

**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
INITIATIVE 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**

5TH & 6TH RESPONDENTS' SUBMSISIONS

1. My Lord these Submissions are done in opposition to the Amended Petition dated September 10, 2015, filed herein; and as against the 5th and 6th Respondents [hereinafter referred to as 'Respondents'].

The Case Against the Respondents'

2. The gist of the Petitioners claims against the Respondents is captured in their Written Submissions as filed herein dated March 25, 2021. Specifically, at pages 73 to 79; which contain paragraphs 170 to 182. My Lord throughout the Amended Petition dated the 5th Respondents is only mentioned at the Party's description part and in the part listing the various Prayers that are being sought. The 6th Respondent is only mentioned at the Party's description part.
3. My Lord it is the Petitioners case against the Respondents that: -
 - a. The Respondents, being state agents, ought to have provided information on family planning options to the Petitioners, to assist them make autonomous decisions on the available options and their consequences;
 - b. It is the Responsibility of Respondents to ensure that private facilities comply with the law; in this case the various laws that govern institutions providing health care to the public. The Petitioners allege that it is failure on part of the Respondents to implement the law that necessitated the violation of the Petitioners rights;
 - c. The violation of the Petitioners rights was a result of failure by the Respondents to perform their supervisory duties over health care providers, both public and private. That the Respondents abdicated their duty to supervise health care providers and their resulted into the exposé of the Petitioners to violation;
 - d. That the Respondents failed to fully implement the National Guidelines on Family Planning of 2010 and put in place the relevant administrative [reporting, monitoring and evaluation] structures / systems; thus exposing the Petitioner to violation.
 - e. That the government has a positive duty to protect the rights of its citizens and this includes the Petitioners herein. That this was held in the case of *Satrose Ayuma & 11 Others vs. Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 3 Others, Petition No. 65 of 2010.*
4. My Lord in the ultimate the Petitioners seek the following Orders and Declarations against the Respondents: -

- a. That the Respondents do 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.
- b. That the Respondents do conduct in depth mandatory training of all practicing gynecologists and obstetricians on the revised FIGO ethical guidelines on the performance of tubal ligation.
- c. That the 5th Respondent is ordered and directed to review the National Family Planning Guidelines for Service Providers to address the provisions that are discriminatory.
- d. This Honourable Court issue an order directing that there be instituted a mandatory forty-eight (48) hours waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery.
- e. 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.
- f. This Honourable Court issues an order directing the 4th and 5th Respondents to establish clear procedural guidelines for following up on complaints of rights violations and strengthen administrative accountability at hospitals.
- g. This Honourable Court issues an order directing the 2nd, 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.
- h. 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.
- i. This Honourable Court is pleased to order the 1st, 2nd, 3rd, 4th and 5th Respondents to jointly and severally pay general and exemplary damages on an aggravated scale to the 1st, 2nd, 3rd and 4th Petitioners for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.
- j. This Honorable Court issues an order directing the Respondents within 90 days of the Court Judgment to file affidavits in this Court detailing out their compliance with orders with the Orders and Declarations, as will be rendered by this Court.
- k. This Honourable Court be pleased to make such other orders as it shall deem fit and just.

5. My Lord the issue relevant to the violations levelled against the Respondents is captured in para. 44(d) of the Petitioners Written Submissions of March 25, 2021 as thus: -

‘Whether the 4th, 5th and 6th Respondents violated their statutory and constitutional obligations to protect the constitutional rights of the 1st to 4th Petitioners.’

Responses in Reply

6. My Lord the main issue, cutting across the petition, the witness statements, the affidavits filed herein by the Petitioners, is an allegation that Bilateral Tubal Ligation was conducted on the them without their voluntary and informed consent. Further that this surgical procedure was conducted on them because of their HIV statutes.
7. My Lord, it is our case that: -
- a. The Respondents were not parties to the actions complained of by the Petitioners. They were not privy to the arrangement and the alleged contractual understand between the individual petitioners and the individual health facilities. Consequently, no constitutional claim can arise against the Respondents in the circumstances;
 - b. The Respondents are not responsible for the consequences of the private actions of the individual Petitioners and the health facilities complained of. The two parties are legal persons capable enforcing constitutional rights, as against one another without the involvement of the Respondents;
 - c. The Petitioners have not demonstrated in any way the how the actions / inaction of the Respondents violated their constitutional rights. Specifically, and arising from the framed issue, they do not disclose which particular statute or constitutional provision that the Respondents failed to uphold – a consequence of which the Petitioners rights were violated;
 - d. The Petition is non justiciable, as against the Respondents. It dwells on an alleged failure to act or legislate or generate a policy on part of the Respondents which results in to their violation. At best this is conjecture because it is a negative being incapable of being proved in a court of law;
 - e. The Petition does not raise any constitutional issues but issues in the domain of tort law which are sufficiently remedied through procedures provided for by statute and professions bodies;

