L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) (Constitutional Petition 606 of 2014) [2022] KEHC 17132 (KLR) (Constitutional and Human Rights) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 17132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 606 OF 2014

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

L A W ..... 1ST PETITIONER

KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV/AIDS (KELIN) ..... 2ND PETITIONER

AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM) ..... 3RD PETITIONER

AND

MARURA MATERNITY & NURSING HOME ..... 1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF HEALTH SERVICES – NAIROBI COUNTY ..... 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

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

AND

SECRETARIAT OF THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS ..... AMICUS CURIAE

ALICIA ELY YAMIN ..... AMICUS CURIAE

NATIONAL GENDER AND EQUALITY COMMISSION ..... AMICUS CURIAE

Factors to consider when determining whether informed consent has been properly obtained by a health care provider

The 1st petitioner underwent bilateral tubal ligation (BTL), permanently extinguishing her ability to conceive. She claimed that the BTL was done without her informed consent. The court pointed out the factors to be considered in determining whether informed consent had been properly obtained by a healthcare provider. The court noted that there were no instances in the Health Act where consent could be transferred and that the law placed individual responsibility on health care providers and health care professionals while providing their services.

Reported by Kakai Toili

Health Law *- consent - informed consent - factors to be considered when determining whether informed consent had been properly obtained by a health care provider - whether consent obtained from a patient was transferrable from one health facility to another - Constitution of Kenya, 2010, article 43; Health Act, No 21 of 2017, sections 2, 6, 8 and 9.*

Civil Practice and Procedure *- constitutional petitions - constitutional issues - nature of constitutional issues - whether claims of statutory violations could give rise to constitutional violations.*

Constitutional Law *- fundamental rights and freedoms - social and economic rights first class rights/rights of liberty - what was the distinction between social and economic rights and rights of liberty.*

Words and Phrases *- consent - definition of consent - permission for something to happen or to be done - Concise English Dictionary, page 304.*

Words and Phrases *- consent - definition of consent - voluntary yielding to what another proposes or desires; agreement, approval or permission regarding some act or purpose esp given voluntarily by a competent person; legally effective assent - Black's Law Dictionary, Thomson Reuters Publishers, page 380.*

Words and Phrases *- informed consent - definition of informed consent - permission granted in the knowledge of the possible consequences - Concise English Dictionary.*

Words and Phrases *- informed consent - definition of informed consent - a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives; a patient's knowing choice about the medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical community would give to a patient regarding the risks involved in the proposed treatment or procedure – also termed as knowing consent - Black's Law Dictionary, Thomson Reuters Publishers.*

Brief facts

In March 2006, the 1st petitioner visited a health centre (the first health centre) for ante-natal clinic visit. The health professional there advised her to undertake HIV test which turned out to be positive. A follow-up test at another health centre (the second health centre) confirmed the results and the 1st petitioner was advised by a nurse that it was wise not to have more children as it would be perilous to her health and life and that of the baby. Eight months into the pregnancy, the 1st petitioner went to the second health centre and was referred to a community health worker in Korogocho who gave her two vouchers; one written 'CS' and the other 'TL'. She was advised that when she was due for delivery, she would use the vouchers at the 1st respondent's hospital.

The 1st petitioner was admitted at the 1st respondent's hospital where after caesarean section operation, she was blessed with a baby boy. Later on, upon visiting a medical camp, the doctors revealed that she could not conceive because her fallopian tubes were blocked. Upon inquiry from the community health worker, it dawned on the 1st petitioner that the vouchers meant that she was going to undergo a bilateral tubal ligation (BTL) during the caesarean section and was informed that the procedure was done where both her fallopian tubes were tied. The 1st petitioner claimed that the BTL was conducted on her without being informed and

her consent obtained. She averred that the procedure resulted in permanent inability to conceive, a situation, she claimed, amounted to a violation of her reproductive health rights, her right to dignity and social justice.

The 1st petitioner posited that the BTL sterilized her without her informed consent and had subjected her to torture, inhuman and degrading treatment. She pleaded that she was not informed by the 1st respondent of other options of family planning and as a result did not get an opportunity to choose and decide the most appropriate method of contraception. The petitioners posited that the conduct of the 1st, 2nd and 3rd respondents violated the 1st petitioner's right to life, freedom form discrimination, right to dignity, freedom form torture, right to privacy, freedom of expression, the right to highest attainable standard of health, the right to found families, the right to be given service of reasonable quality.

Issues

i. What were the factors to be considered when determining whether informed consent had been properly obtained by a health care provider?
ii. Whether consent obtained from a patient was transferable from one health facility to another.
iii. Whether claims of statutory violations could give rise to constitutional violations.
iv. What was the distinction between social and economic rights and rights of liberty (civil rights)?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 43 - Economic and social rights

(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

Health Act, No 21 of 2017

Section 2 - Interpretation

"informed consent" refers to a process of getting permission before conducting a health care prevention on a person;

Section 9 - Consent

(3) For the purposes of this section "informed consent" means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as provided for in section 8 of this Act.

Held

1. A constitutional issue was one which confronted the various protections laid out in a constitution. Such protections could be in respect to the Bill of Rights or the Constitution of Kenya, 2010 (the Constitution) itself. The issue had to demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. Claims of statutory violations could not give rise to constitutional violations.
2. A petition was deemed to raise constitutional issues if the cause of action was based on an act or omission that resulted in an infringement or threat thereof of an entitlement spelled out in the Constitution or to the Constitution itself. In disclosing constitutional issues, a petitioner had to identify with a reasonable degree of precision the alleged violations or threats thereof and demonstrate the nature and manner of violation or threats thereto. The instant petition properly presented a serious constitutional issue for determination.
3. The social and economic rights under article 43 of the Constitution were positive rights since they imposed obligations on the State to do as much as it could to secure for its citizens a core minimum of the social and economic rights. Socio-economic rights derived their identity from the fact that their realization called upon the State to take positive steps in order for its citizens to realize their rights. Unlike rights of liberty (civil rights), also known as first-generation rights or *liberte* whose realization

called for non-interference from the State, socio-economic rights were distinguished by the duty they imposed on Government to act.

4. The full realization of the petitioner's right to reproductive health called upon the State to *inter alia* develop health policies, legislate on health, building and equipping hospitals, employing qualified health professionals and facilitate their training from time to time among other things.
5. The 1st petitioner underwent BTL and as a result was permanently unable to bear children. In fact, the BTL amounted to the 1st petitioner's permanent sterilization. In other words, as a result of the BTL, the 1st petitioner lost the ability to conceive and bear any children.
6. In its endeavour to discharge its duty in providing health care services to its citizens, Kenya undertook various initiatives. They included constitutional, statutory, policy interventions among many others. Section 2 of the Health Act defined informed consent as a process of getting permission. Section 9(3) defined informed consent as consent for the provision of a specified health service given by a person with legal capacity to do so and who had been informed before conducting a health care procedure on a person. Kenyan law recognised informed consent as a process. The process was the cumulative product of the steps involved in which permission was obtained before conducting a health care procedure on a person or a user.
7. A healthcare provider was the custodian of the information that facilitated a patient's informed consent. That information was always not readily available to patients. It was indeed a fact that in most cases there was a grave imbalance of knowledge and information between the healthcare provider and the person receiving the professional services. As such, a healthcare provider was under an obligation to ensure that such information was accurately broken down and communicated to the patient and in a language that the patient or user understood.
8. The law, via sections 8 and 9 of the Health Act, recognised and emphasised the need by a healthcare provider to obtain informed consent from a user before undertaking any procedure on that person. However, there was no developed standard procedure in the manner in which such consent would be obtained. The reason for such was that discretion was granted to the healthcare provider to choose the manner in which the consent would be obtained or presumed as long as it was within the Constitution and the law.
9. The Kenyan position on the informed consent was akin to various international instruments in which Kenya was a signatory. Most of the instruments placed an obligation upon State parties to take measures to prevent, protect against and remedy human rights violations including those committed by non-State actors. That was the due diligence principle in international law.

10. Informed consent could be regarded as having been properly obtained upon the healthcare provider satisfying the following:
    a. Ascertained the age of the patient.
    b. Ascertained if the patient was a minor or was under any disability that made him/her unable to understand and consent, for instance, if one was too ill or mentally incapacitated.
    c. In the event the patient was a minor or was under any disability that made him/her unable to understand and consent, such consent was to be obtained from another person legally authorised to give such consent.
    d. Ascertained the literacy level of the patient or the one legally authorised to give such consent, as the case could be.
    e. Ascertained the language the patient wished to use. An interpreter could be availed if need be.
    f. Ascertained, as much as possible, the background of the patient.
    g. Disclosed the patient's health status as restrained by the law or a court order.
    h. Explained the range of promotive, preventive and diagnostic procedures and treatment options generally available to the patient.
    i. Explained the benefits, risks, costs and consequences generally associated with each option.
    j. Explained the patient's right to refuse the recommended medical options and the implications, risks, and legal consequences of such refusal.
    k. Took all reasonable steps and ensured that the patient, or the one giving the consent, was reasonably free and not under any form of compulsion, duress or coercion.
    l. The explanations given to the patient were to be, in as much as possible, in the nature of a dialogue with the aim of ensuring that the patient fully understood the seriousness of her/his condition, the anticipated benefits and risks of the proposed treatment and any reasonable alternatives so much so that the patient made an informed decision. To a very great extent technical language was to be avoided.
    m. The patient ought to be accorded time, if need be, to enable him/her consider the information given and to decide except in cases where the procedure was an emergency.
    n. The consent had to be in writing.
11. The 1st petitioner's low level of literacy and understanding of family planning options and health generally imposed upon healthcare providers a high legal duty to facilitate her consent. They had the obligation to break down and convey in a language she understood the information as to what BTL entailed in the first place, its implications and check to ensure that she had understood what the procedure was all about. In addition, the healthcare provider had a legal duty as required under sections 8 and 9 of the Health Act to explain to her the available alternatives of family planning.
12. By juxtaposing the 1st petitioner's position and the legal requirements in obtaining informed consent side by side, the 1st respondent did not obtain any such informed consent from the 1st petitioner. There was no evidence that the 1st respondent undertook any meaningful due diligence on the 1st petitioner in the quest to obtain the requisite consent.
13. The 1st petitioner was casually asked by the doctor performing the BTL procedure whether she was aware that she was being sterilized. Even such enquiry was made just before the operation began. The consent form produced in evidence, as well, raised serious doubts into the manner in which the consent was obtained. The 1st petitioner must have made up her mind on the premise that it was not advisable to have children when she was HIV positive, a
position which was not medically accurate.
14. The consent obtained from the 1st petitioner appeared to have been borne out of fear and apprehension that having more children would pose danger not only to her but also to the child she would carry. The healthcare providers took advantage of the 1st petitioner's economic vulnerability, low level of understanding occasioned by her illiteracy to subject her to the BTL operation. The consent was not

freely obtained. The 1st respondent did not, in the least, adhere to the procedure provided in the law in the manner the consent was obtained. The consent was obtained contrary to the law and did not amount to an informed consent.

