

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
**CONSTITUTIONAL PETITION NO. 447 OF 2018**

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLES 27, 28, 29, 31, 32, 43(1) (A), 45, 49, 50(2)  
AND 53 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE CONSTITUTIONALITY OF SECTION 26 OF THE  
SEXUAL OFFENCES ACT NO. 3 OF 2006

IN THE MATTER OF: DEFENCE OF THE CONSTITUTION UNDER ARTICLE  
3 (1)

IN THE MATTER OF: INTERPRETATION, ENFORCEMENT AND  
PROTECTION OF THE BILL OF RIGHTS UNDER  
ARTICLES 19, 20, 22, 23, 24, 165, 258 AND 259 OF THE  
CONSTITUTION

**BETWEEN**

EM.....1<sup>ST</sup> PETITIONER

SN.....2<sup>ND</sup> PETITIONER

**VERSUS**

THE ATTORNEY –GENERAL.....1<sup>ST</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT

**AND**

NATIONAL AIDS CONTROL COUNCIL.....INTERESTED PARTY

## INTERESTED PARTY'S REPLYING AFFIDAVIT

I, **Dr. Ruth Laibon-Masha** of Post Office Box Number 61307-00200, Nairobi and resident of Nairobi within the Republic of Kenya do hereby make oath and state as follows: -

1. **THAT** I am the Chief Executive Officer of the Interested Party fully seized of the facts of this matter by virtue of my position and thus competent to swear this Affidavit.
2. **THAT** I have read the petition and the supporting affidavits of the petitioners and the same having been further explained to me by Counsel on record, I wish to respond as follows:
3. **THAT** the National AIDS Control Council (herein NACC) is a State Corporation under the Ministry of Health responsible for coordinating a multi-sectoral response to HIV and AIDS in Kenya. In doing so NACC is vested with the mandate to provide policy and strategic framework for mobilizing and coordinating resources for the prevention of HIV transmission and providing care and support to infected and affected persons in Kenya.
4. **THAT** HIV and AIDS as a global epidemic remains a major public health challenge with 38 Million (36.2 million adults and 1.8 million children) people living with HIV, 1.7 million new infections annually and 690,000 AIDS related deaths annually (UNAIDS, 2020). In Kenya, about 1.5 million people are living with HIV, 41,000 people (6,806 children and 34,610 adults) are newly infected with HIV every year and 21,000 (4,333 children and 16,664) Kenyans die of HIV related causes every year.
5. **THAT** according to the Kenya Population-based HIV Impact Assessment (KENPHIA) 2018 survey, the prevalence of HIV in women (15 – 65 years) is at 6.6%, twice that in men (15 – 64 years) at 3.1%, thereby making women and young girls a more vulnerable group in need of state protection. *(Annexed and marked "RLM-1" is the KENPHIA 2018 Preliminary Report.*



6. **THAT** further to the fulfillment and protection of the right to health under Article 43 of the Constitution, one of the premises for inclusion of section 26 stemmed from anecdotal incidents of deliberate HIV transmission including myths of “Virgin cleansing of HIV”. The State responded to the rising cases of sexual violence in Kenya among vulnerable groups particularly women and children, by criminalizing deliberate transmission of HIV within the ambit of sexual offences.
7. **THAT** despite progressing policies in Kenya, gender-based and other forms of violence against key and vulnerable populations remain high; sexual violence constitutes a human rights violation that not only impedes progress in ending the HIV epidemic but also in alleviating poverty and promoting peace and security, as such there is need to protect human rights and eliminate all forms of violence and the Sexual Offences Act provides one such avenue of protection. *(Annexed and marked “RLM-2” is the Kenya AIDS Strategic Framework (KASF II) for 2020/21 to 2024/25 showing the link between sexual violence and HIV)*
8. **THAT** a multi-sectoral approach to reducing HIV and AIDS prevalence in Kenya including enhancing the legal and policy environment for vulnerable groups who have heightened risks of HIV infection or aggravated violations and promoting legal redressal mechanisms against HIV related violations and gender based violence has witnessed a tremendous decrease in HIV prevalence in the country, decrease in new infections as well as increase in the uptake of HIV care and support services by persons living with HIV. *(Annexed and marked “RLM-2” is the Kenya AIDS Strategic Framework (KASF II) for 2020/21 to 2024/25 showing the progress and trends in the HIV response against the country commitments)*
9. **THAT** over the last three decades, Kenya has made tremendous progress in the HIV response as evidenced by current trends in HIV. According to the Kenya HIV Estimates 2020, there has been a 44% reduction in new HIV infections from a high of 75,000 in 2010 to 41,416 in 2019. AIDS-related deaths declined by 59% over the same period, which is attributed to the significant increase in the number of people on treatment which was at 1,160,479 by the end of 2019. *(Annexed and marked “RLM-3” is the Kenya HIV Estimates Report 2020 showing HIV prevalence and incidence trends in Kenya.)*

