**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CONSTITUTIONAL PETITION NO.E009 OF 2020**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF 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, 165 (3,6&7),232,258,259 AND SIXTH SCHEDULE SECTION 7 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 158, 159 AND 160 OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CHILDREN'S ACT OF 2001 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 35(3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE HEALTH ACT OF 2017 AND THE CLINICAL OFFICERS (Training, Registration and Licensing) Act, 2017.**

**AND**

**IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KILIFI CRIMINAL CASE NUMBERS 395, 396 OF 2019 AND CHILDREN'S CASE NO. 72 OF 2019**

**BETWEEN**

**PAK.....1ST PETITIONER**

**SALIM MOHAMMED.....2ND PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1ST RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....2ND RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT**

**THE SENIOR PRINCIPAL MAGISTRATE KILIFI.....4TH RESPONDENT**

## J U D G M E N T

## PETITIONER'S CASE

The petitioners instituted this suit by way of a Petition dated 30th November, 2020 that is supported by affidavits filed by Joseph Karisa Ngozi on 15th January 2021 and Professor Joseph Karanja filed on 3rd February 2021.

The petitioners filed submissions on 7th June 2021.

The petitioner is an 18-year-old adolescent from Ganze Location in Kilifi County. At the material time, PAK was a form two student at Patanguo Mixed Day Secondary School in Ganze Sub-County, Kilifi County. PAK became pregnant after sexual intercourse with a fellow student. Upon experiencing complications with her pregnancy including severe pain and bleeding, she went to Chamalo Medical Clinic in Ganze Location for treatment on 19th September 2019. On the same day at around 5:00pm Salim Mohammed, the 2nd Petitioner, received PAK at Chamalo Medical Clinic. PAK complained of severe lower abdominal pain, vaginal bleeding, and dizziness. She reported that she woke up with intense abdominal cramps that were followed by mild vaginal bleeding which increased over time.

At the Clinic PAK received emergency care from the 2nd Petitioner who upon examining her concluded that she had suffered a spontaneous abortion. The 2nd Petitioner performed a successful manual vacuum evacuation, after which PAK was in fair general condition. With mild lower abdominal pain, PAK was then allowed to return to the female ward to recuperate.

The 2nd Petitioner is a registered Clinical Officer with the Clinical Officers' Council with a current practice license. He holds a Diploma in Clinical Medicine and Surgery from the Kenya Medical Training College and is currently employed at Chamalo Medical Clinic in Ganze Sub county.

At around 7 pm on 21st September 2019, plain-clothed Police officers stormed Chamalo Medical Clinic without notice or permission. They demanded to be given PAK's treatment records and subsequently confiscated the same from the 2nd Petitioner.

The 1st and 2nd Petitioners together with two female employees at Chamalo Medical Centre both working as cleaners, were arrested and taken to Ganze Police Patrol Base. The Police officer at Ganze Police Patrol Base made PAK sign a statement written by the inquiring Police officer.

On 22nd September 2019 PAK was forced to undergo a medical examination at Kilifi County Hospital where a medical examination form was filled out.

On 23rd September 2019, PAK was charged in Kilifi Criminal Case No. 395 of 2019 with the offence of 'Procuring abortion contrary to section 159 of the Penal Code' with the particulars of the offence being that 'On the 19th September 2019 at around 1900 Hours at Game location in Game Sub-county within Kilifi County with intent to procure her miscarriage administered to herself drugs which led to her miscarriage.'

On the same day the 2nd Petitioner was charged in Kilifi. criminal case number 395 of 2019 with 'Procuring abortion contrary to section 158 of the Penal Code' with particulars that 'Jointly with another not before the court, on the 19th September 2019 at around 1900HRS at Game sub-location, Game location in Game sub-county within Kilifi County unlawfully administered unknown drugs into the body of PAK (accused in CR395) that led to her miscarriage.'

The 2nd Petitioner was in the alternative charged with 'Supplying drugs to procure abortion contrary to section 160 of the Penal Code' with particulars that 'Jointly with another not before the court: on the 19th September 2019 at around 1900 HRS at Game sub-location, Game location in Game sub-county within Kilifi County unlawfully supplied drugs to one PAK aged 17 years knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.'

Concurrent with the criminal charges against PAK, the Children's Officer in charge of Ganze Sub-County made an application in Children's case No. 72 of 2019 seeking to send PAK to a children's home from 23rd September 2019 to the 17th October 2019. On 18th February 2020, the children's officer for Ganze sub-county, one Mr Mbogo, wrote a letter to the head teacher of PAK's school seeking to confirm her attendance at the school and further stigmatized her entire encounter with the criminal justice system by labelling her as one charged with procuring an abortion and subject to criminal proceedings. On

the 19th February 2020, the children's officer summoned PAK from school, together with her mother. On 1st March 2020, PAK's father received summons from the Senior Principal Magistrates Court applied for by the children's officer in charge of Ganze Sub-county, requiring him to bring PAK from school to Court on the 12th March 2020.

The petition is founded on Articles 2, 2(5), 3, 7, 10, 232, 20(3)(a) and (b), 21(1), 24(1), 26(1) and (4), 27, 28, 29, 43, 46, 47, 48, 49, 50,53, 73, 75, 157, 159, 165, 258, 259 of the Constitution of Kenya 2010, section 6(1) of the Health Act 2017, Sections 158, 159,160 of the Penal Code, Sections 4 and 5 of the Fair Administrative Action Act No. 4 of 2015 among other various legislative provisions.

With regards to Article 50(2)(1) the Petitioners relied on the case of **Republic vs John Kithyulu (2013) eKLR, Rochin vs California 342 US 165 (1952), Francis Mburu Mungai vs The Director of CID and Another – High Court Misc. App. No. 615 of 2005 (unreported)** in support of their submissions. They further submitted that in making the decision to charge and admitting the involuntary statement of the 1st petitioner, the agents of the 3rd respondent acted contrary to the provisions of Article 50(2) and Article 50(4) of the Constitution.

The petitioners submitted that the 4th respondent violated the petitioners' rights under article 50(2) (a) (i) by finding that they had a case to answer and putting them on their defence. They cited R v Oakes (1986) 1 R CS. Further, that they violated Article 50(2) (n). They cited **Woolmington vs DPP 1935 A C 462 and Miller vs Minister of Pensions 1942 A C**. they also cited **R vs Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** on the exceptions where an accused person can be called to give an explanation in rebuttal.

The petitioners submitted that Article 25(c) of the Constitution provides that the right to a fair trial cannot be limited and that the ruling of the 4th

respondent violated this right. They cited **Meixner & Another vs Attorney General (2005) 2 KLR 189** in support of this.

The petitioners submitted that forcing the petitioner to undergo a medical examination was in violation of the right to a fair trial. The medical results are contrary to the rule against self-incrimination and the right to a fair hearing as enshrined in Article 49(1) (d) and 50(2) of the constitution. They cited the Court of Appeal case of **COI & Another v Chief Magistrate**.

They set out the instances within which a court can declare a prosecution to be improper and cited **Samuel Kamau Macharia & Another vs Attorney General (2001) eKLR.**

The petitioners submitted that the sections the petitioners are charged under should be construed to conform with the alterations and exceptions provided for under schedule 6 of the constitution and to ensure the implementation and application of Articles 26(4) and 43(1) (a) of the Constitution. Further, that the 2nd petitioner met the criteria set out in section 6 of the Health Act and that the petitioners are not candidates for any charge under the impugned sections of the Penal Code.

The petitioners contend that the respondents exercised their powers arbitrarily and contrary to public policy. They cited **Rosemary Wanja Mwagiru & 2 others vs The Attorney General & 2 others (2013) eKLR and Vincent Kibiego Saina vs Attorney General Misc. Applic. No. 839 of 1999** in support of this submission.

On articles 26(4), 43(1) (a), 43(2) of the Constitution, Section 35(3) of the Sexual Offences Act and Section 6 of the Health Act the petitioners submitted that they set out the parameters within which a victim of sexual offences and experiencing pregnancy complications may access treatment. They cited the FIDA Kenya & 3 Others decision and reiterated the position of the High Court on the same.

The petitioners submitted that as pertains to Article 49 of the Constitution the circumstances surrounding the arrest of the 1st Petitioner the same amounted to a false arrest. They cited **Daniel Waweru Njoroge & 17 Others vs Attorney General, Civil Appeal No. 89 of 2010(2015) eKLR.** Further, that the arrest and prosecution of the petitioners was an abuse of the court process. They cited **Peter George Antony D' Costa vs Attorney General & Another, Nairobi Petition No. 83 of 2010** in support of their submission.

The petitioners submitted that Article 26(4) of the Constitution provides that there are certain situations when abortion is permitted. They cited the case of **FIDA – Kenya & 3 Others** where the blanket criminalization of abortion was found to be unconstitutional.

With regards to emergency medical treatment the petitioners submitted that section 8 of the Health Act provides that the guardian of a minor can consent to treatment when the patient is a minor, in the absence of which care should be provided in the best interest of the child.

With regards to Article 27 of the Constitution the petitioners submitted that everyone is equal before the law and has the right to equal protection and equal benefit of the law which includes the full and equal enjoyment of all rights and fundamental freedoms. They also cited article 18(3) of the African Charter on Human and People's Rights, Article 2(1) of the Protocol to the African Charter on the Rights of Women and Articles 1 and 12 of CEDAW. Further, that the impugned sections indirectly discriminate against women of reproductive age in Kenya.

The petitioners submitted that the petitioner being forced to undergo a medical examination was in violation of Article 28 of the constitution. Human dignity is also recognized as a national value under article 10(2) (b) of the Constitution. They cited **Republic of Kenya vs Kenya National Examination Council ex parte Audrey Mbugua Ithibu (2014) eKLR, W.J & Another vs Henry Amkoah (2015) eKLR, Dawood & Another vs Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8, Mayelane vs Ngwenyama**

**and Another (CCT 57/12) [2013] ZACC 14 and COI & Another vs Chief Magistrate Ukunda Law Courts & 4 Others [2018] eKLR** in support of their submission.