15. There were no instances in the Health Act where consent could be transferred. The law placed individual responsibility on health care providers and health care professionals while providing their services. The deliberate architecture emphasised the need for individual decision making by health care providers and professionals whenever they were dealing with human life. It also eradicated instances where a wrong diagnosis or decision by one health care provider or professional was carried along by others. That was in tandem with the national values and principles of governance on integrity, transparency and accountability under article 10(2)(c) of the Constitution.

16. The contention that the informed consent on the BTL procedure was obtained at the second health centre did not hold, more so, given that it was not the healthcare provider that carried out the impugned medical procedure. The responsibility to obtain informed consent from the 1st petitioner firmly and solely rested upon the 1st respondent and not otherwise. There was no evidence to the effect that such informed consent was obtained at the second health centre. As such, there was no consent, in the first instance, to be transferred to the 1st respondent even if the law allowed as much. The 1st respondent did not obtain the informed consent from the 1st petitioner prior to performing the BTL medical procedure on the 1st petitioner.

17. It was the duty of the court to remedy any violation or threats to violation of any of the rights and fundamental freedoms in the Bill of Rights as well as infringement or any attempt thereof to the Constitution. It, therefore, remained the cardinal duty of a petitioner to discharge the duty of proving the violations or threats thereto.

18. The 1st petitioner would not be able to conceive for the rest of her life. The 1st petitioner's rights and fundamental freedoms were variously infringed. The BTL procedure underwent by the 1st petitioner indeed was differential treatment purely based on sex and HIV status. It was unfair discrimination that served no rational purpose and could not be justified in a liberal well-functioning constitutional democracy and society. As a result, article 27 of the Constitution was infringed.

19. The second health centre was under the charge of the Nairobi County through the 2nd respondent, the County Executive Committee Member in-charge of Health Services. The 1st and 2nd respondents were the main parties at the heart of the infringement of the 1st petitioner's rights and fundamental freedoms.

20. The National Government had not only passed legislation on informed consent, (that was the Health Act), but it also passed relevant national policies and even assented to and adopted international treaties and instruments on health including the aspect of informed consent. The National Government could not be rightly so held to have aided to the infringement therein. The National Government had also put in place mechanisms for complaints against health providers and institutions as well as the manner in which such complaints were dealt with. There was no contention that relevant complaints were made, but not acted or satisfactorily acted upon under the law. The 3rd and 4th respondents did not infringe any of the 1st petitioner's rights and fundamental freedoms in the circumstances.

21. Had the 1st respondent endeavoured to and properly obtained the informed consent, the wrong information given to the 1st petitioner at the second health centre would have been corrected and the 1st petitioner accorded an opportunity to address herself on the issue. In terms of parity, the 1st respondent would, therefore, carry a heavier burden of blame than the 2nd respondent

22. In confirming infringement of constitutional rights, courts endeavoured to grant the appropriate relief. Even in instances where a party failed to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief. The 1st petitioner's rights and fundamental freedoms ought not only be vindicated by appropriate declarations, but also by an award of damages which would go

a long way in curbing the failure to obtain informed consents before any medical procedures as well as curbing the manipulation and misleading information used to sterilize HIV positive women.

23. In settling the award of damages, the court was alive to the fact that the 1st respondent was a private medical facility providing services to many people and that decision could generate many like litigations and the court would also wish to have the 1st respondent continue offering appropriate services to the public, going forward. Further, it was expected that the 1st respondent would undertake immediate, if not yet, steps to ensure that faults on its part in the judgment were corrected. It was also expected that the 2nd respondent would forthwith take appropriate steps and ensure that the information given to the public was correct.

Petition allowed.

Orders

i. *The claims against the 3rd and 4th respondents were dismissed.*

ii. *Declaration issued that it was 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.*

iii. *Declaration was issued that referral medical institutions (such institutions where patients were referred to for further medical attention) had to obtain fresh informed consents from the patients for purposes of undertaking any medical operations except in cases of emergency.*

iv. *Declaration issued that the act of sterilization of the 1st petitioner by the 1st respondent by way of BTL was undertaken without obtaining the 1st petitioner's informed consent and as such it amounted to violation of the 1st petitioner's constitutional rights and fundamental freedoms under articles 27, 28, 43(1)(a) and 45 of the Constitution.*

v. *The 1st petitioner was awarded compensation in the sum of Kshs 3,000,000 (Kenya shillings three million only). Payment thereof was to be on the basis of 70% against the 1st respondent and 30% against the 2nd respondent.*

vi. *Each party was to bear its own costs.*

Citations

Cases

1. Anarita Karimi Njeru v Republic (No 1) (Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1979] KLR 154; [1976-80] 1 KLR 1272) — Explained
2. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR) — Explained
3. Government of the Republic of South Africa and Others v Grootboom and Others ((CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169) — Explained
4. Kitheka, Simeon Kioko & 18 others v County Government of Machakos & 2 others (Petition 9 of 2018; [2018] eKLR) — Explained
5. Maina, &Patrick Alouis Macharia 3 others v Shoprite Checkers Kenya Limited (Petition E004 of 2021; [2021] KEHC 8936 (KLR)) — Explained
6. Mitu-Bell Welfare Society v Attorney General & 2 others (Petition 164 of 2011; [2013] eKLR) — Explained
7. Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) (Petition 56, 58 & 59 of 2019 (Consolidated); [2020] eKLR) — Explained
8. PBS & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 others [2016] eKLR (Civil Case 399 of 2010; [2016] KEHC 3468 (KLR)) — Explained
9. PKA v MSA (Petition 236 of 2011; [2011] KEHC 284 (KLR)) — Explained
10. Republic Ex Parte Chudasama v The Chief Magistrate's Court, Nairobi & another ex-parte Hinesh K Chudusama (Miscellaneous Application 473 of 2006; [2007] KEHC 2940 (KLR)) — Explained

11. Shah & 2 others v Shah & 2 others (Civil Appeal 34 of 1981; [1982] KECA 26 (KLR)) — Mentioned
12. Total Kenya Limited v Kenya Revenue Authority (Civil Application 135 of 2012; [2013] KECA 437 (KLR)) — Explained
13. Turkana County Government & 20 others v Attorney General & 4 others (Petition 113 of 2015; [2016] eKLR) — Explained
14. LM and Others v Government of the Republic of Namibia ((1603 of 2008) [2012] NAHC 211) — Explained
15. Castell v Greeff ((1994) (4) SA 408 (C)) — Explained
16. Fose v Minister of Safety and Security ((CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786) — Explained
17. Fredricks & other v MEC for Education and Training, Eastern Cape & others ((CCT 27/01) [2001] ZACC 6; 2002 (2) BCLR 113; 2002 (2) SA 693 ; [2002] 2 BLLR 119 (CC); [2002] 23 ILJ 81 (CC)) — Explained
18. Louwrens v Oldwage ((181/2004) [2005] ZASCA 81; [2006] 1 All SA 197 (SCA); 2006 (2) SA 161 (SCA)) — Explained
19. Minister of Safety and Security v Luiters ((CCT23/06) [2006] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC)) — Explained
20. Britestone Pte Ltd v Smith & Associates Far East, Ltd ([2007] SGCA 47) — Explained
21. Montgomery v Lanarkshire Health Board ([2015] 2 All ER 1031; [2015] UKSC 11) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 10(2)(c); 26; 27; 28; 29; 31; 33; 43(1)(a); 45; 46 (1) (a), (b), (c) — Interpreted
2. Health Act, 2017 (Act No 21 of 2017) — Section 2, 6, 9(3) — Interpreted
3. Constitution of the United States — In general — Cited

Texts

1. Bacchini, S., (Ed) (2011), Concise Oxford English Dictionary (New York: Oxford University Press 12th Edn, p 304)
2. FIGO - International Federation of Gynecology & Obstetrics (2011), FIGO Guidelines on Sterilization and Informed Consent. (FIGO - International Federation of Gynecology & Obstetrics)
3. Garner, BA., Black, HC., (Ed) (2014), Black's Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn, p 380)
4. Ministry of Health (Kenya), Reproductive and Maternal Health Services Unit (2010), National Family Planning Guidelines for Service Providers (Nairobi; Ministry of Health (Kenya), Reproductive and Maternal Health Services Unit, 6th Edition)
5. Republic of Kenya, Ministry of Health (2013), Kenya National Patients' Rights Charter (Nairobi; Republic of Kenya, Ministry of Health, 1st Edition)

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 — Article 5, 16
2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 — Article 2
3. Convention on Elimination of All Forms of Discrimination against Women, (CEDAW), 1979 — Article 12
4. International Covenant on Civil and Political Rights (ICCPR), 1966 — Article 7
5. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 — Article 12
6. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 2003 — Article 16
7. Universal Declaration of Human Rights (UNDHR), 1948 — Article 5

Advocates

Mr Maleche and Miss Njogu for Petitioners.
Mr Ojienda for 1st respondent.
Miss Achola for 2nd respondent.
Mr Moimbo for 3rd and 4th respondents and 1st amicus curiae.
Miss Caroline Oduor for 1st interested party.
Mr Awele for 2nd amicus curiae.

