CASE DIGEST

ABORTION IN AFRICA

ABORTION IS HEALTHCARE

JUNE 2023

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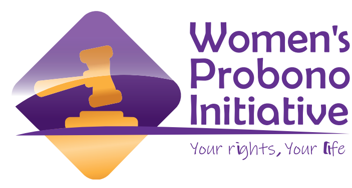

CONTENTS

4 **ACKNOWLEDGMENT**

5 **INTRODUCTION**

6 **LEGAL FRAMEWORK**
6 Synopsis of the cases

9 **THE PREDOMINANT FRAMEWORKS/FRAMING OF ABORTION ADVOCACY**
9 Decolonisation Framing
9 The Liberal Approach: Choice and Bodily Autonomy Framing
10 The Child Best Interest Framing
11 The Comprehensive Health / Reproductive Rights Approach Framing
11 The "Do No Harm" Or Harm Reduction Approach Framing
12 Reproductive Justice Framing

13 **PART B**
13 CHRISTIAN LAWYERS ASSOCIATION OF SA AND OTHERS V MINISTER OF HEALTH AND OTHERS, 1998 (11) BCLR 1434 (T), DIVISION: HIGH COURT, TRANSVAAL PROVINCIAL DIVISION

16 CHRISTIAN LAWYERS' ASSOCIATION V NATIONAL MINISTER OF HEALTH AND OTHERS, Case No: 7728/2000, High Court, Transvaal Provincial Division, 2004 (10) BCLR 1086 (T)

20 THE HIGH COURT, AT ITS HEADQUARTERS, TRIED THE PRESENT CASE IN A PUBLIC HEARING ON 30TH OCTOBER 2015, RPA 0787/15/HC/KIG Folio 1

23 FEDERATION OF WOMEN LAWYERS (FIDA-KENYA) AND JMM AND OTHERS v ATTORNEY GENERAL AND OTHERS, REPUBLIC OF KENYA, IN THE HIGH COURT OF KENYA, AT NAIROBI, CONSTITUTIONAL AND HUMAN RIGHTS DIVISION, PETITION NO 266 OF 2015

34 PAK AND SALIM MOHAMMED v THE ATTORNEY GENERAL AND OTHERS, MALINDI HC CONSTITUTIONAL PETITION NO. E009 OF 2020 – JUDGMENT, REPUBLIC OF KENYA, IN THE HIGH COURT OF KENYA AT MALINDI, CONSTITUTIONAL PETITION NO. E009 OF 2020

41 HM AND CM v QUEEN ELIZABETH CENTRAL HOSPITAL & MINISTRY OF HEALTH, IN THE HIGH COURT OF MALAWI, ZOMBA DISTRICT REGISTRY, JUDICIAL REVIEW CAUSE NO 03 OF 2021

45 **BIBLIOGRAPHY**

ACKNOWLEDGMENT

The Women's Probono Initiative (WPI) are extremely grateful to the Centre for Reproductive Rights (CRR) for the support in the development of this case digest on abortion in Africa. Their contributions towards facilitating the Consultant, Peer Reviewer, printing and designing, and logistics for the dissemination have enabled us develop this digest.

We would like to extend our deepest appreciation to the Consultant, Dr. Maria Nassali, who developed the digest. Our thanks go out to Hon. Lady Justice Lydia Mugambe who peer reviewed the draft digest and offered useful feedback.

An honorable mention goes out to the Executive Director of WPI, Ms. Primah Kwagala, who spared time to oversee the process. We are also thankful to the WPI staff who in one way or another supported the process.

This case digest is meant to serve as a reference resource for the judiciary and lawyers on abortion matters that go to court. We hope it will be a value add.

INTRODUCTION

Women's Probono Initiative (WPI) is an indigenous, non-profit, legal and advocacy organization whose vision is a "Uganda free of violence and discrimination against women and girls." WPI was started in July 2018 and formally registered by the National Bureau for Non-Government Organizations (NGOs) in May 2019. WPI's mission is to protect women and girls' rights in Uganda, by advancing their access to justice. Its programmes include: Awareness creation, free legal representation, impact ligation, research and publication. WPI serves as a knowledge hub for research and knowledge management on women's rights, with a focus on Sexual and Reproductive Health and Rights (SRHR). It has developed this *Case Digest on Abortion in Africa* to serve as a reference resource for the judiciary and the lawyers.

Abortion is one of most contentious issue mired by political, social, cultural and religious contestations. Thus, the women's unfettered right to reproductive autonomy is yet to be recognised as a positive international human right (Albertyn 2019: 90 & 94; Borosso 2014: 168). Generally, there are very few cases on abortion from the courts of record in Africa. These are drawn from South Africa, Kenya, Rwanda and Malawi. Although abortion cases are reported, they are hardly prosecuted but often used for extortion and as evidence of defilement (HRAPF 2016: ix & x). Their limited numbers notwithstanding, collectively the case studies articulate critical issues, including the status of the foetus in law vis-à-vis women's human rights; the meaning of health, the bundle of reproductive health rights, the Child Best interest, adolescent right to give informed consent, state's obligations to prevent maternal mortality due to unsafe abortion, and the anchoring of abortion within the discourse of democratic constitutionalism and social justice debate.

LEGAL **FRAMEWORK**

Abortion laws in Africa are a colonial bequest that characterized abortion as illegal and immoral, with the consequential restrictions of access to abortion with the exception of saving a woman's life (Ngwena 2022). The above notwithstanding, the countries of the review operate under different legal regimes of abortion. South Africa has the most progressive legal regime. The Constitution provides for an express right to bodily and psychological integrity, including the reproductive choice, under s. 12(2) as well as a right to reproductive health services under s. 27. Further, the Choice of Termination of Pregnancy Act (COTPA) 1996 does not restrict abortion under the first trimester and thereafter it is permissible in consultation with the health professional. The constitutions of Rwanda and Kenya allow abortion in respect to the health and to save the life of the mother; Malawi allows abortion to save a woman's life, a situation that is similar to Uganda (Chiweshe and Macleod 2018: 54).

SYNOPIS OF THE CASES

Christian Lawyers Association of South Africa and Others v Minister of Health and Others, 1998(11) BCLR 1434 (T), focussed on whether the foetus or embryo has rights and whether or not abortion was a violation of the right to life. Court held that the question should not be addressed from a medical, scientific, moral nor philosophical dimension, but it was a legal question based on the interpretation of the Constitution. Despite the provision that life commences at conception, the words, "everyone or people" under the bill of rights does not include a foetus as a bearer of rights. Age commences at birth. Affording the foetus legal personality would infringe on a number of women's rights, which would contravene the egalitarian transformative potential of the South Africa Constitution.

Christian Lawyers' Association v National Minister of Health and Others 2004 (10) BCLR 1086 (T) challenged the constitutionality of the Choice on Termination of Pregnancy Act (COTPC) of 1996 for allowing girls under 18 years the right to terminate the pregnancy without the parent's nor guardian's consent, which the petitioners contended was a violation of the child's best interest. Court held that the South African law applied a more liberal concept of "informed consent" that does not use "fixed rigid age" as a yardstick. Instead, it focusses on the individual woman or girls' intellectual or emotional capacity as determined by knowledge, appreciation and consent to the procedure as established by the medical doctor or registered nurse, irrespective of age. The rationale for informed consent is to effect the patient's fundamental right to self-determination and autonomy.

The ***Judicial Review,*** in Rwanda (RPA 0787/15/HC/KIG Folio 1), was an appeal against the denial of legal abortion of a 13 year-old girl on grounds that the exception of Criminal Code only applied to a woman. On appeal, the court held that the common element in both rape and defilement is lack of consent because a child is unable to give consent to sexual intercourse. Court affirmed the state obligations under the Maputo Protocol that any victim of sexual assault and the medical doctor are exempted from criminal liability of abortion on grounds that a woman has become pregnant as a result of sexual abuse. Although a decision by a competent court permitting the abortion is required, the determination of criminal liability is not a requirement of the exemption. IC's application was granted mindful that the pregnancy had not yet reached 22 weeks as provided by the *National Protocol on operationalizing the exceptions to abortion.*

In contrast, in the Malawian case of ***HM (guardian) on behalf of CM (minor) v The Hospital Director of Queen Elizabeth Central Hospital (QECH) and the Minister of Health*** (Judicial Review Cause No 03 of 2021), the court rejected the judicial review of CM—a 15 year-old girl impregnated by a married man, on grounds that: CM had not applied for the termination of the pregnancy at the QECH; the medical examination did not reveal any co-morbidities that would put CM in danger because of the pregnancy; CM's problem was a social one caused by lack of maintenance from her "boyfriend," and she had already pursued this alternative remedy from the Police. Positively, the court reaffirmed that the Penal Code exempts a medical doctor who performs in good faith a medical procedure, to terminate a pregnancy. However, in the absence of express request by the victim to terminate the pregnancy, there was no basis upon which the medical doctor would have made a decision to terminate the pregnancy. The duty of ascertaining the medical condition of a pregnant woman lies with the medical profession not the court.

In the Constitutional petition of ***Federation of Women Lawyers (FIDA-KENYA), JMM and others v AG and others*** (Petition No 266 of 2015), the Constitutional Court held the government accountable for the mortality of unsafe abortion and a violation of a host of women's rights by withdrawing the *2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya* (2012 Standards and Guidelines) and the *National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies* (Training Curriculum). Court clarified that while abortion is illegal under the Penal Code, there are exceptions under the Constitution, the Health Act and the Sexual Offences Act were: (i) a trained health professional forms the opinion that there is need for emergency treatment; (ii) or the life or health of the mother is in danger; (iii) If permitted by any other written law; (iv) or Parliament legislated on it. Further, the term health professional extends beyond a medical doctor to include a medical officer, a nurse, midwife, or a clinical officer with valid licence and training to manage pregnancy-related complications. The action of the Director of Medical Services (DMS) rendered Article 26(4) a dead-letter, was ultra-vires, unlawful and did not have a backup plan to mitigate the negative impact of its withdrawal, thus rendering it unreasonable and unjustifiable in a democratic society. It violated both the medical profession and victim's constitutional rights under Articles 26(1), 43(1)(a), 27, 28, 29(f), 35(1)(b), 33, 43 and 47. The court adopted an expansive definition of health that includes both physical and emotional wellbeing. Court issued a 30 million compensation to reassure the public of the protection of law and to deter future abuse of public authority.

In ***PAK and Salim Mohammed (Petitioners) v The Attorney General and others*** (Constitutional Petition No. E009 of 2020), the petitioner—an 18-year-old Secondary School student—suffered a spontaneous abortion and sought emergency treatment. While recuperating at the clinic, she was arrested by the Police, subjected to medical examination, and made to sign a statement without legal representation. She was charged together with the Clinical Officer. Court held that the lack of guidelines on how to actualise Article 26(4) of the Constitution tantamount to a blanket ban of abortion which impedes service delivery, exposing both the woman and the foetus to mortality, violates women's physical and mental health, as well as compounds social and financial burdens for the woman, communities and health systems. It directed the state to put in place identifiable central pillars to prevent arbitrary, unfair, and unreasonable denial of access to safe abortion.

Reaffirming the FIDA-Uganda decision, court quashed the lower court proceedings for being unfounded on grounds that: (i) The 2nd petitioner met the criteria of a health professional providing life threatening emergency care. PAK's rights to life, freedom from torture and cruel, inhuman or degrading treatment or punishment, dignity, to the highest attainable standard of health, which includes the right to reproductive health services and emergency medical treatment and to fair and public trial were violated. However, court declined to issue the order for *mandamus* to the AG, IGP and ODPP as an interference of their discretionary duties, which also required coordinated response that could not be realised under the suggested timelines. Lastly, while acknowledging that the petitioner qualified for a grant of damages, court applied the *"concept of exceptionalism"* not to award damages mindful that it is the taxpayer to ultimately bear the costs.