The petitioners submitted that the forced medical examinations were in violation of Article 29 read together with Article 25(a) of the Constitution. The actions of the 3rd respondent's agents brought shame and contempt to the1st petition as she was dragged out of hospital and held for two nights with regard to her status as a minor and a patient in need of medical attention.

As pertains to Article 31 of the constitution the petitioners cited **Ibrahim Ndadema Adenya vs Honourable Attorney General C/O Ministry of Foreign Affairs and International Trade and Another (2016) eKLR, Standard Newspapers Limited & Another vs Attorney General & 4 Others, Petition 113 of 2006(2013) eKLR, COI & Another vs Chief Magistrate Ukunda Law Courts & 4 Others (2018) eKLR, M W K & Another vs Attorney General & 3 Others (2017) eKLR** and submitted that post abortion care is part of maternal health service and does to qualify as an offence. The 3rd respondent's agents compelled PAK to undergo a medical examination to unlawfully obtain evidence for an alleged abortion offence thus violating her right to privacy.

The petitioners submitted that the right to health finds root in article 43(1) (a) and 43(2) of the constitution. The impugned sections of the penal code restricts access to lawful abortion services and lead to inequality in that they violate women's rights to equal access to healthcare. In arresting PAK from the health facility thereby preventing her from accessing health care the 3rd respondent violated her rights to health and access to emergency treatment.

The petitioners submitted that the arresting and charging of the petitioners by the 2nd and 3rd respondents violated article 47 of the constitution. If they had undertaken quality investigations they would have established the status of the abortion law in the country and that post abortion care is not a known offence in Kenya.

Through their actions and omissions the respondents violated the child's right to healthcare and the best interest of the child under articles 53(1) (c) and (2) of the Constitution. The denial of access to education while in detention and the interruptions after release violated PAK's right to education. In arresting her they did not consider the best interests of the child.

The respondents have not shown any nexus between the limitation and the purpose of limitation as required by Article 24(1). They have not shown the purpose of limiting the right of abortion through the application of the blanket criminalization of abortion to even justify the objective of the impugned sections, to bring justification within article 24(3). They relied on **Thulah Maseko and 3 Others vs The Prime Minister of Swaziland and 3 Others Case No. 2180 of 2009** in that the state has an obligation to justify existence of a law. They also cited **Andrew Mujuni Mwenda vs Attorney General (2010) UGCC 5** with regards to the respondents to prove that the blanket application of the impugned sections falls within acceptable limitations. They further cited **Robert Alai v Attorney General (2017)eKLR, Olum & Another vs Attorney General (2002) 2 EA and Hamdarada Nakhana Union of India Air (1960) 354** and submitted that the continued implementation of the impugned sections violates the right of abortion guaranteed under article 26(4) of the Constitution. The respondents have not demonstrated that the limitation of the impugned sections is justified, contrary to article 24(3).

In prosecuting the Petitioners the 2nd respondent neither applied the evidential test and or threshold test. They ought to have established that the charges against the petitioners lacked factual and legal foundation to disclose a prosecutable offence. The state has the obligation to ensure the respect and fulfilment of the constitutional rights of the petitioners as provided for by the Constitution of Kenya at Article 21 and has been affirmed by various decisions of the court. They cited **Satrose Ayuma & 11 Others vs Registered Trustees of the Kenya Railways Staff Benefits Scheme & 3 Others Petition No. 65 of 2010. They also cited C.K (A child) through Ripples International as her guardian & next friend) & 11**

**Police/Inspector General of the National Police Service & 3 Others (2013) eKLR.**

The petitioners sought the following orders;

**a. A declaration that forcing PAK and women and girls of reproductive age to undergo medical examination with the intention of charging them for procuring abortion violates the rights to health, privacy, dignity and fair hearing.**

**b. A declaration that the arrest, detention and prosecution of patients seeking post-abortion care services is cruel, inhuman and degrading treatment and a violation of Articles25 (a) and 28 of the Constitution.**

**c. A declaration that the arrest, detention and charges against the petitioners are illegal, arbitrary and a violation of Articles 26(4), 43(1) (a), 43(2) and 50 of the Constitution.**

**d. A declaration that arresting and detaining PAK from her hospital bed, charging her for seeking medical care, detaining her in a children's remand home denying her treatment and a chance to be in school violates her constitutional rights to health including reproductive healthcare, access to emergency healthcare, dignity, equality, non-discrimination, privacy, education and freedom from cruel, inhuman and degrading treatment and not in the best interest as a child.**

**e. A declaration that arresting and prosecuting women seeking abortion care services from a trained health professional and arresting and prosecuting a trained health professional providing abortion care , as stipulated in Article 26(4) of the Constitution, the Health Act,2017 and the Sexual Offences Act ,2006 is unlawful and a violation of the constitution.**

**f. A declaration that the conduct of the Police officers and the Children's officer is contrary to Articles 10 and 232 of the constitution on the principles of good governance and public service.**

**g. An order of certiorari calling into court and quashing the charge sheets in Kilifi Senior Principle Magistrates Court Criminal case numbers 395 of 2019 and 396 of 2019 and the application in Kilifi Children's case number 72 of 2019.**

**h. An order of permanent injunction barring the Director of Public Prosecutions from prosecuting any patient seeking abortion care from a trained health professional providing abortion care as stipulated under Article 26(4) of the Constitution and the Health Act, 2017.**

**i. An order of permanent injunction against the Inspector General of Police and the Director of Criminal Investigations from arresting any patient seeking abortion care from a trained health professional providing abortion care as stipulated under Article 26(4) of the Constitution, the Health Act,2017 and the Sexual Offences Act 2006**

**j. An order for damages to the Petitioners for the violations suffered.**

**k.An order of mandamus compelling the Attorney General to within 90 days from judgment, forward a Bill to the National Assembly for amendment of the Penal Code in line with Article 26(4) of the Constitution , the Health Act, 2017 and the Sexual Offences Act,2006**

**l. An order of mandamus compelling the Inspector General of Police to, within 90 days of judgment, issue a circular to all Police officers directing them on the illegality of arresting and harassing trained health professionals providing abortion services within the law throughout the country.**

**m. An order of mandamus compelling the Director of Public Prosecutions to, within 90 days of judgment, issue a circular to all prosecutors directing them on the illegality of prosecuting patients**

**receiving and trained health professionals providing abortion services within the law throughout the country.**

**1ST 3RD AND 4TH RESPONDENT'S CASE**

The 1st, 3rd and 4th Respondents filed submissions on 6th July 2021. They also filed a grounds of opposition dated 23rd February 2021. They opposed the petition on the following grounds;

- The issues raised herein were judicially determined by a court of competent jurisdiction in **Federation of Women Lawyers (Fida - Kenya) & 3 others v Attorney General & 2 others: East Africa Centre for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR** hence the same is barred by the doctrine of issue estoppel.

- Human rights and freedoms as envisioned under the Bill of rights are not absolute and the same are subject to limitations.

- Sections 158 and 159 of the Penal Code do not offend Article 26(4) of the Constitution hence constitutional.

- The ODPP, Inspector General of Police and the Senior Principal Magistrate are independent offices which the Petitioners should not direct them on how to conduct their constitutional duties.

They submitted that one is estopped or precluded from raising issues in a separate suit involving different parties which were substantially determined by a court of competent jurisdiction. Where the doctrine of res-judicata is not available for a party since one party was not a party to the previous suit, one can always turn to the doctrine of estoppel. Strict critical issues raised herein by the Petitioners were substantially discussed and determined with finality by a five-judge bench in **Federation of Women Lawyers (Fida - Kenya) & 3 others v Attorney General & 2 others; East Africa Centre for Law 8. Justice & 6 others (Interested Party) &**

**Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR.** This judgement has not been appealed against and therefore still stands. This court only distils and addresses matters arising to this particular petition.

The respondents argued that the intention of Article 26 (4) was to make abortion illegal save for instances when in the opinion of a qualified health practitioner, the life of the mother is in danger or that there is need for emergency treatment or where permitted by any other written law. That it is therefore preposterous to argue that Article 26 (4) repeals sections 158, 159 and 160 of the Penal Code. Article 26 (4) only provides a limitation to the core right and it has to be construed as narrowly as possible so that it does not take away from the core right stipulated under Article 26 (1), (2) and (3) and associated rights under Article 27(1), (2) and (4). Article 26 (4) therefore buttresses the right to life and the law on abortion in Kenya.

The constitutional position as it emerges from Article 26 is that human life begins at conception, and that abortion is prohibited under Article 26(4] and sections 158-160 of the Penal Code. No cogent reasons have been given by the petitioners as to why Sections 158, 159 and 160 should be declared unconstitutional. They have failed to demonstrate that the process within which the Legislature used to enact the legislation was unconstitutional or was flawed. No attempt whatsoever has been made to demonstrate that the parliament in enacting the Penal Code and specifically the Sections claimed to be unconstitutional failed to follow the due process.

By trying to stop their prosecution, this is a clear indication that the Petitioners want this Court to interfere with the independence of both the Principal Magistrate's Court and the ODPP.

They reiterated the submissions of the 2nd respondents on the manner in which the investigation was conducted and that no evidence has been adduced to indicate that the medical examination was forced, malicious and conducted in a manner to demean the 1st Petitioner or infringe on

malicious and that the learned magistrate has demonstrated an open bias while conducting the trial of the two petitioners.

They asked that the petition be dismissed.

**2ND RESPONDENT'S CASE**

The 2nd respondents filed submissions on 6th July 2021. They also filed grounds of opposition in opposition to the petition. They restated the facts leading up to the arrest of the petitioners. They then submitted that without the arrest of the petitioner the 2nd respondent would not have been in a position to investigate the matter. The arrest and detention formed part of the investigation.

On the issue of criminal charges, the 2nd respondent having perused the police file noted that an offence had been committed and that the 1st petitioner had recorded a statement. The statement had not been procured using torture or undue influence. The statement does not amount to a confession and cannot be adduced as evidence by the petitioners. It simply informed the 3rd respondent on what to further investigate.