f. The Petition alleges violation on part of the Respondents for inaction;

Respondents' not Privy to the Arrangement between the Petitioners and 1st Respondent to 4th Respondents –

8. My Lord from the testimonies and statements of the 1st to 4th Petitioners, it is clear that the Respondents were not privy to the arrangements between the 1st to 4th Petitioners and the 1st to 3rd Respondents. My Lord the Respondents were not party to these agreements and therefore no responsibility, constitutional or statutory or any other, can be assigned to them *post facto*, and as a result of the unpleasant consequences of their private actions.

a. In respect to SWK, the 1st Petitioner, she testified that she was attending her prenatal clinics at MSF, the 1st Respondent, and was referred to Pumwani Maternity Hospital, the 2nd Respondent for delivery. She testified that she was given a document to sign on her way to theatre to deliver. A document that she signed but did not understand its contents. She realized later upon examination by Dr. Khisia that she had been ligated. She did not produce the letter of referral from MSF to Pumwani.

b. In respect to PAK, the 2nd Petitioner, she alleges to have undergone BTL at Huruma Clinic which she consented to.

c. In respect to GWK, the 3rd Petitioner, who is educated up to form 4, she confirms that in deed she spoke to a nurse working for the 2nd Respondent; and signed some documents. She also confirmed that she told the nurse that she did not intend to have more children. She also alleges that she did not understand the content of the documents she signed. At para. 25 of her affidavit in support of the petition she confirms that a Dr. Langat performed the caesarean section procedure on her, at Pumwani Hospital.

d. In respect to AMM, the 4th Petitioner, at para. 17 of her affidavit in support of the petition swore that BTL was done at Huruma Lions Health Centre in Huruma which was conducted by Marie Stopes, the 3rd Respondent herein.

9. Under Article 260 of the Constitution, all the parties involved in the above captioned arrangements are legal persons *sui generis* and they can pursue their constitutional and statutory rights privately, before this Court or any other forum – without necessary dragging the 5th and 6th Respondents into their fray. This has

been held by this Court before, Lenaola J in the Satrose Ayuma Case at Paragraph 59 states that: -

*It also seems clear to me therefore that from a wide definition of the term “person” as contained in **Article 260**, the intention of the framers of the Constitution was to have both a vertical and a horizontal application of the Bill of Rights. I therefore find that the Petitioners are entitled to file a claim under **Article 22** before this Court alleging a violation of the Petitioners rights by any of the Respondents, and the Court can properly grant an appropriate relief as envisaged by **Article 23** of the **Constitution**. I hope this settles the issue once and for all in as far as the views of this Court are concerned.’*

Regulation of the Conduct and Discipline of Health Facilities and Professionals

10. My Lord if in deed the Petitioners were ligated without their unequivocal consent, the questions arising from the conduct of the healthcare workers and healthcare facilities involved should be a question to be determined by the Council, established under section 4 of the Medical Practitioner and Dentists Act, Cap. 253 Laws of Kenya. It raises no constitutional issues.
11. My Lord the question as to whether consent to carry out the BTL procedure on the affected Petitioners presents two challenges. One, it is not clear what form the consent took. Two, the Petitioners were not able to identify the doctors who conducted the procedure. This challenge is exacerbated by the fact that all the Petitioners feigned ignorance. That they were not able to read or discern the meaning of the initials BTL. My Lord to determine whether in deed the consent was issued or not could only have been determined by the right forum, which is Council under Cap. 253. Under the repealed law the Board carried out the functions of the Council.
12. My Lord there is no lacuna in the law as regards the regulation and discipline of health facilities in this country. Equally, My Lord there is no void in respect to the regulation and discipline of health professionals. Under section 4 of Cap. 253, the Council is the statutory body tasked with: -