THE PREDOMINANT FRAMEWORKS/FRAMING OF **ABORTION ADVOCACY**

Each progress in the international human rights regime has brought forth a new framing of abortion advocacy. The frameworks are both overlapping without a clear delineable distinction and are mutually reinforcing.

Decolonisation Framing:

There are two conflicting framing on decolonization. On one hand, decolonization decries abortion as un-African and an imposition of western values. The decolonisation approach has been criticized for homogenizing African culture as the same, static and without any diversity. Yet, culture is so dynamic and shaped by social, economic and political interactions that there is no uniform interpretation and practices. Moreover, the fact that the Guttmacher 2016 reports found that for each year between 2010 – 2014, 8.3 million women in Africa underwent unsafe abortion refutes the characterisation of abortion as un-African. (Chiweshe and Mcleod 2018: 55).

On the flipside, decolonization is embedded in the common and positive African concept of communitarianism. A common norm amongst most Africans is the concept of *ubuntu,* which embodies the principles of reciprocal relationships, characterized by humanness, compassion and dignity to mention but a few. This progressive redefinition of "decolonization," amplifies the agency, equitable value and importance of all human beings. Indeed, the ability of an individual to make choices is often affected by whether the social, private and public relationships around them are either constructive or destructive (Albetyn 2019: 101).

In respect to abortion, *ubuntu* requires the treatment of a women seeking abortion as having a unsupported pregnancy due to challenges related to health, cultural, socio-economic and legal issues among others (Chiweshe and McLeod 2018: 57). Consequently, *ubuntu* requires taking into consideration the actual experiences, specific concerns and contextual realities of each human being in order to yield substantive justice. Doing so would ultimately achieve substantive justice as propagated by the reproductive justice framework.

The Liberal Approach: Choice and Bodily Autonomy Framing

The liberal approach is premised on the rights to bodily integrity and choice over issues choice concerning their private life. The government is obliged to refrain from interfering with one's personal choice and agency over the decision on their body (Albetyn 2019: 89). Profoundly, both the South African and the Kenyan cases applied the same standard of limiting the human rights to

abortion. As such, any limitation of human rights must be reasonable, proportionate and justified in a democratic society.

On the negative side, the liberal choice tends to protect the privileged woman. It also ignores the power relations and gender imbalances within the economic, social and political arenas that constrain the exercising of this right (Chiweshe and Mcleod 2018:57). Although framing abortion as a choice is important to recognise women's agency, it fails to address discrimination in law, procedures and practise that shape's women's choices. For example, despite the guarantees provided for under the South African constitution, the courts have interpreted the rights in a narrow and abstract manner that only requires government's negative obligations of restraining itself from interfering with the individual's exercise of rights. While the courts have made a powerful endorsement of women's reproductive rights and personal autonomy in which the state cannot interfere, it hardly developed the normative rights of women's rights nor held the state accountable for the positive obligation to ensure the fulfilment of these rights. The first *Christian Lawyers Association* case focussed more on the legal status of the foetus (Albetyn 2019:106 - 107), while the second highlighted the reluctance of respecting adolescent informed consent over action about their bodies. In addition, stigmatisation of both the women and health workers delays access to services, and personal objections inhibits the access to safe abortion services in South Africa (Chiweshe and McLeaod 2018:53).

Worse still, the anti-choice have hijacked the campaign by reframing the issue of bodily integrity and choice as one between killing a woman or an innocent "unborn child," instead of termination of a foetus. Moreover, the scientific progress resulting in better viability of a foetus and perceived growing infertility is exacerbating the controversy surrounding abortion, warranting multi-pronged framing.

The Child Best Interest Framing:

Mindful that all the cases in Africa are in respect of children, the courts have applied the Child Best Interest (CBI) concept. The CBI is applicable as a substantive right, a fundamental interpretative legal principle and as a rule of procedure (Committee on the Rights of the Child, General Comment No 14 of 2013). It is assessed on a case-by-case basis to enable the child participate in the decisions affecting her or his rights as well as promote its holistic and harmonious development. In the second *Christian Lawyers' Association* case, the court applied a more liberal determination of the informed consent as not determined by fixed age but one's emotional and intellectual capacity.

The Malawi case is quite a retrogressive one for ignoring to take into consideration the holistic application of the CBI. While the judge did not object to hearing the case, he decided the case on the basis of morality, which indirectly applied the Conscientious Objection principle. Court contended that the girl and the man who made her pregnant were lovers and therefore she was neither raped nor made a specific request to the hospital to terminate the pregnancy. And as such, there was no basis for judicial review. However, conscientious objection is a personal right which is not enjoyed by the judiciary because the judiciary is obliged to apply the law but not morality nor personal biases (*Women's Link v Colombia*, Petition T 388/2009).

In contrast and progressively, in the Rwanda case, court acknowledged the inter-sectional marginalization of the girl-child on account of age, being prone to sexual violation, social stigmatisation and economic poverty. It therefore held that the denial of abortion would frustrate the child's education, prematurely turn her into an ill-equipped mother, thus robbing her of an opportunity to grow into a dignified human being. Court applied the CBI, the Do-no-Harm and the reproductive justice framework (Discussed later).

The Comprehensive Health / Reproductive Rights Approach Framing

In 1994, the International Convention of Population and Development (ICPD) provided a comprehensive definition of health as entailing both physical and mental aspects thus framing abortion as a reproductive health right (Twinomugisha 2022; Ngwena 2014). Importantly, the CESCR in 'General Comment No. 22 of 2016,' highlighted that denial of safe abortion violates "the physical and mental integrity of individuals and their autonomy as well as the rights to life, liberty and security of the person; freedom from torture and other cruel, inhuman or degrading punishment; privacy and respect for family life." Although it did not endorse the abortion on request, it highlighted the programmatic ways of saving women's lives via safe abortions.

The conceptualization of reproductive rights is not new. Rather, it is a bundle of existing rights, including the rights to equality and non-discrimination, privacy, freedom and security of the person, dignity, life and health. Significantly, reproductive rights are not restricted to reproduction. Rather, reproductive rights refer to *"a range of rights relating to reproduction and reproductive health throughout women's life cycle, including sex education and contraception, the ability and decision to have (or not have) children, ante-natal and obstetric care and the right to give birth safely, and the reproductive needs and interests of women outside of, and beyond, pregnancy and child-birth"* (Albertyn 2019: 90).

The "Do No Harm" Or Harm Reduction Approach Framing

The Do-no-Harm principle obliges the prevention of re-victimisation of the victims by protecting their safety and privacy as well as mitigating the effects of violence (United National Office of Drug Control (UNDOC) 1999). The Maputo Protocol is heralded as the first international instrument to provide for abortion as a right in order to promote women's comprehensive wellbeing, dignity and survival. However, it only authorises medical abortion in limited circumstances of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus, under 14 (2) c. Nonetheless, Article 14(2) (c) of the Protocol was reserved by Uganda, Kenya, Malawi and Rwanda, among the countries of the study. Progressively, Rwanda subsequently removed its reservation to the Maputo Protocol on 14th August 2012.

The Maputo Protocol applies a harm reduction approach, which tend to protect only "morally blameless' women who have 'no choice' in being raped and falling pregnant or whose life is endangered by the pregnancy (Albertyn 2019:94). Consequently, the Do-no-Harm strategy leaves the patriarchal and gendered stereotypes of the women unchallenged.

The above notwithstanding, the Maputo Protocol has yielded some incremental progress in realising the Sexual and Reproductive Rights (SRHRs) in general and rights to abortion in particular. In other words, it has advanced the right particularly for those countries where abortion was mis-conceptualised as totally illegal. For example, in JMM's and FIDA-Kenya petition, court noted that despite Kenya's reservation of Article 14 (2)(c) of the Maputo Protocol, its laws mirrors the same wording. In Rwanda, court affirmed the government's obligation to implement the Maputo Protocol.

The revised Maputo Plan of Action (MPoA) 2016-2030 under key Strategic Objective Number 2, obliges governments to put in place in health legislation which, among others, ensures access to safe abortion in accordance with the national law and policies. Nonetheless, the subjection of the MPoA 2016-2030 to national policies is a political compromise that detracts from continental standards. Further, Strategic Objective 3 focusses on ensuring gender equality, women and girl empowerment and respect for rights to enable all citizens have control over and decide freely and responsibly on matters related to SRHR, free from coercion, discrimination and violence.

Reproductive Justice Framing

The 1994 Vienna Convention on Human Rights emphasised that CPR and ESCRs are inter-dependent, indivisible and inter-related as well as recognised that women's rights are part of universal human rights. Reproductive justice links reproductive rights to social justice, focusing on the wellbeing and dignity of the individual. It addresses both the contextual reality of women and the structural root causes that negatively affect them from accessing their rights. These root causes include inter-sectional marginalization in terms of race, class, gender, education and attitudes that place multiple barriers in people's lives. It calls for both the negative state obligations to refrain from interfering with women's SRHR. It also urges for the positive obligation to put in place the necessary legal and regulatory framework, social and economic programmes with the adequate resources, including trained personnel, equipment and medicines to enable all women—particularly the most vulnerable and marginalized—to enjoy substantive equality in a comprehensive manner (Africa Commission General Comment 2 of 2015; Chiweshe and Macleod 2018: 58; Ngwena 2014:167& 168, Albertyn 2019: 87). For example, in the FIDA-KENYA 2006 petition, court took judicial notice that JMM's case represented the poor grassroots communities without access to health services. It also adopted a broader definition of health professionals beyond the medical professionals in cognizant of the realities at the grassroots levels.

The above notwithstanding, it is evident that while the reproductive justice approach is the most ideal, it might not always appear the most strategic nor be easy because of the multiple contestations and challenges influenced by politics, stigma and secrecy, poverty, weak health and social systems, reality of litigation and judicial practice resulting in compromises (Albertyn 2019: 117).

CONCLUSION

Overall, it is strategic to have a holistic approach that cumulatively builds on each of the frameworks in order to foster a more transformative agenda that yields substantive justice.

The following section, which is Part B, provides a review of each of the cases. The Case Digest is organised on the basis of date, starting from the earliest one to the most recent one. The analysis of each of the cases provides a summary of the facts, issues raised, major arguments of the parties, rationale of the decisions and the decision of the court. In summarising the cases, some verbatim text of the judgment is italicised to enable the reader easily cite and make reference to it.

PART B

CHRISTIAN LAWYERS ASSOCIATION OF SA AND OTHERS V MINISTER OF HEALTH AND OTHERS, 1998 (11) BCLR 1434 (T), DIVISION: HIGH COURT, TRANSVAAL PROVINCIAL DIVISION

Decision by: Judge S.W. McCreath
Judgement Date: 10th July 1998

The Applicant's Case

The plaintiffs sought an order against the defendants to strike down the Choice on Termination of Pregnancy Act 72 of 1996, arguing that life begins at conception, and therefore it violated the right to life under Article 11.

The following are the impugned provisions of the CPTS 1996

s. 12 The Act permits abortion

12.1. On request of the mother during the first twelve weeks of the pregnancy;

12.2. From the 13th – 20th weeks of pregnancy, if a medical practitioner, in consultation with the mother, are of the opinion that:

i) the continued pregnancy is a risk to the mother's physical or mental health; or there is a substantial risk of severe physical and mental abnormality of the unborn child
ii) the pregnancy resulted from rape or incest; or
iii) the continued pregnancy would significantly affect the social or economic circumstances of the mother.

12.3. after the 20th week of pregnancy, if a medical practitioner, after consultation with the mother, is of the opinion that:

i) It would endanger the mother's life,
ii) results in severe malformation of the unborn child (iii) would pose a risk or injury to the unborn child

13. Life of a human being starts at conception

14. Abortion terminates the life of a human being.

The Defendant's Case

The defendants argued that the plaintiff's case did not disclose a cause of action on grounds that:

i. A foetus is not a bearer of rights
ii. The constitution does not preclude termination of pregnancy in the circumstances of the Act
iii. The right for women to choose to have their pregnancies terminated is provided for under the Constitution under various rights.