The 2nd respondent was mandated by law to effect the arrest and detention. They are well covered by the provisions of sections 29(a) and 36 of the Criminal Procedure Code and section 58 of the National Police Service Act. The 2nd Respondent acted within the confines of Article 157 of the Constitution, Section 5 of the ODPP Act, The National Prosecution Policy and the decision to charge guidelines. The court will realise that none of the 1st petitioners rights as enshrined by Articles 25(a), Article 29, Article 43(1) & (2) and Articles 53(2) were violated.

There is no medical evidence that the 1st petitioner was examined at Kilifi Hospital after being arrested by the police.

The examination conducted was in the course of investigations and it was well within the right of the police to conduct investigations. They cited

**Republic vs Commissioner of Police and Another ex parte Michael Monari & Another (2012) eKLR**.

They submitted that the issue of sections 158, 159 and 160 being unconstitutional was resolved in **Constitutional Petition 266 of 2015 – FIDA & 3 Others vs Attorney General & 3 Others & East Africa Centre for Law & Justice & 6 Others (Interested Parties)**

The 2nd petitioner has not proven that he has the requisite skills and experience to conduct abortions. He has simply annexed proof that he attended KMTC. Further that the abortion conducted by the 1st petitioner was not one mandated by the provisions of Article 26 of the Constitution since there was no emergency at the material time.

The 2nd respondent cited **Constitutional Petition No. E003 of 2020 – Ezekiel A. Omollo vs DPP & 2 Others** and submitted that the petitioners were accorded a chance to record statements and knew why they were being arrested. Further, they were arraigned before court within 24 hours. Therefore the decision to arrest them did not contravene their rights as provided by articles 49 and 50 of the Constitution. The petitioners have failed to prove how the police acted unlawfully in arresting them.

The 2nd respondent maintained that the matter is res judicata and should be dismissed. It cited **Kenneth Kanyarati & 2 others vs Inspector General of Police Director of Criminal Investigations Department & 2 others (2015) eKLR.**

**ISSUES FOR DETERMINATION**

Upon perusal of the pleadings and submissions of the parties herein, I have condensed the issues for determination into the following;

1. Whether there is a lacuna in the current statutory scheme to operationalize Article 26(4) of the Constitution.
2. Whether Sections 154, 159 and 160 of the Penal Code are unconstitutional.

3. Whether the Constitutional Rights of the petitioners were violated
4. Whether the proceedings should be quashed
5. Whether the Court should give orders for Mandamus under prayers k,l and m

**WHETHER THERE IS A LACUNA IN THE CURRENT STATUTORY SCHEME TO OPERATIONALIZE ARTICLE 26(4) OF THE CONSTITUTION**

**THE LAW**

**Right to Life**

**In S vs Makwanyane (1995) (3) SA 391(CC). According the O'Regan J "the right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitution values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially dismissed. Without life, there cannot be dignity."**

Where formal legal channels to abortion are lacking or inaccessible the victims (women) terminate their pregnancies by unscrupulous devices and substances. In the view of this court, in abortion cases the pregnant women tend to avoid such medical examination on the ground that it violates her right to privacy or for that matter, the right to human dignity as enshrined under

Articles 28 & 39 of the Constitution. 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 way I see it, the protection of unborn life is an important motive for restricting abortion, and the Kenyan Constitution at 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.

Although abortion is illegal in Kenya, our Constitution and other international instruments like CEDAW provide a legal framework to reaffirm reproductive rights of women. Keeping in view of these rights the right to the enjoyment of the highest attainable standard health specifically on women's right to sexual and reproductive health in international law states **"Women's rights to equality and to the highest attainable standards of health, to enjoy the benefits of scientific progress and to health-care services, including those related to reproductive and sexual health, are enshrined in international and regional human rights instruments, reaffirmed in consensus agreements, including the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action adopted at the Fourth World Conference on Women and the outcome documents of the review and appraisal conferences, and recognized by international, regional and national mechanisms and jurisprudence. The International Conference on Population and Development, held in 1994, recognized women's rights to reproductive and sexual health as being key to women's health. Discrimination against women in the area of health and safety and denial of their right to control their own bodies severely violate their human dignity, which, along with equality, is recognized in the Universal Declaration of Human Rights as the foundation of freedom, justice and peace in the world.**
**States are obliged to secure women's rights to the highest attainable standard of health and safety, including their underlying determinants,**

**and women's equal access to health-care services, including those related to family planning, as well as their rights to privacy, information and bodily integrity. The obligation to respect, protect and fulfil women's right to equal access to health-care services and to eliminate all forms of discrimination against women with regard to their health and safety is violated by neglecting women's health needs, failing to make gender-sensitive health interventions, depriving women of autonomous decision-making capacity and criminalizing or denying them access to health services that only women require. In some situations, failure to protect women's rights to health and safety may amount to cruel, inhuman or degrading treatment or punishment or torture, or even a violation of their right to life.**
**Women's bodies are instrumentalized for cultural, political and economic purposes rooted in patriarchal traditions. Instrumentalization occurs within and beyond the health sector and is deeply embedded in multiple forms of social and political control over women. It aims at perpetuating taboos and stigmas concerning women's bodies and their traditional roles in society, especially in relation to their sexuality and to reproduction. As a result, women face continuous challenges in accessing health care and in maintaining autonomous control in decision-making about their own bodies. Understanding and eliminating the instrumentalization of women's bodies, which is based on harmful cultural norms and stereotypes, and its detrimental impact on women's health, is critical for change to occur."**

The legality and application of international law to our local circumstances is pursuant to Article 2(5) of the Constitution.

Access to safe abortion services is a human right. Under international human rights law, everyone has a right to life, a right to health, and a right to be free from violence, discrimination, and torture or cruel, inhuman and degrading treatment.

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, in my view, 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. This puts the life of the mother in danger and ipso facto violates the right to life.

Access to abortion is therefore fundamentally linked to protecting and upholding the human rights of women, girls and others who can become pregnant, and thus for achieving social and gender justice. The World Health Organization notes that lack of access to safe, affordable, timely and respectful abortion care, and the stigma associated with abortion, poses risks to women's physical and mental well-being throughout the life-course.

Inaccessibility of quality abortion care risks violating a range of human rights of women and girls, including the right to life; the right to the highest attainable standard of physical and mental health; the right to benefit from scientific progress and its realization; the right to decide freely and responsibly on the number, spacing and timing of children; and the right to be free from torture, cruel, inhuman and degrading treatment and punishment.

The Human Rights Committee affirmed the above view in its General Comment No. 36 on the right to life by expressing the view that the duty to protect life includes the fact that States should take appropriate measures to address the general conditions in society that may prevent individuals from enjoying their right to life with dignity. This obligation includes ensuring access to essential goods and services, including health care, developing campaigns for raising awareness of gender-based violence and harmful

practices, and improving access to medical examinations and treatments designed to reduce maternal and infant mortality. A blanket ban on abortion and or prosecution of medical personnel exposes both the mother and fetus to mortality and therefore flies against state obligations in preventing/reducing maternal and infant mortality rates and ipso facto violates the right to life.

The Human Rights Committee further noted that social and other determinants of health must be addressed in order for women to be able to seek and access the maternal health services they need and recommended that States should develop strategic plans and campaigns for improving access to treatments designed to reduce maternal mortality, as part of advancing the enjoyment of the right to life. In my view therefore, continued restrictive abortion laws inhibit quality improvements that might be possible to protect the women with unintended pregnancies. Furthermore, 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 considering that the WHO has identified unsafe abortion as a leading – but preventable – cause of maternal deaths and morbidities and which can lead to physical and mental health complications and social and financial burdens for women, communities and health systems.

The above position has been reiterated numerous times by the Human Rights Committee. For example, in its General Comment Number 36 and as part of preventing foreseeable threats to the right to life in relation to abortion, the Human Rights Committee affirmed that States have a duty to ensure that women and girls do not have to undertake unsafe abortions, which according to the World Health Organization (WHO) is a leading cause of maternal deaths worldwide, with restrictive laws being a main barrier to accessing safe abortion. Accordingly, the Human Rights Committee noted that States must not impose criminal sanctions against women and girls undergoing abortion

or against medical service providers assisting them in doing so, and at a minimum, States;

***"must provide access to safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable."***

This formulation allows for a broad interpretation of the minimum grounds under which abortion should be made legal and also calls on States to take affirmative steps to provide access to abortion.

In line with WHO findings, the Human Rights Committee also set forth other recommendations to prevent unsafe abortion, including the removal of existing barriers to safe and legal abortion—including the exercise of conscientious objection by individual medical providers—and [that States] should not introduce new barriers. The Committee also noted that States should ***"protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and especially girls and boys, to quality and evidence-based information and education on sexual and reproductive health and to a wide range of affordable contraceptive methods, and prevent the stigmatization of women and girls who seek abortion."*** They also recommended ensuring ***"the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances and on a confidential basis."***

Consequently, and taking cue from the above, it is my finding that restrictive abortion laws coupled with lack of effective laws giving effect to Article 26(4) of the Constitution, exposes women and girls to mental and physical health risks that are often associated with unsafe abortion and stigmatizes women

and girls who seek abortion thereby violating their right to life and the right to highest attainable standards of health.

**Right to Privacy and freedom of choice.**

Privacy is a fundamental human right, enshrined in numerous international and regional human rights instruments. These include; ***Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, Article 14 of the United Nations Convention on Migrant Workers, Article 16 of the UN Convention of the Protection of the Child, Article 10 of the African Charter on the Rights and Welfare of the Child, Article 11 of the American Convention on Human Rights, Article 4 of the African Union Principles on Freedom of Expression, Article 5 of the American Declaration of the Rights and Duties of Man, Article 21 of the Arab Charter on Human Rights, and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms***.

The right to privacy is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information and association.

The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others, free from arbitrary State intervention and from excessive unsolicited intervention by other uninvited individuals. Consequently, the right to privacy can only be limited when there is extreme need for the same. But even under such circumstances, the Constitution puts limits to the extent of limitation by providing safeguards against the limitation. It is for this reason that activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, are necessary to achieve a legitimate aim, and proportionate to the aim pursued.

