivated by their erroneous belief that, as women who had tested positive for HIV, the 1st – 4th petitioners should not bear any more children.

41. My Lord the evidence shows that for a long time, women living with HIV were routinely sterilized as part of an unofficial government policy. The 6th petitioner conducted a study to investigate the prevalence of forced and coerced sterilization of women living with HIV. This study culminated in a report entitled ***Robbed of Choice: Forced and Coerced Sterilisation of Women Living with HIV in Kenya.***[16] This report contains accounts of women living with HIV, including the 1st-4th petitioners, all of whom underwent bilateral tubal ligation without their knowledge or informed consent. Each of the women interviewed for the study stated that they would attend public health facilities where medical personnel would tell them that women living with HIV should not have any more children, and in particular, that "*women living with HIV must not give birth*."[17] Due to unceasing pressure from medical personnel as well as their ignorance on reproductive health, these women would sign whatever documents that were provided by medical personnel, even if they did not know what those documents stated. The study found that–

> *"healthcare providers, both doctors and nurses in some health facilities are violating the reproductive rights of [women living with HIV] by coercing or forcing them to accept unwanted surgical sterilization procedures. Family members, especially spouses and parents, have also participated in coercing or forcing [women living with HIV] to be sterilized, often based on misinformation provided by trusted medical professionals about the need for sterilization. Further, consent was routinely sought when the patient was in a vulnerable position,*

[16] This report was produced in evidence by Gladys Kiio (PW6) and is annexed to her affidavit as GK-001.

[17] See Robbed of Choice: Forced and Coerced Sterilisation of Women Living with HIV in Kenya, Testimony of Maureen at p.6.

especially while in labour pains just about to go for a caesarean section. In some instances, incentives such as food were offered. The study illuminates how the intersection of low socio-economic status, HIV and gender exacerbates vulnerability of [women living with HIV] to non-consensual contraceptive sterilization."

42. The report further documented the impact of forced sterilization of women living with HIV. It found that:

> *"The impact of non-consensual sterilization on the women's physical, emotional and personal lives and their socio-economic status was evident. [Women living with HIV] reporting forced and coerced sterilizations endure immense physical, psychological and social trauma due to the permanent loss of the ability to give birth. Reported health complication post-tubal ligation including severe abdominal and back pains has negatively affected the active lives of these women who are mainly casual workers who rely on their physical fitness to earn a living. However, it was beyond the scope of the study to establish if the reported post-tubal ligation complications were as a result of the procedure of progression of the illness or both.*[18]

43. The conduct, content and conclusions reached in this report were not disputed by any of the respondents.

AGREED ISSUES FOR DETERMINATION

44. The petitioners filed an agreed written list of issues for determination on 8th December 2017. Your Lordship is called upon the following issues:

[18] See Robbed of Choice: Forced and Coerced Sterilization of Women Living with HIV in Kenya, Conclusion at p. 30.

a) Whether the sterilization of the 1st to the 4th petitioners by way of bilateral tubal ligation was done without their informed consent;
b) Whether the actions of the 1st respondent amounted to coercion of the 1st, 2nd and 3rd petitioners to undergo sterilization by way of bilateral tubal ligation;
c) Whether the sterilization of the 1st to 4th petitioners by way of bilateral tubal ligation amounted to a violation of their constitutional rights and freedoms;
d) Whether the 4th, 5th and 6th respondents violated their statutory and constitutional obligations to protect the constitutional rights of the 1st to 4th petitioners; and
e) Whether the petitioners are entitled to the remedies sought.

45. Each issue for determination is addressed herein below, making reference to the relevant laws, policies and decided cases. Your Lordship will note that this is the first time that a case of this nature has been brought before Kenyan courts. We therefore refer to persuasive authority to demonstrate how the rights of the 1st - 4th petitioners have been violated.

WHETHER THE STERILIZATION OF THE 1ST TO 4TH PETITIONERS BY WAY OF BILATERAL TUBAL LIGATION WAS DONE WITHOUT THEIR INFORMED CONSENT

The Legal Elements of Informed Consent

46. My Lord, it is trite that under the common law, medical and surgical procedures constitute *prima facie* assault or battery unless authorized by a patient's informed consent.

47. In ***Samuel Gatenjwa v Marie Stopes Kenya & another [2020] eKLR***, the Court quoted the following dicta from ***Chester v Afshar 920040 UKHL***, in which Lord Steyn held:

> *"A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purpose. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient."*

48. In in ***P B S vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016) eKLR***, the following was quoted with authority:

> *"[U]nless it is an emergency, [a doctor] 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…."*

49. It is submitted that while implied consent may be sufficient for minor treatments or therapies (such as when a doctor listens to a patient's breathing with a stethoscope), when it comes to an invasive procedure the patient's consent should be explicit.

50. Were a petitioner to have brought a claim against a healthcare worker for battery for having performed a procedure without consent, it is submitted that in the ordinary course, the fact of consent having been given to the procedure is a defence which the defendant would have the onus to prove. This petition is not grounded in tort, however. Being a constitutional claim, it is accepted that the petitioners bear the onus of proving an infringement of their rights on a balance of probabilities. It is submitted, however, that the claim being of a nature involving a contention that a healthcare professional has performed an invasive surgical procedure without informed consent, that the respondents ought at least to bear an evidential burden to show that informed consent was obtained prior to the procedure being performed.

51. In the South African case of ***Castell v De Greeff 1994(1) SA 408*** Ackerman J held that under the common law, where a medical provider alleges that consent has been procured prior to it performing a procedure, then the following requirements must, *inter alia*, be satisfied:

> *"(a) the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;*
> *(b) the consenting party must have appreciated and understood the nature and extent of the harm or risk;*
> *(c) the consenting party must have consented to the harm or assumed risk;*

(d) the consent must be comprehensive, that is extend to the entire transaction, inclusive of its consequences."[19]

52. In ***CNM v Karen Hospital Limited [2016] eKLR***, HIV and AIDS Equity Tribunal held:

> *"Informed consent refers to consent given with the full knowledge of the risks involved, probable consequences and the range of alternatives available. We hasten to add that there is a big difference between consent and informed consent. ...*
>
> *In medical treatment, requiring invasive procedures, the doctor or health care personnel is required to disclose* ***sufficient information*** *to the patient to enable the patient to give an informed consent. Informed consent for HIV testing means that the person being tested for HIV 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, or others, and what risks are associated with any or all the available treatment options."* [Emphasis added.]

53. The High Court of Namibia held in ***LM, MI & NH v the Government of the Republic of Namibia [2012] NAHC 211***[20] considered whether or not informed consent had been procured by doctors prior to performing sterilization on the plaintiffs. The Court stated that it *"should be obvious that*

[19] At 425H-I/J.

[20] *LM, MI & NH v the Government of the Republic of Namibia [2012] NAHC 211* available at https://namiblii.org/na/judgment/high-court/2012/211.

the required consent must be given freely and voluntarily and should not have been induced by fear, fraud or force. Such consent must also be clear and unequivocal."[21]

54. The Namibian High Court further held that in order to obtain informed consent prior to a medical procedure, there must be adequate information given to the patient, seeing as the patient is a lay person, and not familiar with medical matters. This decision was affirmed on appeal by the Supreme Court of Namibia in ***Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19 (03 November 2014)***[22]. Here, the Namibian Supreme Court underscored that the decision to undergo sterilization:

> "*must be made with informed consent, as opposed to merely written consent. Informed consent implies an understanding and appreciation of one's rights and the risks, consequences and available alternatives to the patient. An individual must also be able to make a decision regarding sterilization freely and voluntarily."*

55. The Supreme Court also noted that in considering whether or not there was informed consent to a sterilization procedure, it was imperative to take into account –

> *"whether the woman has the capacity to give her consent for sterilization at the time she is requested to sign consent forms. Therefore, it is not decisive what information was given to her during antenatal care classes or at the moment she signed the consent form if she is not capable of fully comprehending the information or making a*

[21] Para. 14.

[22] *Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19 accessible at* https://namiblii.org/na/judgment/supreme-court/2014/19.

decision without any undue influence caused by the pain she is experiencing."

56. Based on the above understanding of "informed consent", it is submitted that the legal elements thereof include the following:

a. that the individual in fact subjectively assented or agreed to the entire transaction (the procedure, including its consequences and risks);

b. that such assent or agreement was freely and voluntarily made without duress, force or coercion; and

c. that the assent or agreement was adequately informed – the individual had sufficient knowledge of the nature, consequences, risks of, and alternatives to the procedure, and that the person appreciated and understood that information.

57. It is submitted that the assessment of these criteria ought to be appreciated in the context of the particular circumstances and the particular patient. With respect to marginalized or indigent persons, or women of limited means and education such as the 1st – 4th petitioners herein, it is rational to expect that in order for knowledge and the appreciation thereof to be established, it would be necessary for the relevant information to be orally communicated, in a language that the individual understands. At a minimum, that information should include information on the nature of the procedure, the risks and consequences thereof, and the alternatives thereto.

58. My Lord, it is further noted that the requirement for a healthcare worker to ensure informed consent is obtained before undertaking a surgical procedure

such as sterilization, is the norm, the accepted standard of care, and the expected ethical practice amongst healthcare workers as evidenced in the following guidelines.

59. The ***National Family Planning Guidelines 4th Edition (2010),*** in force when the 2nd respondent carried out the procedure on the 1st and 3rd petitioners emphasized the need for informed consent prior to sterilization of a woman in the following terms:

> *"Informed consent must be obtained and the client must sign a standard consent form for the procedure. …*
> *[Tubal ligation] is a permanent [family planning] method (reversal cannot be assured). Hence, a client <u>needs thorough and careful counselling before she decides to have this procedure. A consent form must be signed by the client in all cases before the procedure is undertaken.</u>"*[23] *(emphasis ours)*

60. These guidelines have since been updated to provide more comprehensive guidance on the meaning and nature of informed consent in the ***National Family Planning Guidelines for Service Providers 6th Edition (2010)***:[24]

> *"[Informed consent is] the communication between client and provider that confirms that the client has made a voluntary choice to use or receive a medical method or procedure. Informed consent can only be obtained after the client has been given information about the nature of the medical procedure, its associated risks and benefits and, other alternatives. Voluntary consent cannot be obtained by means of special*

[23] *National Family Planning Guidelines For Service Providers (2010) Updated to Reflect the 2009 Medical Eligibility Criteria of the World Health Organization* at page 173.

[24] *National Family Planning Guidelines for Service Providers 6th Edition Updated to Reflect the 2015 Medical Eligibility Criteria of the World Health Organization.*

inducement, force, fraud, deceit, duress, bias, or other forms of coercion or misrepresentation."[25] It is further stated that *"informed consent must be obtained and the client must sign a standard consent form for the procedure*".