Issue

Whether a foetus is a bearer of rights?

Held

- *"A perusal of the constitution indicates that the terms "everyone," and "every person" are used interchangeably. Thus, the bill of rights generally protects "everyone," but frequently refers to the holders of those rights as "people' or "persons" which enshrines the rights of all "people," which confers locus standi on everyone … to approach the court for relief under the bill of rights but goes on to describe in the list, "the persons" who may do so* (p. 1437).

- *"The Constitutional Principle II that "everyone shall enjoy all universally accepted fundamental rights, freedoms and civil*

liberties," was not "intended to introduce a significant new class of rights-bearer … in this obscure way."

- In South Africa, *the terms "every person" and "everyone", as used in the Constitution (and more particularly in section 11 thereof) are synonymous* (p. 1438).

- The answer to the question whether a foetus has rights is a question of law: *"The answer hereto does not depend on medical or scientific evidence as to when the life of a human being commences and the subsequent development of the foetus up to date of birth. Nor is it the function of this Court to decide the issue on religious or philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation to be given to section 11"* (p. 1438).

- The court cited the dictum of the Canadian Supreme Court in ***Tremblay v Daigle*** *(1989) 62 DLR (4th) 634 (SC): "The respondent's argument is that a foetus is an être humain', in English 'human being', and therefore has a right to life and a right to assistance when its life is in peril. In examining this argument it should be emphasised at the outset that the argument must be viewed in the context of the legislation in question. The court is not required to enter the philosophical and theological debates about whether or not a foetus is a person but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of enquiry. Nor are scientific arguments about the biological status of a foetus determinative in our enquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification. In short, this court's task is a legal one"* (p. 1438).

- Although the plaintiffs had urged the court to take into consideration the legislative history and the circumstances existing at the time the constitution was adopted, court disagreed and held that the general rule is that evidence of surrounding circumstances is not required to interpret a statute. The exception would be to ascertain the mischief the law in question sought to address. Court used the comparison of a contract and reiterated that: *"where the whole contract is not before it, the court will not assign a meaning to particular words."* However, where the contract is ambiguous, reference to the circumstances may enable a more reasonable understanding (p. 1438).

- In determining the term "everyone," court drew from the common law status of a foetus and observed that it is a contested issue:

  - On one hand, Professor Glanville Williams in *The Foetus and the Right to Life (1994) 33, Cambridge Law Journal 71 at 78, submits that "the question is not whether the conceptus is human but whether it should be given the same legal protection as you and me"* (p. 1441). Likewise, ***in Van Heerden and Another v Joubert and Others*** *1994 (4) SA 793 (A)* Supreme Court considered the various dictionary meanings of the word "person" and concluded that *"there is no suggestion in any of these meanings that the word "person" can also connote a still-born child, an unborn child, a viable unborn child, an unborn human being or a living foetus"* (p. 1441).

  - On the other hand, some jurists such as PJJ Olivier *Legal Fictions: An Analysis and Evaluation (Doctoral Thesis Leiden)* and LM du Plessis *Jurisprudential reflections on the status of unborn life* 1990 TSAR 44 maintain that the foetus is recognised as a legal person.. (p. 1441).

- Court focused on interpreting section 11 of the South African Constitution, irrespective of the status of the foetus under the common law, and held:

- *"There is no express provision affording the foetus (or embryo) legal personality or protection. … One of the requirements of the protection afforded by the nasciturus rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition.*

The matter goes further than that. Section 12(2) provides that everyone has the right to make decisions concerning reproduction and to security in and control over their body. Nowhere is a woman's right in this respect qualified in terms of the Constitution" (p. 1441).

- *"Had the drafters of the Constitution wished to protect the foetus in the bill of rights at all, one would have expected this to have been done in section 28, which specifically protects the rights of the child. … A "child" for purposes of the section is defined in subsection (3) as a person under the age of eighteen years. Age commences at birth… "* (p. 1442)
- Court concluded that the reference to the term "everyone" or "every person" did not include the foetus.
- *"Moreover, if section 11 were to be interpreted as affording constitutional protection to the life of a foetus far-reaching and anomalous consequences would ensue. The life of the foetus would enjoy the same protection as that of the mother"* (p. 1442).
- *…If the plaintiffs' contentions are correct then the termination of a woman's pregnancy would no longer constitute the crime of abortion, but that of murder."* (p. 1443)
- Court agreed with the Defendants that the South African Constitution is "primarily and emphatically" an egalitarian one aimed at transforming society along egalitarian lines, which involves eradicating the systematic forms of domination and disadvantage based on race, gender, class and other grounds of inequality.
- The rights of women include *the right to equality, non-discrimination, the right to freedom and security of the person, including the right to make decisions concerning reproduction and the right to security and control over their body and the rights in respect of human dignity, life, privacy, religion, belief and opinion, and health and care."*
- *Consequently, "to afford the foetus the status of a legal persona may impinge, to a greater or lesser extent," women's rights.*

The court dismissed the plaint on the ground that a foetus is not protected under the right to life. Conversely, doing so would violate the rights of women.

THE STATUS OF THE UNBORN CHILD IN COMPARABLE JURISDICTIONS

- The *nasciturus* rule (or fiction) operates in English and Scots law for the protection of the foetus but only if it is subsequently born alive. … The same holds in America, Canada and Australia and Europe (p. 1444).
- According to Professor Glanville Williams, *"English law does not try to answer the question when human life begins, but it gives a clear answer to the question when human personhood begins. It begins with birth, which means that the child must be completely extruded and must breathe"* (p. 1444).
- *In **Roe v Wade** [410 US 35; Led 2nd 147],* the United States Supreme Court held that *"a foetus is not a "person" and does not enjoy a constitutional right to life. The court reasoned that a "person" … is a term used to only apply after birth"* (p. 1444).
- Prof Dworkin's ***Life's Dominion*** at 110-111, notes that there is near unanimity on the issue that a foetus in not a person.
- The same applies to Canada: Canadian private law has never recognised the foetus as a person in law and the protection of its private law interests have been limited to the operation of the *nasciturus* fiction; …. The term "everyone" could not include a foetus (p.1445).
- The European Court of Human Rights, in ***Paton v United Kingdom*** (1980), rejected that a foetus has a right to life as part of "everyone."
- German is the only exception where a constitutional court held that the foetus does enjoy limited constitutional protection.

CHRISTIAN LAWYERS' ASSOCIATION V NATIONAL MINISTER OF HEALTH AND OTHERS, Case No: 7728/2000, High Court, Transvaal Provincial Division, 2004 (10) BCLR 1086 (T)

Decision by: Mojapelo J
Judgement Date: 24 May 2004

The Plaintiff's Case

The plaintiff instituted an action to declare sections 5(2) and 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996 as unconstitutional. The plaintiff challenged the definition of "woman" under section 1 for not distinguishing between a girl and women, but generally defines a woman as "any female person of any age."

- It allowed a girl under 18 years to choose to have their pregnancies terminated without the consultation nor consent of the parents or guardians and without mandatory counselling to reflect on their decision.
- Girls below 18 years are not capable on their own and without parental consent or control to take an informed decision whether or not to have a termination of pregnancy in order to serve their best interests.
- It violated the following Constitutional provisions: The right to family or parental care (section 28 (1)(b)); to be protected from maltreatment, neglect, abuse or degradation (section 28(1)d); A child's best interests (section 28(2)); equal protection of the law (s. 9) and the Bill of Rights as the cornerstone of democracy in South Africa (section 7).

The Defendant's Case

- The defendants challenged the claim for disclosing a cause of action.
- In order to determine whether a claim discloses a cause of action, it must entitle the plaintiff to the relief, support the relief prayed for, and be based on the allegations presumed to be true:

Issue

Whether allowing a girl/woman of under 18 years to choose to have her pregnancy terminated without parental consent is unconstitutional.

The Court examined the Structure and the Principal Rules Regulating Termination of Pregnancy, namely:
Under section 5, the termination of a pregnancy may only be done with the informed consent of the woman. If she gives her informed consent to the termination of her pregnancy, no other consent is required (sections 5(1) and 5(2)).

The court adopted the trimester approach:

i. During the first twelve weeks of pregnancy, only the woman's consent is required
ii. Thereafter, the termination will be done on advice of two medical practitioners or a medical practitioner and a registered midwife (section 2(2)).
iii. The termination may only be performed at a designated facility.
iv. Although the state is obliged to promote the provision of counselling to women before and after the termination of pregnancy, this is not a mandatory directive. Rather, the medical practitioner will advise the women (below the age of 18 years) to consult their parents, guardians, family members or friends.

Held

The legislature regulated the termination of pregnancy by recognising the woman's right to give informed consent, regardless of age: *"The cornerstone of the regulation of the termination of pregnancy of a girl … is the requirement of her "informed consent", No woman, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so."*

The Juridical Meaning and Effect of Informed Consent

- Although the Act does not define "informed consent", it is founded in the Common Law principle "*doctrine of volenti non fit injuria that justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. …* Informed consent is based on three essential elements: *Knowledge, appreciation, consent.*

  i. The requirement of 'knowledge' means that the woman who consents to the termination of a pregnancy must have full knowledge "of the nature and extent of the harm or risks"…
  ii. The requirement of 'appreciation' implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy "must also comprehend and understand the nature and extent of the harm or risk."…
  iii. The last requirement of "consent" means that the woman must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must "extend to the entire transaction, inclusive of its consequences".

The Capacity to Consent

- *"[V]alid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent. Because consent is a manifestation of will, capacity to consent depends on the ability to form an intelligent will on the basis of an appreciation of the nature and consequences of the act consented to."*

- The court observed that young and immature children ordinarily do not have the capacity for real knowledge, appreciation and consent and therefore are incapable of giving informed consent. Hence the common-law rule that a child be assisted by the guardian. However, the court found that the Act aptly addressed this issue, because rather than use the fixed rigid age as a yardstick, the South African Law focussed on emotional and intellectual ability to give informed consent, irrespective of age.

- *"What the Act does not do however is to fix a rigid age ….. Instead of using age as a measure of control or regulation, the Legislature resorted/ opted to use capacity to give informed consent as the yardstick. …. A girl or any woman has the capacity to consent to the termination of her pregnancy and its concomitant invasion of her privacy and personal integrity, only if she is, "in fact mature enough to form an intelligent will."*

- *"Within the context of the Act, actual capacity to give informed consent is determined in each and every case by the medical practitioner, based on the emotional and intellectual maturity of the individual concerned and not on arbitrarily predetermined and inflexible age or fixed number of years, is the distinguishing line between those who may access the option to terminate their pregnancies unassisted on the one hand and those who require assistance on the other.*

- *"It would be incorrect to approach the matter as if the Act is totally blind to the question of youth or minority. … In the case of a pregnant minor, a medical practitioner or registered mid-wife is enjoined in peremptory language to advise such minor to consult with her parents, guardian, family members or friends, before the pregnancy is terminated. The person*

performing the termination of pregnancy has no choice in this regard. … The injunction is thus subject to the proviso that the termination of pregnancy shall not be denied if such minor, having been … duly advised, should choose not to consult with her parents, family members or friends. This is a useful provision that prevents frustration of a constitutional right when the minor is in fact emotionally and intellectually able to give informed consent to the procedure."

- A medical practitioner or registered midwife determines whether or not the pregnant woman or girl is able or unable to give informed consent. Where a girl or women is unable to do so, the termination of pregnancy should not be done because of lack of informed consent, regardless of whether it is a minor or an adult. Where a girl is able to give informed consent, the medical practitioner should respect her decision irrespective of whether or not that girl consults the guardian or not.

THE RATIONALE BEHIND INFORMED CONSENT

The rationale for informed consent is to effect the patient's fundamental right to self-determination and autonomy. Under the South Africa law, capacity to give consent is not founded on a rigid approach to maturity, based on fixed age, but rather accommodates the individual differences.