- a. Regulating the conduct of all registered medical and dental practitioners as well as taking such disciplinary measures for any form of professional misconduct;
 - b. The inspection of all health facilities with the aim of ensuring that they are compliant with all laws and regulations;
 - c. Regulating health institutions and taking disciplinary action for any form of misconduct.
13. My Lord under Section 20 of Cap. 253, the Council is again given the statutory mandate of receiving and processing complaints from the public. The Act provides that any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person, may lodge a complaint in the prescribed manner to the Council for purposes of making an inquiry into any complaint of professional misconduct, malpractice or any breach of standards. Where the Council determines that the complaint is merit it has a raft of remedies including giving a reprimand, cancelling one's license, suspending the license for a period and giving one a probation period.
14. It is our submission that the Petitioners were under duty to formally lodge their complaints against the individual hospitals and the individual doctors who carried out the alleged BTL on them. Filing a constitutional petition before this Court is an abuse of process. This is contrary to the holding in *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*, in a Trinidad and Tobago case of *Harrkinson vs Attorney General of Trinidad and Tobago (1980) AC* and in *Alphonse Mwangemi Munga & 10 others vs African Safari Club [2008] eKLR* where the courts held that '...there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.'
15. Justice W Korir in *South B Hospital v Medical Practitioners and Dentist Board & Peterson Kyalo (On behalf of the late Stella Muthen Kioko) [2021] eKLR* delved into the function and mandate of the Council, where he dismissed the Petitioner's claim for attempting to circumvent statutory procedure. In part the Learned Judge holds: -

- a. *Para. 37 - In the case before this Court the Petitioner avoided a clear statutory appellate mechanism and opted for a constitutional petition. The Petitioner may indeed have valid complaints in the manner in which the complaint of the 2nd Respondent was handled by the Board. The issues raised by the Petitioner may indeed have a nexus with the Bill of Rights. Nevertheless, nearly all cases have connection to constitutional provisions. The danger in entertaining the strategy adopted by the Petitioner is that all parties aggrieved by the decisions of subordinate courts and tribunals will avoid the review and appellate mechanisms and try their luck through constitutional petitions resulting in chaos in the manner in which law is practiced in this country.*
- b. *Para. 38 - The respondents have indeed successfully established that the Petitioner was aware of the decision of the Board by 16th November, 2017 and did nothing up to early 2019. The Petitioner could have moved the High Court for leave to appeal out of time but it did not do so. It would amount to an abuse of the court process to entertain this matter as a constitutional petition considering that the Petitioner intentionally failed to exercise the right of appeal.*
- c. *Para. 47 - I have reviewed the submissions of the parties on this issue. It is clear that Section 4 of the Medical Practitioners and Dentists Act establishes the Board whose mandate includes the licensing and registration of medical and dental practitioners, licensing health institutions, licensing of medical training institutions and conducting inquiries on complaints lodged against medical and dental practitioners and medical institutions. Rule 4(1) as read with Rule 10P of the Disciplinary Proceedings Rules gives the Committee powers to receive and review complaints against medical or dentist practitioners of a medical institution.*
- d. *Para. 48 - The 2nd Respondent's complaint was against the Petitioner and not a particular doctor, dentist, nurse or laboratory technician working for the Petitioner. The deceased had gone to seek medical services from the Petitioner and not from a specific practitioner. The 2nd Respondent was therefore entitled to complain against the Petitioner to its licensing authority being the Board. The Board is expressly mandated by Section 4(k) to register and license health institutions. Section 4(m) mandates the Board to regulate health institutions and take disciplinary action for any form of misconduct by a health institution. This is what the Board did in the circumstances of this case and it is not correct to say that it had no jurisdiction to conduct disciplinary proceedings against the Petitioner. If the*

Petitioner was of the view that it was let down by its nurses and laboratory technicians, then it ought to have taken up the issue with their licensing bodies.

16. My Lord we submit, relying on the foregoing authorities, that it is the Council that is clothed with the statutory mandate and the right technical expertise to deal with issues of misconduct arising from the conduct of healthcare workers and healthcare facilities, if at all they carried out the alleged BTL on the Petitioner. Unfortunately, from their testimony in court and their statements, no complaint was lodged.
17. We urge this Court to dismiss the Petitioners claim for being in the wrong forum and for being an abuse to this Court's process.