61. The ***International Federation of Gynaecology and Obstetrics (FIGO) Guidelines on female contraceptive sterilization*** adopted in June 2011 also provide guidance on the question free and informed consent. Those guidelines are clear that:

> *"under human rights provisions and the professional codes of conduct, it is unethical and in violation of human rights for medical practitioners to perform procedures for prevention of future pregnancy on women who have not freely requested such procedure, or have not previously given their free and informed consent.*
>
> *Only the women themselves can give ethically valid consent to their own sterilization. Moreover, their consent should not be made a condition of access to medical care, such as HIV/AIDS treatment, natural or caesarean delivery, or abortion, or of any benefit such as medical insurance, social assistance, employment, or release from an institution. Consent to sterilization should also not be requested when women are vulnerable, such as when going into labour or in the aftermath of delivery."*

62. Further your Lordship**,** in 2014, six UN agencies: the World Health Organisation (WHO), the Office of the High Commissioner on Human Rights (OHCHR), UNAIDS, the United Nations Development Programme ("UNDP"), the United Nations Children's Emergency Fund (UNICEF), UN Women, and the United Nations Population Fund (UNFPA), issued a

[25] *National Family Planning Guidelines for Service Providers* 6th Edition at page 49.

statement specifically providing guiding principles for the provision and regulation of sterilization services, so as to prevent involuntary sterilization, including against women living with HIV. According to the tenor of the statement,

> *"In obtaining informed consent, take measures to ensure that an individual's decision to undergo sterilization is not subject to inappropriate incentives, misinformation, threats or pressure. Ensure that consent to sterilization is not made a condition for access to medical care (such as HIV or AIDS treatment, ...) or for any other benefit (such as medical insurance, social assistance,...).*
>
> *Where women face contraindications to pregnancy, offer sterilization as one possible method from the full range of contraceptive options available. There are no legitimate medical or social indications for contraceptive sterilization.*
>
> *As sterilization for the prevention of future pregnancy is not a matter of medical emergency, ensure that the procedure is not undertaken, and consent is not sought, when women may be vulnerable and unable to make a fully informed decision, such as when requesting termination of pregnancy, or during labour, or in the immediate aftermath of delivery*.[26]

Assessment of the Evidence

63. The respondents have failed to produce reliable evidence that any of the petitioners gave free, voluntary and informed consent to their sterilization. In

[26] Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO at page 14 available at https://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/.

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particular, the 2nd and 4th respondents have not denied, in their grounds of opposition filed in court, that the 1st and 3rd petitioners underwent the bilateral tubal ligation at the 2nd respondent. However, they failed to show any steps taken to procure informed and voluntary consent from them. Moreover, the 3rd respondent, through Dr Fred Oyombe (DW3) admitted that the evidence demonstrated that the 2nd and 4th petitioners had undergone bilateral tubal ligation, but failed that the 3rd respondent had procured these petitioners free and informed consent. The 2nd and 3rd respondents have therefore failed to discharge the onus of proving that informed consent was obtained expressly, tacitly or otherwise on a balance of probabilities. My Lord, it is apparent that on the facts before his Lordship, that the 1st - 4th petitioners did not give free and informed written consent before they were sterilized. This was demonstrated by the following facts.

64. First, no valid "**agreement**" or "**assent**" was obtained from the 1st to 4th petitioners.

65. Absent positive evidence that the petitioners intentionally communicated assent to the procedures, the "consent" element of informed consent is vitiated. No reliance can be placed on the mere fact of the petitioners having signed forms: the content of those forms is unknown because none of the respondents have produced these before the Court. In any event, even if those forms had been produced, they, by themselves would not indicate that the affected petitioners had indeed understood what they were to undergo or had provided informed consent.

66. The evidence shows that the 1st petitioner was told she would undergo a procedure by a nurse of the 2nd respondent but that she never agreed to the procedure or indicated her assent verbally. While she signed a form while being wheeled into theatre, that form cannot be understood as evidence of assent as the 1st petitioner neither read nor understood it. Moreover, the form was never produced by the 2nd respondent.

67. With respect to the 2nd petitioner, there is no proof on the record that she communicated assent or agreement either verbally or in writing. Her evidence was that she did not consent.

68. With respect to the 3rd petitioner, she was told she would have to undergo a bilateral tubal ligation but there is no evidence that she expressly agreed to the procedure. While she was given a form to sign, that form cannot be understood as evidence of her assent as she could not read the form, nor was it explained to her.

69. With respect to the 4th petitioner, there is similarly no reliable evidence of her agreement to the procedure. While the 3rd respondent's personnel asked her to sign a form, the 4th petitioner's evidence is that she was **instructed** to sign the form. Absent evidence to the contrary, her signature on that form cannot be construed as a communication of her assent because the 4th petitioner is illiterate and unable to understand its meaning.

70. Second, even if any of the petitioners had communicated assent or agreement to the procedures (which we submit they did not), in all four cases, the circumstances affirm that no indication of approval was "**freely**" or

voluntarily given: their very presence at the relevant facilities was obtained under **coercion**.

71. The 1st - 4th petitioners were all informed that they would be denied food portions if they did not prove that they had undergone bilateral tubal ligation.

72. The 1st petitioner was instructed by a nutritionist at the Blue House Clinic that if she wanted to receive food and have her maternity bill paid, she would have to show proof of bilateral tubal ligation.

73. Similarly, the 2nd petitioner was threatened by Benta (DW2) that food portions would be withheld at the Blue House Clinic if she did not prove that she had undergone bilateral tubal ligation.

74. The 4th petitioner was also threatened that her access to food and baby formula at the 2nd respondent would be terminated if she did not prove she had undergone bilateral tubal ligation.

75. With respect to the 3rd petitioner, she was only presented with consent forms for signature when she was in labour and preparing to go for delivery. She was told at that stage that she **had** to have a bilateral tubal ligation and she was in pain when she was asked to sign. These are acutely coercive circumstances. The ability of a person to refuse the sterilization when at the mercy of the clinic's power to provide or withhold care for the immediate urgency of the delivery of the infant, vitiates the freedom of any agreement given. Any purported consent procured by the 2nd respondent was obtained through duress and was therefore invalid.

76. Third, even if there had been valid assent in the absence of coercion or threat (which we submit was not the case) none of the petitioners were adequately "**informed**" to establish "informed consent".

77. The respondents have not provided any evidence that the petitioners were, prior their surgery, counselled in a manner in which they could understand on any of the following: on the nature and impact of bilateral tubal ligation, on the procedure's probable permanent effect in rendering them sterile, on the risks of the procedure, and on their contraceptive options or alternatives to the procedure. We submit that this is information that can only be in the purview of the 2nd and 3rd respondents to provide, and that in line with section 112 of the Evidence Act, they ought to have provided.

78. On being presented with the consent forms at the height of labour, the 1st and 3rd petitioners did not receive any information on the nature and consequences of tubal ligation, and neither did they know or understand what they were signing. Moreover, in such a state of urgency and pain, and being in need of immediate medical care for their delivery, there was no opportunity for one to meaningfully consider the long-term consequences of sterilization even if it had been explained.

79. During their oral testimony, the 1st and 3rd petitioners indicated how personnel at the 2nd respondent simply told them that they should undergo bilateral tubal ligation because they were living with HIV and, while they signed consent forms for undergoing caesarean sections, it only later emerged that they had been sterilized. This evidences that these petitioners had no understanding of

the implications of the procedure, least of all that it would leave them permanently sterile. This was forceful sterilization.

80. The 2nd and 4th petitioners were similarly not informed. They presented at the Lions Health Care Centre, Huruma for a family planning drive after having been coerced by employees of the 1st respondent and 2nd respondent respectively, after being threatened with withholding of food portions for themselves and formula milk for their children. This family planning drive was facilitated by the 3rd respondent. On the same date they presented themselves at the drive, the 3rd respondent's personnel proceeded to perform the procedure on these petitioners, failing to provide them with educational information on the procedure, any alternative methods of contraceptive, or on the risks and impact of the decision. Critically, they were not provided enough time to make a genuinely informed decision.

81. It is to be noted that with respect to the 1st – 3rd petitioners, Benta (DW3) gave contradictory evidence. She first stated that she met the 1st petitioner at the Blue House Clinic in 2005, and that she attended four antenatal sessions and twelve (12) post-natal sessions at the Clinic. This is however not borne out in the evidence she gave in her bundle of documents, particularly at pages 58-59 which shows that SWK attended six antenatal sessions as well as ten post-natal sessions. She also stated in her evidence that she was a qualified nutrition assistant, and attached the typical job description of a nutrition assistant at the Blue House Clinic at page 9 of her bundle of documents. In this role, the nutrition assistant does various roles, all related to provision of information and provisions of rations to clients at the HIV/TB Clinic. Benta also attached the job description that she signed when she took up the role of nutrition

assistant where none of her roles relate to provision of nutritional aids to patients. In fact, it appears that her role was to identify pregnant women in Blue House and register them in the PMTCT, ensure timely deliveries of anti-retroviral therapy to mothers and "*identify clients in need of family planning services and refer as appropriate*."[27] These are not roles connected with her position as a nutrition assistant, and speaks to why she would refer patients for family planning services even without counselling. This is corroborated by her evidence at paragraph 36 of her affidavit that she would *"as clients for other documentation slips related to any forms of family planning, including BTL."* She also confirmed that she required the 3rd petitioner to provide information about whether or not she had undergone family planning. It is therefore not in dispute that the employees of the 1st respondent did require women living with HIV who received their support to show proof that they had undergone a form of permanent family planning, including bilateral tubal ligation.

82. It is also to be noted that even the dates that Benta testified to with respect to the 1st petitioner are completely inaccurate; She indicated at page 58 of her bundle of documents that the 1st petitioner attended antenatal clinics on 3rd March 2010. This evidence given by Benta is clearly a fabrication because the 1st Petitioner attended the clinic on 5th March 2010 and was seen by Beatrice Runo who made a note on the hospital card.[28]

[27] See the bundle of documents referred to in the affidavit of Benta Anyango Owuor at page 10.
[28] See SWK-001 annexed to the affidavit of the 1st petitioner which is signed by Beatrice Runo and indicates "patient wishes to be done BTL".

83. On her part, Beatrice Runo (DW1) testified that Benta's role was to assist her in provision of formula and during prenatal sessions. She conceded in cross-examination that she worked with the 1st respondent only from September 2008. She therefore did not have any knowledge of Benta's role in the coercion of the 2nd petitioner, since this happened in 2005. It is therefore apparent that up until Beatrice joined the Blue House Clinic in 2008, Benta was working unsupervised.

84. That in fact at the time the question of bilateral tubal ligation was being brought up by the 1st and 2nd respondents, the 1st - 4th petitioners were vulnerable as they were either in labour, breastfeeding, in the immediate aftermath of delivery or in need of the food rations for themselves and their children.

85. The sterilization to avoid future pregnancies which was the case for the 1st to the 4th petitioners was not an emergency that required immediate sterilization without room to allow them make an informed decision.