COMPARATIVE PERSPECTIVE OF THE RIGHT OF THE WOMAN TO TERMINATE HER PREGNANCY

- In the United States of America, this right is entrenched in the right to liberty under the Fourteenth Amendment as held in ***Roe v Wade (1972) 35 Led 2ed 147,*** which among others includes the right to privacy. The denial of this right would cause a "distressful life and future, psychological and mental stress due to unwanted child care, inability to so and continuing stigma of unwed motherhood. However, given that rights are not absolute the State has a legitimate interest in the preservation and protection of the health and welfare of the woman herself and of the potential life of the foetus, particularly where the foetus becomes viable. The law that restricts abortion, makes the woman "no longer in charge of her own body, but under a kind of slavery" (Dworkin, Life's Dominion).

- The court cited the case of ***Casey v Planned Parenthood of Southeastern Pennsylvania*** (1992) 120 L ed 2d 674 that "although abortion is found to be offensive to morality, the court's obligation is to define the liberty of all, not to mandate its own moral code to erode the most intimate and personal choices that are central to personal dignity and autonomy."

- The Canadian Charter has express provisions of the right to liberty and to "security of the person". In ***R v Morgentaler (2) (1988) DLR (4th)*** 385, the Canadian Supreme Court held that: ***"Not only does the removal of decision-making power threaten women in a physical sense, the indecision of knowing whether an abortion will be granted inflicts emotional stress. .. [It] clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person"*** (At 402).

- Although the German Constitutional Court protects pre-natal life, it equally recognises the countervailing constitutional protection of the woman's personal autonomy to determine the fate of her own pregnancy. In ***Bruggemann and Scheutan v Federal Republic of Germany*** (1977) 3 EHRR 244, the European Commission, while acknowledging the woman's right to privacy and self-determination, also found it permissible for the state to regulate abortion.

In comparison, Court found that the South African Constitution had the most explicit provisions on right to bodily autonomy, including the right to make reproductive decisions. This right is reinforced by the right to equality and protection against discrimination on the grounds of gender, sex and pregnancy (section 9), the inherent right to dignity and to have her dignity respected and protected (section 10), the right to life (section 11), the right to privacy (section 14) and the right to access to reproductive health care (section 27(1)(a).

IMPACT OF STATE-IMPOSED INTERFERENCE

The case reaffirmed the Constitutional right of the woman to determine the fate of her own pregnancy and the State's obligation to refrain from unduly interfering in her right to choose whether or not to undergo an abortion.

The Court analysed "A Girl's Right to Choose Under the South African Constitution" and held:
The Act allows all women who have the intellectual and emotional capacity for informed consent, to choose whether to terminate their pregnancies or not, irrespective of age. The Act is consistent with the Constitution inter alia for the following reasons:

i. The right of every woman to choose whether to terminate her pregnancy or not is enshrined in sections 12(2)(a) and (b), 27(1)(a), 10 and 14 of the Constitution. All of those rights are afforded to "everyone", regardless of age, to exercise their right to self-determination.
ii. Section 9(1) provides for the equal protection under the law.
iii. Section 9(3) prevents unfair discrimination against "anyone", including on the ground of age.
iv. Any limitation upon the freedom of any woman, including any girl under the age of 18 years, to have their pregnancy terminated, constitutes a limitation under their fundamental rights. A limitation of any right is only valid if justified in terms of section 36(1): It must be reasonable and justifiable in an open and democratic society based on human dignity, and freedom.

- The distinction made by the Act, between women who have the capacity for informed consent on the one hand and those who do not have the capacity on the other, is a rational distinction and therefore constitutional.

- The Act serves the best interest of the child because it is *"flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no account, little or inadequate account of her individual peculiarities."*

- Giving of informed consent is *"dependent on a particular individual girl or woman and on her particular circumstances and must therefore be determined for each and every woman in each case."*

- The Act also recognises that some women or girls, regardless of age, could require parental or counselling assistance to give the informed consent. Those capable of giving informed consent require no assistance.

- The legislature has left the determination of the "factual position" of capacity to give informed consent to the medical professional or registered midwife who performs the act.

CONCLUSION

- The exercise of the right is not unregulated.
- The exception is upheld.

THE HIGH COURT, AT ITS HEADQUARTERS, TRIED THE PRESENT CASE IN A PUBLIC HEARING ON 30TH OCTOBER 2015, RPA 0787/15/HC/KIG Folio 1

Decision by a panel of judges: Mukakalisa Ruth, Kaliwabo Charles, Kabagambe Fabienne
Decision date: 30th October 2015

The Appellant's Case

- The Appellant NJ, the mother of IC, a 13 year-old girl, applied to Nyarugenge Intermediate Court for the legal abortion of her daughter who had been raped by BK after getting her drunk. NJ argued that the pregnancy that was as a result of rape was a threat to IC's life.
- The trial court rejected NJ's application on the ground that: There was neither a criminal charge nor conviction of rape by BK. It was possible to get pregnant without having sexual intercourse and that there was no evidence that IC's life was threatened by her pregnancy.
- On 8th October 2015, NJ appealed to the High Court on grounds that sexual intercourse with a 13 year-old amounts to rape and there is no other way IC could have gotten pregnant.
- Article 190 of Organic Law defined defilement as *"any sexual intercourse or any sexual act with a child regardless of the form and the means used."*

The Prosecution's Case

- The prosecution argued that Article 165 of Organic Law instituting the Criminal Code which granted a raped pregnant woman the right to terminate that pregnancy, did not apply to a defiled child.
- Rape and defilement are two different crimes.

Issues

i. Whether Article 165 of Organic Law instituting the Criminal Code of Rwanda is applicable to a defiled child
ii. Whether IC was defiled
iii. Whether IC can be granted the right to terminate her pregnancy.

Issue 1 Whether Article 165 of Organic Law Instituting the Criminal Code of Rwanda is Applicable to a Defiled Child and Whether IC Had Been Defiled

Held

- Among the reasons for the lawful abortion under Article 165 of Organic Law is that the woman got pregnant as a result of rape. Whether the crime of rape is different from the crime of defilement is …*"cleared by what those crimes have in common; that is the rape victims are raped against their consent. Regarding the child, under 18 years, the child is considered unable to decide for themselves concerning sexual intercourse, this is also called rape. . … Article 165 of the present Organic Law does not change that a child was raped, since it was done against their consent"* (para 8).
- The Ministry of Health, National Protocol for operationalization of exemptions for abortion in the Penal Code of 2012 (p.9) clarified that for *"young women under 18 who are made pregnant the act is referred to as child defilement as provided for by article 190 of Organic Law instituting the Penal Code, and to be punished as people who committed rape"* (para 9).

Issue 2 Whether IC Was Raped and Can Be Granted Permission to Terminate the Pregnancy

Held

- The consideration of terminating a pregnancy arising out of sexual violence is not subject to a court determination of guilt: *"Since the Court ought not to wait until the presumed accused of BK is found guilty."*
- While the trial decision held that a woman can get pregnant without being raped, it did not provide other possible ways IC might have gotten pregnant and that medical evidence proved that she was no longer a virgin.
- NJ's request on behalf of IC is provided for under Article 165 of Organic Law instituting the Penal Code of Rwanda as well as International Protocols.
- Defilement amounts to rape because of the girl's incapacity to give consent (para 15).
- A woman and the medical doctor are exempted from criminal liability of abortion on condition that:

    i. a woman has become pregnant a result of rape
    ii. When the person who requests for the abortion has presented to the doctor the decision of a competent Court approving the abortion (para 16).

- The Court applied Article 14(2) (c) of the *Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, because Rwanda is signatory and authorized its use in Rwanda concerning the observation of Article 14.2.c, provides that member States shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in case of sexual assaults, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus* (para 17).
- NJ has a right to request a medical abortion for IC having been defiled, which is sexual consent against the child's consent.

Issue 3

Whether it is in the Best Interest for IC to Request for a Medical Abortion

- Cognisant that IC was aged 13 and studying in P 5, it was "beyond reasonable doubt that getting pregnant made her shameful among her schoolmates. It was equally hard for her to assume the responsibility of a mother" (para 20).
- IC's need to continue her lessons was reasonable for bringing up her child. Refusal of the termination of the pregnancy would prevent her from continuing her studies and adversely affect her future life (para 21).
- IC had the right to abort as a result of defilement and that the pregnancy had not yet reached 22 weeks as provided by the *National Protocol on operationalizing the exceptions to abortion* (para 22).

The Court's Decision:

i. IC granted permission for medical abortion;
ii. Kacyiru Police Hospital to carry out the medical abortion before it reaches 22 weeks.
iii. Court's fees to be deposited in the Government Treasury as the case was filed in the child's best interests.

FEDERATION OF WOMEN LAWYERS (FIDA-KENYA) AND JMM AND OTHERS v ATTORNEY GENERAL AND OTHERS, REPUBLIC OF KENYA, IN THE HIGH COURT OF KENYA, AT NAIROBI, CONSTITUTIONAL AND HUMAN RIGHTS DIVISION, PETITION NO 266 OF 2015

Panel of judges: A.O. Muchelule, M. Ngugi, G.V. Odunga, L. A. Achode and J.M. Mativo
Judgement Date: 12th Day of June 2019

The petition was filed against the Attorney General, in the capacity of being the principal legal advisor; The Cabinet Secretary, Ministry of Health (for being responsible for the development of policies and coordination of the technical functions of the Ministry), the Director of Medical Services (DMS) and the Registrar of the Kenya Medical Practitioners and Dentists Board (for being responsible for the technical functions of the Ministry of Health).

THE FACTS

- JMM died in June 2018 at the age of 18. In 2014, she was forced into sexual intercourse by an older man and became pregnant. She kept the pregnancy secret for fear of family rejection.

- On 8th December 2014, an older girl introduced JMM to a quack doctor to terminate the pregnancy. JMM was given an injection but the foetus did not get expelled. The 'doctor' then inserted a metal-like cold object in her vagina, resulting in extreme bleeding.

- On 10th December, JMM was admitted at Kisii Teaching and Referral Hospital, a Level 5 Hospital, about 15.6 km away, where the foetus was removed.

- On 12 December, Kisii Level 5 Hospital transferred JMM to Tenwek Mission Hospital, a faith-based hospital, about 50 kilometres away, for dialysis treatment of her failing kidney. JMM was admitted into intensive care and discharged on 19th December on ground that Tenwek Hospital did not have any equipment to undertake dialysis.

- Kisii Hospital recommended the transfer of JMM to Kenyatta National Hospital for treatment of a septic abortion and haemorrhagic shock, resulting in chronic kidney disease. JMM accumulated a bill of Kshs 39,500, which she was unable to pay. JMM was detained at the Hospital during which period she slept on a mattress spread on the floor and fell sick again. She was readmitted to the main ward for four days. On recovery, she was returned to the detention room for 2 weeks, until her release on 13th March 2015 when the hospital bill was waived.

- Although JMM was advised to undergo dialysis every month at Kenyatta National Hospital Renal Unit at the cost of Kshs 50,000, she did not do so because of financial constraints.

THE IMPUGNED LAW:

The core of the Petition
The petition sought interpretation of Article 26 which provides as follows:

1. *Every person has the right to life.*
2. *The life of a person begins at conception.*
3. *A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.*
4. *Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.*

THE PETITIONERS' CASE

- The Government of Kenya, through the *Ministry of Health National Guidelines on the Management of Sexual Violence in Kenya, 2nd Edition, 2009 (2009 National Guidelines),* made pursuant to section 35(3) of the Sexual Offences Act, allowed termination of pregnancy as a result of sexual violence. However, it was unclear how such services would be accessed.

- In September 2012, the Ministry of Medical Services, through a consultative process, issued the *2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya (2012 Standards and Guidelines)* and the *National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies* (Training Curriculum)

- On 3rd December 2013, the DMS withdrew both the 2012 Standards and Guidelines and the Training Curriculum.

- On February 24th, 2014, the DMS circulated a memo notifying all health care professionals that they would face professional and legal sanctions for attending training on safe abortion practices and the use of Medabon. On the same date, the DMS also reprimanded the Kenya Obstetrical and Gynaecological Society (KOGS) for developing a training curriculum on safe abortion and for spending 60% of time on abortion during their annual scientific conference.