The right to privacy 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. 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.

For example, the abortion – right to privacy legal discourse today can generally be associated with the genesis of the ―right to privacy in the United States Supreme Court's finding in ***Griswold vs Connecticut 381 US 479 [1965***]. In this case, the plaintiff was convicted of violating a Connecticut law that prohibited the use of contraceptives as she had given medical advice to married persons on the means of preventing conception. On appeal, the Supreme Court held that the said law was unconstitutional and that it violated the ―right to privacy. The Court stated, inter alia, that the marital relationship lay within a ―zone of privacy and a law which sought to achieve its goals by the means having a maximum destructive impact upon that relationship violated the ―right to privacy of the marital relation.

The application of the principle was further expanded in subsequent Supreme Court decisions such as in ***Eisenstadt vs Baird 405 US 438 [1972]*** to include contraceptive decisions made by unmarried individuals. The dictum of **Justice William Brennam** in the latter case highlights the nature of the right to privacy thus;

***"If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."***

Based on the ―right to privacy principle, the question of abortion emerged in the 1973 US Supreme Court's landmark decision in ***Roe v Wade 410 US 113 [1973].*** In the said case, decided on 22nd January 1973, the Court, by a 7-2 vote, ruled that the right to privacy extended to a woman's decision to have an abortion, but that right must be balanced against the State's two legitimate interests in regulating abortions: protecting prenatal life and protecting women's health. In particular, the US Supreme Court reaffirmed the principle established in earlier cases to the extent that the constitutional right to privacy protected an individual's rights to reproductive autonomy.

The court was of the view, which I fully associate myself with, that protecting access to abortion effectuates vital constitutional values, including dignity, autonomy, equality, and bodily integrity. Furthermore, the Court recognized that;

***"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives,"***

The Court further acknowledged that;

"***At the heart of liberty is the right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."***

The Court therefore opined, which I agree with, that the right to terminate a pregnancy is a "fundamental right and the decision as to whether to terminate a pregnancy is fundamental to a woman's "personal liberty." The Court thus recognized the great ***"detriment that the State would impose upon the pregnant woman by denying this choice,"*** including forcing her to endure health risks associated with pregnancy and the costs of bringing a child into a family under circumstances that completely ignore the viability of the fetus or imminent danger of the mother.

The above decisions of the US Supreme Court have been reiterated by both regional and international human rights bodies and implementation mechanisms. For example, the UN Working Group on the issue of discrimination against women in law and in practice in its statement in 2017 opined that the right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity. In this regard, the Working Group considered that the decision as to whether to continue a pregnancy or terminate it, is fundamentally and primarily the woman's decision, as it may shape her whole future personal life as well as family life and has a crucial impact on women's enjoyment of other human rights. Accordingly, and following the good practice of many countries, the Working Group called for allowing women to terminate a pregnancy on request during the first trimester.

However in the making of our Constitution we have a limited scope for life begins at conception. Nevertheless it should be recognized that every society is unique and it should therefore be approached on this issue by it is own ethos, culture, history and as a democratic state its citizens are the owners of the Constitution. I see the role of the Constitution as a living instrument which breathes life to a country in the consolidation of the society around common values and principles of governance. (note Article 10 of the Constitution).

The Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) have also both clearly indicated that women's right to health includes their sexual and reproductive health and this includes the right to privacy and family as anchored under Article 17 of the ICCPR and entails access to available reproductive health care technology, including safe and acceptable contraceptive methods and available spaces for safe abortions. In this regard, human rights bodies have provided clear guidance on the need to decriminalize abortion and noting that ensuring access to these services in

accordance with human rights standards is part of State obligations to eliminate discrimination against women and to ensure women's right to health as well as other fundamental human rights. It is further in this regard that the Human Rights Committee in its General Comment 28 [2000], on the equality of rights between men and women at paragraph 20 stated that imposing ***"a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion"*** fails to respect women's right to privacy.

Regionally, the African Commission on Human and Peoples Rights in its General Comment Number 2 held that for women who have the right to therapeutic abortion, the practice of interrogation by healthcare providers, the police and/or judicial authorities is a violation of their right to privacy and confidentiality.

Locally, the Kenya National Commission on Human Rights in its report titled, 'Realizing Sexual and Reproductive Health Rights in Kenya: A myth or reality? 2012' was of the view that the enjoyment of sexual and reproductive health rights in Kenya by women is affected by among others, laws that do not allow for personal autonomy of women.

It is clear from the above examples that the concept underlying the recognized right to privacy in Article 31 of the Constitution and as buttressed by international conventions is that there are areas of citizen's lives that are outside an intrusive sphere that the 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.

Parliament should therefore, as the legislative body, fast track legislation that provide for access to safe abortion for women in Kenya and to actualize the provisions of Article 26(4) of the Constitution. I say this cognizant of the fact that heath officials and civil society organization have emphasized the country's law do not prevent women from having abortions but instead, severely undermines the quality of care women receive or forces them to resort to unsafe and clandestine means to terminate unwanted pregnancies. I also say this cognizant of the fact that other legislation exists to effectuate other provisions of the constitution including the Access to Information Act 2016, meant to actualize Article 35 of the Constitution.

In this regard, I take cognizance of the fact that there exists, the Reproductive Healthcare Bill, 2019, that is before Parliament. The Bill as gleaned, provides more substantial and comprehensive provisions on sexual and reproductive health. In its Memorandum of Objects and Reasons, the mover of the Bill, Nakuru Senator Susan Kihika notes that the proposed law is meant to actualize the Constitutional guarantee that every person has the right to the highest attainable standard of health, including the right to reproductive health. To this end, as is plain to see in the text of the Bill itself, it provides an in-depth framework for a range of reproductive health services, including; access to family planning and right to reproductive health information; conditions for and limitations of assisted reproduction, including the parties to surrogate parenthood agreements and validity of those agreements, artificial insemination for surrogate parenthood, multiple pregnancies and compensation; safe motherhood, including antenatal care, delivery services and post-partum care; sterilization; termination of pregnancy; duty to refer; consent; post-abortion care; and data collection; confidentiality; reproductive health of adolescents, provision of information and consent (including mentorship, spiritual and moral guidance, counselling on sexual abstinence, consequences of unsafe abortion, drug abuse and training in life skills); the

obligation on the state to provide adolescents with correct information, guidance and counselling on reproductive health; and information and treatment of HIV and AIDS; and female genital mutilation. The bll is thus timely.

The correctness of this view is informed by the provisions of the **English and Wales Abortion Act 1967 which expressly stated as follows; (a) that subject to the provisions to regulate medical abortion a woman shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner and in his or her professional opinion formed in good faith such a rare step of terminating the pregnancy ought to be permitted. (b) That the continuance of the pregnancy will invoke risk greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman. (c) That the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman. (d) That there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped and survival rate compromised.**

The discussion in this chapter of English and Wales demonstrate that in criminalizing abortion in our Penal Code, this has not been a constant feature in the adjudication of processing evidence bound to be used by the Director of Public Prosecution under Article 157(6) (7) & (8) of the Constitution. Thus, the questionable Sections were designed to allay the concerns of society with regard to protection and preservation of the right to life prior to the enactment of the Constitution 2010. It is now imperative a new act be put in place by the legislature stipulating conditions in which if met would enable a court of law to declare procuring an abortion a criminal offence. The statement of prohibited conduct should be in clear and unambiguous language absorbed into the text of Article 26(4) of the Constitution. In view of this it is the court's interpretation that the scope of the impugned sections are so broad and would

in my view do well if the wording of it is subject to fundamental rights such as woman rights to health, life, dignity and security.

In interpreting the right to security under Article 29 of the Constitution I rely on the principles expressed from comparative jurisprudence in **Singh vs Minister of Employment and Immigration (1985) 1 SCR 177 RE B.C Motor vehicle Act (1985) 2 S.C.R 486 Law Society of Upper Canada vs Skapinker (1984) 1 S.C.R thus "security of the person must include her right of access to medical treatment for a condition representing a danger to life or health without fear of criminal charges. Generally speaking also reproductive rights are understood to be performed in privacy. Sexual activity occurs in the innermost of the privacy walls. Yet the right to privacy is not absolute but can be protected only against unjust interference. Balance or proportionality is unanticipated feature of the scheme."**

First, it is essential to capture the matter under discussion that the 1st petitioner presented herself to the second petitioner who performed a surgical operation which may have been informed by the diagnosis of the 1st petitioner. It is not disputed from the brief facts that the 2nd petitioner is a qualified health care provider duly licensed by the relevant body to practice medicine in Kenya. Presumably therefore he falls within the textual meaning of Article 26(4) of the Constitution referenced as **"unless in the opinion of a trained health professional....."**

Second, in all circumstances borrowing from the principles in the Singh case (supra) 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.

By this reasoning the court will be sending a signal to the legislature that if the statutory provisions under the Penal Code are not amended it may as well be considered a threat or infringement to the rights of the pregnant women as to the enjoyment of their reproductive rights. It is not in dispute that the states important and legitimate interests is to protect the life of the unborn child and

that of the mother where compelling circumstances permit to terminate the pregnancy. Who has the final say to establish the medical fact and viability of the fetus 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. It is the courts' view point that the legislature further draft a law which recognizes right to abortion in consonance with Article 26(4) of the Constitution for protection of everyone right to life save in the exception provided by law.