86. We therefore submit that the evidence on record leads to the conclusion that the 2nd and 3rd respondents, each working in concert with the 1st respondent, were responsible for coercing and forcing the 1st – 4th petitioners to undergo sterilization in exchange for food portions for themselves and their infant children.

87. Dr Fred Oyombe the witness for the 3rd respondent testified that the personnel of the 3rd respondent would routinely perform group counselling sessions for patients who indicated that they wanted family planning services. My Lord, presenting oneself to a medical facility does not amount to providing consent

for any procedure. Moreover, in the course of group counselling, it is doubtful that information that was relevant to the particular contexts of the 2nd and 4th petitioners could be provided to them. Dr Oyombe also testified that prior to performing any medical procedure, medical personnel would first obtain signed consent from the patients. In the context of the 2nd and 4th petitioners, there was no signed consent form that was provided in court to demonstrate this fact. In fact, Dr Oyombe did confirm during his testimony that the facts that he presented were not through his own personal knowledge, but from information gleaned from other sources, sources which he did not disclose to this Court. During cross-examination, he also confirmed that he had never interacted with the 2nd and 4th petitioners, or any of their medical records.

88. The facts as presented by the 1st - 4th petitioners remain uncontroverted, and that there has been no evidence adduced by the 1st, 2nd and 3rd respondents to countermand the evidence given by the 1st- 4th petitioners. In the result, the evidence shows that no informed consent was given by the petitioners prior to the 2nd and 3rd respondents undertaking the procedures.

WHETHER THE ACTIONS OF THE 1ST RESPONDENT AMOUNTED TO COERCION OF THE 1ST, 2ND AND 3RD PETITIONERS TO UNDERGO STERILIZATION BY WAY OF BILATERAL TUBAL LIGATION

89. My Lord, we have addressed above that the evidence shows that the 1st, 2nd, and 3rd petitioners were coerced into undergoing the procedure. We expand on these submissions here.

90. The 1st respondent admitted to running the Blue House Clinic which, as part of its services, offered food support to its clients and advised indigent HIV positive patients on replacement feeding. This was done in order to lower the risk of transmission of the HIV virus from the mother to child.[29]

91. Feeding support was initially given through food packages, and later through vouchers through which patients could visit nearby supermarkets and pick foodstuffs for themselves. The 1st respondent's witnesses, Beatrice Runo (DW1) and Benta Awuor Onyango (DW2) confirmed that as part of the services that were offered, patients who attended the Blue House clinic would be counselled, as part of a group on family planning options. Such patients would then be sent either to Pumwani Maternity Hospital, the 2nd respondent, or to Marie Stopes in Eastleigh, a facility ran by the 3rd respondent for family planning options, and, in particular, for sterilization procedures. Evidence of these referrals was provided in the affidavit sworn by Benta (DW2) as part of her bundle of documents. The Midwife in Charge of the programme had to sign the referrals.

92. After delivery, both Beatrice (DW1) and Benta (DW2) would follow up with the patients as to whether or not they had undergone the procedures. Dr Fred Oyombe who testified on behalf of the 3rd respondent confirmed that the 1st and 3rd respondent would routinely have family planning drives which were advertised by the 1st respondent at its facility. The procedures would be carried

[29] See affidavit of Beatrice Runo at paras 9-13.

out by personnel of the 3rd respondent. Such drives were held at various facilities in Nairobi, including at the Lions Health Centre in Huruma.[30]

93. The 1st respondent's witnesses confirmed having interacted with each of the 1st- 4th petitioners and recording the fact of the petitioners having undergone bilateral tubal ligation in registers that were produced in evidence by Beatrice Runo (DW1). Your Lordship will note that the said registers were maintained by the nutritionists, who were in a position of power over the 1st, 2nd and 3rd petitioners, on whom they relied on for a determination for the provision of food supplies. In fact, the 2nd petitioner did testify that she *"was uncomfortable complaining about Benta's push to have me undergo a bilateral tubal ligation."*[31] It is also apparent that all the women who were receiving food support from the 1st respondent were required to inform either Beatrice (DW1) or Benta (DW2) of their family planning status, but the 1st respondent has not indicated the purpose for which it required this.[32]

94. While Benta indicated that she would ask for this information for her records, the uncontroverted evidence of the 1st, 2nd and 3rd petitioners was that when they could not provide proof of having undergone the sterilization, then they were threatened with the withdrawal food rations by the 1st respondent.

95. The 1st respondent has tendered the evidence of their witnesses[33] who have stated that they were in no way coerced or forced into any medical procedures

[30] See the testimony of Dr Fred Oyombe.

[31] See the testimony of the 2nd Petitioner.

[32] See paragraph 32-36 of the Affidavit of Benta Anyango Owuor.

[33] See the affidavits of MA, SW, EAM and PB filed on 22nd April 2015.

by the 1st respondent. We urge that this court treat this evidence with utmost caution. First it is noteworthy that these witnesses are conflicted as they received direct benefits from the 1st respondent, still in the form of food rations and free health care services. In this regard, the evidence tendered by EAM is apt. She stated that *"I am saddened by the allegations made against Blue House as the staff have been very supportive in paying my medical bills, providing treatment and food support."*[34] This evidence demonstrates that these witnesses remain beholden to the 1st respondent who was providing them with sustenance.

96. More importantly, it must be noted that the individual circumstances of each of these witnesses was completely different from the 1st, 2nd and 3rd petitioners herein. For example, SW (DW3) was attending Blue House Clinic, but she had her own private insurance, and attended St Mary's Hospital for delivery of her child. She was therefore not reliant on the 1st respondent for payment for her maternal health care services.[35]

97. The case of MA is also completely different. It was her evidence that she unfortunately lost her child shortly after delivery. This means that at no point did the question of her receiving food aid for her child arise, since the food aid was being provided by the 1st respondent in order to reduce the chances of transmission of HIV.[36] She also chose to undergo family planning, and continued to receive antiretroviral medication from the 1st respondent. PB also stated that she had information on family planning and due to her the

[34] See paragraphs 7 and 19 of the affidavit of EAM sworn on the 22nd April 2015.
[35] See testimony of SW and para. 11 of the affidavit of SW sworn on 22nd April 2015.
[36] See paragraph 10 of the affidavit of MA sworn on the 22nd April 2015.

circumstances of her personal and family life, she opted to undergo a bilateral tubal ligation.[37] While she stated that she did undergo the procedure at the Lions Huruma Clinic, ran by the 3rd respondent, she did not provide any documentation or evidence to show that she had indeed given informed consent to the procedure.

98. In any event, the experiences of these four witnesses did not in any way controvert that of the 1st - 3rd petitioners herein, or the evidence given by them, who were coerced by the 1st respondent to present themselves for permanent family planning procedures, failure to which they would not receive food aid. In fact, the experiences of these women are distinguishable from what the 1st, 2nd and 3rd petitioners underwent, and we urge that this Court should treat their evidence with an abundance of caution.

WHETHER THE ACTIONS OF THE 2ND RESPONDENT AMOUNTED TO COERCION OF THE 4TH PETITIONER TO UNDERGO STERILIZATION BY WAY OF BILATERAL TUBAL LIGATION

99. The 4th petitioner gave birth to her child at the 2nd respondent facility in 2005. While she was being discharged, she was advised to collect baby formula as well as medication for herself from the 2nd respondent. Two weeks later, she went to collect baby formula and was attended by a nurse at the 2nd respondent. The nurse, called Maggy informed the 4th petitioner that she could not be given milk unless she had proof of undergoing the bilateral tubal ligation.[38] She was

[37] See affidavit of PB at paragraph 7.

[38] See the oral testimony of AMM given on the 29th September 2018

informed by the said nurse that "*it was necessary to undergo bilateral tubal ligation because she [was living with HIV] and had three children."* The nurse then instructed her to go to the Lions Health Center in Huruma for the family planning drive that was being held by the 3rd respondent. The fear of losing baby formula milk for her child is what led the 4th petitioner to present herself at the Lions Health Center in Huruma. The 2nd respondent has not tendered evidence to disprove the facts as put forward by the 4th petitioner; the 2nd respondent also did not question any part of the 4th petitioner's testimony and did not cross-examine her. The court can thus safely draw a conclusion that the 4th petitioner has proved that she was coerced by the 2nd respondent, and proved this beyond a balance of probabilities.

WHETHER THE STERILIZATION OF THE 1ST TO 4TH PETITIONERS BY WAY OF BILATERAL TUBAL LIGATION PERFORMED WITHOUT THEIR INFORMED CONSENT AMOUNTED TO A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS AND FREEDOMS.

100. In the South African *locus classicus* on informed consent, ***Castell v De Greeff 1994(1) SA 408 (C),***[39] Ackerman J held that there was an inalienable nexus between informed consent and bodily integrity. He stated that:

> *"It is clearly for the patient, in the exercise of his or her fundamental right to self-determination, to decide whether he or she wishes to undergo an operation, and it is in principle wholly irrelevant that the patient's attitude is grossly unreasonable in the eyes of the medical*

[39] *Castell v De Greeff 1994(1) SA 408(C) available at* https://ethiqal.co.za/wp-content/uploads/2019/08/CASTELLvDE-GREEF-1994-Disclosure-of-Risk-Reasonableness.pdf

profession: the patient's right to bodily integrity and autonomous moral agency entitles him or her to refuse medical treatment".

101. The Namibian Supreme Court, in Government of the ***Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19*** (03 November 2014)[40]. stated that:

> *"Individual autonomy and self-determination are the overriding principles towards which our jurisprudence should move in this area of the law… these principles require that in deciding whether or not to undergo an elective procedure, the patient must have the final word."*

102. The failure to obtain free and informed consent prior to undertaking the surgery was in violation of the Constitution, as well as the fundamental freedoms enshrined in international law. Your Lordship will note that the actual sterilization of the 1st – 4th petitioners took place in May 2010 (the 1st petitioner), 8th June 2005 (2nd Petitioner), 13th June 2010 (the 3rd petitioner) and 4th May 2005 (the 4th petitioner). While some of the rights were not explicitly recognized by the retired Constitution, they found expression in various treaties to which Kenya has long since ascribed to. Moreover, we draw the attention of this Court to the edict of the Court of Appeal in ***Michael Mbogo Kibuti v Attorney General [2020] eKLR (Civil Appeal No. 82 of 2017)***[41] wherein it held that courts ought to consider claims brought under the

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[40] *Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19 accessible at* https://namiblii.org/na/judgment/supreme-court/2014/19.

[41] *Michael Mbogo Kibuti v Attorney General [2020] eKLR available at* http://kenyalaw.org/caselaw/cases/view/189435/.

Constitution of Kenya, 2010 even where such violations occurred under the old Constitution.

The Right to Freedom and Security of the Person

103. As was set out in section 70 of the retired Constitution as well as in Article 29 of the Constitution of Kenya, 2010 every person has the right to freedom and security of the person, including the right not to be subjected to torture in any manner, whether physical or psychological, or to be treated or punished in a cruel, inhuman or degrading manner. The retired Constitution further prohibited inhuman, cruel and degrading treatment at section 74(1) which stated that "*No person shall be subject to torture or to inhuman or degrading punishment or other treatment*."