- The community human rights mobilizers from the low-income informal settlements in Mathare Constituency, witnessed an average of three to five cases of early pregnancies, defilement, rape, and unsafe abortion, a week. Yet, the service providers in the community lack the necessary skills, knowledge and facilities, thus putting girls at risk.

- Given that Article 26(4) of the Constitution permits abortion in certain circumstances, the unilateral DMS' actions were unlawful, irrational, and unreasonable.

THE RESPONDENTS' CASE

- The Ministry of Health had the mandate to regulate health training within a proper legal and policy framework.

- The withdrawal of both the *2012 Guidelines and Training Curriculum* was based on the fact that abortion is illegal and unconstitutional and therefore warranting no need for training. The withdrawal was done in the public

interest due to the disagreement amongst the stakeholders, particularly the different faiths, on the contents. Similarly, some members of Kenya Obstetrical and Gynaecological Society (KOGS) were uncomfortable with the training on the use of Medabon, despite its being placed on the Kenya Essential Medicine List (KEML) for being poisonous.

- The unwanted pregnancies were a result of moral decay, lack of quality parenting, reckless sexual activity and neglect to use modern contraception, its public awareness notwithstanding.

- There was no shortage of legal abortion services in public hospitals nationwide with emergency facilities which meet the requirements of Article 26(4) of the Constitution.

- The withdrawal sought to eliminate unauthorized teaching of unskilled health workers, which may increase illegal abortions countrywide.

- Abortion violates the unborn child's right to life protected under Article 26. Therefore, the right to choose whether or not to carry a pregnancy to term should not be left to the province of the individual woman's conscience.

- The government has developed the *National Post Abortion Manual Care Reference* dated 22nd May 2017, to address the knowledge gap.

- The orders sought by the petitioners have the effect of curtailing the statutory duties and functions of the enforcement officers, who are obliged to act in public health interest.

THE ISSUES

i. Whether Article 26(4) permits abortion in certain circumstances;

ii. Who is a trained health professional for the purposes of Article 26(4)?

iii. What does the right to health and the right to reproductive health entail?

iv. Whether pregnancy resulting from sexual violence falls under the permissible circumstances for abortion under Article 26(4);

v. Whether the DMS's impugned letter and memo meet the test for limitation of rights set out in Article 24;

vi. Whether the decision to withdraw the 2012 Standards and Guidelines and Training Curriculum and to issue the Memo violated Articles 10 and 47 and was ultra vires the powers of the DMS;

vii. Whether the decision of the DMS in (v) above violated the petitioners' rights and the rights of other women of reproductive age guaranteed in Articles 26, 27, 29, 33, 35, 43 and 46;

viii. Whether the decision of the DMS violated the rights of health workers guaranteed in Articles 32, 33, 34, 35 and 37;

ix. Whether the circumstances of JMM qualified her for post-abortion care under Article 43;

x. Whether PKM as the personal representative of the estate of JMM is entitled to comprehensive reparation, including indemnification for material and emotional harm suffered as a result of the actions of the respondents.

THE SOCIAL CONTEXT

Court noted the high incidents of maternal mortality and morbidity arising, among others, unsafe abortions. The Ministry of Health had also conceded that one of the goals of developing the 2012 *Standards and Guidelines* was to address unsafe abortions, which is one of the major causes of maternal mortality and morbidity. JMM's case demonstrated a failed health care system lacking in both skilled staff, facilities and a proper referral system and at exorbitant costs. Neither was there information about where to seek help to secure an abortion. JMM's situation also illustrates the need for competence-based training to ensure proficiency in reproductive health skills and knowledge as well as create an environment in which the incidence of maternal deaths as a result of unsafe abortions can be addressed (para 320 – 328).

THE CONTROVERSIAL NATURE OF THE PETITION

Court took judicial notice of the controversy surrounding unsafe abortion:

- *"We recognise that we are not dealing with an easy matter. We are called upon to pick or make the best of a bad situation. The petitioners argue that the solution lies in a situation where the state provides information, standards, and guidelines on access to safe abortion where pregnancy results from sexual violence. The respondents see the problem as being a social problem, which can only be dealt with in the context of family sex education"* (para 296).
- *"Muslims believe life begins at "ensoulment", which is on the 40th day of a pregnancy, while some Christian churches believe it starts at "quickening" (at about 12 weeks from conception). Traditionalists believe life begins at birth and scientists have varied other opinions. Some people believe that life begins before conception…. Secondly, the medical practitioners said, there are situations where the mother's life is not in danger but her health would be seriously damaged if an abortion was not performed or where an operation on her reproductive organs would result in an abortion"* (para 298).

THE PRINCIPLES OF CONSTITUTIONAL PETITION INTERPRETATION

The court outlined the principles against which it measured the constitutionality or otherwise of the actions of the DMS.

- Article 20 provides that the *"Bill of Rights applies to all law and binds all State organs and all persons.*
- Article 20(3)(b) provide that court must "adopt the interpretation that most favours the enforcement of a right or fundamental freedom."
- Article 259 requires the Court, in considering the constitutionality of any issue before it, to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights, fundamental freedoms and good governance.
- *The Coalition for Reform and Democracy (CORD) & 2 others [2015] eKLR,* outlined the parameters for the limitation set out in Article 24:

    i. *"The limitation of rights must: first be by law,*

ii. *Secondly, that the objectives of the law must be pressing and substantive and must be important to society" (para 349).*
iii. *The third principle is … whether the legislation meets the test of proportionality relative to the objects or purpose is seeks to achieve (para 350).*

"[The] Proportionality test requires the following of any limitation:

i. *that it be rationally connected to its objective,*
ii. *that it impairs the right or freedom as little as possible, and*
iii. *that there is proportionality between its effects and its objectives* (para 352).

Issue 1 Whether Article 26(4) Permits Abortion in Certain Circumstances

There was disagreement on the interpretation of Article 26 (4).

- The petitioners contended that Article 26(4) permits abortion in cases of pregnancy resulting from sexual violence. They cited the 2009 National Guidelines which were made pursuant to section 35(3) of the Sexual Offences Act, which entitles a victim of a sexual offence to access to treatment in any public hospital or institution.

- The respondents contended that Article 26(4) rendered abortion illegal with the exception of saving the mothers' life or health, regardless of the circumstances under which a pregnancy occurs. Further, there is no law that permits abortion.

Held

- The right to life applies to a natural person not a legal person.

- Articles 26(2) is categorical that life begins at conception (para 301).

- The *Black's Law dictionary* defines conception as *"the fecundation of the female ovum by the male spermatozoon resulting in human life capable of survival and maturation under normal conditions"* (para 302). Article 26(4) considered abortion as an intentional deprivation of a life, and does not apply to a miscarriage (para 303).

The general rule is that abortion is not permitted or is illegal.

While life begins at conception and abortion is prohibited under Article 26(4) and sections 158-160 of the Penal Code, there are exceptions to the general rule.
It exempts situations in which:

i. a trained health professional forms the opinion that there is need for emergency treatment
ii. or the life or health of the mother is in danger.
iii. If permitted by any other written law.
iv. It also provides a window for Parliament to legislate situations where abortion is permissible (paras 301, 305 and 397).

Section 2 of the Health Act, No. 21 of 2017 defines *'emergency treatment'* a *"necessary immediate health care that must be administered to prevent death or worsening of a medical situation"* (para 357).

Issue 2 Who is a Trained Health Professional for the Purposes of Article 26(4)?

While both the petitioner and respondents agreed that it is *"the trained health professional"* who should determine whether the pregnancy poses a threat to the life or health of the mother, there was a disagreement of what that term meant.

- The petitioners argued that it included nurses, midwives and clinical officers as defined in the Health Act, 2017.
- The respondents restricted the term to medical doctor (p. 53-54).

Held:

- According to the *Final Report of the Committee of Experts on Constitutional Review,* the framing of Article 26(4) was to forge a comprise to accommodate the different views in order to generate support to the review process (para 298). The Constitution uses the term 'trained health professional' instead of 'a medical doctor' due to the reality on the ground. Given the dearth of qualified medical doctors at the first line health facilities, many of which are manned by nurses and clinical officers, the aim was to enable appropriate medical intervention to be available when necessary (para 258).
- Section 6(2) and Section 2 of the Health Act 2017 defines a trained health professional as a person *"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* (p. 69).

Issue 3 What Does The Right To Health And The Right To Reproductive Health Entail?

- The respondents considered health in its narrowest circumstances involving endangering of the physical health of the mother by the pregnancy.
- The petitioners applied the comprehensive definition of health involving the endangering of both the *physical and mental or psychological health of the mother by the pregnancy.*

Held

- The Constitution does not define the term 'health.' However, Section 2 of the Health Act 2012 replicates the WHO definition of health as *"a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity* (paras 360 and 398).
- A similar construction is adopted by the *"The General Comment 14, [Committee on Economic, Social and Cultural Rights (CESCR GC 14);* The International Conference on Population and Development Program of Action 1994 (ICPD), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.
- The right to health is interdependent and crucial for the realisation of other rights and includes access to health facilities, goods and services ***(Purohit & Moore v The Gambia*** Communication 241/01, the African Commission; ***Mathew Okwanda v. Minister of Health and Medical Services & 3 others*** [2013] eKLR, and ***P.A.O & 2 Others v Attorney General*** [2012] eKLR).
- CESCR GC 14 requires the state to put in place *"measures to improve child and maternal health, sexual and reproductive*

health services, including access to family planning, pre- and post-natal care emergency obstetric services and access to information, as well as to resources necessary to act on that information."

- Paragraph 7.2 of the ICPD Program of Action emphasises that *Reproductive health … implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so"* (para 341).

Issue 4 Whether Pregnancy Resulting From Sexual Violence Falls Under the Permissible Circumstances under Article 26(4):

- The petitioners argued that first, abortion is lawful when it is permitted by a statute, treaty or convention. Second, that section 35(3) of the Sexual Offences Act, No. 3 of 2006 empowers the Minister of Health to prescribe circumstances under which a victim of a sexual offence may at any time access treatment in any public hospital or institution. Third, that the 2009 *'National Guidelines on the Management of Sexual Violence in Kenya, 2nd Edition'* provides for termination of pregnancy as a result of rape as provided for by the *Sexual Offences Act, 2006".*

- The respondents counter-argued that the 2009 Guidelines are not 'any other written law." The only law is the Penal Code, under which abortion is a crime.

Held

- Article 19 of the Kenya Constitution underlines that the purpose of the Bill of rights is to *"preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings."*

- Article 21 obliges the State to *respect, protect, promote and fulfil the rights."*

- The Constitution permits abortion in situations where a pregnancy, in the opinion of a trained health professional, endangers the life, the mental/psychological or physical health of the mother.

- A third exception to the prohibition of abortion under the Constitution is where abortion is permitted by "any other written law".

- Although the Penal Code prohibits abortion, the Sexual Offences Act, 2006 and the Constitution of 2010 take precedence, under the doctrine of implied repeal:

- *"More importantly, the Constitution having provided a right to abortion where, in the opinion of a trained health professional, there is need for emergency treatment, or that the life or health of the mother is in danger, the apparent blanket prohibition of abortion under the Penal Code cannot stand. This is because, in accordance with sections 6 and 7 of the 6th Schedule to the Constitution, the provisions of the Penal Code must be read with the necessary "alterations, adaptations, qualifications and exceptions" to bring it into conformity with the Constitution. While the said section is still valid in so far as unlawful abortions are concerned, the same must be read taking into consideration the provisions of the Constitution as well as the Sexual Offences Act* (para 369, p.71).

- While the general rule is that abortion is prohibited, there are exceptions under Article 26(4) of the Constitution and section 35(3) of the ***Sexual Offences Act*** where it is permissible.