Imprecise Pleading

i. No Statute or Constitutional Article Pleaded

18. My Lord the issue relevant to the violations levelled against the Respondents is captured in para. 44(d) of the Petitioners Written Submissions. The Petitioner argues that 4th, 5th and 6th Respondents violated their Statutory and Constitutional obligations to protect the constitutional rights of the 1st petitioner.
19. My Lord the relevant part of the Petitioner's Written Submissions focusing on the Respondents is between Paras. 170 -182.
20. My Lord there is no mention of a single statute / legislation that the Respondents did not comply with or they failed to comply with and as a result the Petitioner was violated. Equally, My Lord, there is no mention of a single constitutional provisions. This is a demonstrates the point of imprecise and / or omnibus pleading.
21. To the extent that the Petitioner fails to identify the specific legislation or Articles of the Constitution that were violated by the Respondents' alleged actions and inaction, the Petition fails the test established by the Court of Appeal in the *Mumo Matemu-Vs- Trusted Society of human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR* that pleadings must be done with precision in order to elicit precise responses.

ii. National Policy

22. My Lord a reading through paras. 170 through to 182 leads to the conclusion that the complaint raised against the Respondents is that they failed, neglected and refused to formulate healthcare policies to protect vulnerable persons in the category of the Petitioner. Further that they have failed, neglected and refused to supervise healthcare personnel and facilities in the country and thereby exposed persons in the category of the Petitioner to exploitation, abuse and violation. My Lord these allegations are not only omnibus and therefore incapable of attracting responses, but they are generally not correct. My Lord, from the Petitioner's written submissions at paragraphs 59 and 60 it is acknowledged, in the following terms, that we have National Family Planning Guidelines.

a. *Para. 59 - **The National Family Planning Guidelines 4th Edition (2010)** emphasize 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 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.” (emphasis ours)

b. *Para. 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**: -*

“[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 inducement, force, fraud, deceit, duress, bias, or other forms of coercion or misrepresentation.”

23. My Lord Foot Note 23, 24 and 25 on the Petitioner's Written Submissions acknowledge that the Respondents have been reviewing the Guidelines every time when it is necessary to catch up with the world's best practices as distilled by the World Health Organization. It is acknowledged by the Petitioner that our 2010 National Family Planning Guidelines for Service Providers (2010) were

updated to reflect the 2015 Medical Eligibility Criteria (for BTL) of the World Health Organization.

24. Do the Respondents need to formulate any new or more policies on family planning? No. The Petitioner has not given any reasons why that should be done. Further, this question is outside the jurisdiction of this Court. This Court cannot make a determine when policy should be review. This Court should avoid and defer the same to the Executive Arm of Government.

25. My Lord in the testimony of Dr. Fred Oyombe i.e. DW – 3, in cross examination by the 5th and 6th Respondents, confirmed that the *National Family Planning Guidelines for Service Providers* sufficiently cover for the provision of family planning options including BTL. He confirmed that they do not require any amendments. He confirmed that it counselling before any procedure is done is mandatory and he testified that coercion in family planning is prohibited by the Guidelines. My Lord Dr. Khisia did not raise any concerns on the alleged inadequacy of our National Policy.

26. Separately My Lord in the testimony of Gladys Kiio, PW 6, at pages 158 the opening paragraph, it is reported that: -

We sought responses from a number of healthcare facilities mentioned in the Report. Kenyatta National Hospital did not give any formal written response but verbally denied that such cases happened in their facilities and reiterated that it is against the hospital's policy to forcibly sterilize any patient.'

27. My Lord the above policy statement from Kenyatta National Hospital should be looked at in relation to the testimony of 'Caro' at page 23 of the Report, where she states that the doctor who operated her was from Kenyatta National Hospital. This goes to confirm that it is fair to hold individual practitioners accountable for their professional conduct, other than giving general condemnation to an entire institution.

iii. Relevant Legislation

28. My Lord statutes form part of the national policy on issues they are legislated on. In respect to the regulation of the conduct of healthcare facilities and workers

we have in place the Medical Practitioner and Dentists Act, Cap. 253 Laws of Kenya; and as submitted hereinabove, the Council established under Section 4 of this Act registers, regulates the operations, disciplines the healthcare facilities and workers. Any complaints made to the Council are heard and determinations made. The decisions of the Council are subject to an appellate process in the High Court.