**WHETHER SECTIONS 154, 159 AND 160 OF THE PENAL CODE ARE INCONSISTENT WITH ARTICLE 26(4) OF THE CONSTITUTION**

In making a determination on the unconstitutionality of the law there are principles that need to be considered. Ideally, the provisions should support each other. The interpretation of the law is guided by Article 20 of the Constitution which provides;

(1) The Bill of Rights applies to all laws and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) Develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

The 5 judge bench in **Federation of Women Lawyers (Fida – Kenya) & 3 others vs Attorney General & 2 others; East Africa Center for Law & Justice & 6 Others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR** cited with approval the decision in

**Coalition for Reform and Democracy (CORD) & 2 Others vs Republic of Kenya &10 Others [2015] eKLR** where the court set out the principles that a court should bear in mind when interpreting the Constitution. The court held;

**91. The Constitution has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.**

**92. We are also guided by the provisions of Article 159(2) (e) of the Constitution which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the Constitution.**

**93. Thirdly, in interpreting the Constitution, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of S. vs Acheson, 1991 (2) S.A. 805 (at p.813) where he stated that:**

**"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."**

**94. Further, the Court is required, in interpreting the Constitution, to be guided by the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other: see Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3).**

Keeping these principles in mind, we need to now analyze the impugned sections of the Penal Code.

Section 158 of the Penal Code provides;

> **Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.**

Section 159 of the Penal Code provides;

> **Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and is liable to imprisonment for seven years.**

Section 160 of the Penal Code provides;

> **Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years.**

Article 26(4) of the Constitution provides;

**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 question on interpretation of the Constitution against the backdrop of an impugned statute or sections thereof found it is way to the guided principles in ***Olum and another v Attorney General*** [2002] EA, it stated that;

> "***To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."***

In the same vein the quote in ***The Queen v Big M. Drug mart Ltd,*** 1986 LRC (Const.) 332, the Supreme Court of Canada stated that;

> ***"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."***

The principal issue raised in this petition is whether the penal code provisions on abortion infringe the right to life in terms of Article 26(1), Article 28 on Human Dignity and Article 29 on Right to Freedom and Security of the person. During the submissions by the learned counsels some of the distinct issues apparent were that there is a sense of unconstitutionality as the provisions fetter the wide ranging the guaranteed and protected rights which the petitioner is entitled under the Constitution. Generally speaking the Penal Code provisions used by the state to indict women against criminal offences related to procurement of abortion operates in the following sphere:

(a) They create an indictable offence for any person to use any means with the intent to procure the miscarriage of a female person.
(b) They establish a parallel criminal offence when a pregnant woman uses or permits any means to be used with the intent to procure her own miscarriage.
(c) The means referred in the sections make reference to the administration of a drug or whatever means, or device manipulated to procure an abortion.

In this scenario the provisions' literal interpretation presumptively are in violation of Article 26(4) of the Constitution. Notwithstanding that position my reading of Sections 158, 159 & 160 of the Penal Code do not provide for an exception in the context of Article 26(4) of the Constitution which states that the fetus' interests are not to be protected where the life and health of the mother is under imminent danger. In light of this Constitutional provision the Penal Code which criminalizes abortion ought to be read in consonance with the fundamental rights and freedoms enshrined in the Constitution. I take the view that 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. From a comparative jurisprudence perspective in

**Mills –v- the Queen (1986)1 S.C.R the court had this to say "security of the person is not restricted to physical integrity, rather it encompasses protection against overlong subjection to the vexatious and vicissitudes of a pending criminal accusations. This include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs as to the outcome of the sanctions."**

I am convinced that the rights of a woman to control her reproductive process and rights following the promulgation of the Constitution 2010 were not extinguished for Article 26(4) provides for a saving clause to safeguard her human rights. I have in mind that abortion performed by a licensed medical practitioner with the consent of the pregnant woman is not punishable, if done in order to prevent danger to the life or health of the mother and if this danger cannot be avoided by other means. In this respect further guidance on this Constitutional question is to be found in the case of **Roe vs Wade 410 US 113 (1973)** in which the court held inter alia that **"The Constitutional right to privacy (a liberty right protected by the fourteenth amendment) encompassed a woman's decision in consultation with her physician whether to terminate a pregnancy. At the same time the court recognized that the privacy right is not absolute, at some point the state interest as to protection of health, medical standards and prenatal life become dominant. To coordinate the rights and it's regulation of women's abortion decision over the course of a pregnancy, permitting restrictions on abortion to protect unborn life only to a point of viability (when a fetus is deemed capable of surviving outside a woman's womb."**

The important point to mention however is; first, it is actually in our Constitution that the right to life begins at conception. Second, that in the case of an emergency upon certification by a medical doctor/practitioner abortion is permitted to save a woman's life or health. The paradox is that access to what I call therapeutic abortion as provided for in the Constitution is typically impossible, more specifically to women in the rural setup. There

may be even a struggle in the mind of the victims on how to seek medical treatment, arising out of a progressive miscarriage or a visioned act to terminate unwarranted pregnancy. As part of addressing the challenges posed by the Penal Code sanctions, it is for the state to guarantee women equal and non-discriminatory access to health care with standard procedures or protocols for the implementation of Article 26(4) of the Constitution. Indeed as the factum of this petition attests there is evidence that access to abortion services before an authorized medical practitioner comes with it the risk of criminal sanctions under Section 158, 159 & 160 of the Penal Code. What is also intriguing is lack of the identifiable central pillars applied on the certification by the medical provider to the women reproductive rights in decision making. The suitability test imposed by Article 26(4) without the legislative scheme may pose a challenge to guarantee the effect of protection of the life of the fetus. What has to be determined is whether preservation of the fetus signals the manifestation of the need for emergency treatment or the life of the mother is in danger is a decision not subjected to checks and balances within the hierarchy of professional health providers. Embracing the arguments by the petitioners, there is merit in the idea that the primary objective of the Penal Code sanctions on abortions without transformative legislative/policy framework may result in arbitrary, unfair and unreasonable considerations in initiating a prosecution by the Director of Public Prosecutions. The court in **Health Workers (CNTS) –V- Courts of Justice of the States, ADPF 54 (before the Supreme Court of Brazil) held thus "The termination of pregnancy of anencephalic fetus is a measure protective of the physical and emotional health of women, avoiding psychological disorders she would suffer were she forced to carry on a pregnancy that she knew would not result in life. Note that termination of pregnancy is a choice, having to respect, of course, also the choice of those who prefer to carry on and live the experience to the end. But respect to this choice is respect for the principle of human dignity."**

The constitutional question which further arises is whether in enforcing the provisions of the Penal Code to criminalize any woman found in the clinic of a trained health professional with suspicion of having committed a crime without inquiry as to the compliance of Article 26(4) of the Constitution is a threat to fundamental justice. 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.

The constitution has clearly set out the threshold within which procurement of an abortion is permissible. The main parameters that set the threshold are;

a) The opinion of a trained health professional
b) Need for emergency treatment
c) If the life of the mother in danger

For the abortion to be considered unlawful it must breach the threshold set out in the constitution. The health act has provided the definition of a health professional and emergency treatment under section 6. The section refers to one with a 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.

The 2nd petitioner provided proof of his qualifications as a health professional. The respondents failed to controvert that the 2nd petitioner was a qualified health professional as stipulated in Article 26(4) of the Constitution.

As to the import of the provisions being unconstitutional, there is a sense that the unlawful actions or omissions contemplated in the impugned penal provisions be read harmoniously whenever reasonable, with separate parts being interpreted with their broader statutory context. As held **in Sebelius vs**

**Cloer, 569 U.S NO. 12-236, Slip No. op (May 20, 2013) that in construing a statute it is the language of the statute itself, if the language of the statute is plain and unambiguous it must be applied according to its terms**.

The court has no power to declare a law unconstitutional unless probative evidence is provided that it conflicts with some provisions of the Constitution. It is conceded that these provisions apply the phrase unlawfully to describe the offences in question either in procuring or administering some substance to actualize the expected outcome of termination of the pregnancy. By extension, any act by a pregnant woman to procure an abortion triggers a criminal liability. 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. I further hold the view that the court cannot properly declare certain acts of other organs of government as unconstitutional simply because they bring about results which are in the opinion of the court clearly unjustified. The court in **S vs Makwanyane & Another 1995 (3) SA 391 (CC) at par, 104 held as follows "proportionality calls for the balancing of different interests. It held that in the balancing process, the relevant considerations will include the nature of the right that is being restricted and its importance to society. Regard should also be had to the purpose for which the right is restricted and the importance of that purpose to society. Further, a court entrusted with the interpretation of a right should look at the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, it should consider whether the desired ends could reasonably be achieved through other means less damaging to the right in question."**

It is impossible to place rules, principles, and evaluation of worth in a sequence of inferences to this petition without acknowledging the cross-cutting themes discussed by the Five court bench of learned justices of concurrent jurisdiction in the case of **Federation of Women Lawyers(FIDA-**

**KENYA) & 3 Others vs The Attorney General & 10 others PETITION NO. 266 OF 2015.** The FIDA case is heralded as a land mark decision in the High Court history for it embodies explicit Constitutional principles derived from comparative jurisprudence and subsequently through judicial interpretation in terms of Article 26(4) of the Constitution. The context of that petition dealt primarily with the specific provisions designed and effectuated in the instant petition. Generally, the principles set out in that petition serve as a broad interpretation of the aims and purposes of the petition filed before this court for consideration. On points of agreement the decision provides concrete foundation of any justiciable issues pursuant to Section 158, 159 & 160 of the Penal Code. It informs the basis on which to understand the demands and requirements of the Constitution on right to life and an exception to limitation of that right in the letter and spirit of the Constitution. The rationale of the right in Article 26(4) is obvious, given the fact that the police, the Director of Public Prosecutions or any other criminal justice actor, for that matter would not be able to determine the unlawful acts of omission stipulated in the Penal Code on procuring abortion without reference to these provisions of the Constitution. It is in this climate that the sanctity of life is protected. I consider an essential element to this claim as the right of women 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. In this light, it might be preferable to shift the emphasis on morality to the rights of the mother. Examples of the types of exception abortion is permitted is crystal clear in the FIDA case.