Issue 5 Whether the DMS's Impugned Letter and Memo Meet the Test for Limitation of Rights Set out in Article 24

- The petitioners submitted that the withdrawal was in violation of their rights and led to confusion and lack of clarity on the part of health care providers as to when an abortion is permissible under the law.

- The respondents argue that the *2012 Standards and Guidelines* had included matters that had not been agreed upon in the Technical Working Group, particularly by the religious groups, as well as with the medical professionals.

Held

- Article 10 of the Constitution outlines the national values that would apply to all State organs, State officers, public officers and all persons, namely: *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people* (para 381).

- The 2012 Standards and Guidelines and the Training Curriculum were public policy documents which were developed through a participatory process. *"A decision to withdraw a public policy document must similarly be subjected to the constitutional dictates. It is a power that cannot therefore be arbitrarily exercised. It is now recognised that arbitrary exercise of power, even where it exists, is a ground to grant a judicial review relief"* (para 382).

- Article 24(1) only permits a limitation of rights which is reasonable and justifiable in a democratic society:

- International law has developed a *'three-part test'* to determine the above:

    i. *First, the restrictions must be precisely prescribed by law … with sufficient precision to enable an individual regulate his or her conduct." …*
    ii. *Second, the restriction must pursue a legitimate aim: as respect of the rights or reputation of others, protection of national security, public order, public health or morals. …*
    iii. *Third, the restrictions must be necessary and proportionate to secure the legitimate aim: Necessity requires that there must be a pressing social need for the restriction* (para 387-390).

- *In this case, the limitation was a negative act of arbitrary withdrawal of the facilitating instruments. No back up mechanism was put in place to facilitate the said rights in the absence of the said 2012 Standards and Guidelines and Training Curriculum. The 2014 Guidelines, apart from drawing attention to the constitutional provisions, did not guide the health professionals on the circumstances in which the said rights were to be attained. In our view, the 2014 Guidelines did not meet the threshold of precision required under Article 24* (para 391).

Issue 6

Whether the Decision to Withdraw the 2012 Standards and Guidelines and Training Curriculum and to Issue the Memo Violated Articles 10 and 47 and was Ultra Vires the Powers of the DMS

Held

- *To the extent that the withdrawal was by the DMS as opposed to the Medical Practitioners and Dentists Board, the act itself was ultra vires and unlawful. … Section 7(2)(a) of the Fair Administrative Action Act, 2015 gives court the discretion to review an administrative action or decision, "if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation"* (para 392).

- *In this case there is no evidence that the Board made the decision to withdraw the said documents. There is, however, no express power to delegate and we refuse to make such inference* (para 394).

- *Accordingly, the limitation was not by law. Further, the … nature and extent of the limitation was not clear and specific about the right or freedom to be limited and the nature and extent of the limitation. In addition … whether there are less restrictive means to achieve the purpose, the limitation did not meet the proportionality test. The state, which under Article 24(3) of the Constitution shoulders the burden of demonstrating that the requirements of this Article has been satisfied has failed to do so. If the only issue was the misuse of otherwise useful 2012 Standards and Guidelines and Training Curriculum, we have not been satisfied that there are not available mechanisms to stop the same otherwise by withdrawal of the said instruments. The withdrawal of the 2012 Standards and Guideline and the Training Curriculum was unreasonable, drastic and unjustifiable in a democratic society* (para 395).

Issue 7

Whether the Decision of The DMS Violated the Petitioner's Rights and the Rights of other Women of Reproductive Health

- Failure to address unsafe abortion in Kenya is a violation of rights under the Constitution and international instruments. The withdrawal of the 2012 Standards Guidelines and Training curriculum disabled the efficacy of Article 26(4) of the Constitution and rendered it a dead letter (para 402).

- In so doing, it also undermined a number of constitutional rights guaranteed to women: Life under Article 26(1), the right to health, which includes the right to reproductive health under Article 43(1)(a); the right to equality and non-discrimination guaranteed under Article 27; the right to dignity under Article 28; the right to freedom from cruel, inhuman and degrading treatment guaranteed under Article 29(f); the right to access information under Article 35(1)(b), including health-related information; the right to freedom of expression under Article 33; the right to enjoy the benefits of scientific progress (Article 43); and the right to fair administrative action under Article 47.

- The withdrawal by the DMS *"derogated from the core or essential content of the right of the … petitioners and other women and adolescent girls of reproductive age whose interest they represent to the highest attainable standard of health guaranteed under Article 43(1)(a). Since this is a right that inures to women and girls only, the unjustifiable limitation amounted to the violation of their right to non-discrimination as well as the right to information, consumer rights, and right to benefit from scientific progress. We therefore find that the directive by the DMS created an environment in which survivors of sexual violence cannot access safe quality services despite the clear constitutional provisions* (para 402).

Issue 8 Whether the Decision of the DMS Violated the Rights of Health Workers Guaranteed in Articles 32, 33, 34, 35 and 37.

Held

"Any condition that in the opinion of a trained health professional, necessitates emergency treatment, or endangers the life or health of the mother, warrants an abortion. It is not the cause of the danger that determines whether an abortion is necessary but the effect of the danger. Therefore, if in the opinion of a trained health professional emergency treatment is necessary or the *life or health of a mother is in danger, abortion is permissible. It therefore follows that if a pregnancy results from rape or defilement, and in the opinion of a trained health professional, endangers the physical, mental and social well-being of a mother, abortion is permissible (that is the health of the woman or girl) (para 399).*

Issue 9 Whether the Circumstances of JMM Qualified her for Post-Abortal Care Under Article 43

Held

- *"Women and girls in Kenya who get pregnant as a result of sexual violence have a right, under Kenyan law, to have an abortion performed by a trained health professional if that health professional forms the opinion that the life or health of the mother is in danger. Health, in our view, encompasses both physical and mental health* (para 372).

- Further, Kenya is also a signatory to the International Covenant on the Elimination of all Forms of Discrimination against Women (CEDAW). The CEDAW Committee, in General Recommendation Number 19 of 1992, requires States to protect women from violence and abuse, and to provide for appropriate physical and mental health services and train health care workers (para 373).

- *"There can be no dispute that sexual violence exacts a major and unacceptable toll on the mental health of women and girls. Whether the violence occurs in the home or in situations of conflict, women suffer unspeakable torment as a result of such violence* (paras 374 & 400).

- The Maputo Protocol, under General Comment No. 2:

  "The Protocol provides for women's right to terminate pregnancies contracted following sexual assault, rape and incest. Forcing a woman to keep a pregnancy resulting from these cases constitutes additional trauma which affects her physical and mental health … Apart from the potential physical injuries in the short and long term, the unavailability or refusal of access to safe abortion services is often the cause of mental suffering, which can be exacerbated by the disability or precarious socioeconomic status of the woman."

- *While Kenya made a reservation to Article 14(2)(c) of the Maputo Protocol, it is instructive that the words of the Article mirror in some respects the words used in the Constitution"* (para 372).

- *"JMM was clearly entitled to emergency treatment including post-abortal care. … all persons who are in need of treatment are entitled to health care and it matters not the circumstances under which they find themselves in those situations" (para 403, p. 79).*

Issue 10 Whether PKM as the Personal Representative of the Estate of JMM is entitled to Comprehensive Reparation Including Indemnification for Material and Emotional Harm Suffered as a Result of the Actions of the Respondents

- PKM as the personal representative of the estate of JMM is entitled to comprehensive reparation, including indemnification for material and emotional harm suffered as a result of the actions of the respondents: post-abortion care was wanting in the Level 5 Hospital, there was no ambulance to transfer the patient as part of emergency treatment services.

- *The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. … The payment of compensation in such cases is not to be understood as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making monetary amends; under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the Constitution* (para 406).

- *The quantum of compensation will, however, depend upon the facts and circumstances of each case. … Award of damages entails exercise of judicial discretion, which should be exercised judicially* (para 407- 408).

- *The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional rights and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award* (para 410).

- In view of the need for deterrence of such behaviour, especially by those in positions of power similar to the respondents, the court awarded a global award in the sum of Kshs. 3,000,000 (para 413-414).

The Court made the following Declaration and orders:

i. *There was violation of the right to the highest attainable standard of health, right to non-discrimination, right to information, consumer rights, and right to benefit from scientific progress of women by the withdrawal of the guidelines. The letter of the DMS dated 24th February 2014, violated or threatened the rights of health care professionals to information, freedom of expression and association, consumer rights, and the right to benefit from scientific progress;*

ii. *The respondent's letter was unlawful, illegal, arbitrary, unconstitutional, and thus null and void ab initio, and is hereby quashed;*

iii. *Abortion is illegal in Kenya save for the exceptions provided under Article 26(4) of the Constitution.*

iv. *Pregnancy resulting from rape and defilement, if in the opinion of a trained health professional, poses a danger to the life or the health (physical, mental and social well-being) of the mother may be terminated under the exceptions provided under Article 26 (4) of the Constitution.*

v. *Compensation by the Respondents to PKM of Ksh. 3,000,000/= for physical, psychological, emotional and mental anguish, stress, pain, suffering and death of JMM.*

All parties to bear their own costs of the suit.

PAK AND SALIM MOHAMMED v THE ATTORNEY GENERAL AND OTHERS, MALINDI HC CONSTITUTIONAL PETITION NO. E009 OF 2020 – JUDGMENT, REPUBLIC OF KENYA, IN THE HIGH COURT OF KENYA AT MALINDI, CONSTITUTIONAL PETITION NO. E009 OF 2020

Decision by: Judge R. Nyakundi
Judgement Date: 24th March 2022

The Facts

- The Petitioner, an adolescent girl, was impregnated by a fellow student.
- She suffered a spontaneous abortion and went to Chamalo Medical Clinic in Ganze Location for treatment.
- Salim Mohammed, the 2nd Petitioner, a registered Clinical Officer with a Diploma in Clinical Medicine and Surgery from Kenya Medical Training College (KMTC), provided her with emergency care and admitted to recuperate at his Chamalo Medical Clinic.
- On 21st September 2019, plain-clothed Police officers stormed Chamalo Medical Clinic, confiscated PAK's medical records and arrested her.
- At the Police Patrol Base, she was made to sign a statement and forced to undergo a medical examination at Kilifi County Hospital.
- On 23rd September 2019, the petitioners where independently charged under sections 158 – 160 of the Penal Code relating to offences of abortion.
- The Children's Officer in charge of Ganze Sub-County, Mr. Mbogo, informed PAK's school about her criminal charges.
- On 1st March 2020, PAK's father was summoned by the Senior Principal Magistrates Court to take PAK to court on 12th March 2020.

The Petitioners' Case

- The petitioner's right to fair trial under Article 25(c) was violated yet it cannot be limited.
- Forcing the petitioner to undergo a medical examination contravened Article 49(1)d against self-incrimination.
- The criminal sections were subject to the exceptions under Articles 26(4) and 43(1) (a) of the Constitution.
- The 2nd petitioner was qualified under section 6 of the Health Act to offer abortion treatment.
- The respondents acted arbitrary towards a victim of sexual offences who was experiencing pregnancy complications, as held by the FIDA-KENYA petition 266 of 2015.
- The blanket criminalisation of abortion amounted to a false arrest.
- The emergency medical treatment was done in the best interest of the child as per section 8 of the Health Act.
- The impugned sections erode the right to equal protection before the law under as provided for Article 27, for women of reproductive age in Kenya.
- The respondents had not justified the limitation of rights with the purpose of limitation as required by Article 24(1) of the Constitution.

- Neither was the evidential test nor the threshold test to establish the factual and legal foundation to disclose a prosecutable offence met.

The Attorney General, Inspector General of Police (IGP) and the Senior Principal Magistrate Kilifi Case

- Human rights and freedoms are not absolute, but subject to limitations.
- Sections 158 – 160 of the Penal Code do not offend Article 26(4) of the Constitution.
- The Office of the Director of Public Prosecution (ODPP), Inspector General of Police and the Senior Principal Magistrate are independent offices that should not be directed on how to conduct their constitutional duties.
- Article 26(4) should be narrowly construed not to erode the core right to life.
- The petitioners neither proved the unconstitutionality of the Penal Code sections nor the flawed enactment process of the Penal Code Law.
- No evidence confirmed that the medical examination was forced nor maliciously conducted nor that the Magistrate was biased in conducting the trials.