29. Secondly, we have the *Health Act, 2017* which provides under section 6 and 9 that - Every person has a right to reproductive health care which includes — Reproductive health - (a) the right of men and women of reproductive age to be informed about, and to have access to reproductive health services including to safe, effective, affordable and acceptable family planning services. Section 9 provides that - No specified health service may be provided to a patient without the patient's informed consent.

iv. The Constitution

30. It is urged by the Petitioner that it is the obligation of the state to ensure the respect and fulfilment of her constitutional rights under Article 21 of the Constitution. The case of *Satrose Ayuma* is cited to support this submission. My Lord while the Petitioner will want to read only Sub-Article 1, the remains Sub Articles of Article 21, as read together with Article 3(1) of the Constitution, will give a proper direction on the position of Government in matters such as this.

31. Article 21(2) of the Constitution decrees that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43 [the highest attainable standard of health, which includes the right to health care services, including reproductive health care], Sub Article 3 - All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, Sub Article 4 - The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

32. My Lord as submitted hereinabove the State i.e. the Respondents have in discharging their mandate under Article 21 taken deliberate steps and made plausible amendments to the Medical Practitioner and Dentists Act, Cap. 253 Laws of Kenya. Further My Lord, as admitted by the Petitioners, the ***National Family Planning Guidelines for Service Providers 6th Edition*** were updated to reflect the 2015 Medical Eligibility Criteria (for BTL) of the World Health Organization. Lastly My Lord, we now have the Health Act, 2017 which is very particular at Section 6 and 9 of what a consent to medical procedure should entail in law.

33. My Lord in ***Zeitun Juma Hassan Petitioning On Behalf of the Estate of Abdul Ramadhan Biringe (Deceased) vs. Attorney General & 4 Others [2014] eKLR*** it was stated: -

Para. 23 - "23. Apart from ensuring that every person enjoys the right to life to the fullest extent, the right to life imposes a positive duty on the State to protect the right to life by enacting laws that protect life which are backed by effective law enforcement machinery for the prevention, suppression and sanctioning of breaches of such laws."

34. My Lord by enacting the relevant laws that regulate the health sector i.e. personnel and facilities; and by enacting the Health Act, 2017 with clear definition of what consent is and lastly by reaffirming the application of the comprehensive ***National Family Planning Guidelines for Service Providers 6th Edition*** which has been synched with the 2015 Medical Eligibility Criteria (for BTL) of the World Health Organization, the Respondents have discharged their statutory and constitutional mandates. They have equally joined other nations under the United Nations in comity by aligning the National Policy with the international best practices as proposed by the World Health Organization.

35. My Lord the case of ***Satrose Ayuma*** is inapplicable in this circumstances. It is distinguishable. My Lord the issue in question in the ***Satrose Ayuma Case*** was an impending eviction of squatters from, what we now know as Muthurwa in Nairobi. The land belonged to the Pension Scheme of Retirees of Kenya Railways. The threat of eviction was real. The ownership of land was determinable; the question arose as to how those evictions should be carried out. We had an Eviction Bill. It is yet to become law, but it is explicit on the protection of the rights of the evictees. The pandemonium that comes with every unplanned eviction vis-à-vis the potential of violating peoples' rights to housing was real. In

the present Petition we are looking at a situation where the law on reporting rogue health facilities and workers exists and the complaint mechanism is well established. We are also staring at a situation where the reporting mechanism was not used and no explanation has so far been offered for this oversight. There is a pending issue of ascertaining whether or not BTL was in deed done; and whether it was done with the consent of the Petitioners.

36. Likewise, the **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**7 is inapplicable and distinguishable. The **C.K (A Child) Case**, speaks to a totally different and unrelated legal question. In this case the Petitioners sought a declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints violates the first eleven petitioners' fundamental rights and freedoms. An order of mandamus was issued directing the 1st respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' respective complaints of defilement and other forms of sexual violence.