**WHETHER THE PROCEEDINGS IN THE LOWER COURT SHOULD BE QUASHED**

**THE LAW**

This petition rallies the court behind the designated judicial review jurisdiction of the high court as a remedy under Article 23 of the Constitution. In Cart in the Supreme Court (2012) 1AC 663 **"... the scope of judicial**

**review is an artefact of the common law whose object is to maintain the rule of law - that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise. Both tribunals and the courts are there to do Parliament's bidding. But we all make mistakes. No-one is infallible ..." "... what machinery is necessary and proportionate to keep such mistakes to a minimum? In particular, should there be any jurisdiction in which mistakes of law are, either in theory or in practice, immune from scrutiny in the higher courts?" "First, we could accept the view of the courts below in the Cart and MR (Pakistan) cases that the new system is such that the scope of judicial review should be restricted to pre-Anisminic excess of jurisdiction and the denial of fundamental justice (and possibly other exceptional circumstances such as those identified in the Sinclair Gardens case [2006] 3 All ER 650). Second, we could accept the argument, variously described in the courts below as elegant and attractive, that nothing has changed. Judicial review of refusals of leave to appeal from one tribunal tier to another has always been available and with salutary results for the systems of law in question. Third, we could adopt a course which is somewhere between those two options ... namely that judicial review in these cases should be limited to the grounds upon which permission to make a second-tier appeal to the Court of Appeal would be granted."**

Back home in **R vs Attorney General exp 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. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. 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".**

The petitioners essentially have applied for a writ of certiorari which I consider of an extraordinary character for is not every court that is permitted to issue it. "**In Abdi & 4 Others vs Minister Office of the President & 2 Others 200 KLR 80 that it is trite law that an Order of certiorari is issued to quash an order already made if such a decision or order is made without or in excess of jurisdiction while prohibition also issue prohibiting a body not to continue with proceedings in excess of jurisdiction or in contravention of the laws of the land."**

**"In Kenya National Examinations Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR the Court of Appeal held *inter alia* as follows: "Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter. Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice."**

This is a discretionary remedy employed by this court to quash quasi-judicial and judicial decisions of inferior tribunals and courts in cases in which a decision made appears to be an error of law on the face of the record. The case

in point where the evidence used to make the decision is often inconclusive or the tenor of it manifest some error amounting to a jurisdictional defect. In considering certiorari in this petition  am persuaded by the comparative jurisprudence in **Rex vs Bourne 1 K.B 691 Justice Morris** had this to say **"If the doctor is of opinion, on reasonable grounds, and with adequate knowledge, that the probable consequence of the continuance of pregnancy would indeed make the woman a physical or mental wreck, juries are quite entitled to take the view that the doctor who in those circumstances and in that honest belief operates is operating for the purpose of preserving the life of the [pregnant woman]"**

The court in **Kenya in Mehar Singh Bansel vs R 111 (1959) EA 832 "Defined an illegal operation as one which is intended to terminate pregnancy for some reasons other than what can, perhaps be best be called a good medical reason, which the court interpreted to be the genuine belief that the operation is necessary for the purpose of saving the patients life or preventing severe prejudice to her health**."

Underlying the court approach 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. **Professor Cook & Bernard M Dickens, Abortion Laws in Commonwealth Countries 22 (1979)** made the following observation **"The requirement for a [health worker's] good faith in making a medical assessment of a woman's needs or qualification for abortion implies an obligation to apply proper professional criteria of health care and the absence of motivation based on ulterior or non-professional purposes.**
**The decision must be based on reasons of real danger to life or health, and not on financial and social factors as such. The underlying reasoning is that a physician's opinion not formed upon the basis of his special skill and trained insight is not a medical opinion."**

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. In the premise of this petition, whether abortion was carried out other than by the decisive element of good reason by the trained health professional is moot.

An important legal development in Kenya is the adoption of the Constitution 2010 which is ground breaking for women as Article 26(4) recognizes there are reproductive rights constitutionally protected as fundamental rights. 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. Particularly in relation to this petition, the corpus of the 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. As positioned in the **Fida case (supra)** the right to life exception in Article 26(4) should be understood to encompass emotional, mental, psychological and physical health grounds and pregnancies arising from sexual violence related acts. Given the importance of our constitution the police are obligated to respect, protect and promote implicit rights to protect the womens' rights as maintained in Article 26(4) of the Constitution. It is a fact that the police regained access to the medical facility in which the 1st petitioner was recuperating after the medical procedure performed by the 2nd petitioner. It was on that basis a recommendation to charge was made to the Director of Public Prosecutions. In the instant case one cannot ignore the facets of violation of the right to human dignity, liberty, privacy and conscience of the petitioner. The court in **MWK vs Another vs Attorney General & 3 others (2017)Eklr** made the following commentaries; **"That this court in line with its constitutional mandate to promote and protect the values and ethos**

**that underpin our constitution, will undoubtedly find and hold that an arrest, such and detention of a child that violates privacy and dignity of the child in unconstitutional. Thus in line with our nascent human rights culture before every arrest, search and a detention of a child is executed police officers must consider whether there are no less invasive methods which may be used to bring the suspects before court and to secure the evidence. It is sufficient that in arresting a child police officers must do it through the lens of the bill of rights and pay special attention to the paramount importance of the best interest of such a child."**

It is well known that the 1st petitioner was a child aged 17 years old. In short, there is prima facie evidence that establishes an inescapable conclusion that her fundamental freedoms in the bill of rights were violated. The law in Article 26(4) of the Constitution is very short and simple, it may not provide details on the decision making process of the medical practitioner and ethical considerations but it does lay down the threshold on the exception to the rule on permissible abortion. This was one of the pillars in **Roe vs Wade in which the court stated that "The attending physician with his patient, is free to determine without regulation by the state that in (*his/her)* medical judgment, the patient's pregnancy should be terminated." (underline emphasis mine).**

Articles 156, 159 and 160 of the constitution are clear on the unlawfulness of conducting an abortion. They have clearly set out the threshold for the procurement of an abortion to be considered unlawful. The prosecution did not at any juncture answer the question as to whether the abortion was conducted outside the threshold set out in Article 26(4) of the Constitution. In order for the charges to stand there had to be prima facie evidence that the alleged abortion was conducted outside Article 26(4) of the Constitution.

The prosecution failed to meet the criteria set out to prove that the alleged abortion was conducted outside the provisions of article 26(4) which have been clearly stated. They did not establish that the health professional was

unqualified to conduct the procedure or that the life of the mother was not in danger and in need of emergency treatment that would prevent the worsening of her medical condition. This is the principle in **R vs Secretary of state for the Department, ex p Venables, (1998) AC 407 Lord Browne-Wilkenson** observed that "**When Parliament confers a from time to time over a period, such a power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way he will exercise the power in the future [...] By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such an exercise. These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of case [...] But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case [...] If such an inflexible and invariable policy is adopted, both the policy and the decision taken pursuant to it will be unlawful."** See the jurisprudential Development in our own jurisdiction as illustrative of the following cases Municipal Council of **Mombasa vs Republic Umoja Consultants Ltd, Nairobi Civil Appeal NO.185 OF 2007(2002) Eklr, Kenya National Examination Council supra.**

In this petition the petitioners are at odds as what constitutes a threat to the woman's life as anallowable reason for abortion as the country lacks laws and policies that facilitate access to safe abortion.

In the premises I find that 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. What now

is meant, more precisely by a prerogative writ of certiorari the proceedings in Criminal cases Nos. 395, 396 OF 2019 and Children's Case No.72 of 2019 are hereby quashed.

**WHETHER THE CONSTITUTIONAL RIGHTS OF THE PETITIONERS WERE VIOLATED**

The threshold for establishing constitutional violation was set out in **Mumo Matemo vs Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) eKLR:** the court said:

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

The petitioners claim their rights under Articles 25(a), 28, 26(4), 43(1) (a), 43(2) and 50 of the Constitution were violated.

Article 25(a) provides;

> **Freedom from torture and cruel, inhuman or degrading treatment or punishment;**

Similarly in S v Williams, the Constitutional Court, referring to punishment in general, held that the Constitution required that;

***"measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanizing treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavors to move away from a violent past. It is therefore reasonable to expect that the State must be***

***foremost in upholding those values which are the guiding light of civilized societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that ....even the vilest criminal remains a human being possessed of common human dignity."***

Article 26 provides;

1) **Every person has a 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.**

Article 28;

**Every person has inherent dignity and the right to have that dignity respected and protected.**

Article 43(1) (a) provides;

**To the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**

Article 43(2) provides;

**A person shall not be denied emergency medical treatment.**

Article 50 provides;

**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

With regards to prayers d and e which touch on the arrest and detention of the 1st petitioner, the court needs to determine whether her rights under articles 25(a) and 28 of the Constitution were violated. The petitioner was recovering from a medical procedure and therefore the police did not have any medical qualifications to determine whether she was in a condition to leave the clinic regardless of her admission status at the said clinic. There is a danger of violation of constitutional rights under the guise of independence that they claim allows them to arrest where probable cause exists. As per the facts of the case there is a dispute with regards as to the condition of PAK at the time of the arrest. What needs to be determined is;

- Was she 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?

The petitioners produced annexure 1 and 7 from the petitioners' affidavit being her treatment card and her medical examination report from Kilifi County Hospital as proof of post abortion medical care.

It is not in dispute that the petitioner had undergone a medical procedure before the arrest. It is upon the respondents to prove that she was given medical care when in detention by way of producing medical treatment notes or records. A failure to do so would mean that the petitioner had her rights to reproductive healthcare infringed by agents of the respondents.

Upon her arrest she was held in custody without access to medical care despite her condition. The respondents have failed to prove that they provided her with the access to health care and especially reproductive health care. This was a gross violation of article 43(1) (a) of the constitution as she was entitled to access to the highest standards of health care and more specifically reproductive health. I further find that her arrest was degrading and inhumane. In the premises it is crystal clear that her rights under article 25(a) and 28 were grossly violated.