JUDGMENT

1. The dispute before this court predominantly revolves around the constitutional right to reproductive healthcare and the attendant obligation of the State and the actors in the medical field to facilitate a patient's right to make informed medical decisions.

2. The 1st petitioner, LAW is an adult female who resides in Nairobi. She lives with Human Immuno-deficiency Virus (HIV) and is on prescribed anti-retroviral therapy.

3. The 2nd petitioner, Kenya Legal and Ethical Issues Network (KELIN) is a non-partisan, non-profit making non-governmental organization committed to the protection, promotion and enjoyment of the right to health and more so protecting and promotion of HIV related human rights through public interest litigation, advocacy, training and law reform.

4. The 3rd petitioner, African Gender and Media Initiative Trust (GEM) is a not-for-profit organisation that works to advance gender equality through research and action on women's human rights.

5. The 1st respondent, Marura Maternity and Nursing Home is a medical facility situated in Mathare Area in Nairobi.

6. The 2nd, 3rd and 4th respondents are the County Executive Committee Member in Charge of Health Services, the Cabinet Secretary, Ministry of Health and The Honourable Attorney General respectively.

7. Sometimes in March the year 2006, when LAW, was pregnant with her second child, she visited Kariobangi Health Centre to for ante-natal clinic visit. The health professional there advised her to undertake HIV test. It turned out to be positive. Upon doing a follow-up test at [particulars withheld] Health Centre, the results confirmed that indeed she was HIV positive.

8. At [particulars withheld] Health Centre, the 1st petitioner was advised by a nurse that it was wise not to have more children as it would be perilous to her health and life and that of the baby.

9. Eight months into the pregnancy, the 1st petitioner went to [particulars withheld] Health Centre where she was referred to a Community Health worker in Korogocho. At Korogocho, the health worker gave her two vouchers worth Kshs 300. One was written 'CS' and another 'TL'. She was advised that when she was due for delivery, she would use the vouchers at Marura Maternity and Nursing Home.

10. On September 15, 2006, the 1st petitioner was admitted to Marura Maternity and Nursing Home where she was prepared for theatre and after Caesarean Section operation. She was blessed with a baby boy.

11. Towards the end of the year 2006, she lost her husband and later in the year 2010, got remarried. A few months into the new marriage, her new husband wanted to have some children with the 1st petitioner.

12. They tried to conceive in vain. Upon visiting and explaining her predicament to a Medical Camp in Mathare, the doctors, upon examining and carrying out tests on her, revealed that she could not conceive because her fallopian tubes were blocked.

13. With that information, the 1st petitioner returned to the community health worker that gave her the vouchers with the initials TL and CS to inquire what they meant.

14. Upon being explained to, it dawned on her that the vouchers meant that she was going to undergo tubal ligation during the Caesarean Section. She was informed that the procedure was indeed done where both her fallopian tubes were tied.

15. It is the health services that that took place at Marura Maternity and Nursing Home that led to the instant petition.

16. The respondents opposed the petition.

The Petition:

17. Through the amended petition dated September 10, 2015, supported by the affidavit of LAW deposed to a similar date, the petitioner approached this court with the grievance that a medical procedure known as tubal ligation was conducted on her whilst at Marura Maternity and Nursing Home without being informed and her consent obtained.

18. The procedure, she averred, involved ligation (tying) of her fallopian tubes which resulted in permanent inability to conceive, a situation, she claimed, amounted to violated of her reproductive health rights, her right to dignity and social justice.

19. She posited that the bilateral tubal ligation sterilized her without her informed consent and has subjected her to torture, inhuman and degrading treatment in contravention of her constitutional right.

20. It is her case that on September 8, 2014, she wrote to the 1st respondent to requesting for hospital and medical records to no avail. She deposed that she did a reminder on November 24, 2014 but she is yet to receive any form of communication from the hospital.

21. The 1st petitioner pleaded that she sought gynaecological advice at Hurlingham Family Health Clinic on how to reverse tubal ligation but was informed that the procedure is 100% permanent and therefore not reversible.

22. She pleaded that despite having the desire to have more children, she was not informed by the 1st respondent of other options of family planning by the health professionals and as a result did not get an opportunity to choose and decide the most appropriate method of contraception.

23. It was her case that her inability to conceive has caused friction and unending disagreements with her husband and has resulted in depressive disorder negatively impacting her relationships and social life.

24. The 2nd and 3rd petitioners supported the petition through the further affidavit of Allan Achesa Maleche, the Executive Director of KELIN deposed to on July 18, 2016, and Gladis Kiio the Programme Manager deposed to on September 10, 2014 respectively.

25. The 2nd petitioner contended that as a matter of constitutional entitlement, it was necessary for all women living with HIV to be given specific information on sterilization and alternative procedures for family planning in order to guard against medical procedures being conducted without information.

26. While speaking to the nature and effects of sterilization, the 3rd petitioner referred to International Conference on Population programme and posited that reproductive health is defined as a state of physical, mental and social well-being and not merely the absence of disease or infirmity.

27. It was its case that reproductive health implies that people are able to have satisfying and safe sex life and that they have the capacity to reproduce and the freedom to decide if, when and how often to do so.

28. The 3rd petitioner posited that due to its permanent effect, the decision to sterilize, must not be forced or coerced, rather, it must be voluntarily obtained after a health care provider has explained the procedure and the effects to the patient.

29. It posited further that the coerced and forced sterilization have negative impact on women including emotional and relational impact caused by the inability to bear children, clinical depression, physical impact evidenced by the long time it takes for the procedure to heal, irregular or non-existent menstrual cycle and financial impact occasioned by the consultation done with the desire to reverse the procedure or alternative methods of contraception.

30. In citing particulars of unconstitutionality, the petitioners posited that the conduct of the 1st, 2nd and 3rd respondents violated the 1st petitioner's right to life, freedom form discrimination, right to dignity, freedom form torture, right to privacy, freedom of expression, the right to highest attainable standard of health, the right to found families, the right to be given service of reasonable quality as guaranteed under article 26, 27, 28,29, 31,33, 43(1)(a), 45 and 46(1)(a-c) of the *Constitution* respectively.

31. The petitioner further cited that the action of the respondents violated international instruments Kenya is a signatory including article 12 of *Convention on The Elimination of All Forms of Discrimination Against Women* (CEDAW), article 16 of *African Convention on Human and Peoples' Rights* requiring the enjoyment of the best attainment of physical and mental health, article 14 of *Protocol to the ACHPR on the Rights of Women in Africa* and the General Comment No 2 on article 14.1(a), (b), (c) and (f) and 14.s(a) and (f) of the *Protocol* which requires state parties to ensure that the right to health of women, including sexual and reproductive health is respected and promoted.

32. In addition to the foregoing, the petitioners posited that article 5 of *Universal Declaration of Human Rights* (UDHR) forbidding torture to cruel, inhuman or degrading treatment or punishment as read with article 7 and article 2 and article 5 of *International Convention on Civil and Political Rights* (ICCPR) and *Convention Against Torture* (CAT) and *African Charter on Human and Peoples Rights* respectively.

33. The petitioners posited that the right to marry and found a family is recognized and protected under article 23 and to that end, referred to the Special Rapporteur to the United Nations on the right to health where it was reconfirmed that reproductive freedom should never be limited by individual or states as a family planning method, HIV & AIDS prevention or any other public health agenda.

34. On sterilization he posited that the Special Rapporteur non-consensual sterilization is an act of violence, a form of social control and a violation of the right to be free from torture and other cruel, inhuman and degrading treatment.

35. In further reference to the 54th ordinary session of African Commission on Human and Peoples' Right, the petitioners posited that it was reaffirmed that all medical procedures, including sterilization, must be provided with free and informed consent of the individual concerned.

36. Closer home, the Petitioners referred to the *National Family Planning Guidelines for Service Providers [2010]* where informed and voluntary consent prior to female surgical sterilization is emphasized.

37. Based on the foregoing legal and factual background, the petitioners posited that the healthcare she received at Marura Maternity and Nursing Home violated her rights as enumerated in the foregoing paragraphs. She prayed for the following reliefs;

a. This honourable court declares that the act of sterilization of the 1st petitioner by way of tubal ligation as done by the 1st respondent amounted to violation of the human and constitutional rights of the 1st Petitioner as outlined in the Petition herein.

b. This honourable court declares that it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when and how often to bear children.

c. This honourable court issues an order directing the 2nd and 3rd respondents to put in place guidelines, measures and training for healthcare providers and social workers that are in line with *FIGO Guidelines on Sterilization and Informed Consent.*

d. This honourable court issues an order directing the 2nd and 3rd 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.*

e. This honourable court issues an order directing the 3 respondent to review the *National Family Planning Guidelines for Service Providers* to address the provisions that are discriminatory.

f. This honourable court issue an order directing that there be instituted a mandatory waiting period between the time that a woman freely requests tubal ligation and the performance of the surgery.

g. This honourable court issues an order directing the 2nd and 3rd respondents to conduct public awareness campaigns to educate patients and citizens about their rights to informed consent, privacy and information and ensure that information on patients' rights is immediately accessible within health care facilities.

h. This honourable court issues an order directing the 2nd and 3rd respondents to establish clear procedural guidelines for following up on complaints of rights violations and strengthen administrative accountability at hospitals.

i. This honourable court issues an order directing the 2nd and 3rd respondents to create a monitoring and evaluation system to ensure full implementation of laws and policies regarding the performance of tubal ligation.

j. This honourable court issues an order directing the 3 respondent to issue a circular directing all medical and health facilities (both public and private) that forceful or coercive sterilization of women living with HIV is not a government policy.

k. This honourable court is pleased to order the 1 respondent to pay general and exemplary damages on an aggravated scale to the 15 petitioner for the physical

and psychological suffering occasioned by the unlawful and unconstitutional sterilization.

l. An order this honourable court issues an order that since this petition is in the public interest, each party should bear their own costs.

m. This honourable court issues an order directing the respondents within 90 days of the court judgement to file affidavits in this court detailing out their compliance with orders d, e, f, g, h, I, j, k and I.

n. This honourable court be pleased to make such other orders as it shall deem fit and just.