104. The right to security of the person and the prohibition against cruel, inhuman and degrading treatment is also contained in various international and regional treaties to which Kenya is a party. These include Article 7 of the **International Covenant on Civil and Political Rights** (ICCPR) and Article 5 of the **African Charter on Human and People's Rights** (ACPHR) and Article 3 of **The Convention Against Torture** (CAT).

105. The right to freedom and security of the person, including the prohibition against cruel and inhuman treatment was considered by this Court in ***Samuel Rukenya Mbura & Others V Castle Brewing Kenya Limited & Another***

[2006] eKLR[42] wherein this Court, considering the import of section 74 of the retired Constitution, defined inhuman or degrading treatment as including *"an action that is barbarous, brutal and cruel"* while degrading punishment is "*that which brings a person in dishonour or contempt*". This meaning was adopted with approval in other decision of this Court such as in ***David Gitau Njau & 9 others v Attorney General [2013] eKLR*** and ***Hezbon Ombwayo Odiero v Minister for State for Provincial Administration & Internal Security & 3 others (2016) eKLR.***[43] We therefore submit that such treatment is that which humiliates or debases an individual in such a manner that shows a lack of respect for, or diminishes, his or her human dignity.

106. A number of international bodies and other similarly-situated jurisdictions have addressed coerced sterilization finding that it violates the prohibition on cruel, inhuman and degrading treatment. At the regional level, the African Commission on Human and Peoples' Rights ("the African Commission") has clearly stated that involuntary sterilization violates the right to be free from cruel, inhuman and degrading treatment guaranteed under the ACPHR and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. In ***Resolution 260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services,*** the Commission:

> *"firmly declares that all forms of involuntary sterilisation violate in particular the right to equality and non-discrimination; dignity, liberty*

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[42] *Samuel Rukenya Mbura & Others V Castle Brewing Kenya Limited & Another [2006] eKLR available at http://kenyalaw.org/caselaw/cases/view/18863.*

[43] *Hezbon Ombwayo Odiero v Minister for State for Provincial Administration & Internal Security & 3 others (2016) eKLR available at http://kenyalaw.org/caselaw/cases/view/118067.*

and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health; as enshrined in the regional and international human rights instruments, particularly the African Charter and the Maputo Protocol;"[44].

107. Forced and coerced sterilization is a form of gender-based violence that constitutes cruel, inhuman and degrading treatment. The African Commission in its **General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (2017)**, described forced or coerced sterilization as:

> "*a form of sexual and gender-based violence that amount[s] to a form of torture and other ill-treatment in view of the specific, traumatic and gendered impact of sexual violence on victims, including the individual, the family and the collective.*[45]

108. Courts on the continent have also found that the practice of coerced sterilization violates the prohibition of cruel, inhuman and degrading treatment. In ***Namibia v LM and Others (supra),*** the Supreme Court of Namibia found that the obtaining the consent for sterilization of women living with HIV while they were in labour or in exchange of other medically

[44] See the preamble of *Resolution 260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services - ACHPR/Res.260(LIV)2013* available at https://www.achpr.org/sessions/resolutions?id=280.

[45] General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) at paras. 57 and 58; available at https://www.achpr.org/legalinstruments/detail?id=60.

necessary treatment violated the right to be free from cruel, inhuman and degrading treatment, among other fundamental rights.

109. On the international front, the Human Rights Committee in ***ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*** has stated that State Parties to the ICCPR have an obligation to ensure the protection dignity and the physical and mental integrity of the individual. The Human Rights Committee stated further that article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. That prohibition in article 7 of the ICCPR relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In addition, in ***ICCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women),*** the Human Rights Committee, has advised that in order to comply with article 7 of the ICCPR, and to allow the Committee to assess such compliance, state parties ought to provide the Committee information on measures to prevent forced abortion or forced sterilization.[46]

110. Further, in the ***Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 3, 2013),*** the Special Rapporteur emphasized that forced sterilization is an act of violence, a form of social control, and a violation of the right to be free from

[46] CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women) at para. 11.

torture and other cruel, inhuman, or degrading treatment or punishment.[47] The Special Rapporteur further noted that "*international and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. Examples of such violations include abusive treatment and humiliation in institutional settings;* ***involuntary sterilization*** *…* ***forced abortions and sterilizations****."*[48]

111. To this end, the Special Rapporteur called upon all states, to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups, including persons living with HIV, and to safeguard free and informed consent on an equal basis for all individuals without any exception, through legal framework and judicial and administrative mechanisms, including through policies and practices to protect against abuses.[49]

112. My Lord, there is similar authority even from international courts. In the case of ***V.C. v. Slovakia (Application No. 18968/07),*** the European Court of Human Rights ("ECtHR"), was faced with a claim from a Roma woman whose situation is on all fours with the claim of the 1st and 3rd petitioners in the present case. She was presented with a request form for the procedure while she had been in labour, and after she was informed by personnel at the

[47] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 3, 2013) at paragraph 48.

[48] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez at para 46.

[49] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 3, 2013) at paragraph 85(e).

hospital that if she got pregnant again, then either her or the child would die. Considering the import of Articles 3 and 8 of the European Convention on Human Rights on State Parties, the ECtHR held that:

> *"106. The Court notes that sterilisation constitutes a major interference with a person's reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life. It may be legitimately performed at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes where the medical necessity has been convincingly established.*
>
> *107. However, in line with the Court's case-law referred to above, the position is different in the case of imposition of such medical treatment without the consent of a mentally competent adult patient. Such a way of proceeding is to be regarded as incompatible with the requirement of respect for human freedom and dignity, one of the fundamental principles on which the Convention is based.*
>
> *108. Similarly, it is clear from generally recognised standards such as the Convention on Human Rights and Biomedicine, which was in force in respect of Slovakia at the relevant time, the WHO Declaration on the Promotion of Patients' Rights in Europe or CEDAW's General Recommendation No. 24 ... that medical procedures, of which sterilisation is one, may be carried out only with the prior informed consent of the person concerned. The same approach has been endorsed by FIGO [...]. The only exception concerns emergency situations in which medical treatment cannot be delayed and the appropriate consent cannot be obtained."*

113. Thus, the ECtHR held that the respondent state was liable, that the sterilization without consent had "*grossly interfered with [her] physical integrity as she*

was thereby deprived of her reproductive capability[50], and that the failure to obtain her informed consent prior to the sterilization showed "*gross disregard for her right to autonomy and choice as a patient" in violation of the prohibition of cruel, inhuman and degrading treatment*.[51]

114. In the present petition, the 2nd and 3rd respondents' action of not obtaining informed consent from the 1st-4th petitioners amounted to cruel, inhumane and degrading that was in disregard of their autonomy and right to choose their reproductive futures. The consequences of the forced and coerced sterilization of the petitioners caused them, and continues to cause them, extreme mental suffering and violated their physical and mental integrity, and thus the violation to their right to freedom of security of the person continues to be violated to date.

The Right to Dignity as Provided under Article 28 of the Constitution of Kenya

115. Article 28 of the Constitution of Kenya provides that every person has inherent dignity and the right to have that dignity respected and protected. This right is also provided for in Article 1 of the Universal Declaration of Human Rights (UDHR), Article 5 of the ACPHR, Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), the Preamble of ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) , the

[50] VC v Slovakia App. No. 18968/07, Eur. Ct. H.R. (2011) at para. 116. Available at https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-290&filename=002-290.pdf.

[51] VC v Slovakia at para 119.

Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

116. The right to dignity is a means to the enjoyment of all other human rights and as stated in Article 19 of the Constitution, the reason for recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. This was restated in ***A.N.N v Attorney General [2013] eKLR*** where the court held that Article 28 of the Constitution "*makes it clear that the protection of the dignity of all human beings is at the core of the protection of human rights under the Constitution."*

117. The right to dignity is capable of judicial enforcement. The High Court in ***A.N.N v Attorney General (supra)*** relied on the persuasive decision of the Constitutional Court of South Africa in ***Barkhuizen v Napier [2007] ZACC 5***[52] when it held that "*Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity",* as well as the decision in ***Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14***[53] wherein the court held that *"…the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the*

[52] *Barkhuizen v Napier [2007] ZACC 5 available at* http://www.saflii.org/za/cases/ZACC/2007/5.html.

[53] *Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14 available at* http://www.saflii.org/za/cases/ZACC/2013/14.html.

greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity."

118. Relying on these two decisions, the High Court held that:

> *"Regardless of one's status or position, or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. Consequently, doing certain things or acts in relation to a human being, which have the effect of humiliating him or her, or subjecting him or her to ridicule is, in my view, a violation of the right to dignity protected under Article 28."*

119. In the context of forced and coerced sterilization of women, The African Commission has noted that coerced sterilization does clearly violate the right to dignity guaranteed under the ACPHR. In its ***Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services***, the Commission has stated that coerced sterilization is a form of involuntary sterilization characterized by the use of financial or other incentives, misinformation, or intimidation tactics to compel an individual to undergo the procedure declares that all forms of involuntary sterilization violate in particular the right to equality and non-discrimination, dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health.

120. My Lords, based on the foregoing authorities, we therefore submit that to the extent that the 1st respondent coerced the 1st, 2nd and 4th petitioners to undergo the sterilization procedure in order to receive food portions, their right to

dignity was violated. In addition, to the extent that the 2nd and 3rd respondents sterilized the 1st – 4th petitioners without their free, voluntary and informed consent, those respondents violated the right to dignity of the petitioners.

The Right to Privacy

121. Article 31 of the Constitution of Kenya, 2010 provides that everyone has the right to privacy. It is also provided for in Article 12 of the UDHR, Article 17 (1) of the ICCPR, and Article 14 of the ACPHR.

122. In ***GSN v Nairobi Hospital & 2 others [2020] eKLR***[54] this Court held that

> *"Although the Section 70(c) of the repealed Constitution is restricted in its wording, it is necessary to interpret it as broadly as possible in order to ensure that all aspects of an individual's privacy are protected. This is the only way to ensure compliance with the international law on human rights. The protection of the right to privacy is integral to democratic governance. As such, I would do a disservice to the Petitioner to limit the application of the provision to the vocabulary used by the drafters of the provision. In that regard, I hold that the right to privacy under the repealed Constitution can and should be interpreted broadly to include the personal privacy of an individual and the privacy of their information."*

123. Privacy is to be expected in questions of personal choice and is closely interlinked with the dignity of a person and the achievement of their self-autonomy. As was stated by this Court in ***Tom Ojienda t/a Tom Ojienda &***

[54] *GSN v Nairobi Hospital & 2 others [2020] eKLR available at* http://kenyalaw.org/caselaw/cases/view/200351/.

Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR,

> *"privacy is a subjective expectation of privacy that is reasonable, inner sanctum helps achieve a valuable good-one's own autonomous identity. Privacy is not a value itself but it is valued for instrumental reasons, for the contribution it makes to the project of 'autonomous identity'. This protection in return seeks to protect the human dignity of an individual."*

124. In the context of coercive and non-consensual sterilization, the right to privacy, is directly linked to the right to one's private life. In ***VC v Slovakia (supra),*** the ECtHR held:

> "'*Private life' is a broad term, encompassing, inter alia, aspects of an individual's physical, psychological and social identity such as the right to personal autonomy and personal development, the right to establish and develop relationships with other human beings and the right to respect for both the decisions to have and not to have a child."*

125. Decisions on reproductive health are private, and any interference in that regard, whether by the state, or by private actors is a direct affront to the right to privacy. In this regard, the Human Rights Committee in ***CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)***[55] has said that the right to privacy encompasses instances where women are subject to medical procedures without their informed consent, and gives as an example, instances where there are general requirements for the sterilization of women.

[55] *CCPR General Comment No. 28: Article 3* at para 20.

126. Ensuring there is informed consent before a medical procedure such as a sterilization which renders a woman permanently unable to bear children, we submit, is an essential component of having an autonomous identity as it enables patients to have full control over their own bodies and in this case, reproduction. Informed consent before a medical procedure such as a sterilization which is permanent procedure is mandatory. A woman being given the information, space and time to make this far-reaching decision is an essential component of having an autonomous identity.

127. My Lord, we have demonstrated that none of the 1st- 4th petitioners was given information, time and space to decide about the bilateral tubal ligation before they were coerced to undergo it. The 1st and 3rd petitioners only came to discover that the procedure had been conducted on them after they woke up from delivery, thus undermining their right to choose and their autonomy in decision making. In the case of the 2nd and 4th petitioners, they were coerced into presenting themselves at a family planning drive conducted by the 3rd respondent. Upon arrival, the personnel of the 3rd respondent did not give either the 2nd or 4th petitioners any information about the procedures to be carried out upon them. Personnel at the 3rd respondent simply took in the 2nd and 4th petitioners, carried out the procedures on them, and sent them on their way. These actions also undermined the 2nd and 4th petitioners' rights to privacy, to space to make choice, and their autonomy. It is therefore apparent that the failure to obtain the petitioners' informed consent violated their right to privacy.

128. We submit further that this violation of the right to privacy is a continuing violation. It is noteworthy that both the 2nd and 3rd respondents refused, and

have to date declined despite requests and reminders, to give information to the 1st–4th petitioners which would indicate what happened to them when they were under their care. It is also to be noted that the 3rd respondent did communicate to the 2nd and 4th petitioners that it would provide information about what procedures were undertaken on them.[56] That information is yet to be provided. Such refusal continues to violate their right to privacy, and as the ***UN InterAgency Statement in Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO*** have noted that:

> "*The right to respect for privacy and family life includes being able to find out about whether or not sterilization has been performed, and the precise procedure used. Lack of access to their medical records makes it hard for individuals to get information about their health status or receive a second opinion or follow-up care, and can block their access to justice.*"[57]

129. The forced sterilizations on the 1st- 4th petitioners were carried out without any reference to them as to the nature and consequences. These procedures dramatically affected their private and family lives and they, to date, do not know exactly what happened to them during the procedures as the 2nd and 3rd respondents have refused to provide them with information. In this regard, we

[56] See the annexure marked PAK4 attached to the supplementary affidavit of PAM, and the annexure marked AMM4 attached to the supplementary affidavit of AMM, both of which are sworn on 27th November 2017.

[57] Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO at page 10 available at https://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/.

submit that the 1st, 2nd and 3rd respondents violated the right to privacy of the 1st to 4th petitioners, and that this violation continues to occur.

The Right to Highest Attainable Standard of Health

130. Article 43 (1) of the Constitution of Kenya provides that every person has the right to the highest attainable standard of health, including the right to health care services and reproductive health care. The right to health includes: the right to physical and mental health wellbeing, the right to informed consent, provision of education and information, and access to quality health care services.

131. My Lord, while the right to health was not explicitly recognized under the retired Constitution, the right to health was expressed in various international covenants and treaties to which Kenya has ratified. These are included in Article 25 of the UDHR, Article 12 of the ICSECR, Article 12 of CEDAW, Article 16 of the ACHPR, Article 14 of the Maputo Protocol. Moreover, these instruments continue to apply to the Kenyan context by virtue of Articles 2(5) and 2(6) of the Constitution of Kenya, 2010.

132. The coerced and forced sterilization of the petitioners was in violation of their *rights to health, and particularly their reproductive health*. In both ***General Comment No. 14: The Right to the Highest Attainable Standard of Health*** and ***General Comment No. 22 (2016) on the Right to sexual and reproductive health,*** the CESCR defines reproductive health as including *"the freedom to decide if and when to reproduce; the right to information, and to have access to safe, effective, affordable and acceptable methods of*

family planning of their choice." The right further includes the right to access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth. Due to the far-reaching effects of sterilization by way of bilateral tubal ligation, informed consent is an integral component in terms of provision of the service.

133. The Committee on Economic, Social and Cultural Rights (CESCR) in its ***CESCR General Comment No. 14*** has stated that the right to health includes the freedom *to "control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation."*[58] Similarly, the CEDAW Committee in ***General Recommendation No 24, Article 12 of the Convention (women and health) (1999)*** calls on State Parties to provide health services "*that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. As such, States parties should not permit forms of coercion, such as non-consensual sterilization, …."*[59]

134. The CESCR stated further that the right to quality health care services requires the provision of acceptable services, which *"are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her*

[58] Para. 8 of CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

[59] Para 22 of CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health).

dignity, guarantees her confidentiality and is sensitive to her needs and perspectives."[60]

135. Your Lordship will note that the 1st-4th petitioners in this case are disenfranchised and marginalized as a result of their health and socio-economic status. In fact, the 1st respondent's witness, Benta, did confirm to the court that the Blue House Clinic was operated to provide health care services to marginalized women living with HIV. The UN Special Rapporteur on Health has noted that marginalized populations, including women are at particular risk of violations of their right to informed consent due to social, economic and cultural inequalities.[61]

136. With respect to the sterilization of marginalized women, the UN Special Rapporteur on the Right to Health notes that:

> "*forced sterilization or contraception continues to affect women, injuring their physical and mental health and violating their right to reproductive self-determination, physical integrity and security. Women are often provided inadequate time and information to consent to sterilization procedures, or are never told or discover later that they have been sterilized. ...Stigma and discrimination against women from marginalized communities, including indigenous women, women with*

[60] Para 22 of CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health.

[61] Report to the General Assembly (Main Focus: Right to Health and Informed Consent) Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health UN Doc A/64/272 (2009) para 46.

disabilities and women living with HIV/AIDS, have made women from these communities particularly vulnerable to such abuses."[62]

137. The CESCR's General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art 12.) in interpreting the right to health states that:

> *The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."*[63]

138. My Lord, the mental health of the 1st- 4th petitioners was detrimentally affected as a result of the forceful and coerced sterilization that was undertaken on them by the respondents. These petitioners testified as to the mental anguish and distress that they suffered as a direct consequence of the forced sterilizations and the lack of information about the procedures.[64] This further compounded the violations to their right to health, since it of necessity, includes the right to mental wellbeing. My Lord in this regard, we submit that the holding of this Court in ***W.J & another v Astarikoh Henry Amkoah & 9***

[62] Report to the General Assembly (Main Focus: Right to Health and Informed Consent) Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health at paras 55.

[63] General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art 12.) at para. 11.

[64] See the psychological reports annexed to the 1st-4th petitioner's affidavits.

others [2015] eKLR[65] and affirmed by the Court of Appeal in ***Teachers Service Commission v WJ & 5 others [2020] eKLR*** is apposite, wherein it was stated that *"In addition, the fact that their psychological well-being was affected is a clear violation of their right to health, which is defined as including the highest attainable standard of physical and mental well-being."*

139. From the facts, we submit that the 1st, 2nd and 3rd respondents violated the 1st-4th petitioner's right to health when they failed to obtained their free and informed consent prior to performing sterilization procedures on them, by failing to provide them with adequate information before conducting the procedures on them. We submit further that the sterilization of the petitioners without their free and informed consent did not meet the standard of quality health care services as a fundamental component of quality health care is providing the individual with the necessary information to obtain her informed consent.

The Right to Freedom from Discrimination

140. Article 27(4) and (5) of the Constitution of Kenya, 2010 prohibits discrimination on any ground. The right to freedom from discrimination is also guaranteed under Articles 2, 3 and 26 of the ICCPR, Articles 2(e) and 12 of the CEDAW, Article 2 and 18 (3) of the ACHPR, and Article 2 of the Maputo Protocol.

[65] *W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR available at* *http://kenyalaw.org/caselaw/cases/view/109721/*.

141. In ***Peter K. Waweru v Republic [2006] eKLR*** this Court defined discrimination as:

> "*affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description…. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured. From the above authorities it emerges that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex creed etc. or due to unfair practice and without any objective and reasonable justification."*[66]

142. The Court went further to state that discrimination would include:

> *"distinction which whether intentional or not but based on grounds relating to personal characteristics of an individual or a 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".*

143. This definition was affirmed by this Court in ***Pravin Bowry v Ethics & Anti-Corruption Commission [2015] eKLR*** the High Court adopted the definitions

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[66] *Peter K. Waweru v Republic [2006] eKLR* available at http://kenyalaw.org/caselaw/cases/view/14988/.

outlined above when addressing a discrimination claim the Constitution of Kenya, 2010.

144. Discrimination on the basis of gender is defined at Article 1 of CEDAW as

> "*... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*."

145. In the context of forced and coerced sterilisation, a number of international and regional bodies have found coerced sterilization of marginalized women violated the prohibition of discrimination.

146. Similarly, the African Commission has clearly stated that the coerced sterilization of HIV-positive women in Africa violates their right to be free from discrimination in its ***Resolution 260 on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services***. In that resolution, the African Commission notes that there are the numerous reports of involuntary sterilisation of women living with HIV in certain State Parties to the ACPHR, and condemns this as a form of discrimination and a human rights violation in relation to the access to adequate health services. It also reaffirms that *"all medical procedures, including sterilization, must be provided with the free and informed consent of the individual concerned in line with internationally accepted medical and ethical standard*."

147. The CEDAW Committee ***CEDAW General Recommendation No. 19: Violence against women, 1992*** has stated that coercive acts can amount to discrimination, stating that:

> "*the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence"*[67]

148. The CEDAW has considered the discriminatory nature of forced and coerced sterilization in ***AS v Hungary Communication No 4 of 2004***[68], where the communication concerned a doctor in Hungary who had performed a forced sterilization procedure without providing adequate information regarding the procedure, and without obtaining Ms. A.S.'s free and informed consent. The doctor in question had required her to sign the consent form when she was in labour. The CEDAW Committee found that Hungary had violated the complainant's rights to protection from discrimination in health care and in family relations and in particular, to consent to medical procedures, to information on family planning, and the right to determine the number and spacing of her children, under Articles 10(h), 12 and 16(1)(e) of the CEDAW. It is also noteworthy that the Committee found that the violation was a continuing one, since the procedure of sterilization is intended to be a

[67] CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 6.