37. In the above case there was a complaint made to the relevant government authority i.e. the police; and the police failed to carry out investigations – which is part of their mandate. Clearly, they violated the Petitioners rights. In this case, the 1st to 4th Petitioners, no complaint was filed with the Board – now the Council under the Medical Practitioner and Dentists Act, Cap. 253.

Conjecture and Prove of Negatives

38. My Lord reading through paragraphs 170 to 182 of the Petitioners Written Submissions, you will note statements like ‘the 4th, 5th and 6th Respondents abdicated duty and this resulted into the forced sterilization of the Petitioner’, ‘had the 5th and 6th Respondents effectively enforced the National Policy Guidelines and set up a properly system...the Petitioner could have been adequately protected’, ‘the Petitioner rights were violated because the 4th, 5th and 6th Respondents failed in their supervisory duty’, ‘We submit that had the 4th, 5th and 6th Respondents undertaken their responsibilities as required by law, by putting in place structures and policies that ensure that both private (such as the 1st respondent) and public

health facilities work and respect the rights of marginalized women, then the question of the forced sterilization of the 1st – 4th Petitioners, as well as that of many other women living with HIV, would not have occurred.

39. My Lord the Petitioners cannot assume the role of umpiring the effectiveness of a government policy. They have no capacity to do so. They have not demonstrated the same through scientific data analysis. This general statements of condemnation are unfounded and therefore they should not form the basis for granting them the Order and Declarations sought. Equally they have no capacity to determine the outcome of their imagined perfect health policy roll-out on reproductive health and family planning options for individuals.

On Prayers, Orders and Declarations Sought

40. My Lord, in respect to the Prayers, Order and Declarations as sought by the Petitioners, and captioned under Para. 183 of the Written Submission, we submit as follows: -

41. On Prayer (a) – this does not affect or concern the 5th and 6th Respondents, however we urge that you find that if at all BTL was performed on the 1st to 4th Petitioners, it was done pursuant to their consent and within the law. That the right procedure and remedy ought to have come from filing a complaint with the Council.

42. On Prayer (b) – this does not concern or involve the 3rd, 4th and 5th Respondents.

43. On Prayer (c) – this is a re-statement of the law. Article 27 of the Constitution of Kenya outlaws and abhors discrimination and it decrees equal protection of every individual by the law.

44. On Prayer (d) & (e) – the training of health workers and practitioners, including the curriculum, matriculation, licensing and continuous professional training is by law the function of the Council, the Board as established under Cap. 253 and various institutions of higher learning as established by their individual Charters and Statutes. Section 4(1)(h) and (n); and Section 11A of Cap. 253 provide that it will be the function of the Council to *inter alia* to determine the framework for

professional practice for medical and dental practitioners; accredit continuous professional development providers. Section 11 (A) of the Act provides that the Board shall satisfy itself that courses of study to be followed by students for a degree in medicine or dentistry, including the standard of proficiency required for admission thereto and the standards of examinations leading to the award of a degree, are sufficient to guarantee that the holder thereof has acquired the minimum knowledge and skill necessary for the efficient practice of medicine or dentist. I submit that this Court should exercise restraint and declaim granting this Orders seeking to interfere with the training of medical practitioners. The right statutory bodies, clothed with this function, are institutions of higher learning that train healthcare workers, working in conjunction with the Council and Board as established by Cap. 253. Respectfully, we place reliance on *the Supreme Court of Kenya* decision in *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR.

45. At paras. 243 – 252, the Supreme Court while exercising judicial restraint stated as follows: -

Para. 243 - 'I must stress at this point, the necessity of judicial restraint; Courts cannot play expert and determine the professional standards to be set in various disciplines by the regulatory bodies of various professions. The Courts are just not best placed to do so. Authorities on this are legion.'

Para. 252 - 'I find these authorities [decisions of the High Court and Court of Appeal cited] persuasive and would adopt them as the proper position in law. I am of the view that it is imperative for this Court to as far as possible, avoid any decision or interpretation of a statutory provision or rule which render the system of registration of engineers unworkable in practice or create a situation that will water down a system designed at maintaining and ensuring high professional standards and competence.'