The Submissions:

38. The petitioner further urged its case through undated written submissions filed in court on July 18, 2016 and further supplementary submissions dated October 15, 2021.

39. It was their case that the respondents do not dispute that Bilateral Tubal Ligation was performed on the 1st Petitioner and that the 1st respondent admitted that in performing it, they did not seek the informed consent on the basis that such consent had been given elsewhere.

40. While speaking to illegality of failing to obtain informed consent, it was submitted that the world over, it is the practice to have a patient's consent before any invasive medical procedure is conducted on them.

41. Reference to the foregoing was found in *Kenya National Patients' Rights Charter (2013)* where it is observed as follows;

> Every person's, patient or client, has a right to be given full accurate information in a language one understands about the nature of one's illness, diagnostic procedures, proposed treatment alternative and the cost involved for one to make a decision except in emergency cases. The decision shall be made willingly and free from duress.

42. To reiterate the foregoing, support was drawn from the South African decision in *Castell v Greeff* (1) SA 408 (c) where Ackerman, J observed as follows;

> For consent to operate as a defence, the following requirements must, inter alia, be satisfied: the consenting party must have had knowledge and been aware of the nature of the harm or risk; the consenting party must have appreciated and understood the nature and extent of the harm and risk; the consenting party must have consented to the harm and assumed risk; the consent must be comprehensive, that it extend to the entire transaction, inclusive of consequences.

43. It was its case that a document purportedly signed during labour pains when the will of the patient is overborne by the pain, and which document is to consent procedure totally unrelated to birth cannot under any circumstance prove consent.

44. It added that the sterilization is not an emergency procedure and as such a patient should be given enough time and support to make a decision.

45. On the foregoing, it was submitted that the 1st Respondent failed to meet the foreign criteria and even the consent document, it was signed, it was signed on his behalf, and even if she did it, she contests its veracity.

46. It was its case that the onus of proving that consent was obtained lies with the 1st respondents and even if signed by the petitioner, there is no evidence that the 1st petitioner was given information regarding the nature and risks of sterilization and the alternatives in a manner she understood.

47. In sum, the petitioner submitted that the respondents, overseeing the health sector had the obligation and the responsibility to protect the constitutional rights of the petitioner.

48. It was submitted that the sterilization without her consent violated her right her autonomous identity, her right to highest attainable standard of health, amounted to discrimination since persons without HIV are not subjected to sterilization without consent.

49. It was further her case that her right to access information held by another person was compromised thus leading to violation of rights which ordinarily ought to have been brought to her attention.

50. The petitioners reiterated that the violation of her right to reproductive health threatened her right to life by preventing her to access conditions that guarantee dignified driving.

51. As the interested party supported the petition, I will next consider its position.

The Interested Party's Case:

52. The International Community of Women Living with HIV supported the Petition through written submissions dated July 7, 2021.

53. In reference to the *Guidelines of International Federation of Gynaecology and Obstetrics* (FIGO) on female sterilization, it was its case that coerced sterilization or consent obtained in exchange of incentives such as loans or cash payments or access to nutrition to other services or support does not fall within the guidelines of FIGO.

54. It was submitted that no reference to any evidence was made by the 1st Respondent that addressed the essence of explanation, full knowledge and understanding of tubal ligation.

55. It was submitted that the 1st petitioner was operated on by Dr Wangwe, a Consultant at the 1st respondent, who did not avail any evidence as regarding consent. Reliance was placed on the decision in *Montgomery v Lanshire Health Board* [2015] UKSC 11 on the obligation of the Doctor.

56. It was its case that stigma and discrimination along with power imbalance make it difficult for women living with HIV to assert their rights when they must engage with the healthcare system for maternal care and delivery.

57. Reference was made to reports of sterilization by various interest groups which revealed that in nearly 40 countries, despite differences in geography, religion, culture and language, the experience and stories of women living with HIV who have been subjected to coercive or forced sterilization had a similar pattern.

58. Upon referring to many different experiences of the women who were sterilized without consent, it was submitted that the whole procedure deprives them of motherhood which is a source of stigma.

59. The experience of different women revealed that inability to have children undermined a woman's worth and their identity as women.

60. It was their case that women who cannot have children are marginalized and experienced diminished social status which negatively impacts their mental wellbeing.

61. In conclusion the Interested party invited the court to join the global judicial leadership in condemning the practice of forced sterilization for women living with HIV by holding practitioners accountable, ensuring compensation and justice to the victims.

62. Next are the respondents' cases.

The 1st Respondent's Case:

63. Marura Maternity & Health Nursing Home responded to the petition through the replying affidavit of Sophia Wanjiku, a Director of the hospital, deposed to on April 13, 2015.

64. It was her case that the 1st respondent could not verify veracity of the events that happened both at Baba Dogo and the Community Health Worker at Korogocho.

65. She deposed that at the time of admission of the petitioner, for tubal ligation and Caesarean Section, she was already living with her second husband and constructively, the boy born in the year 2006 belong to him.

66. It was her case that the 1st respondent is contracted by Price Waterhouse Coopers for the provision of medical services and to organize seminars independent of the 1st respondent where they screen and educate patients with HIV with a view to stemming down its spread under the contract OBA-RH.

67. It is her case that after screening, they choose the type of medical services they deserve then purchase the vouchers without the involvement of the 1st respondent.

68. She deposed that patients purchase the vouchers ad pay to the OBA-RH programme choosing the hospital they desire to have family planning, caesarean section or tubal ligation among others done.

69. She deposed that the voucher in question is bought at Korogocho Screening Centre and the 1st respondent is located at Mathare North and as such, informed consent of the procedure was given to the Petitioner at Korogocho under the OBA – RH.

70. Based on the foregoing, it was its case that the 1st respondent's Role was merely to execute the mandate under the contract by Price water house Coopers and therefore the 1st respondent was an independent contractor.

71. It was her case that the 1st respondent was contracted to perform the tubal ligation and what they did was purely consensual and contractual.

72. She deposed further that the alleged reference to 1st respondent was made independently and that the 1st respondent has no links to with the Community Health Worker.

73. Ms. Wanjiku deposed that the petitioner gave consent to bilateral tubal ligation on September 6, 2006.

74. In rejecting the assertion that the petition was a public interest one, she deposed the 1st respondent does not carry out bilateral tubal ligation or any surgical operation on its patients without consent.

75. She deposed that there was no discrimination meted out against the 1st petitioner since there was no coercion or forceful sterilization by the hospital. It was her case that the 1st petitioner wilfully signed the consent form.

76. Ms Wanjiku further denied the claim for damages on the basis that consent was given to perform the procedure on her. It was her case also that the letter by the petitioner requesting the 1st respondent for her medical records was only done on September 8, 2014.

77. On the strength of the consent given, it was the 1st respondent's case that the 1st petitioner's right to highest attainable health care was not infringed upon.

78. In conclusion the 1st respondent maintained that the petition is not merited for failing to disclose any wrongdoing in its part. It urged that there is no basis upon which the orders sought can be granted.

The Submissions

79. The 1st respondent filed written submissions dated February 10, 2016.

80. From the onset, it sought to absolve itself on any liability on the basis that it was not privy to had a contractual agreement with PricewaterHouse Coopers for provision of medical services under a programme run by a German NGO.

81. It therefore submitted that upon screening and being advised by the German NGO, patients would voluntarily choose the type of medical services they deserve then purchase the vouchers. It was its case therefore that pre-sterilization stage, a patient is deemed to have been sufficiently informed with information to enable her make the decision whether to purchase the vouchers.

82. It was further its case that Kariobangi and Baba Dogo Health Centres are institutions run by Government intuitions and are not part of the 1st respondent and therefore the 1st petitioner obtained independent medical advice and consented to the procedure without the involvement of the 1st respondent.

83. In pleading the defence of volenti-non-fit injuria reliance was placed on the Namibian Case of *LM & others v The Government of the Republic of Namibia* [2012] NAHC 211 where the court observed that, in instances where the Plaintiff signed consent forms it signified consent to sterilization procedures.

84. Reliance was further placed on the decision in *Castel v Greef* 1994 (4) SA 408 (c) to appeal to this court the scope of consent and the extent of disclosure required of medical practitioner in obtaining a patient's consent to treatment.

85. On the foregoing, the 1st respondent submitted that the petition was for dismissal.

The 2nd Respondent's Case:

86. The County Executive Committee Member In Charge of Health Services – Nairobi County opposed the petition through grounds of opposition dated November 19, 2020.

87. It was its case that the petition is vexatious and fit for dismissal for failing to attach evidence of violation of the rights in question.

88. It further stated that the 2nd respondent striCtly adheres to the National Family Planning Guidelines and informs all its clients, in detail, of the full range of family options, the pros and cons, in a language that its clients understand.

89. With respect to surgical procedures, it was its case that a patient has to consent failure which they do not conduct the surgery.

90. It was its case that the 2nd respondent was not a participant in any form of alleged coerced forced sterilization of the petitioners and urged that the petition be dismissed.

The Submissions

91. The 2nd respondent submitted that the 1st petitioner failed to discharge the burden of proof expected of her in order to warrant the orders sought for.

92. In addition to a consent having been produced in court, it was his case that the 1st petitioner's claim was wholly unsubstantiated for lack of evidence. Support was drawn from the decision in *Britestone Pte LTd v Smith & Associates Far East* where it was observed that a court's decision in every case will depend on whether the party concerned has satisfied the burden and standard of proof imposed on him.

93. Separately, it was submitted that the 1st petitioner underwent the procedure out of her own volition and as such she cannot claim to have been coerced or subjected to undue influence as to deprive her of free will.

94. In reliance on the decision in *Huguenin v Baseley* (1807) 33 English Reports, 526, the 2nd respondent stated that what happened to the 1st petitioner was purely voluntary and well understood acts of her mind.

95. Further reliance was placed on the decision in *PBS v Archdiocese of Nairobi Kenya Registered Trustees & 2 others* [2016] eKLR where it was observed that;

> Doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly, they will not do anything to harm the patient in any manner.
>
> ...unless it is an emergency, he obtains informed consent of the parties before proceeding with any major treatment surgical operation even invasive investigation.