10. **THAT** the responsibility to protect citizens against perilous acts that may include deliberate infection lies with the State. Thus, the implementation of section 26 is not solely directed towards persons living with HIV but to the general population with the intention of establishing the criminal consequences of the abusive and harmful exercise thereof with regard to the rights of others and of the community.
11. **THAT** I am advised by Counsel on record that the penalty established under section 26 (1) (c) does not constitute discrimination against persons living with HIV merely due to their health status since it seeks to penalize malafide actors who, although aware of their condition, decide to infect, adversely affect and endanger the health and lives of others. The Sexual Offences Act no.3 of 2006 Laws of Kenya, was enacted to identify, prevent and respond to rising cases of sexual violence in Kenya. Precisely, the law was enacted to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts and for connected purposes.
12. **THAT** I am advised by Counsel on record that section 26 does not violate the petitioners' rights as described under paragraph 19 of their petition since the enjoyment of the said rights is constrained by respect for the rights of others, and all persons including those living with HIV may enjoy their sexuality without endangering the lives of others by taking the required precautions.
13. **THAT** I am advised by Counsel on record that the interpretation of statute is guided by literal, golden and mischief rules; where the first application should always be the literal rule which gives the clear and precise definition and engagement of a word or phrase. As such, applying the literal rule, the provisions of section 26 are clearly and precisely worded.
14. **THAT** I am advised by Counsel on record that the provisions of Article 20 (2) and 24 (1) of the Constitution guarantee every person to enjoy the rights and fundamental freedoms in the Bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom, and that the enjoyment of ones' rights should not prejudice the rights and fundamental freedoms of others.



15. **THAT** I am advised by Counsel on record that the application of section 26 of the Sexual Offences Act No. 3 of 2006 does not impede and or act as a barrier to the enjoyment of rights and fundamental freedoms by the petitioners since the provisions and wording used thereto are clear, precise, unequivocal and do not in any way purport or intend to harm or discriminate the petitioners.
  
16. **THAT** I am advised by Counsel on record that every legally enacted statute enjoys the presumption of legality and the petition dated 10<sup>th</sup> October, 2018 has not sufficiently rebutted this presumption.
  
17. **THAT** I am also advised by Counsel on record that the Constitution and any other legislation should be given a purposive interpretation which conforms with the provisions of Article 259 of the Constitution.
  
18. **THAT** I therefore believe that the petitioners have not established a case to warrant grant of the prayers sought, I pray to court to decline to grant this petition and dismiss it in its entirety.
  
19. **THAT** what is stated herein is true to the best of my knowledge, information and belief save where I have relied on information and advice which I have duly disclosed the source of such information and belief.

SWORN at NAIROBI ]

This 17<sup>th</sup> day of May, 2021 ]

By the said ]

**Dr. Ruth Laibon-Masha** ]

**Njeri Kimuri** ]

**Advocate** ]

**Commissioner for Oaths** ]

**COMMISSIONER FOR OATHS**



DEPONENT

BEFORE ME  
P.O. Box 61397-00200 NAIROBI