The Director of Public Prosecutions' Case

- The arrest was made to commence the investigation process and therefore was lawful.
- There was no evidence of coercive medical examination of the 1st petitioner.
- The criminal charges of the 2nd respondent were based on the voluntary recorded statement of the 1st petitioner.
- The Police and ODPP exercised their lawful powers of arrest under Article 157 of the Constitution, the Criminal Procedure Act, and the National Service Police Act.

Issues for Determination

i. Whether there is a lacuna in the current statutory scheme to operationalize Article 26(4) of the Constitution.
ii. Whether Sections 154, 159 and 160 of the Penal Code are unconstitutional.
iii. Whether the Constitutional Rights of the petitioners were violated.
iv. Whether the proceedings should be quashed.
v. Whether the Court should give orders for Mandamus.

Issue 1 Whether There is a Lacuna in the Current Statutory Scheme to Operationalize Article 26(4) of the Constitution

- *"Where formal legal channels to abortion are lacking or inaccessible the victims (women) terminate their pregnancies by unscrupulous devices and substances.*
- The lack of clarity of how to access safe abortion, compounds the incidents of unsafe abortion, and violated the rights to privacy and dignity.
- *Secondly, the impugned provisions in this petition suffer from lack of guidelines relating to privacy and on how to reach a trained health professional as stipulated in Article 26(4) of the Constitution.*
- *The protection of unborn life is an important motive for restricting abortion, and the Kenyan Constitution in Article 26(4) equates a pregnant woman's life with continued foetal development, thus making it as the single greatest impendent to medical abortion services"* (p. 16-17).
- *"Access to safe abortion services is a human right. … Forcing someone to carry an unwanted pregnancy to term, or forcing them to seek out an unsafe abortion, is a violation of their human rights, including the rights to privacy and bodily autonomy. …*

- *In many circumstances, those who have no choice but to resort to unsafe abortions also risk prosecution and punishment, including imprisonment, and can face cruel, inhuman and degrading treatment and discrimination in, and exclusion from, vital post-abortion health care. This … endangers the life of the mother/maiden due to the inherent fear of prosecution by health professionals who assist the mother in carrying out safe abortion. …ipso facto violates the right to life. … Access to abortion is therefore fundamentally linked to protecting and upholding the human rights … thus for achieving social and gender justice"* (p. 17-18).

- *"A blanket ban on abortion and or prosecution of medical personnel exposes both the mother and foetus to mortality and … ipso facto violates the right to life"* (p. 19).

- *"… the lack of policies and guidelines for the provision of safe and legal abortion care continues to impede service delivery which exacerbates the risk of women to procure unsafe abortion services thereby endangering women lives and their full enjoyment of the right to life, … lead to physical and mental health complications and social and financial burdens for women, communities and health systems"* (p. 19).

The Right to Privacy and Freedom of Choice.

- *The right to privacy is central to the protection of human dignity and forms the basis of any democratic society, … reinforces other rights, … is thus an integral part of women's right and especially in the promotion and protecting of women's rights to equality, to dignity, autonomy, information and bodily integrity and respect for private life and the highest attainable standard of health, including sexual and reproductive health, without discrimination; as well as the right to freedom from torture and cruel, inhuman and degrading treatment* (p. 22).

- *Although the Kenyan Constitution does not explicitly provide for the right such as the right to autonomy, Courts have interpreted the Constitution to protect these rights, specifically in the areas of marriage, procreation, abortion, private consensual homosexual activity, and medical treatment"* (p. 22).

- The recognized right to privacy entails that: *"there are areas of citizen's lives that are outside an intrusive sphere that neither the government nor the public should concern itself with. In my opinion therefore, there exists a direct link between a woman's decision to terminate a pregnancy with the constitutional right to privacy since a matter concerning abortion should be left primarily to the woman who in any circumstance instructive of spirit in Article 26(4) of the Constitution bears the greatest responsibility should she decide to keep or terminate the pregnancy. That is to say, the woman should have the choice and ultimate decision carefully explored with the trained medical provider as to whether to terminate the pregnancy or continue with the same. This is the ultimate exercise and enjoyment of the freedom of choice and the right to privacy"* (p. 26).

- Court found the impugned sections very broad and urged government to fast-track the legislation to actualise Article 26(4), provide clear and unambiguous statement of prohibited conduct to enable the enjoyment of reproductive rights (p 27-29).

- The right to security under Article 29 of the Constitution: The arrest and prosecution of the petitioner who fall within the exception of Article 26(4) that permits seeking of emergency health care from a qualified health professional violated their rights to security.

- *"Who has the final say to establish the medical fact and viability of the feotus and the mother as a necessary congruent to preserve their right to life is in all aspects a decision duly made by the medical doctor or trained health professional. … The 1st petitioner had exercised her rights of access to medical treatment that may have been to prevent imminent danger to her life or health* (p. 29).

Issue 2 Whether Sections 154, 159 and 160 of the Penal Code are Inconsistent With Article 26(4) of the Constitution.

Held

- Article 20 of the Constitution underlines that the bill of rights binds all organs.
- Article 259 obliges the court to offer the most liberal interpretation that advances human rights and the purpose, values and principles of the Constitution as the "national soul' embodying the ideals and aspirations of a nation" and which must be read as an integrated whole (p. 30-31).
- Section 158 – 160 infringed the rights guaranteed in the Constitution because they did not provide for an exception in the context of Article 26(4) of the Constitution:
- *"[To] criminalize abortion under the Penal Code without a statutory and administrative framework on how the victims are to access therapeutic abortion as provided for in the exception under Article 26(4) is an impairment to the enjoyment to reproductive rights accorded to the women. These cluster of rights includes, right to life, right to privacy, freedom of choice, dignity, security and conscience"* (p. 33-34).
- *"[T]he rights of a woman to control her reproductive process and rights following the promulgation of the Constitution 2010 were not extinguished by Article 26(4). …*
- *The constitution has clearly set out the threshold within which procurement of an abortion is permissible. The main parameters are:*

  i. The opinion of a trained health professional
  ii. Need for emergency treatment
  iii. If the life of the mother in danger

- *The whole objects, purpose and true intention or effect of these provisions is that they are directed at complete limitation of access to the recognized trained medical professional who has the Constitutional duty to act in good faith for purposes of preserving the life of the pregnant woman"* (p. 34-35).
- Such abortion is typically impossible for women in the rural setup. Court directed the state to address the equal access to abortion service before an authorized medical practitioner and put in place identifiable central pillars applied on the certification by the medical provider to the women reproductive rights. Conversely, the lack of *"transformative legislative/policy framework may result in arbitrary, unfair and unreasonable considerations in initiating a prosecution by the Director of Public Prosecutions" (*p. 36).
- The 2nd petitioner met the criteria under section 6 of the Health Act that defines a 'health professional and emergency treatment: "as a one 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"* (p. 37).
- *"The danger which exists of the infringement to the fundamental right to justice of the petitioners is that it gives a sweeping effect to the police to arrest and arraign any such victim on mere suspicion she had intended to breach Section 158 & 159 of the Penal Code"* (p. 37).
- The principles in the FIDA-KENYA petition *"serve as a broad interpretation of the aims and purposes of the petition filed before this court for consideration. … I consider an essential element to this claim as the right of w omen to make their own decision, un-coerced by the state or others so long as they bring themselves within the provisions of Article 26(4) of the Constitution" (*p. 38).

Issue 3 Whether the Proceedings in the Lower Court Should be Quashed

- The common law concept of judicial review is a discretionary remedy to maintain the rule of law and is restricted to excess of jurisdiction and the denial of fundamental justice (p. 39-40).

- In Kenya, in ***R v Attorney General ex- Kipngeno Arap Ngeny*** (High Court Civil Application No. 406 of 2001), the Court held that: *"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. …A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable"* (p. 40).

- *"The respondents never presented good evidence that the allegations of abortion did not involve life threatening emergency to call for necessary treatment and the 2nd petitioner obligated under the law did not make the decision in good faith"* (p. 42).

- *"It is trite that a medical doctor or trained medical professional can claim his right to freedom of action taken in dispensing treatment to a patient on consultation. By virtue of his or her profession he/she has the right to practice according to the norms valid for that profession as stipulated in the various statutes. That in emergency cases he has the freedom to perform or not perform an abortion and to choose the way in which to perform it"* (p. 42).

- *Further, denying any pregnant woman whose decision to terminate the pregnancy is anchored in the professional opinion of a medical doctor is in itself an infringement to her legal rights. … [T]he respondents' response to the specific facts of this case was aimed at forcing her to continue an unwanted pregnancy notwithstanding that it may have threatened her right to life or health* (p. 42).

- Contrary to the obligation of the Police to respect, protect and promote women's rights as enshrined in Article 26(4) of the Constitution, they arrested the petitioner while recuperating in a medical facility and charged her, violated the rights to human dignity, liberty, privacy, conscience and the best interest of the child principle (p. 43 - 44).

- *The charges and proceedings were unfounded and should be quashed as there was no prima facie evidence that the abortion was conducted outside the threshold of Article 26(4) of the Constitution* (p. 44).

Issue 4 Whether the Constitutional Rights of the Petitioners Were Violated

Held

- A petition in respect of a violation of the constitutional violation should set out with a reasonable degree of precision that of which he complains of, the provisions said to be infringed, and the manner in which they are alleged to be infringed (p. 45).

- The petitioners claim their rights under:

- Article 25: Freedom from torture and cruel, inhuman or degrading treatment or punishment; Article 26: Right to life; Article 28: Right to dignity; Article 43: Right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; and emergency medical treatment; and Article 50: Fair and public trial.

- *The key questions to determine were: Was [PAK] medically fit to be detained? Was she forced to sign a statement she did not write? Was she interrogated alone? Was she subjected to a medical examination by force?* (p. 47).

- Keeping PAK in custody without access to medical care despite her condition, violated Article 43(1)(a) on access to the highest standards of health care; keeping her without effective legal representation forced her to give incrementing evidence and violated Article 49 on pre-trial rights and exhibited bias in violation of Article 50(2).

- *"I take issue with the provisions of the Penal Code even on a mere matter of construction. It seems apparent that the above provisions by use of the word unlawful import an inference that a miscarriage is prima facie evidence that the victim triggered it through criminal culpability. Sometimes that is not the case. A doctor acting on emergency protocols in performing an abortion may not face criminal penalties under the Penal Code because he would not meet both the mensrea and actus reus of the offence. To that extent the fact of the victim of the alleged offence being a minor, legal counsel's role at the time of arrest and recording statement was most vital"* (p. 48).

Issue 5 Whether the Court Should Give Orders for Mandamus?

Held

- The High Court has power to issue the writ of mandamus against government agencies or body or person to amend all errors, omissions and failure to meet legal expectations.

- The petitioners sought orders for mandamus compelling the AG, IGP and ODPP to offer guidance to their respective offices for the implementation of Article 26(4) of the Constitution, the Health Act 2017 and the Sexual Offences Act within ninety days.

- *The duties sought to be performed are at the discretion of the respondents and in the premises this court cannot compel them to do the same by way of mandamus* (p. 53).

- *The mandamus cannot be granted on mere apprehension by the petitioners that their rights are likely to be violated in the future by the respondent to warrant grant of this remedy as of now. .. Further, the orders sought are not possible to enforce by the actions of one organ. They require a coordinated response between various organs. Whereas the court can make these orders, their enforceability within the requested timelines is a mammoth task. I am reluctant to grant these orders as they will be in vain. The bodies that the petitioners seek to compel will not be in the position to comply with these orders within the timelines given* (p. 56).