The Constitution 2010 must be construed in a manner which secures the fundamental freedoms and rights for each citizen bearing in mind the full measure of the provisions under Chapter 4 on the Bill of Rights. In my humble opinion there are no precise comprehensive policies promulgated by the minister of health setting guidelines on safe and legal abortions. 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. As reiterated elsewhere in this judgment the 2nd petitioner may not be criminally responsible for performing a medical procedure presumably having formed an opinion that it was the right thing to do within the province of Article 26(4) of the Constitution. I am persuaded to hold that 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. In **Avocats Sans Frontieres(on behalf of Bwampanye) –v- Burundi (2000) AHRLR 48 (ACHPR 2000) where it was decided that fair trial is characterized by legal representation. To espouse this argument, it held as follows "The right to fair trial involves fulfilment of certain objective, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of Courts and tribunals to conform to international standards in order to guarantee a fair trial to all."**

This case is a clear example where the 1st petitioner was seized from the hospital bed by arresting officers without the benefit of effective legal representation under Article 49(1c) of the Constitution. As a result the 1st petitioner was prejudiced in circumstances which rendered her arrest, recording of (the so called confession) statement and subsequent arraignment in court in absence of legal counsel. Focusing on pre-trial rights under Article

49 of the Constitution one wonders how an unrepresented minor would articulate matters arising from the interrogatories raised by the police. The binding nature of the rights in terms of this article obligates the state to effectively ensure implementation in accordance with the aims and purpose of the Constitution. In this petition, that contract between the state and the alleged suspects to a crime as underpinned in the supreme law seem not to have been fulfilled.

As pertains to Article 50 of the Constitution, despite the fact that the proceedings are yet to be concluded, the mere fact that the prosecution failed to establish that the medical procedure the 1st petitioner underwent was in breach of Article 26(4) is a clear indication of a bias approach to the prosecution of the petitioners. There was no counsel present when the petitioner signed the statement on procurement of the abortion. I therefore find that the same is of questionable evidentiary value. This is in contravention of Article 50(2) which provides that a person has the right to refuse to give self-incriminating evidence. Admitting this involuntary statement and using it to charge the petitioner is a violation of Article 50(2) and (4) of the Constitution. The violation of Sections 158, 159 & 160 in this case does not accord with the tenets on procedural fairness and fundamental rights clearly stated in the Constitution. The rights embodied in the Constitution on conscience, life, dignity, freedom of choice, security, privacy as grounded conscientiously with reproductive rights behind Article 26(4) should be broadly construed so as not to deny the beneficiaries the essentials of humanity. It is true that in providing a test of imminent danger for the exercise of the Article 26(4) and discretions which go with it, there is good sense that the pregnant woman and the trained health professional would in their decisions exercise their powers to protect the Constitutional right to life. **In Rex v. Bergman and Ferguson (1948), which concerned two doctors indicted for "conspiring together unlawfully to procure miscarriage."104 In his summing-up of this case, Justice Morris read directly from Bourne:**

**If the doctor is of opinion, on reasonable grounds, and with adequate knowledge, that the probable consequence of the continuance of pregnancy would indeed make the woman a physical or mental wreck, juries are quite entitled to take the view that the doctor who in those circumstances and in that honest belief operates is operating for the purpose of preserving the life of the [pregnant woman).”**

Further this court in determining the issues in this petition makes reference to the principles in **Reg. vs Newton and Stungo (1958), concerned the specific issue of mental health grounds for abortion. In this case, in which a woman had died from an abortion performed by a doctor on mental health grounds, the doctor was charged with “unlawfully using an instrument with intent to procure [a] miscarriage,” along with manslaughter and manslaughter on the grounds of negligence.107 In his summing-up, Justice Ashworth stated, “The law on the use of an instrument for such a purpose was this—that it was unlawful unless the use was made in good faith for the purpose of preserving the life or health of the woman.”108 He then explained: Health meant not only physical but mental health as well. There might be cases of a woman going to a doctor in a state of great emotional upset, distraught, and verging on the fringe of insanity. If in such a case a doctor said, ‘If I let this go on and I let her proceed to deliver she will be a mental wreck, if not dead,’ and he then relieved the woman of her pregnancy, he committed no crime.”**

The facts and the context of this case raises the bar as to the chronology of events arising out of a decision of a medical doctor or a health care provider acting in his capacity to give medical opinion to his or her patient on termination of a pregnancy. I presume the constitutional regulatory framework in Article 26(4) is relevant in the context of the alleged abortion conducted on 23/9/2019 at Kilifi.

**WHETHER THE COURT SHOULD GIVE ORDERS FOR MANDAMUS UNDER PRAYERS K, L AND M**

It is settled law that the High Court has power by the writ of mandamus as a remedy against government agencies or body or person to amend all errors, omissions and failure to meet legitimate expectations which tend to oppress the right holders. That kind of infringement resulting in misgovernment calls for this court to exercise discretion through one of this constitutional tools provided as a means of enforcing performance of a public duty bestowed by the constitution or statute.

Prayer (k) seeks orders for mandamus compelling the attorney general within 90 days from judgment to forward a bill to the national assembly for the amendment of the Penal Code in line with article 26(4) of the Constitution, the Health Act 2017 and the Sexual Offences Act. Prayer (l) seeks an order of mandamus compelling the Inspector General of Police to, within 90 days of judgment, issue a circular to all Police officers directing them on the illegality of arresting and harassing trained health professionals providing abortion services within the law throughout the country. Prayer (m) seeks an Order of mandamus compelling the Director of Public Prosecutions to, within 90 days of judgment, issue a circular to all prosecutors directing them on the illegality of prosecuting patients receiving and trained health professionals providing abortion services within the law throughout the country.

The threshold for issuing orders of Mandamus was clearly set out by the court of appeal in **Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR where the court held;**

**The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS" Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."**

**At paragraph 90 headed "the mandate" it is stated: "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."**

**What do these principles mean" They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."**

The upshot of the foregoing is that the orders sought must compel the performance of a public duty that a body or institution is legally bound to perform. The petitioner has not shown that the actions it seeks the respondents to be compelled to perform are specific or that they are legally bound to perform the said duties. Had there been specific legal provisions that bind the respondents to perform the actions sought, the orders sought would

have been granted. 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.

**In the case of Associated Provincial Picture Houses Ltd vs Wednesbury Corp in 1948, Lord Greene MR set out the circumstances in which the courts would intervene. The case is of such historical importance a substantial excerpt of Lord Greene's judgment is set out below: What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the [...] authority has contravened the law to establish that proposition [...] It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles?**
**They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard**

**to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters [...] I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable." It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might**

**almost be described as being done in bad faith; and, in fact, all these things run into one another." (See Paul Kuria Kiore vs Kenyatta University(2016)eklr, Kenya National Examinations Council –v- Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others(1997)eklr)**

Canonical though, these doctrines guides the court in granting remedies against the administrative authorities they require much interpretation to fit the scope of any given specific circumstances. As the law has developed prohibition, certiorari and mandamus have become general remedies which may be granted in respect of any decisive exercise of discretion by an inferior authority performing public functions. In light of the well-illustrated principles I am persuaded that the decision making process by the Director of Public Prosecution to charge and prosecute the petitioners certain relevant factors were not taken into account involving the set criteria under Article 26(4) of the Constitution. The lingering effect is on the legal basis of evidence and conclusion reached by the respondents to investigate and prefer charges against the petitioners. Contrary to the opinion held by the respondent the decision may have been reached with caprice or whim. It signifies what **Lord Denning Ashbridge Investments Ltd vs Minister Housing and Local Government (1965) 1 WLR 1320 at 1326**. **"Held that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a decision to which on the evidence he could not reasonably come, or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law."**

The petitioners have demonstrated that, applying the objective test there is prima facie evidence supporting a feature for prohibition and certiorari against the respondent.

The writ of mandamus provides the normal means of enforcing the performance of public duties by public authorities as part of their statutory or Constitutional duty. The case at hand rest primarily on the principle by **Lord Goddard CJ R vs Goods Vehicles Licensing Authority ex p. Barnett Ltd(1949) 2 KB 17 at 22 "to allow an order of mandamus to go there must be a refusal to exercise the jurisdiction. The line may be a very fine one between a wrong decision and a declining to exercise jurisdiction; that is to say, between finding that a litigant has not made out a case, and refusing to consider whether there is a case."**

Having looked at the nature and scope of the petition I am persuaded that the petitioners have not discharged the burden of proof for this court to exercise discretion under Article 23(3) of the Constitution to grant a writ of mandamus.

In addition to the above concerns from the facts of this petition I am of the considered view that 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.

The petitioners must be alive to the fact that courts do not give orders in vain. 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. Because of the above conclusion it is not necessarily for me to examine the merits and demerits of granting a permanent injunction for those who hold office in government and are responsible to public administration or the common good of the citizens.

As regards the relief of injunction the petitioners addressed this court that the same should issue against the 1st, 2nd, 3rd and 4th respondents to prohibit them from investigating, arresting and preferring charges on any persons in

adherence to Section 158, 159 & 160 of the Penal Code. Now, the arguments before me in reference to this petition turns upon the question whether in the circumstances which I have out above as deduced from the affidavits can be said to contain sufficient reasons to grant a permanent injunction. Generally, speaking the relief on injunctions flows from the provisions of Order 40 Rule 1 & 2 of the Civil Procedure Rules. As in the premised law the purpose of granting a permanent injunction is to prevent a respondent from breaching an obligation existing in favour of the plaintiff. Drawing from the principles in **Kenya Power and Lighting Company vs Sheriff Molana Habib (2018) Eklr and Ngurumani Limited vs Jan Nielsen (2014)Eklr.** For the court to grant a permanent injunction an applicant must pass the four step test.

a) That the applicant has suffered an irreparable harm or injury.
b) That the remedies available at law such as monetary damages are inadequate to compensate for the injury.
c) That the remedy in equity is warranted upon consideration of the balance of hardships between the applicant and the respondent.
d) That the permanent injunction being sought would not hurt public interest.

Giving effect to the above guidelines the petitioners cannot be granted this equitable remedy as there exist alternative efficacious reliefs obtainable in their favour. Notwithstanding that legal proposition I do not lose sight that denial of constitutional right for even at the very minimum periods of time constitutes irreparable harm justifying the grant of an injunction. Going to the specifics of the evidence tendered by the petitioners this court finds that the balancing analysis weighs heavily against grant of this remedy as couched in the petition.

