
COMMUNIQUE

Rachael Mwikali & 3 Others V The Cs, Ministry Of Health; (Kenya Obstetrics Gynecologist Society & Katiba Institute) Interested Parties High Court Petition 27 of 2022

INTRODUCTION

On Monday 11th September 2022, Rachael Mwikali, Esther Aoko, the Ambassador for Youth and Adolescent & Reproductive Health Programme (AYARHEP) and the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) filed a petition against the Cabinet Secretary, Ministry of Health, challenging constitutionality of the National Reproductive Health Policy 2022-2032 due to procedural and substantive elements.

The Policy was passed on 5th July 2022, the culmination of a process that the Petitioners contend was unconstitutional for want of public participation. Prior to passing the Policy, the Petitioners, as well as other actors and stakeholders who work on sexual and reproductive health and rights, urged the Ministry to undertake a public participation process that was meaningful by involving the views of the public with a view to ensuring having a policy that would speak to the lived realities of Kenyans and ensure that service provision and reproductive health care was available to all. However, the Ministry failed to do this. First, as it began the process of developing the petition in 2017, it failed to involve stakeholders or even members of the public. Eventually, in March 2022, it invited the petitioners and other stakeholders to seek their views on provisions to be included in the policy, but this turned out to be a cosmetic process: the Ministry refused to provide copies of the document beforehand, and refused to consider suggestions for inclusion of policy provisions that would ensure the attainment of the highest standard of reproductive health.

The Policy that was passed contains various unconstitutional provisions, the implementation of which will greatly violate the rights of Kenyans, particularly with respect to the right to reproductive health.

First, the Policy excludes certain populations, particularly young women and girls below the age, from accessing or receiving critical reproductive health care services or information and imposes unreasonable requirements on parental consent prior to the provision of reproductive health services all of which will constitute additional barriers for adolescents and young people in attaining the highest standard of health. Moreover, by imposing the requirement of parental consent for provision of reproductive health services, the Policy fails to recognize that many reproductive health services are offered on an emergency basis, and further fails to consider that the reality for many Kenyan children is that parental consent for treatment cannot be obtained without hardship. In addition, there are many children who have the capacity to understand nature of treatment they require and therefore can consent to receive services.

Secondly, the policy infringes on innovation and academic freedom by limiting the conduct of research on reproductive health by giving power to the the Director General for Health to vet all research in reproductive health.

The sum of these provisions is that is they hinder access to the highest standard attainable health; they

are discriminatory and there is no reasonable justification as to why there are limitation of rights as outlined in the Policy. The Policy is therefore defective in form and substance.

WHO IS INVOLVED?

There are four petitioners: The first two petitioners, Rachael Mwikali and Esther Aoko are young activist women who work in their communities and agitate for the realization of sexual and reproductive health for all women and girls. The third Petitioner, AYARHEP, is a non-governmental organization that works to promote adolescent and youth reproductive health and human rights. KELIN is the fourth petitioner, a non-profit organization that works for access to justice and the promotion of health-related human rights in Kenya.

The case further has two Interested parties the Kenya Obstetrics gynecological Society, working to promote a high standard of practice in the art and science of obstetrics and gynaecology in Kenya and Katiba Institute, a constitutional research, policy and litigation institute established to further the implementation of the Constitution of Kenya, 2010.

WHAT DO THE PETITIONERS WANT FROM THE COURT?

The Petitioners seek various reliefs from the Court. First, it has filed together with the petition asking the court to stay the implementation of the policy to avert further violation of the right to health. In addition, the Petitioners have sought various orders, including a permanent order barring the Ministry of Health from implementing the provisions of the Policy that would hinder the access of rights of Kenyans.

The Petitioners also seek an order requiring the Cabinet Secretary for Health to review the Policy, and to do so with the full involvement of all stakeholders by carrying out a meaningful public participation exercise.

For more information:

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