- A grant of a permanent injunction must pass a four step test:

  i. *The applicant has suffered an irreparable harm or injury.*
  ii. *The remedies available at law such as monetary damages are inadequate to compensate for the injury.*
  iii. *The remedy in equity is warranted upon consideration of the balance of hardships between the applicant and the respondent.*
  iv. *The permanent injunction being sought would not hurt public interest* (P. 57).

- Court held that it would not provide an injunction because alternative remedies were available (p. 57).

- While the petitioners may qualify for grant of damages given the violation of their rights, the court exercised its discretion to apply the *"concept of exceptionalism,"* mindful that awarding damages against state actors places a high burden on the taxpayer (p. 63).

Declarations and Orders

a) That Sections 158, 159 & 160 of the Penal Code are not inconsistent with Articles 1, 2, 4, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 43, 46, 48, 49, 50, 73, 75, 157 (11), 159, 163 (3, 6 & 7), 232, 258, 259 and Sixth Schedule Section 7 of the Constitution.

b) That the right to abortion is a fundamental right but it cannot be said to be absolute in light of Article 26(4) of the Constitution. There is a lacuna on information regarding the termination of pregnancies as strongly provided for in these provisions.

c) Parliament to enact an abortion law and public policy framework in terms of Article 26(4) of the Constitution.

d) That the proceedings having been marked with irregularities warranted a writ of certiorari against the text of the charges involved in prosecuting the petitioners under the authority of Article 157 (6) & (7) of the Constitution.

e) That the forced medical examination violated the petitioners right under Article 25 on freedom from torture and cruel, inhuman and degrading treatment, Article 26(4) on the right to life; Article 28 on human dignity; Article 29 on freedom and security of the person; and Article 31 on the rights to privacy.

f) That the right to private communication between a patient and his or her personal doctor is protected under Article 31. The Police and the Director of Public Prosecutions are prohibited from criminalizing such communication unless under order of court.

g) That the medical doctor/trained health professional licensed to practice medicine and acting in good faith inferred from examining a patient will not be guilty of an offence.

h) The prerogative writ of mandamus was denied.

i) The grant of perpetual injunction against the respondents denied as interference in the discretionary powers of public officials.

j) A declaration that sections 158, 159 and 160 of the Penal Code on purely procedural and substantive defects does not capture the exceptions in Article 26(4) of the Constitution.

k) Award of damages against the State is denied.

l) Each party bears their costs.

HM AND CM v QUEEN ELIZABETH CENTRAL HOSPITAL & MINISTRY OF HEALTH, IN THE HIGH COURT OF MALAWI, ZOMBA DISTRICT REGISTRY, JUDICIAL REVIEW CAUSE NO 03 OF 2021

Judgement Date: 15th day of June 2021
Decision by Judge: Mzonde Mvula

FACTS

- The applicant—HM—was a biological brother to CM, a 15 year-old minor.
- On 30th March 2021, the first defendant, One Stop Centre Clinic (OSCC) at Queen Elizabeth Central Hospital (QECH), denied the applicant access to safe termination of pregnancy.
- During the COVID-19 lockdown, the applicant got pregnant by a Benson Kapindula (BK). BK rejected living with the applicant and neither offered CM any material support.
- Since becoming pregnant, the applicant has become mentally and physically unhealthy and was suicidal.
- CM applied for access to safe termination of her pregnancy at QECH which declined to perform the procedure, claiming that it was illegal under sections 149,150, and 151 of the Penal Code.

THE IMPUGNED LAW

- Section 243 of the Penal Code:

"A person is not criminally responsible for performing in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and in all the circumstances of the case."

THE APPLICANTS' CAUSE OF ACTION

- The Penal Code makes exceptional in the circumstances where the life of the woman is in danger because of the pregnancy, and the preservation of a woman's life includes the preservation of her mental and physical health.
- PAK's condition falls under the exceptions and therefore the 1st defendants' decision was unlawful and unreasonable.

THE RESPONDENTS' CASE

- The Respondent opposes the application for leave to Judicial Review.
- The medical examination did not reveal any co-morbidities that would put CM's life in danger because of the pregnancy.
- During the counselling, there was no request for CM's termination of her pregnancy. Rather, CM had alluded that BK should be arrested for not supporting her pregnancy.
- The physical and mental problems are social issues caused by lack of care and support towards CM from BK. Further, CM had already sought a remedy of maintenance against BK.
- The Ministry of Health was not privy to the alleged decision by the 1st defendant.

THE ORDERS SOUGHT

The applicant sought judicial review against the defendant seeking the following reliefs:

(a) An order quashing the decision denying the Applicant access to safe termination of pregnancy.

(b) A declaration outlining the specific circumstances a victim of sexual offences and/or other deserving women/girls can access safe termination of pregnancy under section 243 of the Penal Code.

(c) A mandatory order for the Ministry of Health to promulgate clear guidelines within 6 months clarifying the circumstances in which victims of sexual offences can access safe termination of pregnancy under section 243 of the Penal Code.

(d) An order for compensation.

ISSUES

i. Whether the decision by the 1st Defendant was unlawful and contravened section 243 of the Penal Code, where the life of a woman is in danger.
ii. Whether the denial by QECH, the 1st defendant, on safe termination of pregnancy was unjustified and within the exceptions of section 243 of the Penal Code.

THE LAW APPLICABLE

- Section 108(2) of the Constitution empowers court to review actions of public bodies.
- Order 19 Rule 20(1) of the Courts (High Court) (Civil Procedure) Rules, 2017 allows judicial review where a law, action or decision of the Government or a public officer in the exercise of public function does not conform to the Constitution.
- The purpose of the judicial review is to determine the lawfulness, procedural fairness, justification and bad faith of public functions.
- The court does not look at the accuracy of the decision *per se*, but the decision-making process itself.
- Order 19 Rule 20(2) of the CPR provides that a person applying for Judicial Review must have *locus standi*.
- A decision for Judicial Review lies against a public body, in the exercise of a public mandate. In other words, it does not apply to private decisions.
- The applicant bears the onus to establish that s/he suffered detriment or disadvantage personally as a result of a public decision complained of. Where the applicant has an alternative remedy under law, a judicial review will not be granted.

Issue 1

Whether the Decision by the 1st Defendant was Unlawful in Contravening Section 243 of the Penal Code, where the Life of a Woman is in Danger

Held

- Section 243 exempts a medical doctor who lawfully performs such a medical procedure, to terminate a pregnancy.
- *"The qualifiers in the performance of such duty are:*

  i. That is, must be performed in good faith;
  ii. The performance of the procedure must be reasonable;
  iii. Must be done with regard to the state of the patient at that time; and
  iv. Regard should be had to all the circumstances of the case (p. 7).

- *The medical practitioner examines the woman and makes a decision based on the facts of each applicant. … This means, the medical practitioner cannot on his own motion apply the provision of section 243 of the Penal Code against a patient. If this happens, the medical practitioner would not be acting in good faith. Such an act would not be reasonable and is a ground for Judicial Review* (p. 8).

- *"The medical practitioner therefore will make the decision based on the facts that are brought by the applicant. The applicant must expressly make known the decision which the medical doctor should independently review, and advise on. In the absence of such express request, the medical doctor has no basis to make a decision against which Judicial Review may lie."*

- *"The one alleging must prove. The onus in this case, rests on CM over how the pregnancy pits the mental or physical health. As if that is not enough, the medical practitioner may evaluate the pregnancy for preservation of the life of the mother, if the state of the patient is unstable to warrant such a procedure to terminate* (p. 8).

- *"Again, all this is only possible if the person willing to undergo such a procedure demonstrates how the pregnancy is detrimental to her health, and life in general. Most importantly, such a lady must ask for such decision to terminate on medical grounds, of the medical practitioner. The latter makes a decision in accordance with surgical procedure and medical skill for the benefit of the person, if the circumstances allow for it to be had* (p. 9).

- *The section is restrictive as it is not open to each and every lady that is expectant. The qualifier is that there should be a risk to the life of the mother by preserving the unborn child. The law favours preservation of the life of the mother at the expense of the unborn child. The law thus favours the known over the unknown"* (p. 9).

Issue 2 Whether The Denial By CECH, the 1st Defendant on Safe Termination of Pregnancy Was Unjustified and Within the Exceptions Of Section 243 of the Penal Code.

Held

The analysis of CM at OSC of QECH's conduct of the first defendant, reveal that:

- The Head of Paediatrics and Child Health at QECH, responsible for all administrative decisions, reveals that he received CM after being referred by the Police's Victim Support Unit because she had been defiled.

- CM had opted for a criminal route, in retaliation of lack of maintenance from BK whom she described as her "boyfriend."

- Medical evidence revealed that CM was HIV negative.

- There was no record of CM's formal request to terminate the pregnancy by the medical practitioner at QECH.

Held

- *"On the request for termination for the pregnancy, the court finds the request to be outside interventions sought in this matter. … If it was actually pursued, the court should have found that detail in the medical history at QECH taken by Clinician M. Nawena. … The record by the medical practitioner did not record, ever receiving such request. This Court finds. If it were recorded, the Clinician impression/ opinion/ after History and Examination column would have registered what medical procedure needed to be performed in consequence of such request. Instead, the medical practitioner simply records "history of consensual intercourse. Physical examination not done. Pregnancy test positive." It becomes abundantly plain that CM and her guardian went to the hospital to get record of her pregnancy. They did not seek*

medically performed termination because the pregnancy was a threat to the life and limb of the mother as section 243 of the Penal Code provides (p. 11-12).

- Court concluded that had the 1st Defendant failed to perform such procedure, it would have been a subject of Judicial Review, particularly because it is a public institution (p. (p.12).
- Secondly, the applicant is pursuing a legal remedy, of arresting BK for lack of maintenance and had already reported to the Police, putting the wheels of the criminal justice in motion.
- The Court would not interfere with the decision made at the 1st Defendant's decision because it was not unreasonable.
- CM has the option to pursue a civil remedy. Being a minor, she is guaranteed maintenance and financial support for the unborn child. *"An arrest of Benson Kaphinduka and conviction would leave the alleged perpetrator with prospect of long custodial sentence. If successfully prosecuted, and unable to support his 2 children of his wife and the unborn child along the way with CM, CM would have no financial help. In this regard, the application for child maintenance order, in addition to, or in substitution of the present criminal remedy, remains ajar as an addition optional remedy. This falls under Child Care Protection and Justice Act, specifically under section 12, if desired* (p.13).
- Court declined to give the Judicial Review because:

i) CM had an alternative remedy which she was pursuing.
ii) She did not meet any of the exceptions under section 243 of the Penal Code.
iii) CM did not apply for access to legal abortion at OSCC of QECH.
iv) The suicidal thoughts arose out of lack of support, or non-cooperation by BK, rather from physiological wellbeing at health risk.
v) It was morally wrong: *"This Court will not offend the moral campus of society by allowing unjustified blanket termination through application for Judicial Review which are frivolous, vexations and an abuse of process… The 1st defendant did not make any decision to decline the same, to form a basis for application for leave to apply for Judicial Review before this Court of law"* (p.14).

Conclusion

- **The applicant "skipped to ask for legal termination at OSC of QECH, which is the rightful forum.**
- **Courts do not examine medical cases the same way a medical practitioner conducts a prognosis at hospital. It was at the medical facility that CM had to demonstrate that her condition affects her state of complete physical, mental, and social well-being. CM did not produce any medical records to ground her application under section 243 of the Penal Code. The onus was on her to produce qualifiers under the provision. In the absence of, the specific request for abottio, there is nothing to apply for Judicial Review over.**
- ***"Finally, CM is already actively pursuing the remedy at criminal law. Judicial review cannot lie while there is already an alternative remedy available. It is abuse of process. … The Minister of Health cannot be privy to the non-decision made in the case of CM."***

Court dismissed the application for judicial review with costs.

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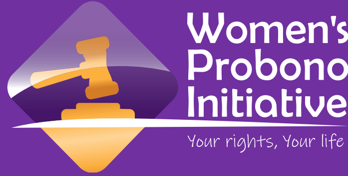

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