[68] AS v Hungary available at https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf.

permanent procedure, and any attempts to reverse it carries significant risks and would likely be permanent.[69]

149. We further urge your Lordship to be guided by the sentiments of Judge Ljiljana Mijovic who dissented in ***VC v Slovakia (Application No. 18968/07***). The learned judge in addressing the coerced sterilization of Roma women, highlighted why a finding that coerced sterilization violated the right to be free from discrimination was important to address the broad and systemic nature of the coerced sterilization finding that it was apparent that the victim in this case was marked out due to her ethnic origin. Similarly, my Lord, we submit that the facts herein demonstrate that the 1st – 4th petitioners were all marked out as a result of their health status. Each of these women had been receiving food portions, and had received information from their social workers and health care providers that they should not bear any more children. It is this coercion, where HIV positive women were being coerced to undergo permanent family planning procedures, that led them to be in situations where the procedures were conducted upon them without their free and informed consent.

150. We submit that in the circumstances, there is ample evidence to demonstrate that the 1st-4th petitioners were singled out for forced sterilization as a result of the HIV status. Each of the petitioners set out in their affidavits and in their oral testimony that the personnel at the 1st and 2nd respondents repeatedly told

[69] While these observations and views on the continuing violation and the nature of sterilization were made in the context of considering the admissibility of the Communication, we submit that they apply with equal force in the circumstances at hand, and in particular, on the merits of the case presented by the 1st – 4th petitioners.

them that they should not bear any more children because to do so would be inappropriate due to their health status. In addition, evidence tendered by Gladys Kiio (PW6) on behalf of the 6th petitioner demonstrates that women living with HIV were forced and coerced into sterilization procedures where these procedures were forced on them without their knowledge or consent, or where they were scared into going because they were HIV positive, and therefore should not bear any more children. The experiences of the 1st – 4th petitioners echo those of many women as documented in ***Robbed of Choice: Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya.***[70]

151. That forced and coerced sterilization is inherently a discriminatory practice has also been discussed in ***Patel, P. Forced sterilization of women as discrimination.*** [71] In that article, the author notes that "*forced and coerced sterilization primarily targets women who are perceived as inferior or unworthy of procreation. Forced and coerced sterilization of marginalized women is part of existing stigma and discrimination facing the marginalized population."* Because it is founded on stigma, "*the motivating reason for forced and coerced sterilizations is to deny specific populations the ability to procreate due to a perception that they are less than ideal members of society."*

152. In the present petition, each of the 1st-4th petitioners were repeatedly asked not to conceive or bear any further children due to the fact their HIV status.

[70] Annexed to the affidavit of Gladys Kiio and produced in evidence as GK-007.

[71] *Public Health Rev* 38, 15 (2017), at page 9 available at https://publichealthreviews.biomedcentral.com/articles/10.1186/s40985-017-0060-9.

We ask the Court to take judicial notice of the fact that in the period after HIV was declared an epidemic, women were routinely criticized for their choice to procreate due to the stigma associated with HIV. This was based on a paternalistic and discriminatory belief that women living with HIV could not, or should, not bear children. Moreover, it was erroneously believed that women living with HIV would invariably transmit the virus to their children. These misconceptions about HIV transmission have since been debunked.[72]

153. Your Lordship will note that many of the women living with HIV who are subjected to forced and coerced sterilization are marginalized and of limited education. Like the 1st- 4th petitioners herein, these women are reliant on facilities such as the 1st respondents' clinic for antiretroviral therapy, antenatal care and food aid when they conceive. These women are in a vulnerable position because facilities such as those run by the 1st respondent, and the 2nd respondent, control how and when they receive health care and sustenance.

154. We submit that the 1st - 4th petitioners were particularly vulnerable to coerced sterilization due to their marginalized status and because they were women living with HIV. My Lord, we submit that the unlawful sterilization of the 1st -4th Petitioners was due to discrimination based on the intersecting grounds of their gender and health status: as women living with HIV.

[72] See Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO at pages 3-4 available at https://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/.

The Right to Access Information

155. The right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom is guaranteed under Article 35(1) of the Constitution of Kenya, 2010. It also applied in Kenya by virtue of Article 9(1) of the ACPHR and Article 14 of the Maputo Protocol which also provide for the right to information and education on family planning. The significance of information to reproductive health is reinforced by Article 10(h) of the CEDAW provides which requires that women have access to *"specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."*

156. My Lord, we submit that the 1st-4th petitioners required information about the procedures they were to undergo in order for them to give free and informed consent, and thus, secure their fundamental rights. In ***Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others [2013] eKLR***[73], this Court did note the importance of access to information for citizens in the exercise of their fundamental rights and freedoms. It noted that it is –

> "*beyond dispute that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. It has been recognised expressly in the Constitution of Kenya 2010, and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution.*"

[73] *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others [2013] eKLR* available at http://kenyalaw.org/caselaw/cases/view/88569/.

157. In that case, the court adopted with approval the finding of the court in ***Brummer v Minister For Social Development 2009 (II) BCLR 1075 (CC)***[74] wherein it stated that "the right to information is at the core of the exercise and enjoyment of all other rights by citizen and access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights."

158. The Special Rapporteur on Health has summarised the importance of access to information and transparency as essential features of an effective health system in his report to the seventh session of the Human Rights Council in 2008 where he stated:

> *"access to health information is an essential feature of an effective health system, as well as the right to the highest attainable standard of health. Health information enables individuals and communities to promote their own health, participate effectively, claim quality services, monitor progressive realization, expose corruption, hold those responsible to account, and so on."*

159. Without information about the type and nature of the procedure being carried out, as well as the information about the permanence of the procedure, the 1st-4th petitioners were unable to give consent at all. The 2nd and 3rd Respondents did not provide any health and or educational information or counselling to the Petitioners prior to *giving* them the forms to sign.[75] This was a violation of the 1st-4th petitioners' right to information.

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[74] *Brummer v Minister For Social Development 2009 (II) BCLR 1075 (CC) available at* http://www.saflii.org/za/cases/ZACC/2009/21.html.

[75] It is noteworthy that neither the 2nd nor 3rd respondents provided any consent forms, although they indicated that the petitioners signed consent forms.

160. Moreover, despite request for information made by the petitioners, the respondents continue to refuse to avail medical records of the procedures the petitioners underwent, in violation of both Article 35 of the Constitution of Kenya, as well as sections 4 and 9 of the Access to Information Act. This is therefore a continuing violation.

161. As it relates to the 2nd, 4th and 5th respondents, CESCR in ***General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art 12.)*** (at 35) expands the positive obligations of the state thus:

> *"States should also ensure that third parties do not limit people's access to health-related information and services. The committee has stated that it 'interprets the right to health ... as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health such as ... access to health-related education and information.'"*

162. It should be noted that the responsibility to ensure the right of access to information is both positive (in that the State is required to provide information and the means through which people can access health related information) and it is also negative (in that the State is required to ensure that there are no barriers in accessing health related information). In the present circumstances, the 2nd respondent completely failed to provide information to the 1st and 3rd petitioners prior to coercively sterilizing them. Moreover, they continue to refuse to provide this information. The 4th and 5th respondent, as state agencies have a responsibility to ensure that there is sufficient health related information available that will aid and enable the autonomous making of decisions by patients. They failed in this regard, and therefore contributed to the violation of the right to access to information of the petitioners.

163. In addition, the petitioners had no information about how they could seek recourse after they suffered violations at the hands of the 1st, 2nd and 3rd respondents. The 1st respondents witness, Beatrice (DW1) stated that the 1st respondent never received any complaints from the 1st, 2nd and 3rd petitioners about their coercion to undergo family planning. She stated further that such complaints could be received by way of a suggestion box, which was the primary manner in which complaints were reported. It is to be noted however that the Blue House Clinic served indigent women, of limited education, many of whom were like the 1st – 4th petitioners herein. It is therefore questionable that they would be able to present their complaints to the respondents by way of a suggestion box, particularly if they were not made aware of it, or had no means to engage with it.

The Right to Life

164. The violation of the right to health is tied to the right to life. This Court in ***P.A.O & 2 Others v Attorney General [2012] eKLR***[76] reaffirmed the nexus between the right to dignity, the right to health and the right to life in the following terms:

> *"In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy, and where one has an illness that is as debilitating as HIV/AIDS is now generally recognised as being, one's inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised."*

[76] *P.A.O & 2 Others v Attorney General [2012] eKLR* available at http://kenyalaw.org/caselaw/cases/view/79032.

165. Similarly, in ***Villagran Morales et al. v Guatemala, Series C, No. 63, 19 Nov. 1999***[77] the Inter-American Court of Human Rights held that:

> *"The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it."*

166. My Lord, it is our submission that the violations of the rights that we have referenced herein above led to further violations of the right to life for the 1st-4th petitioners. By being subjected to involuntary sterilisation, they have been prevented *from having access to conditions that guarantee a dignified existence* as held in the ***Villagran Morales et al. v Guatemala*** (***supra***). Moreover, they continue to suffer psychologically due the effects of sterilization on their lives. It should be noted that each of the petitioners has suffered direct consequences as a result of the forced and coerced nature of the procedures. The 1st petitioner has testified that she wishes to have more children, and that suffers from stress that her husband will desert her due to her inability to conceive.[78] The 2nd petitioner also suffers from major

[77] *Villagran Morales et al. v Guatemala, Series C, No. 63, 19 Nov. 1999 available at* https://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf.

[78] Affidavit of SWK at para. 46.

depressive disorder and requires anti-depressant medication.[79] The 3rd petitioner has also suffered strain in her marriage due to her inability to conceive and is constantly anxious due to fear that her husband may abandon her.[80] The 4th petitioner also suffers from extreme anxiety and depressive disorder, and was chased away from her matrimonial home by her husband due to her inability to conceive.[81]

167. It is apparent that the consequences of the forced and coerced sterilisation have been detrimental to the quality of life of the petitioners.

168. My Lord, one participant in the report ***Robbed of Choice: Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya*** mentioned above notes: "*The sterilization ruined my life*."[82] We ask this court to take note of challenges women face in a largely patriarchal society that Kenya is. An unsanctioned act that makes a woman lose her sense of "completeness" and in turn makes her start viewing her life as "meaningless" is a threat to her right to life, and to her quality of life.

No Reasonable Justification

169. It will be noted that there have been no reasons advanced by any of the respondents to indicate that the rights of the petitioners herein were to be

[79] Affidavit of PAM at para 31.

[80] Affidavit of GWK at para 34.

[81] Affidavit of AMM at para 26.