96. While seeking to illustrate the low probative value of the Medical Report by Dr Khisa, it was submitted that it was not clear when the procedure was carried out and at whose instance.

97. It was urged that expert report is just an opinion and is not binding on the court. Support to that end was found in the decision in *Shah & another v Shah & others* (2003) 1 EA 290.

98. It was urged that the 1st petitioner could have the procedure reversed since the process was not permanent.

99. In conclusion it was prayed that the petition did not raise constitutional issues and ought to be dismissed.

The 3rd and 4th Respondents' Cases:

100. The Cabinet Secretary Ministry of health and the Honourable Attorney General opposed the petition through Grounds of Opposition dated April 22, 2016.

101. It was their case that they were not parties to the actions complained of by the petitioners and should not be party to this suit. They claimed that the suit does not disclose or demonstrate the manner in which rights have been violated by them.

102. It was urged that the petition is incompetent, vexatious and an abuse to court process liable to dismissal.

The Submissions

103. In their written submissions dated April 22, 2016, the 3rd and 4th respondents faulted the petition for failing to demonstrate the manner of violation of constitutional rights of the 1st petitioner. it was their case that since it was not a right party, the petitioner could only secure orders against a perpetrator.

104. Substantively, it was their case that since there is no legislation on informed consent, the 1st petitioner had no cause of action.

105. The 3rd and 4th respondents rebutted the prayer urging the court to place guidelines, measures and training for healthcare providers and social workers by submitting that such is the mandate of the executive and that this court ought to abide by the doctrine of separation of powers.

106. In the end, it was urged that the petition be dismissed with costs.

107. A consideration of the input by the *amici curiae* now follows.

The 1st Amicus Curiae's Case:

108. The Secretariat of the Joint United Nations Programme on HIV/Aids (UNAIDS Secretariat) filed written submissions dated July 7, 2021.

109. In reference to article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), it was its case that the right to health entails sexual reproductive rights.

110. It submitted that the right to health includes the right to make free decisions, receive health related information and education among others.

111. While speaking to informed consent it was submitted that there are various ingredients to it including knowledge and understanding of a proposed procedure and agreeing to the procedure.

112. It was its case that a patient must be informed on the right to refuse the procedure and to withdraw the consent at any time.

113. With respect to sterilization, it was submitted that the patient must be informed that the procedure is permanent and that if they want to have a child in future, they can choose another method.

114. On the foregoing, it was its case that if the procedure is involuntary then it amounts to violation of right and fundamental freedoms.

115. In conclusion, it was its case that effective HIV/AIDS response must be based on observation of human rights and fundamental freedoms which by the state.

The 2nd Amicus Curiae's Case:

116. Professor Alicia Ely Yamin, an expert in health and international human rights law, sexual reproductive health and a leader in socio-economic rights was admitted as amicus on January 28, 2016.

117. Through written submissions dated July 18, 2016, it was her case that women belonging to a particular group and living with HIV may be disproportionately affected by intersectional discrimination in the context of sexual reproductive health.

118. She submitted that among people with HIV, only women are targeted with sterilization either by performing sterilization surgery entirely without their knowledge or by using force coercion or non-

disclosure of critical information to pressure women into having the procedure without granting full and informed consent.

119. On the foregoing, she stated that the practice of bilateral tubal ligation, is a form of violence against women and inherently discriminatory on the basis of gender.

120. She submitted further that according to World Health Organization, in making a decision against sterilization, an individual must not be induced by incentives including a healthcare provider or a public officer.

121. She stated that women living with HIV have been coerced into signing consent forms for sterilization procedures as a condition of receiving anti-retroviral and other HIV treatment and prenatal care for current pregnancy or other reproductive services.

122. It was her case further that women have been made to sign the consent forms under duress such as times when they are in labour pain and in severe pain.

123. While referring to the response of UN Committee on Economic and Social Rights Kenya's Government Report on conditions in the country, she stated that the law on reproductive rights is designed not to help women prevent HIV transmission to their children but rather to punish women whose children are born with HIV.

124. She submitted further that it was undignifying to strip women of the ability to make responsible choice of childbearing.

125. In the end, the 2nd amicus invited the court to utilize the constitutional authority to condemn the practice without free and informed consent. He urged that there be structural dialogue among government agencies to ensure lasting effect.

126. It was her case that the foregoing will go a long way in upholding the constitutional commitment of nurturing and protecting the well-being of the individual, the family communities and the nation.

The 3rd Amicus Curiae Case:

127. The National Gender and Equality Commission (NGEC) urged its case through written submissions dated July 26, 2021.

128. It was its submission that Kenya has due diligence obligation international human rights obligation to make legislation to ensure compliance with standards to prevent forced sterilization through the regulation of healthcare providers, establishment of quality standards and provision of training for health care personnel.

129. It was its case that forced sterilization is discriminatory and an act of violence against women and may amount to torture or cruel or inhuman or degrading treatment.

130. In reference the obligation imposed upon states by *ACHPR*, it was submitted that all medical procedures including sterilization must be provided with free and informed consent of the individual concerned.

131. It was its case that, in line with Resolution 260 of *ACHPR* and funeral comment, State parties have an obligation to investigate, punish and provide redress of involuntary sterilization in all cases of women living with HIV.

132. The 3rd amicus called upon Kenya to enact laws and regulations necessary to deter and sanction forced sterilization, to monitor and supervise the provision of healthcare, to investigate and prosecute those

responsible for forced sterilization and make sure victims have access to judicial protection and are adequately compensated.

133. With the foregoing, the parties rested their respective cases.

Issues for Determination:

134. From the reading of the documents filed, the parties' submissions and the decisions referred to, the following issues arise for determination: -

(a) Whether the Petition raises any constitutional issues.

(b) In the event issue (i) above is answered in the affirmative, a brief consideration of the nature and scope of socio-economic rights in the context of the Petition.

(c) The issue of informed consent and whether the 1st petitioner gave informed consent to undergo the bilateral tubal ligation medical procedure.

(d) What remedies, if any, ought to be granted.

135. The court will, hence, deal with the issues in *seriatim*.

Analysis:

i. Whether the petition raises any constitutional issues:

136. This was a preliminary issue collectively raised by the respondents. They contended that the petition could not stand since it raised no constitutional issue for consideration by the court. They urged the court to dismiss it.

137. The *Constitution* does not define what a constitutional matter is. However, courts have variously delimited what constitutional issues are. In *Fredricks & other v MEC for Education and Training, Eastern Cape & others* [2002] 23 ILJ 81 (CC) the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

> The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself:
>
> > if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too .... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

138. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the *US Constitution*.

139. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the *Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters*, [2007] 28 ILJ 133 (CC): -

> ... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...

140. Whereas it is largely agreed that the *Constitution of Kenya, 2010* is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *PKA v MSA* Petition No 236 of 2011 [2011] eKLR

> '... Courts must interpret it with all liberation they can marshal...'

141. Resulting from the above discussion and the definition of what a constitutional issue entails, this court agrees with the position in *Turkana County Government & 20 others v Attorney General & others* [2016] eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

142. A petition is, therefore, deemed to raise constitutional issues if the cause of action is based on an act or omission that results in an infringement or threat thereof of an entitlement spelled out in the *Constitution* or to the *Constitution* itself.

143. In disclosing constitutional issues, a petitioner must identify with a reasonable degree of precision the alleged violations or threats thereof and demonstrate the nature and manner of violation or threats thereto.

144. The foregoing was a principle established in Miscellaneous Criminal Application 4 of 1979, *Anarita Karimi Njeru v Republic* [1979] eKLR when it was observed as follows thus: -

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

145. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR also added its voice in the matter as follows: -

> Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

146. In the instant petition, the 1st petitioner's plight was instigated on the realization that she was unable to bear children. Upon tracing her medical history, it dawned on her that during the birth of her second child, she underwent bilateral tubal ligation, permanently extinguishing her ability to conceive.

147. The petitioner thus founded her case on the alleged violation of her right to reproductive health care constitutionally guaranteed under article 43 of the *Constitution*.

148. As a consequence of the failure to protect her right to healthcare, the petitioner claimed that her right to dignity, to life, to found a family, to privacy and social justice was violated. The 1st petitioner drew the nexus between her inability to have children to the indignity, social and mental anguish she has suffered.

149. The totality of the 1st petitioner's case revolves around the contention as to whether the respondents variously failed to uphold and protect the socio-economic rights pertaining to the 1st petitioner's right to reproductive health care.

150. This court, therefore, finds and hold that the instant petition properly presents a serious constitutional issue for determination.

151. Having so found, a consideration of the rest of the issues follow.

ii. The nature and scope of socio-economic rights in the context of the petition:

152. The social and economic rights provided for in article 43 of the *Constitution* include the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education. The *Constitution* further provides that a person is not to be denied emergency medical treatment and enjoins the State to provide appropriate social security to persons who are unable to support themselves and their dependants.

153. Section 6 of the *Health Act*, No 21 of 2017 (which Act was assented to on June 21, 2017) makes further provisions on the right to reproductive health as follows: -

> 6. Reproductive health:
>
> (1) Every person has a right to reproductive health care which includes—
>
> (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;
>
> (b) the right of access to appropriate health-care services that will enable parents to go safely through pregnancy, childbirth, and the postpartum period, and provide parents with the best chance of having a healthy infant;
>
> (c) access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an

extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.

(2) For the purposes of subsection (1)(c), the term "a trained health professional" shall refer to a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid license from the recognized regulatory authorities to carry out that procedure.

(3) Any procedure carried out under subsection (1)(a) or (1)(c) shall be performed in a legally recognized health facility with an enabling environment consisting of the minimum human resources, infrastructure, commodities and supplies for the facility as defined in the norms and standards developed under this Act.

154. The above social and economic rights are positive rights since they impose obligations on the State to do as much as it can to secure for its citizens a core minimum of the social and economic rights specified in the article.

155. Socio-economic rights, also known as rights of equality (egalite), therefore, derive their identity from the fact that their realization calls upon the State to take positive steps in order for its citizens to realize their rights.