46. Lastly My Lord on prayers (d) & (e), this Court has been asked to Order the Respondents to fashion their policy on the International Federation of Gynecology and Obstetrics (FIGO) Guidelines on female contraceptive sterilization adopted in *June 2011*. My Lord this is a private member organization whose professional opinions should not be allowed to bind any government. Secondly, this Guidelines were adopted in June 2011, this was way before we changed our Policy i.e. 2015, to be in synch with the WHO Guidelines.

47. On prayer (f) the Petitioners are urging this Court to Order the Respondents to review the National Policy Guidelines for Service Providers to address provisions therein that are discriminatory. My Lord this prayer cannot be granted for four (4) reasons. One, the Petitioners have not identified the specific provisions in the said Policy / Policies that are discriminatory. This therefore means that this Prayer is imprecise and it offends the Court of Appeal judgment in the **Mumo Matemu Case** cited above. Secondly, that if at all there are any provisions in the policy that foment discrimination; then by dint of Articles 2(4) and 27 of the Constitution, those laws or policies are a nullity. This has not been canvassed in this Petition. Thirdly, My Lord, in the Petitioners own admissions at pages 20 and 21 of their Written Submission they confirm that the National Family Planning Guidelines for Service Providers 6th Edition were **updated** to Reflect the **2015 Medical Eligibility Criteria of the World Health Organization**. Lastly My Lord this prayer is non justiciable, the review of laws and policies in this country is in the domain of Parliament and the Executive, respectively. The 5th Respondent acting alone cannot be able to effect the order, if granted and granting the same will be overshooting this court's mandate. My Lord, the Petitioners are seeking this Court's help to redraft the Policy outside what the WHO provides. This is a mandate outside the jurisdiction of this Court and this Order should not be granted.
48. On prayer (g) that there should be an interlude of 48 hours between the time consent is given and when the procedure is undertaken. My Lord other than the fact that the Petitioners have not given a rationale for the interlude, this prayer is beyond the powers of this Court. It is a power that is exercisable under the law by the Council and the Board under Cap. 253.
49. On prayers (i) & (j) where the Petitioners are seeking for the establishment of clear procedural guidelines for a follow up on rights violations and strengthening administrative accountability for healthcare facilities and workers particularly on sterilization. My Lord this will entail restating the law. Cap. 253 provides for the process of lodging complaints. Hearing of the same and the sanctions available. It equally provides for an appellate procedure to the High Court. We submit that the state through legislation has already put these mechanisms in place.

50. On prayer (k) – this entails restating the law and policy of this country.
51. On prayer (l) – this prayer concerns an order to award general and exemplary damages on an aggravated scale as against the Respondents jointly and severally for physical and psychological torture. At paragraph 205 of the Petitioners’ Written Submissions, the 1st to 4th Petitioner seek an award of Kshs. 30,000,000/= each as compensation.
52. My Lord Kshs. 30,000,000/= for the alleged breaches is disproportionate. At best My Lord the Petitioners allegations against the Respondents should be considered as *Constitutional Torts*. This is fairly novel in our jurisdiction. But the claims in question have resulted from alleged injuries inflicted upon the Petitioners by the Respondents in the course of performing medical procedures.
53. The Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*** had the opportunity of dealing with an appeal based on alleged *Constitutional Torts*.
54. The ***Imanyara Case*** was an appeal from the judgment of the High Court (Lenaola, J.) delivered on June 14, 2013 in which the learned Judge awarded Hon. Gitobu Imanyara a sum of Kshs. 15 Million, Hon. Njehu Gatabaki a sum of Kshs. 10 Million, and Bedan Mbugua a sum of Kshs. 7 Million for general damages arising out of breach of the appellants' fundamental rights and freedoms under the Repealed Constitution, which violations had been defined as constitutional torts. In their appeal they sought monetary compensation ranging between Kshs. 137 million and Kshs. 799 million, which the court of appeal declined to grant and instead it proceeded to expound the principles the court should consider in awarding damages for constitutional violations. It inter alia guided that, awards for damages:-
- a. *Are a discretion of the trial court;*
 - b. *That the discretion is however guided by the urge to create a balance between compensating for the violations by public officers, the vindication of the constitutional right alleged to have been violated and the fact that the compensation amount will be paid by the innocent tax payers;*