[82] Page 1 of Robbed of Choice: Forced and Coerced Sterilization Experiences of Women Living with HIV in Kenya.

limited. We submit that the right to freedom from torture, cruel and degrading treatment are absolute and cannot be limited, as is provided under Article 25 of the Constitution. As provided in article 24 of the Constitution, a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors. It is noteworthy that none of the respondents have advanced the position that any of the rights that they violated, and continue to violate, were justifiably limited. In the absence of any lawful justification, we submit that the 1st – 4th petitioners' rights were violated unjustifiably.

THE OBLIGATIONS OF THE 4TH AND 5TH RESPONDENTS

170. The submissions above relate to the violation of the constitutional rights of the 1st- 4th petitioners by the 1st – 3rd respondents. In the following section, we highlight the obligations of the state in the respect of the rights of the petitioners.

171. The state has a clear obligation to protect the constitutional rights and freedoms of citizens. The 4th and 5th respondents are in charge of the health sector at the county and national levels.[83] They are directly in charge of public health facilities, and they ensure that private health facilities comply with the law. Sections 14 and 15 of the Health Act set out the responsibilities for formulation and implementation of the 4th and 5th respondents. In

[83] See the Fourth Schedule of the Constitution as well as sections 15 and 20 of the Health Act.

implementation of policies, the 4th respondent is directly responsible in ensuring enforcement at the county level, whereas the 5th respondent is responsible for this function at national government level. Neither the 4th or the 5th respondents filed any documents in this court setting out how it had undertaken its obligations with the Constitution and the Health Act in carrying out its roles.

172. It is our submission that the violation of the rights of the 1st - 4th petitioners herein was the direct result of the failure, neglect and refusal by the 4th and 5th respondents to perform their supervisory duties in health services. In particular, the 2nd respondent is under direct supervisory control of the 4th respondent, whereas the 1st and 3rd respondents are to be supervised by both the 4th and 5th respondent. My Lord, we submit that the 4th and 5th respondents abdicated their duties and supervisory responsibility which has resulted in coerced sterilization of women living with HIV. We reiterate that these violations would not have occurred had the government effectively enforced the National Guidelines on Family Planning aforementioned, monitored their compliance or set up proper systems to achieve its monitoring and supervisory roles.

173. My Lord, this obligation by the state to ensure the respect and fulfilment of the constitutional rights of the petitioners is clearly provided for by the Constitution of Kenya at Article 21 and has been affirmed by various decisions by the courts in Kenya. In ***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3***

others Petition No 65 of 2010[84] the obligations of the state as regards human rights were set out in the following manner

> *"In this regard, the obligations of the State and its Organs are clear cut it must "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights" The very raison d'etre of the State is the welfare of the people and the protection of the people's rights and it is its obligation, under international and national laws, to ensure that human rights are observed, respected, and fulfilled, not only by itself but also by other actors in the country. For this purpose, it can and should regulate the conduct of non-state actors to ensure that they fulfil their obligations."*

174. This duty was further expounded ***in C.K. (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR***[85] the Court found state officers responsible for human rights violations due for their failure to perform their duties and responsibilities. The Court held that

> "*The State's duty to protect is heightened in the case of vulnerable groups such as girl-children and the State's failure to protect it need not be intentional to constitute a breach of its obligation."*

175. The Court went further to note:

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[84] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Petition No 65 of 2010* Available at http://kenyalaw.org/caselaw/cases/view/90359/.

[85] *C.K. (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR available at http://kenyalaw.org/caselaw/cases/view/89322/.*

> "*In the instant case the police owed a Constitutional duty to protect the petitioners' right and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners' fundamental rights and freedoms as entrusted in the Constitution..... the Police failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringes upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 and further by failing to enforce existing defilement laws the police have contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.*

176. The positive obligations of the state to act to protect human rights were discussed by the African Commission in ***Zimbabwe Human Rights NGO Forum v Zimbabwe 245/2 Comm. No. 245/02 (2006)*** wherein it stated that:

> *Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation."*[86]

177. In reaching its decision, the African Commission adopted with approval a judgment of the Inter American Court of Human Rights in ***Velásquez Rodríguez v Honduras Resolution No. 22/86, Case 7920***, where the Court asserted that there is state responsibility even for the actions of private

[86] *Zimbabwe Human Rights NGO Forum v Zimbabwe 245/2 Comm. No. 245/02 (2006)* at Para 143 available at https://www.achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf.

individuals. It stated that a State "*has failed to comply with [its] duty ... when the State allows "private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention*."[87]

178. The violations meted out on the 1st- 4th petitioners were as a direct result of the 4th, 5th and 6th respondent's failure to ensure compliance with the national policies through training and ensuring enforcement of the law. In questions of family planning, the 4th and 5th respondents have an obligation to ensure that services are provided to women living with HIV, and to ensure that these are not discriminatory in effect. In ***General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,*** the African Commission has reiterated the specific state obligations of state parties to "*ensure that the necessary legislative measures, administrative policies and procedures are taken to ensure that no woman is forced, because of her HIV status, disability, ethnicity or any other situation, to use specific contraceptive methods or undergo sterilization or abortion. The use of family planning/contraception and safe abortion services by women should be done with their own informed and voluntary cons*ent."[88]

179. The CEDAW Committee has set out in ***CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*** the obligation of state parties with regards to women's right to health. It has stated, that the

[87] Velásquez-Rodríguez v. Honduras, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, paras. 172-76.

[88] General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa at para. 47 available at https://www.achpr.org/legalinstruments/detail?id=13.

government obligation as regards the right of women to health is to *"eliminate discrimination against women in their access to health-care services throughout the life cycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period*."[89]

180. The CEDAW Committee further states that

> *"States parties should implement a comprehensive national strategy to promote women's health throughout their lifespan. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services.*[90]

181. This has been built upon by the CESCR in General Comment No. 14 on the Right to the Highest Attainable Standard of Health[91] on where it has been stated that

> *States should also ensure that third parties do not limit people's access to health-related information and services. The committee has stated that it "interprets the right to health ... as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health such as ... access to health-related education and information."*

[89] CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) at para. 1.

[90] CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) at para. 29.

[91] *General Comment No. 14 on the Right to the Highest Attainable Standard of Health* at para. 35.

182. We submit that had the 4th and 5th respondents undertaken their responsibilities as required by law, by putting in place structures and policies that ensure that both private (such as the 1st and 3rd respondent) and public (such as the 2nd respondent) health facilities work and respect the rights of marginalized women, then the question of the forced and coerced sterilisation of the 1st -4th petitioners, as well as that of many other women living with HIV, would not have occurred.

THE APPROPRIATE REMEDY

183. My Lord the amended petition outlines 15 prayers that are sought before the court. We list them here for ease of reference:

a. This Honourable Court declares 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 herein.

b. This Honourable Court declares that the act of threatening to withhold the provision of 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 outlined in the petition herein.

c. 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.

d. This honourable Court issues an order directing the 4th and 5th Respondents to put in place guidelines, measures and training for health care providers and social workers that are in line with FIGO guidelines on sterilization and informed consent.

e. This Honourable Court issues an order directing the 4th and 5th respondents to conduct in depth mandatory training of all practicing gynaecologists and obstetricians on the revised FIGO ethical guidelines on the performance of tubal ligation.

f. This 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. This 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. This 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 complaints 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 that the 1st, 2nd, 3rd, 4th and 5th respondents to jointly and severally pay general and exemplary damages on an aggravated scale to the 1st, 2nd, 3rd and 4th petitioners for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.

m. This Honourable court issues an order that since this Petition is in the public interest, each party should bear its 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 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 fit and just.

184. We submit that Article 23(3) is the guiding legal provision that guides the Court in determining what remedies to be granted to a party whose rights and fundamental freedoms have been threatened, infringed, denied or violated. That constitutional provision uses the term '*including'* when listing the six possible remedies that the court can grant. As such this Court has wide discretion in granting relief in claims of constitutional violations, and the prayers by the petitioners herein are well within the provisions of Article 23(3) of the Constitution.

185. We now highlight the importance of each of these prayers and why we submit that these are appropriate and necessary to remedy the infringement of the petitioners' rights.

186. The Petitioners seek declaratory orders in prayers (a), (b) and (c). On the basis of the evidence outlined above, we submit that the petitioners have proved the requirements necessary for the grant of the declaratory orders as required under Article 23(3) of the Constitution of Kenya, 2010. In addition, we have proved that the violations as committed by the respondents have been proved on a balance of probabilities.

187. Prayers (d) (e), (f), (g), (h), and (i) are remedies that mandate the respondents to take positive measures to avert future and further violations of the rights of women who may be in similar circumstances as the 1st- 4th petitioners. We reiterate the positive duty placed upon the state to take steps and put in place structures that will ensure that the rights of women living with HIV are not

violated by use of forced and coerced sterilisation. Moreover, there is a positive obligation on all health care providers to ensure that there is adequate information given to women seeking services about the health care services that they will receive and to have an accountability mechanism for any issues that may arise out of such service provision. It is in this regard that we urge this court to grant prayers (h), (i), (j) and (k).

188. My Lord with regard to the need to enact, amend or review the relevant legal and policy frameworks so as to ensure the rights of other women are safeguarded, we rely on the cases of ***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others (Supra)*** where the Court lamented the widespread forced evictions and the lack of appropriate legislative or policy framework. The Court therefore directed as follows:

> *"It is on this basis that it behooves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in* ***Articles 9*** *and* ***10*** *of the* ***Constitution."***

189. In that case, the Court found that due to the widespread evictions it was necessary to direct the Government towards an appropriate legal framework based on internationally acceptable guidelines. My Lord we submit that this dictum is informative in this case, it is necessary that the Ministry of Health, be compelled to review the National Family Planning Guidelines for Service Providers so as to ensure that the discriminatory provisions are amended and that they are in line with the Internationally accepted standards as prayed for in prayer (f).

190. My Lord, there is legal precedent demonstrating that this court can order the State to develop or review policy guidelines and regulations where the continued absence of such guidelines or regulations leads to violation of human rights. This court has issued a similar order, which was fully complied with, in the case of ***Daniel Ng'etich & Others v The Attorney General & Other [2016] eKLR***[92] as follows:

> *"That the 4th respondent [The Cabinet Secretary for Health] does, in consultation with county governments, within Ninety (90) days from the date hereof, develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and that incorporates principles from the international guidance on the involuntary confinement of individuals with TB and other infectious diseases."*[93]

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[92] *Daniel Ng'etich & Others v The Attorney General & Other [2016] eKLR available at* http://kenyalaw.org/caselaw/cases/view/127856.

[93] That Tuberculosis Isolation Policy is available at http://www.kelinkenya.org/wp-content/uploads/2018/06/Kenya-TB-Isolation-Policy-2018.pdf. in the Foreword, at Page 2, Dr Kioko Jackson, then the Minister for Medical Services outlines the steps that the Ministry of Health (the 5th respondent) took to ensure compliance with the court orders given in the Daniel Ngétich case.