156. Unlike rights of liberty, also known as first-generation rights or liberte whose realization call for non-interference from the State, socio-economic rights are distinguished by the duty they impose on Government to act.

157. The obligation of the State with respect to realization of the socio-economic rights in article 43 of the *Constitution* was discussed by the High Court in Petition No 164 of 2011, *Mitubell Welfare Society v Attorney General & 2 others*, in the following manner: -

> ... The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the *Constitution* ignores the fact that no provisions of the *Constitution* is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of socio- economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a constitutional obligation on the State, when confronted with a matter such as this, to go beyond the standard objection....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."

158. In South Africa, the Constitutional Court spoke to the State's obligation to the realization of socio-economic rights in *Government of the Republic of South Africa v Grootboom* Case CCT 11/00, as follows: -

> ... Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization

> of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources"

159. In the context of this matter, therefore, the full realization of the petitioner's right to reproductive health called upon the State to *inter alia* develop health policies, legislate on health, building and equipping hospitals, employ qualified health professionals and facilitate their training from time to time; among other things.

160. With the foregoing, the stage is set for consideration of the merits, or otherwise, of the petition.

iii. The issue of informed consent and whether the 1st petitioner gave informed consent to undergo the bilateral tubal ligation medical procedure:

161. In discussing this issue, two sub-issues arise. They are: -

(a) What entails informed consent.

(b) Whether informed consent was obtained from the 1st petitioner.

Informed Consent:

162. It is common ground that indeed the 1st petitioner underwent a medical procedure known as Bilateral Tubal Ligation (hereinafter referred to as 'the BTL') and as a result was permanently unable to bear children. In fact, the BTL amounted to the 1st petitioner's permanent sterilization. In other words, as a result of the BTL, the 1st Petitioner lost the ability to conceive and bear any children.

163. What is in contention is whether the 1st petitioner was made aware of the nature of the BTL procedure and its life-long repercussions and whether the consent, if any, was informed.

164. The *Concise English Dictionary* defines the word consent at page 304 to mean: -

> Permission for something to happen or to be done.

165. The same Dictionary defines "informed consent" as: -

> Permission granted in the knowledge of the possible consequences.

166. The *Black's Law Dictionary*, Thomson Reuters Publishers defines the term 'consent' at page 380 as follows: -

> Voluntary yielding to what another proposes or desires; agreement, approval or permission regarding some act or purpose esp given voluntarily by a competent person; legally effective assent.

167. The same Dictionary defines 'informed consent' as follows: -

> 1. A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.

2. A patient's knowing choice about the medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical community would give to a patient regarding the risks involved in the proposed treatment or procedure – also termed as knowing consent.

168. In its endeavour to discharge its duty in providing health care services to its citizens, Kenya undertook various initiatives. They include constitutional, statutory, policy interventions among many others.

169. For instance, the very crucial *Health Act*, No 21 of 2017 was assented to on June 21, 2017. It is an Act of Parliament to establish a unified health system, to coordinate the inter-relationship between the National Government and County Government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes. It is a post-2010 legislation and it appropriately endeavoured to be at par with the *Constitution*.

170. The *Health Act* further defines the roles and responsibilities of the National Government and County Governments on matters relating to health including adherence to international obligations under conventions, treaties among others. As said, the *Health Act* is, to a very large extent, a comprehensive legislation on matters health.

171. The *Health Act* defines 'informed consent' in section 2 thereof as follows: -

> " informed consent" refers to a process of getting permission before conducting a health care procedure on a person.

172. Section 9(3) of the *Health Act* also defines the term 'informed consent' as follows: -

> ... informed consent" means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as provided for in section 8 of this Act.

173. The Government through the Ministry of Health went further to develop the *Kenya National Patients' Rights Charter, 2013*, which is a document designed to empower clients and patients by informing them of their rights and responsibilities.

174. The said *Charter* recognises informed consent as a Patient's right. It states as follows: -

> 8. Right to informed consent to treatment:
>
> To be given full and accurate information in a language one understands about the nature of one's illness, diagnostic procedures, proposed treatment, alternative treatment and the cost involved for one to make and decision except in emergency cases
>
> The decision shall be made willingly and free from duress.

175. The law in Kenya, therefore, recognises 'informed consent' as a process. The process is the cumulative product of the steps involved in which permission is obtained before conducting a health care procedure on a person or a user.

176. There is no doubt that a healthcare provider is the custodian of the information that facilitates a patient's informed consent. That information is always not readily available to patients. It is indeed a

fact that in most cases there is a grave imbalance of knowledge and information between the healthcare provider and the person receiving the professional services. As such, a healthcare provider is under an obligation to ensure that such information is accurately broken down and communicated to the patient and in a language that the patient or user understands.

177. In an attempt to neutralize the imbalance, section 8 of the *Health Act* provides as follows: -

> 8. Health information:
>
> (1) Every health care provider shall inform a user or, where the user of the information is a minor or incapacitated, inform the guardian of the—
>
> (a) user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
>
> (b) range of promotive, preventive and diagnostic procedures and treatment options generally available to the user;
>
> (c) benefits, risks, costs and consequences generally associated with each option; and
>
> (d) user's right to refuse recommended medical options and explain the implications, risks, and legal consequences of such refusal.
>
> (2) The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy.
>
> (3) Where the user exercises the right to refuse a treatment option, the health care provider may at its discretion require the user to confirm such refusal in a formal manner.
>
> (4) In this section, the word "user" refers to any person who seeks or intends to seek medical care from a health care provider and the expression "health care provider" includes any health facility.

178. Once health information has been sufficiently communicated to the patient or user, section 9 of the *Health Act* then kicks in. It outlines in detail the various parameters through which a patient's or user's consent can be obtained. It also sets out the instances when medical procedure may be conducted consent notwithstanding.

179. Section 9 of the *Health Act* provides as follows: -

> 9. Consent
>
> (1) No specified health service may be provided to a patient without the patient's informed consent unless—
>
> (a) the patient is unable to give informed consent and such consent is given by a person—
>
> i. mandated by the patient in writing to grant consent on his or her behalf; or

ii. authorized to give such consent in terms of any law or court order;

(b) the patient is unable to give informed consent and no person is mandated or authorized to give such consent, but the consent is given by the next of kin;

(c) the provision of a health service without informed consent is authorized by an applicable law or court order;

(d) the patient is being treated in an emergency situation;

(e) failure to treat the user, or a group of people which includes the user, will result in a serious risk to public health; or

(f) any delay in the provision of the health service to the patient might result in his or her death or irreversible damage to his or her health and the patient has not expressly, or by implication or by conduct refused that service.

(2) A health care provider must take all reasonable steps to obtain the user's informed consent.

(3) For the purposes of this section "informed consent" means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as provided for in section 8 of this Act.

180. The law, therefore, recognises and emphasises the need by a healthcare provider to obtain informed consent from a user before undertaking any procedure on that person. However, there is no developed standard procedure in the manner in which such consent will be obtained. The reason for such is that discretion is granted to the healthcare provider to choose the manner in which the consent will be obtained or presumed as long as it is within the *Constitution* and the law.

181. The above Kenyan position on the informed consent is akin to various international instruments in which Kenya is a signatory. Most of the instruments places an obligation upon State parties to take measures to prevent, protect against and remedy human rights violations including those committed by non-State actors. That is the due diligence principle in international law. A further look into this arena will be undertaken later in this judgment.

182. The issue of informed consent has also been dealt with in other jurisdictions. For instance, the South African Constitutional Court in *Oldwage v Louwrens* (10253/01) 2004 ZAWCHC 9; [2004] 1 All SA 532 (C) discussed the concept in the following words: -

> ... Consent on treatment will only be informed if it is based on substantial knowledge concerning the nature and effect of the act consented to. Thus, a medical practitioner is obliged to warn a patient of the material risks and consequences which may ensue during and consequent to the proposes treatment.

183. The role of the healthcare provider in obtaining the informed consent was discussed in *Montgomery v Lanshire Health Board* [2015] UKSC 11 as follows: -

> ...the doctors advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is in a position to make an informed decision. The role will only be performed effect if the information provided is

comprehensible. The doctor's duty is not therefore fulfilled by bombarding the patient with technical information.

184. And, in the words of Mr Richard Wagner as captured in his expert article on the duty of a medical provider: -

> .... to disclose information on the treatment, test or procedure in question, including the expected `benefits and risks, and the likelihood (or probability) that the benefits and risks will occur...
>
> .... the patient must comprehend the relevant information, and must grant consent, without coercion or duress...

185. There are also the *FIGO (the International Federation of Gynaecology and Obstetrics) Guidelines* which deal with various aspects of informed consent. FIGO is an organisation that brings together professional societies of obstetricians and gynaecologists around the world. FIGO is dedicated to the improvement of women's health and rights and to the reduction of disparities in healthcare available to women and new-borns, as well as to advancing the science and practice of obstetrics and gynecology.

186. *FIGO Guidelines* in dealing with the aspect of sterilization in women provide as follows: -

1. No woman may be sterilised without her own, previously-given informed consent, with no coercion, pressure or undue inducement by healthcare providers or institutions.
2. Women considering sterilisation must be given information of their options in the language in which they communicate and understand.
3. Sterilisation for prevention of future pregnancy is not an emergency procedure. It does not justify departure from the general principles of free and informed consent.
4. Consent to sterilisation must not be made a condition of receipt of any other medical care, such as HIV/AIDS treatment, assistance in natural or caesarean delivery, medical termination of pregnancy, or of any benefit such as employment, release from an institution, public or private medical insurance, or social assistance.
5. Forced sterilisation constitutes an act of violence, whether committed by individual practitioners or under institutional or governmental policies. Healthcare providers have an ethical response in accordance with the guideline on Violence Against Women [2007].
6. It is ethically inappropriate for healthcare providers to initiate judicial proceedings for sterilisation of their patients, or to be witnesses in such proceedings inconsistently with article 23(1) of the Convention on the Rights of Persons with Disabilities.
7. At a public policy level, the medical profession has a duty to be a voice of reason and compassion, pointing out when legislative, regulatory or legal measures interfere with personal choice and appropriate medical care.