- c. *That vindication of the alleged infringement is the primary purpose of the courts pronouncement and that an award of damages is secondary;*
- d. *That the amounts awarded must be just and appropriate;*
- e. *That the amounts awarded must be based on the established principles, and range of settlements in the local jurisdiction and lastly*
- f. *In principle damages may well not suffice, but the court can award an ‘additional award’ not necessarily substantive to just reflect a sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. Accordingly, in tortious constitutional breaches terms such as ‘punitive’ and ‘aggravated’ damages are subsumed in the additional award; and their use should be avoided.*

Separately, the constitutional court has previously in fatal police shooting incidences, issued a global sum of Kshs. 2 million in compensation to the victims’ estates. This happened in **Kenya National Commission on Human Rights & another v Attorney General & 3 others [2014] eKLR** the estates of two persons shot by the police were awarded a global sum of Kshs. 2 million. In **Malik Mohammed Kipsang’ v Attorney General [2014] eKLR** the petitioner’s estate sought general damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya for the unconstitutional conduct by the Kenyan Government its agents and/or servants, be awarded in the sum of Kshs. 25 million but the court declined but granted a global sum of Kshs. 3 million.

55. This Court has previously declined to award exemplary damages in addition to general damages for reasons that there is no justification for such an award in changed [political] circumstances in **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009.** We urge this court to adopt the same position in the present petition.

56. My Lord we urge this Court in exercise of its discretion to decline granting compensation by way of damages as sought by the Petitioners; and if you must My Lord then be guided by the foregoing submissions. Exemplary and / or punitive damages are not available in the circumstances of the Petitioners case.

Conclusion

57. My Lord in conclusion we urge this Court to dismiss this Petition in its entirety. In the event that Your Lordship is not convinced to dismiss the Petition, we urge this Court to dismiss all claims made against the 3rd and 4th Respondents on account that: -

- a. The 5th and 6th Respondents were not privy to the arrangement(s) that exists between the 1st – 4th Petitioners and the 1st Respondent in carrying out the alleged BTL procedure. This was a private arrangement between the two parties and the unintended or intended pleasant and unpleasant consequences resulting from the arrangement should not be visited upon the Respondents, who were not involved.
- b. The conduct of healthcare workers / professionals and operations of healthcare facilities are highly regulated. That the Constitution, the Medical Practitioner and Dentists Act, Cap. 253 Laws of Kenya, the Health Act, 2017 and the National Family Planning Guidelines for Service Providers 6th Edition [as updated to Reflect the 2015 Medical Eligibility Criteria of the World Health Organization form the corpus of the Government's policies on family planning options and they have not been interdicted by the Petitioners claim herein. They remain useful and adequate.
- c. That the case against the Respondents is inadequately pleaded. In as much as the Petitioners plead that the Respondents have violated statutes and the Constitution, they have itemized the statutes violated or the specific constitutional provisions.
- d. That the Petitioners never formally complained to the Council or Board as provided for under Cap. 253. She opted to file this Petition to circumvent the elaborate complaints mechanism established by statute. This is an abuse of this Court's process.
- e. That the Satrose Ayuma Case and the C.K (A Child) Case are inapplicable and distinguishable in the circumstances of the Petition filed herein. They were real disputes before the Court. That Article 21 of the Constitution calls for the State to legislate and put in place policies that will promote the

enjoyment of human rights and fundamental freedom. The Medical Practitioner and Dentists Act, Cap. 253 Laws of Kenya [as now amended], the Health Act, 2017 and the National Family Planning Guidelines for Service Providers 6th Edition [as updated to Reflect the 2015 Medical Eligibility Criteria of the World Health Organization confirm that the State has done its part as required by the Article 21. No blame of whatsoever nature should be assigned to it in circumstances of the Petition herein, see the *Zeitun Juma Hassan Case*.

- f. That to the extent that the Petitioners are seeking to introduce new regulations binding on healthcare worker / practitioners' and facilities; and their training, outside the provisions Cap. 253 and the Health Act, 2017, Petition is non justiciable. See *Martin Wanderi Case*. This Court should exercise judicial restraint.
- g. That damages are discretionary. Further that exemplary damages are not available where one is claiming constitutional violations. The claim for damages should be dismissed, as against the 5th and 6th Respondents.

58. We respectfully submit.

Dated at Nairobi this 15th day of July 2021

signed

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