191. My Lord, the International Federation of Gynecology and Obstetrics (FIGO) has formulated useful guidelines on female contraceptive sterilization that ought to be emulated in our context. The guidelines define the conditions under which consent cannot be sought in any case. Of particular importance are:

a) *Prevention of future pregnancy cannot ethically be justified as a medical emergency, and thus cannot be used as a reason for a doctor to sterilize a woman without her full, free and informed consent.*
b) *No minimum or maximum number of children may be used as criteria to sterilize a woman without her full, free and informed consent.*
c) *Only women themselves can give ethically valid consent to their own sterilization.*
d) *Women's consent to sterilization should not be made a condition of access to medical care, such as HIV treatment or of any benefit such as release from an institution.*
e) *Consent to sterilization should not be requested when women may be vulnerable, such as when requesting termination for pregnancy, going into labour or in the aftermath of delivery.*
f) *As for all non-emergency medical procedures, women should be adequately informed of all the risks and benefits of any proposed procedure and of its alternatives; and*
g) *The right of all persons with disabilities who are of marriageable age to marry and to found a family is recognized.*
h) *All information must be provided in a language, both spoken and written, that the women understand and in an accessible format such as sign language, braille and plain non- technical language appropriate to the individual woman's need.*

192. My Lord, we submit that an adoption of guidelines that are in line with the FIGO guidelines on sterilization and informed consent is of utmost

importance to prevent future violations of reproductive health rights of women – especially those living with HIV.

193. My Lord with regard to prayer (k) that calls on the court to compel the 5th respondent to issue a circular directing all medical and health facilities that the forceful and coercive sterilization of women living with HIV is not a government policy. We submit that in the circumstances with due consideration to the potential for women living with HIV to be exposed to stigma and discrimination on the basis of their health status, it is necessary for this Court to intervene in ensuring that a judgment in favour of the petitioners is widely publicised.

194. In ***Prakash Singh & Ors v Union Of India And Ors the Supreme Court of India*** delivered judgment instructing central and state governments to comply with a set of seven directives laying down practical mechanisms to kick-start police reform. The Court held that:

> *"Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the*

Central Government and/or the State Governments pass the requisite legislations."[94]

195. My Lord we submit that the circumstances in this case possess the gravity and urgency described above and require intervention of this Court. My Lord it bears repetition that one of the national values is the protection of the marginalized. It can also not be gainsaid that persons living with HIV continue to be vulnerable, due to the high level of stigma associated with HIV as well as socio-economic factors which predispose them to further marginalization and discrimination in society. My Lord we submit that given the vulnerability of the 1st - 4th Petitioners and others who may be in similar circumstances this Court must intervene in ensuring they are protected from any continued violation of their rights.

196. My Lord, it is our humble submission that this court has the power to order the 5th Respondents to issue a circular to health care facilities directing them to stop doing acts which have been found unconstitutional by the court. My Lord, a great injustice would be occasioned if after the order of unconstitutionality has been given, state officers, their agents or other entities within their supervisory control continue with this practice of forced & coerced tubal ligation of women living with HIV. There exists a possibility that health care workers may continue carry out this inhuman and degrading practice even after the court makes its decision finding it illegal and unconstitutional. The order as to a circular will ensure that the court does not issue orders in vain and that clear timelines as to implementation of the order

[94] Prakash Singh & Ors vs Union Of India And Ors on 22 September, 2006 available at https://indiankanoon.org/doc/1090328/.

are provided for. This will also ensure that healthcare workers both in the private and public sector are still not under the impression that it is legal to implement unconstitutional directives or practices, and are equally apprised of the dangers of implementing unconstitutional directives or practices. As we have demonstrated above, there is precedent for such an order having been granted by this Court and fully complied with by the 5th respondent in ***Daniel Ng'etich & Others v The Attorney General & Others (supra).***

197. My Lord with regard to prayer (i) that seeks to compel the respondents to pay general and exemplary damages on an aggravated scale to the 1st – 4th petitioners for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization. We submit that My Lord, it is our submission that the violations of the human and constitutional rights of the 1st – 4th petitioners entitle them to both general and exemplary damages and that this would constitute appropriate redress for the infringement of their rights as individuals. This Court is properly placed to award damages in such a case involving gross violation of human and constitutional rights as provided under Article 23(3) (e) states: *In any proceedings brought under Article 22, a court may grant appropriate relief, including an order for compensation.*

198. In ***Dick Joel Omondi v Hon. Attorney General [2013] eKLR*** the Court stated:

> *"It is now settled law that a party whose constitutional rights are found to have been violated by the state is entitled to damages. The quantum of damages is in the discretion of the Court, taking into account the nature of the violations."*[95]

[95] *Dick Joel Omondi v Hon. Attorney General [2013] eKLR available at* *http://kenyalaw.org/caselaw/cases/view/93333/.*

199. Other jurisdictions have awarded damages for sterilization without informed consent. In ***Government of Namibia v LM & others (supra)*** the Namibian Supreme Court awarded damages for the infringement of human rights of the plaintiffs who had been subjected to forced and coerced sterilisation and referred the matter back to the High Court for determination of quantum.

200. Similarly, in ***Isaacs v Pandie, [2012] ZAWCHC 47***[96]***,*** the High Court of South Africa in 2012 found the applicant had been sterilized without informed consent and awarded damages for past medical expenses, general damages, future medical expenses and loss of earnings in the amount of R410,172.35.[97] It is noteworthy that while the underlying legal finding was overturned on appeal, the quantum of damages was not reviewed.

201. In Canada, the Court in ***Muir v The Queen in right of Alberta, 132 D.L.R. (4th) 695***[98] awarded a woman who had been subjected to sterilization without her informed consent $375,280[99] (Canadian dollars). In reaching this amount the Court awarded the plaintiff $250,280 for her pain and suffering and awarded her aggravated damages in the amount of $125 000 because of the stigma and humiliation she experienced as she had been sterilized ostensibly due to an intellectual disability.

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[96] *Isaacs v Pandie [2012] ZAWCHC 47 available at* http://www.saflii.org/za/cases/ZAWCHC/2012/47.html.

[97] Approximately Kshs 3,015,174 as at January 2021.

[98] *Muir v The Queen in right of Alberta, 132 D.L.R. (4th) 695 available at* https://eugenicsnewgenics.files.wordpress.com/2014/01/muir-v-alberta.pdf.

[99] Approximately 32,218,020 as at January 2021.

202. We submit that the 1st – 4th petitioners will no longer be able to conceive and bear children, depriving them of a deeply intimate part of their humanity. They continue to suffer mental illness, disharmony in their relationships and shame and humiliation. Had it not been for the 1st, 2nd and 3rd respondent's actions, as well as the 4th and 5th respondent's failure to carry out their constitutional and statutory mandates, the 1st- 4th petitioners would not have undergone the forced and coerced sterilization. It is also noted that the procedures are effectively permanent in nature, and any chance of reversal has extremely limited possibility of success. Effectively, if the 1st – 4th petitioners are to ever have a chance at conceiving, they would have to do so through in vitro fertilization. Again, were it not for actions of the 1st – 3rd respondents, and the inaction of the 4th and 5th respondents, the petitioners would not even have to consider these options, which are well out of their means. We humbly submit that any compensation award takes into account not only these petitioner's pain and suffering but also the cost of in vitro fertilization in order to provide meaningful redress.

203. In this regard, we urge the Court to take guidance from the various authorities of this Court where global awards of damages have been made after taking into account the nature of the violations and the circumstances of the plaintiffs, or petitioners, as the case may be. In ***Wachira Weheire v Attorney-General [2010] eKLR (Miscellaneous Civil Case 1184 of 2003)***[100], this Court made an award of Kshs 2,500,000.00 to a petitioner whose rights to liberty and freedom from cruel, inhuman and degrading treatment were violated. In ***GSN v Nairobi Hospital & 2 others (supra),*** this court made an award of Kshs

[100] ***Wachira Weheire v Attorney-General [2010] eKLR (Miscellaneous Civil Case 1184 of 2003) available at*** http://kenyalaw.org/caselaw/cases/view/66294.

2,000,000.00 to a petitioner who had suffered physical and psychological suffering as a result of the violations of her right to privacy.

204. In cases where there have been multiple constitutional violations, or where the effect of the violations are prolonged, courts have rightly made higher awards. In ***Michael Rubia v Attorney General [2020] eKLR (Petition No 10 of 2013),***[101] the court awarded the sum of Kshs 17,000,000.00 to the estate of the petitioner as general damages for the violation of his constitutional right to liberty for a period of 9 months. This was also the approach taken by this court in ***Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR (Constitutional Petition 441 of 2015)***[102] where the petitioners were awarded Kshs 20,000,000.00 each as damages for the violation of their rights under section 72 and 74 of the retired Constitution. This approach was cemented in law by the Court of Appeal in ***Koigi Wamwere v Attorney General [2015] eKLR (Civil Appeal 86 of 2013)***[103] where the Court found that a lower sum than Kshs 12,000,000.00 for the violations under section 74 of the retired Constitution were patently inadequate.

205. My Lord, we submit that guided by the authorities above, this court ought to consider the myriad and continuing violations that the 1st – 4th petitioners suffered, and continue to suffer and award the sum of Kshs 30,000,000.00 for each of the 1st – 4th petitioners.

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[101] ***Michael Rubia v Attorney General [2020] eKLR (Petition NO. 10 of 2013 available at http://kenyalaw.org/caselaw/cases/view/192889.***

[102] Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR available at http://kenyalaw.org/caselaw/cases/view/168130/.

[103] Koigi Wamwere v Attorney General [2015] eKLR (Civil Appeal 86 of 2013) available at http://kenyalaw.org/caselaw/cases/view/106472.

206. My Lord with regard to prayer (m) we submit that given this Petition is brought in the public interest, each party should bear their own costs. We are guided by ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR***[104] where the Supreme Court held that:

> *"Just as in the Presidential election case, Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making. The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs."*

207. My Lord with regards to prayer (n) we submit that guidance is to be taken from the crafting of the order in ***Daniel Ng'etich & Others v The Attorney General (supra)*** and ***Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*** where the Court crafted orders with timelines whereby the respondents were required to file affidavits that allowed the Court to monitor compliance with its judgment. The application of these structural orders and reliefs were considered to be appropriate by the Supreme Court of Kenya in ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR***.[105]

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[104] *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR* available at http://kenyalaw.org/caselaw/cases/view/95668/.

[105] ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR*** available at http://kenyalaw.org/caselaw/cases/view/205900/.

208. We submit that in this matter such an order is necessary to ensure compliance within a reasonable period of time and to guarantee that another ruling of this Court does not go unenforced, and in this regard, we urge this Court to take judicial notice of the increased non-compliance of court orders by the State.

209. In light of the analysis of the facts of the amended petition as well as the law and authority we have set out, we therefore submit that the amended petition be allowed as prayed.

These are our humble submissions.

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