187. Drawing from the above discussion, it can be deduced that informed consent may be regarded as having been properly obtained upon the healthcare provider satisfying the following:

(i) Ascertains the age of the patient.

(ii) Ascertains if the patient is a minor or is under any disability that makes him/her unable to understand and consent, for instance, if one is too ill or mentally incapacitated.

(iii) In the event the patient is a minor or is under any disability that makes him/her unable to understand and consent, such consent be obtained from another person legally authorised to give such consent.

(iv) Ascertains the literacy level of the patient or the one legally authorised to give such consent, as the case may be.

(v) Ascertains the language the patient wishes to use. An interpreter may be availed if need be.

(vi) Ascertains, as much as possible, the background of the patient.

(vii) Discloses the patient's health status as restrained by the law or a court order.

(viii) Explains the range of promotive, preventive and diagnostic procedures and treatment options generally available to the patient.

(ix) Explains the benefits, risks, costs and consequences generally associated with each option.

(x) Explains the patient's right to refuse the recommended medical options and the implications, risks, and legal consequences of such refusal.

(xi) Takes all reasonable steps and ensure that the patient, or the one giving the consent, is reasonably free and not under any form of compulsion, duress or coercion.

(xii) The explanations given to the patient to be, in as much as possible, in the nature of a dialogue with the aim of ensuring that the patient fully understands the seriousness of her/his condition, the anticipated benefits and risks of the proposed treatment and any reasonable alternatives so much so that the patient makes an informed decision. To a very great extent technical language be avoided.

(xiii) The patient ought to be accorded time, if need be, to enable him/her consider the information given and to decide except in cases where the procedure is an emergency.

(xiv) The consent must be in writing.

188. This court will now apply the circumstances in this case to the foregoing in dealing with the second sub-issue.

Was Informed Consent Obtained From the 1st Petitioner Prior to the Performance of the BTL Procedure?

189. The answer to the above question rests on the interrogation of the steps undertaken by the health provider or providers, as the case may be, prior to the performance of the BTL operation. As a result, a review of the chronology of events suffices.

190. In her dispositions and evidence in court, the 1st petitioner testified that sometimes in 2006 she realized that she was pregnant and went to Kariobangi Clinic within Nairobi County for the regular ante-natal clinics. She was subsequently diagnosed as HIV positive. She then went to Babadogo Health Centre for a second opinion. She also tested positive.

191. While at the [particulars withheld] Health Centre she was counselled on how to live with the challenge and advised that it was not proper to conceive again since that will affect her health. By then she was pregnant with her second child.

192. She testified that in order to have an HIV free-child, she was further advised that a caesarean section operation should be performed and that the procedure would cost Kshs 10,000/-.

193. Desirous to have a HIV-free baby and on the basis that she could not afford the foregoing amount, the 1st petitioner posited that she was given two Vouchers by the health attendant to use at Marura Maternity and Nursing Home during her delivery time. The Vouchers costed her Kshs 300/=.

194. On September 15, 2006, the 1st petitioner while in the company of her now late husband went to Marura Maternity and Nursing Home. She testified that she was given a card and upon examination by the Doctor, she was informed that the labour pain was premature. However, since the delivery would any way have had to by way of caesarean section, she was informed that the procedure would be conducted the following day and she was admitted.

195. It was her further evidence that on the following day, that is September 16, 2006, without being told anything about family planning, she was taken to the theatre. A Doctor injected her on her back. The Doctor then asked her whether she knew she was being sterilized and she answered in the affirmative but did not sign any document. She successfully completed the procedure and went home.

196. It was further her case that upon the death of her first husband she remarried and after three months of trying to conceive in vain, she sought the medical help form a German Doctors' Hospital where she was informed that an irreversible medical procedure known as BTL had been performed on her and that she would not be able to conceive again.

197. During cross examination by Mr Ojienda, Learned Counsel for the 1st respondent, she testified that she knew that she was being sterilized but did not know it was permanent. It was her case that whereas she knew it was about family planning, she did not consent to it despite being asked if she knew she was being sterilized.

198. The 1st respondent called its representative one Sophia Wanjiku who was one of the nurses during the time the 1st petitioner was admitted to the facility.

199. She testified to the effect that 1st petitioner gave her consent and that the BTL procedure was reversible.

200. There are several documents which were produced by the parties. They included the vouchers, 1st petitioner's medical records with the 1st respondent, the consent, Medical Report, Psychological and Psychiatric Evaluation Reports from Hurlingham Family Health Clinic among others. This court has carefully perused and considered the documents and their contents.

201. The inception of the 1st petitioner's problems was when she was diagnosed HIV positive. She was subsequently advised not to have more children due to her said status.

202. In this case, there is uncontroverted evidence that the 1st petitioner fell in the low income, illiterate class of the society because she earned a paltry Kshs 150/- on a daily basis and educationally, she only went up to Class 3.

203. In her psychological and psychiatric evaluation, it was her evidence further that she lost her father when she was three years old and was married off at the age of 14 years.

204. The foregoing brings to a sharp focus the person in whom the 1st respondent was providing health services. Her low level of literacy and understanding of family planning options and health generally imposed upon healthcare providers a high legal duty to facilitate her consent.

205. They had the obligation to break down and convey in a language she understood the information as to what BTL entailed in the first place, its implications and check to ensure that she had understood what was the procedure was all about.

206. In addition, the healthcare provider had a legal duty as required under sections 8 and 9 of the *Health Act* to explain to her the available alternatives of family planning.

207. By juxtaposing the 1st petitioner's position and the legal requirements in obtaining informed consent side by side, it is apparent that the 1st respondent did not obtain any such informed consent from the 1st petitioner. There is no evidence that the 1st respondent undertook any meaningful due diligence on the 1st petitioner in the quest to obtain the requisite consent.

208. It is in evidence that the 1st petitioner was casually asked by the Doctor performing the BTL procedure whether she was aware that she was being sterilized. Even such enquiry was made just before the operation began. The consent form produced in evidence, as well, raised serious doubts into the manner in which the consent was obtained.

209. The medical professional who obtained the consent did not tender any evidence on how he/she procured the consent. That was despite the court granting the 1st respondent an opportunity to file any dispositions to that end and well before the hearing of the petition. Further, the 1st respondent's representative who testified in court did not aid the court much since she admitted that she was not aware of the circumstances under which the consent was obtained. The witness only emphasized that as long there was a consent letter in the patient's file, then it meant that the consent was regularly obtained.

210. The 1st petitioner must, therefore, have made up her mind on the premise that it was not advisable to have children when she was HIV positive, a position which is not medically accurate.

211. The consent obtained from the 1st petitioner, hence, appears to have been borne out of fear and apprehension that having more children would pose danger not only to her but also to the child she would carry.

212. It is also not lost on this court that the healthcare providers took advantage of the 1st petitioner's economic vulnerability, low level of understanding occasioned by her illiteracy to subject her to the BTL operation. It cannot, therefore, be alleged that the consent was freely obtained.

213. By and large, the 1st respondent did not, in the least, adhere to the procedure provided in the law in the manner the consent was obtained. In the end, the consent was obtained contrary to the law and did not amount to an informed consent.

214. There was another angle to the issue of the consent raised by the 1st respondent. It alleged that by the time the 1st petitioner arrived at the facility for the BTL procedure, she had already given her informed consent at Baba Dogo Health facility and as such, 1st respondent did not have a further obligation to obtain a fresh consent.

215. The foregoing raises the issue as to whether consent is transferrable from one health facility to another so that once it is obtained in one hospital, it subsequently is not mandatory for the referral hospital to get its own.

216. This court has carefully gone through the provisions of the *Health Act* and did not come across instances where consent may be transferred. What comes out throughout the statute is that the law places individual responsibility on health care providers and health care professionals while providing their services.

217. The said deliberate architecture emphasises the need for individual decision making by health care providers and professionals whenever they are dealing with human life. It also eradicates instances where a wrong diagnosis or decision by one health care provider or professional is carried along by others.

218. The foregoing is also in tandem with the national values and principles of governance under article 10(2)(c) of the *Constitution* on integrity, transparency and accountability.

219. In sum, therefore, the contention that the informed consent on the BTL procedure was obtained at the Baba Dogo Health facility does not hold more so given that the said Baba Dogo Health facility is not the healthcare provider that carried out the impugned medical procedure. The responsibility to obtain informed consent from the 1st petitioner firmly and solely rested upon the 1st respondent and not otherwise.

220. It is also worth-noting that going by the manner in which informed consent is to be obtained from a user, there was no evidence or at all to the effect that such informed consent was obtained at the Baba Dogo Health facility. As such, there was no consent, in the first instance, to be transferred to the 1st respondent even if the law allowed as much.

221. In the end, this court finds and hold that the 1st respondent did not obtain the informed consent from the 1st petitioner prior to performing the btl medical procedure on the 1st petitioner.

iii. Remedies:

222. It is the duty of this court to remedy any violation or threats to violation of any of the rights and fundamental freedoms in the Bill of Rights as well as infringement or any attempt thereof to the *Constitution*.

223. It, therefore, remains the cardinal duty of a petitioner to discharge the duty of proving the said violations or threats thereto.

224. In this case, the petitioners have proved that the 1st respondent failed to obtain the informed consent prior to performing the btl procedure on the 1st petitioner. From the expert reports filed on record, it is the case that the BTL procedure was a permanent sterilization medical procedure in nature despite the 1st respondent alleging that any family planning procedure is reversible. I say so because whereas the experts demonstrated how the procedure was irreversible, the representative of the 1st respondent, who was a Nurse, laid nothing in support of the reversibility allegation.

225. There is no doubt that the 1st petitioner will not be able to conceive for the rest of her life. The trauma associated with such a scenario has been extensively dealt with by the petitioners and *amici curiae* in this matter where a lot of reference was made to international instruments and researches undertaken world over. This court agrees with the position.

226. The upshot is that the 1st petitioner's rights and fundamental freedoms were variously infringed. For instance, the right to the highest attainable standard of reproductive health under article 43(1)(a) of the *Constitution* was infringed.