It is now the remedial turn for considerations as to whether the petitioners merit an award of damages on the strength of infringement of their constitutional rights. The new conceptual framework in our jurisprudential development is a remedy strictly grounded in constitutional torts. To get a feel

of the legal proposition around this question the learned author **Susan Bands in article reinvesting Bivens, : The self-executing constitutions 68 S. CAL L.REF 289, 292, (1995) made the following commentaries "That constitutional rights and liberties have specific limitations and restrictions on governments and must be enforceable. Courts must allow damage suits to compensate the wronged victims. The traditional common law remedy may be considered inadequate, not because many of the rights parallel the interests protected by common law torts actions, but because constitutional violations are enforceable in their own rights. Thus damage actions under the constitution should not require implementing legislation, because constitutions are specifically designed to place limitations on the political branches of government. Although a balance must exist between the vindication of constitutional right and effective, efficient government, the application of common law tort doctrine can ensure adequate compensation for the claimants, while ensuring that governments are not mired down in baseless suits. Moreover damage awards are the only true remedy for the private citizens that can ensure government officials respect constitutional protections."**

To this authority can be added statements in **Christensen vs State 266 GA 474, 468 S.E and United States vs Barona 56 3D 1087, 9th circuit (1995)** the judges made the following observation **"A constitution is a social contract through which individuals give up certain liberties in exchange, the government agrees to provide services for the community such as the enforcement of social norms through the criminal law, the necessary infrastructure for the economy and a general system of social stability. However, the government also agrees to certain limitations on its authority in the form of constitutional rights. The citizenry relies on the promise that the government will respect certain areas when it grants authority to the government. Whenever the government breaches this contract, the government has violated the community's reasonable**

**expectations the people have relied to their detriments and deserve compensation. Without relief, the foundation upon which the government is built falls into question. When a government violates, a constitution there is detrimental reliance by the people that the government will obey the constitution and the government will appropriately use the power the people granted it. Even though the government is often placed in a superior position with respect to the private citizens in other context, this status cannot stand in the way of vindicating a violation of the constitution."** See also **Paul Finn vs Smith "The citizen, the government and reasonable expectations 66 AUSTL L.J 139, 140, (1992)."**

Having regard to the foregoing it is clear that the contentions by the petitioners in this matter do raise serious issues to the extent of considering an award of damages. In any event in a case like the present one where personal liberty of an individual, security, privacy, dignity, equality are at stake, the standard question would be what proportionate of damages would be appropriate? In the view of the court on the matter of adequacy of damages, I think each case must be considered on its own specific characteristic and rooted facts on the violation.

The court of appeal in ***Gitobu Imanyara & 2 Others vs Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR*** *had this to say:*

> ***"...It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future***

***<u>infringements</u>. (Emphasis supplied) The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration..."***

By way of concluding, the petitioners have adjudicated on interference and infringement of their fundamental constitutional rights. The respondents failed to satisfy the court by way of evidence or some other information that a limitation or a restriction on those fundamental rights was justified and reasonable as dictated by the Constitution.

A court must assess damages on the importance of a particular right against the backdrop in the overall constitutional scheme. There are good reasons in our constitutional order for the rights to life, privacy, liberty, due process, dignity, security, equality on the fundamental freedoms being given prominence though not exceptionally absolute. For the purpose of this petition they must be looked at from continuum scale. Hence the legal of philosophical statement and limitation of Constitutional right will not be justifiable unless there is a substantial state interest that requires the limitation.

In the instant petition, the manner in which the 1st, 2nd and 3rd respondents went about in limiting the rights of the petitioners under the auspices of section 158, 159 and 160 of the Penal Code was in certain terms a violation of the same Constitution. There are interlocking issues between the prevention of crime, health or morals, enjoyment of reproductive rights and guarantees on fundamental rights and freedoms safeguarded the Constitution. The petition as constructed simply showed the police exercised their wide powers against the petitioners in complete disregard to the permissible covenants to their right to privacy, security, dignity, the saving

clause in article 26 (4) (Supra) and pre-trial fair rights in article 49 of the Constitution. As articulated by Prof. Robert Stein, University of Minnesta Law School titled ***"Rule of Law: What does it mean"*** **"published in 18 Minnesota Journal of International Law, 293 (2009)** in which he proposes the ideal characteristics of a society governed by the rule of law as follows:

a) **"The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.**
b) **The law is known, stable and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined, and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.**
c) **Members of society have the right to participate in the creation and refinement of laws that regulate their behaviours.**
d) **The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.**
e) **Judicial power is exercised independently of either the executive or legislature powers and individual judges base their decisions solely on facts and law of individual cases."**

To invoke article 22, 23 and 24 of the Constitution the petitioners have made allegations to persuade this court that their fundamental rights have been infringed or violated by the respondents. These provisions provide a broad approach to standing to trigger an aspect of fundamental rights are at stake. It is on this premise that the 2nd petitioner be charged with performing an abortion in contravention of the Penal Code that the legislation limits his fundamental rights. Put at its simplest, the petitioners may qualify for grant of damages under the purpose of interpretation on conduct by the respondents inconsistent with the Constitution. In **Foser v Minister of Safety and Security 1997 ZACC 6 BCAR 851** at 60 held thus;

***"there is no reason in principle why appropriate relief should not include an award of damages, where such an award is necessary to protect and enforce the rights in the bill of rights, when it would be appropriate to do so and what the measure of damages should be will depend on the circumstances of which case and the particular right which has been infringed."***

In the instant petition, it was clearly submitted by the petitioners the range of infringement which in this court's opinion is actionable in damages. On the part of the respondents they were found woefully wanting on this front. In excising discretion, the test for injury and assessment is an objective one. To determine the current model the courts have moved to assess and award damages for threats, infringement and violation of Constitutional rights. It is however important always to bear in mind on what this court refers as the concept of exceptionalism having due regard to the far reaching questions of importance involving an award of damages against state actors. It is of crucial significance to borrow the principles in comparative jurisprudence in **Mvumvu vs Minister for Transport (2011) ZACC** in which the court stated as follows:

"***That in determining a suitable remedy, the courts are obliged to take into account not only the interests of the parties, whose rights are violated, but also the interests of good government, these compelling interests need to be carefully weighed".*** In addition this was also crystalized in the matter of the **Residents of Industry House & 8 Others vs Minister of Police & 9 Others (2021) ZACC at 37;**

***"The court observed that once the appropriate relief is established it becomes unnecessary to award assessment of damages as an additional remedy where the object of the damages is not to compensate the claimants of the loss they have suffered but to uphold the Constitution. It is not fair to burden the public purse with financial reliability where there are alternative remedies that can sufficiently achieve that***

***purpose. To do otherwise will effectively amount to punishing the taxpayers for conduct for which they bear no responsibility given the many pressing demands on the fiscus, it is not appropriate to use scarce resources to pay damages to individuals for purpose of enforcing rights conferred on the general public where there are other effective methods of upholding the Constitution."***

As well intentioned and seemingly justified the formulation for damages may be granted as fashioned in this petition nevertheless the notion of effective remedies does not necessarily include an assessment of monetary damages. There are several circumstances that the nature of a constitutional violation cannot escape a remedy and damages to serve a specific purpose. It may be not necessary for the courts to punish the offender generally unless it becomes inevitable part of the essential remedies. Looking at this seminal jurisprudence, I am inclined not to assess damages in favour of the petitioners as a tool of compensation.

For the foregoing reasons the petition partially succeeds and as a consequence the following declarations shall abide.

**(a) That Sections 158, 159 & 160 of the Penal Code are not inconsistent with Articles1, 2, 4, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27,28,29,31,43,46,48,49,50,73,75,157(11),159,165(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. That the language in the impugned sections looked at from the legal lens of the Constitution there is a lacuna on information regarding the termination of pregnancies as strongly provided for in these provisions.**

**(c) That a declaration be and is hereby made founded on the right to life for Parliament to enact an abortion law and public policy framework in terms of Article 26(4) of the Constitution to provide for the exceptions as stipulated in the Supreme Law.**

**(d) That the declaration be and is hereby made by reviewing of the decision making process in a wider context by the respondents to initiate an investigation, arrest and commencement of criminal proceedings in Criminal Case No. 395, 396 OF 2019 and Children's Case No. 72 OF 2018 at Kilifi Law Courts against the petitioners in terms of Sections158, 159 & 160 of the Penal Code. That the proceedings having been marked with irregularities from the outset a writ of certiorari clearly merit based do issue 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 in which the 1st petitioner was subjected to by the police violated her rights prescribed under Article 25 on freedom from torture and cruel, inhuman and degrading treatment, right to life within the bounds of Article 26(4), Article 28 on human dignity, Article 29 freedom and security of the person, Article 31 on rights to privacy all of the Constitution.**

**(f) That the right to private communication between a patient and his or her personal doctor is guaranteed and protected under Article 31 of the Constitution and other enabling statutes safe for the disclosure is consented to by the patient or is in the public interest or the limitations provided for in the Constitution. To that extent the police and the Director of Public Prosecutions are prohibited from criminalizing such communication unless compelled by the due process of the court.**

**(g) That the medical doctor/trained health professional licensed to practice medicine in Kenya by the relevant authorities exercising his/her skill, expertise with due care and attention, good faith inferred from the diagnostic carried out on examination of a patient shall not be guilty of an offence in the expansive provisions of the Penal Code on procuring abortion.**

**(h) The declaration be and is hereby issued that a prerogative writ of mandamus prayed for by the petitioners against the 1st, 2nd and 3rd respondents to fulfil the public duty on a wide range of duties stated in the petition lacks merit and is therefore denied.**

**(i) That a declaration be and is hereby made to the effect there is no primary justification for a grant of perpetual injunction against the respondents.**

**(j) That a declaration be and is hereby made that section 158, 159 and 160 of the Penal Code on purely procedural and substantive defects fails to capture the letter and spirit to the exceptions in article 26(4) of the Constitution.**

**(k) That the truism on assessment and award of damages against the State is hereby denied.**

**(l) What constitutes cost be borne by each party.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI ON 24TH OF MARCH 2022.**

**.....**

**R. NYAKUNDI**

**JUDGE**

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