227. Closely linked to the above is the right to the dignity of the 1st petitioner guaranteed under article 28 of the *Constitution*. The dignified right of the 1st respondent as a woman to have children was unlawfully taken away. The 1st Petitioner now stands perpetually ridiculed especially going by the manner in which women who are unable to conceive, have babies and maintain families in the African communities are generally treated with contempt.

228. The right to a family provided for under article 45 of the *Constitution* was likewise infringed. The 1st petitioner demonstrated how her second marriage came to an end when her husband realized that she had undergone sterilization. She has since then remained unmarried.

229. Further, the BTL procedure underwent by the 1st petitioner was differential treatment purely based on sex, gender and her HIV status.

230. The above aspects were dealt with in High Court at Nairobi in Petition Nos 56, 58 & 59 of 2019 (Consolidated), *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR. The High Court discussed the various facets of discrimination and instances when differential treatment does not amount to discrimination. It observed as follows: -

> 983. The precise meaning and implication of the right to equality and non-discrimination has been the subject of numerous judicial decisions in this and other jurisdictions. In its decision in *Jacqueline Okeyo Manani & 5 others v Attorney General & another* (*supra*) the High Court stated as follows with respect to what amounts to discrimination:
>
> 26. *Black's Law Dictionary*, 9th Edition defines "discrimination" as
>
> (1) "the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship"
>
> (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".
>
> 27. In the case of *Peter K Waweru v Republic* [2006] eKLR, the court stated of discrimination thus: -
>
> Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject

or have 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."(emphasis)

28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the *Constitution* prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

29. The *Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

30. In this regard, the court stated in the case of *Nyarangi & 3 others v Attorney General* [2008] KLR 688 referring to the repealed constitution; "discrimination that is forbidden by the *Constitution* involves an element of unfavourable bias. Thus, firstly unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the constitutional definition of the word "discriminatory" in section 82 of the *Constitution*.

984. It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate. Such differentiation, however, does not amount to the discrimination that is prohibited by the *Constitution*. In John Harun Mwau v Independent Electoral and Boundaries Commission & another (*supra*), the court observed that:

> [i]t must be clear that a person alleging a violation of article 27 of the *Constitution* must establish that because of the distinction

made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the *Constitution*.

985. When faced with a contention that there is a differentiation in legislation and that such differentiation is discriminatory, what the court has to consider is whether the law does indeed differentiate between different persons; if it does, whether such differentiation amounts to discrimination, and whether such discrimination is unfair. In *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another*: Petition 150 & 234 of 2016 (Consolidated) the court held that:

> 288. From the above definition, it is safe to state that the *Constitution* only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

986. In *Harksen v Lane No and others* (*supra*) the court observed that the test for determining whether a claim based on unfair discrimination should succeed was as follows:

> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the *Constitution*. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination,' does it amount to

> 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

988. It must also be noted, as observed by Mativo J in Mohammed *MohAbduba Dida v Debate Media Limited & another* (*supra*) that:

> It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. (Emphasis added).

231. As stated above, this court is satisfied that the BTL procedure underwent by the 1st petitioner indeed was differential treatment purely based on sex and HIV status. It was unfair discrimination that served no rational purpose and cannot be justified in a liberal well-functioning constitutional democracy and society.

232. As a result, article 27 of the *Constitution* was infringed.

233. At this point in time, it is imperative to note that whereas the 1st respondent failed to obtain the informed consent from the 1st petitioner prior to the procedure, the 1st petitioner was also made to believe that it was dangerous to continue having children while she was HIV positive. According to the 1st petitioner, she was made to believe that if she continued to conceive she risked not only the life of the babies, but hers as well, hence opted to undergo the medical procedure. That information was passed to the 1st petitioner at Baba Dogo Health Centre where she was also given the two vouchers which she took to the 1st respondent. The Baba Dogo Health Centre was under the charge of the Nairobi County through the 2nd respondent, the County Executive Committee Member in-charge of Health Services.

234. In this case, therefore, it is plain that the 1st and 2nd respondents were the main parties at the heart of the infringement of the 1st petitioner's rights and fundamental freedoms.

235. On a careful consideration of this matter, this court does not find any fault against the 3rd and 4th respondents. The 3rd respondent was the Cabinet Secretary in-charge of Health and the 4th respondent was the Hon. Attorney General. Both represented the National Government.

236. It has been demonstrated in this judgment that the National Government has not only passed legislation on informed consent, (that is the *Health Act*), but it also passed relevant national policies

and even assented to and adopted international treaties and instruments on health including the aspect of informed consent.

237. Some of them include the *Convention on The Elimination of All Forms of Discrimination Against Women* (CEDAW), the *African Charter on Human and Peoples' Rights* (ACHPR), The *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa* and the General Comment No 2 on article 14.1(a), (b), (c) and (f) and 14.s(a) and (f) of the *Protocol* which requires state parties to ensure that the right to health of women, including sexual and reproductive health is respected and promoted.

238. In addition to the foregoing, the National Government has assented to the *Universal Declaration of Human Rights* (UDHR), the *International Convention on Civil and Political Rights* (ICCPR) and the *Convention Against Torture* (CAT) among many others.

239. To that end, the National Government may not be rightly so held to have aided to the infringement herein.

240. The National Government has also put in place mechanisms for complaints against health providers and institutions as well as the manner in which such complaints are dealt with. In this case, there is no contention that relevant complaints were made, but not acted or satisfactorily acted upon under the law.

241. As found earlier, this court now affirms that the 3rd and 4th respondents did not infringe any of the 1st Petitioner's rights and fundamental freedoms in the circumstances of this case.

242. Turning to the main agents of the infringement, it is a fact that had the 1st respondent endeavoured to and properly obtained the informed consent, the wrong information given to the 1st petitioner at Baba Dogo Health Centre would have been corrected and the 1st petitioner accorded an opportunity to address herself on the issue. In terms of parity, the 1st respondent would, therefore, carry a heavier burden of blame than the 2nd respondent.

243. Having said so, for purposes of compensation, if any, this Court would settle the liability at 70% against the 1st respondent and 30% against the 2nd respondent.

244. As is the case in constitutional petitions, there are arrays of available remedies. what a court endeavours to do upon confirming of any infringement is to grant an appropriate remedy. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief.

245. Courts have severally rendered on reliefs. The Court of Appeal in *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR held that article 23 of the *Constitution* does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

246. In *Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi and another* Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

> While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the *Constitution* itself. Not only can the court enlarge old remedies, it can invent new ones

> as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General [2001] 2 RC 671; Ramanoop v Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna v Republic* [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See The *Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361.

247. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

248. This court has before discussed monetary compensation and instances where such compensation is inappropriate. In *Patrick Alouis Macharia Maina & 3 others v Shoprite Checkers Kenya Limited* [2021] eKLR this court stated as follows: -

> 67. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR was very categorical on how courts ought to approach the aspect of award of damages in constitutional petitions. In affirming the position that indeed damages are awardable in constitutional petitions, the court called for care and caution in doing so.
>
> 68. The Court of Appeal undertook an in-depth comparative analysis of the issue and in the end, rendered itself as follows: -
>
> > ... It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.
> >
> > It is convenient to consider first, the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual by a State. We will do so very briefly and broadly because it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case and as we posited earlier, we would want to consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

... In *Peters v Marksman & another* [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in *Fuller v A-G of Jamaica* (Civil Appeal 91/1995, unreported), where the Court held that:

It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.

The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 to include, a remedy that will:

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in constitutional violation cases though is limited by what is "appropriate and just "according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether.

> In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

249. Taking cue from the foregoing, this court finds and hold that the 1st petitioner's rights and fundamental freedoms ought not only be vindicated by appropriate declarations, but also by an award of damages which will go a long way in curbing the failure to obtain informed consents before any medical procedures as well as curbing the manipulation and misleading information used to sterilize HIV positive women.

250. In settling the award of damages, this court is alive to the fact that the 1st respondent is a private medical facility providing services to many people and this decision may generate many like litigations and the court would also wish to have the 1st respondent continue offering appropriate services to the public, going forward. Further, it is expected that the 1st respondent will undertake immediate, if not yet, steps to ensure that faults on its part in this judgment are corrected.

251. It is also expected that the 2nd respondent will forthwith take appropriate steps and ensure that the information given to the public is correct. This court has also considered the proposals by the petitioners under this head.

252. Drawing from the foregoing, this court shall render suitable remedies based on the fact that the 1st and 2nd respondents variously infringed upon the 1st petitioner's rights and fundamental freedoms.

Disposition:

253. In the end, the court finds the petition is merited and do hereby issue the following final orders: -

    a. The claims against the 3rd and 4th respondents are hereby dismissed.

    b. A declaration hereby issue 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.

    c. A declaration hereby issue that referral medical institutions (such institutions where patients are referred to for further medical attention) must obtain fresh informed consents from the patients for purposes of undertaking any medical operations except in cases of emergency.

    d. A declaration hereby issue that the act of sterilization of the 1st petitioner herein by the 1st respondent by way of bilateral tubal ligation was undertaken without obtaining the 1st petitioner's informed consent and as such it amounted to violation of the 1st petitioner's constitutional rights and fundamental freedoms under articles 27, 28, 43(1)(a) and 45 of the *Constitution*.

    e. The 1st petitioner is hereby awarded compensation in the sum of Kshs 3,000,000/- (Kenya shillings three million only). Payment thereof shall be on the basis of 70% against the 1st respondent and 30% against the 2nd respondent.

    f. Since this is a public interest litigation, each party to bear its own costs.

254. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

AC MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr Maleche and Miss Njogu, learned counsel for the petitioners.

Mr Ojienda, learned counsel for the 1st respondent.

Miss Achola, learned counsel for the 2nd respondent.

Mr Moimbo and Mr Munywa Ezekiel, learned counsel for the 3rd and 4th respondents and 1st amicus curiae.

Miss Caroline Oduor, learned counsel for the 1st interested party.

Mr Awele for 2nd amicus curiae.

Regina/Kirong – court assistants.