

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)
CONSTITUTIONAL PETITION NO. E605 OF 2014

-between-

1. SWK
2. PAK
3. GWK
4. AMM
5. KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV & AIDS (KELIN)
6. AFRICAN GENDER AND
MEDIA INITIATIVE TRUST (GEM).....PETITIONERS

-versus-

1. MÉDECINS SANS FRONTIÈRES – FRANCE
2. PUMWANI MATERNITY HOSPITAL
3. MARIE STOPES INTERNATIONAL
4. COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF
HEALTH SERVICES – NAIROBI COUNTY
5. CABINET SECRETARY MINISTRY OF HEALTH
6. THE ATTORNEY GENERAL.....RESPONDENTS

-and-

1. SECRETARIAT OF THE UNITED
NATIONS PROGRAMME ON HIV/AIDS
(UNAIDS) SECRETARIAT.
2. PROF. ALICIA ELY YAMIN
3. NATIONAL GENDER AND
EQUALITY COMMISSIONS..... AMICUS CURIAE

-and-

1. INTERNATIONAL COMMUNITY
OF WOMEN LIVING WITH HIV (ICW)

**2. INTERNATIONAL COMMUNITY OF WOMEN
LIVING WITH HIV (ICW -KENYA..... INTERESTED PARTIES**

JUDGMENT

Introduction:

1. *Bilateral Tubal Ligation* (BTL) is a surgical procedure that cuts, ties, burns, clips or removes parts of a woman's fallopian tubes closing them thus preventing future incidence of pregnancy.
2. S.W.K, P.A.K, G.W.K and A.M.M, the 1st to 4th Petitioners herein respectively, claim to have undergone the processes leading to the BTL at different facilities, named as Respondents herein, without their informed consent.
3. This Petition will, therefore, ascertain the said claims. To that end, a look at the background of the 1st to 4th Petitioners follows.

Background:

- *The 1st Petitioner*
4. The 1st Petitioner, S.W.K, claimed that sometime in the year 2003, she tested positive for HIV. In the year 2009, she conceived. During her pregnancy, she attended prenatal care at *Blue House Mathare Clinic*, a health facility run by *Médecins Sans Frontiers*, the 1st Respondent herein.
 5. For purposes of giving birth, *Blue House Mathare Clinic*, referred SWK to *Pumwani Maternity Hospital*, the 2nd Respondent herein. Before her referral, however, a nutritionist at *Blue House Maternity Clinic* by the name *Benta Anyango Owuor*, informed the 1st Petitioner that if she did not agree to undergo Tubal Ligation at the time of giving birth, she would not qualify to receive food portions (cooking oil, porridge and ugali flour) and for payment of her maternity bill at the 2nd Respondent.

6. In May 2010, the day of delivery, before being taken to the theatre for Caesarean section, SWK claimed that the nurse on duty advised her on the need to plan her family since she already had three children. She was told she was better off undergoing bilateral tubal ligation and to that end was given a paper to sign that she will undergo both the caesarean section and tubal ligation.
7. On 23rd May 2010, days after being discharged from *Pumwani Maternity Hospital*, the 1st Petitioner went to *Blue House Mathare Clinic*. The Nutritionist informed her that she would not qualify to get formula milk and food portions unless she had proof that she had undergone BTL.
8. Upon checking the rear of the hospital card, the nutritionist confirmed that the procedure had been done on the 1st Petitioner.

- *The 2nd Petitioner*

9. The 2nd Petitioner, claimed that she discovered she was HIV positive in the year 2001. She did not take any form of medication until 15th July 2002, when her husband died of HIV related complications. Upon being referred to *Blue House Mathare Clinic* she was placed on Septrin and Anti-Retro Viral (ARVs) drugs.
10. On 29th October 2004, the 2nd Petitioner gave birth to twin boys at the 2nd Respondent. The costs she incurred were paid *by Blue House Mathare Clinic*.
11. She claimed that after birth she was under instructions from the 2nd Respondent and the doctor at *Blue House Mathare Clinic* was not to breastfeed her children but to only use formula milk only which was to be provided weekly at *Blue House Mathare Clinic*. She was also to be provided with food portions.
12. The 2nd Petitioner claimed that every time the 2nd Petitioner went to collect her food portions and formula milk, the Nutritionist, *Benta Anyango Owuor*, asked her to undergo bilateral tubal ligation. On one occasion the nutritionist told the 2nd Petitioner that if she did not have proof of family planning, especially that of tubal ligation,

she would not qualify to receive the food portions and formula milk anymore.

13. The nutritionist referred the 2nd Petitioner to a community health worker who subsequently told her to report to *Lions Clinic* in *Huruma*, where personnel from *Marie Stopes*, the 3rd Respondent herein, convened a family planning clinic.
14. On 8th June 2005, while at *Lions Clinic*, together with a group of women, the 2nd Petitioner, upon signing a form, whose contents she could not remember, as she could not read and were not explained to her, underwent bilateral tubal ligation.
15. On 15th June 2015, the 2nd Petitioner visited the 3rd Respondent clinic in Eastleigh for review where he was told she was recovering well.
16. Subsequently, when she when to collect formula milk and food portions from *Blue House Mathare Clinic*, her card indicated that she had under gone BTL and there was no further confrontation from the facility from that point onwards.

- *The 3rd Petitioner:*

17. Upon recovering from Tuberculosis (TB), a disease she was diagnosed with at *Kimabu District hospital* in the year 2005, G.W.K, the 3rd Petitioner herein visited *Blue House Mathare Hospital* where she continued to collect her TB drugs.
18. It is at *Blue House Mathare Hospital* that the 3rd Petitioner tested positive for HIV and consequently started taking ARVs in the year 2006.
19. The 3rd Petitioner conceived in the year 2009. She attended antenatal care at *Blue House Mathare Clinic* and as she approached her due date, she was informed that she would give birth at *Pumwani Maternity Hospital*. To that end was given a referral letter to present to the hospital.

20. The evening before going into the theatre, the 3rd Petitioner, upon answering in the negative the question whether she was in any form of contraception, a nurse gave her a form to sign. She was told that she was giving consent to the Doctor to perform caesarean section.
21. It is her case that while recuperating at Pumwani Maternity Hospital, she was brought formula milk by a nurse from *Blue House Mathare Hospital* and was advised not to breastfeed her child. She was asked to collect her weekly formula and food portions from the 1st Respondent.
22. The 3rd Respondent contended that the 1st Respondent, made payments of her maternity fees to the 2nd Respondent
23. It is while recuperating that the 3rd Petitioner was informed by a nurse that tubal ligation had been performed on her and is the reason she was in a lot of pain.
24. She stated that she had not consented to such procedure and was not given an opportunity to choose the kind of family planning she wanted to use.
25. Upon going for baby formula at *Blue Maternity hospital*, she was asked to go back to Pumwani Maternity Hospital to get proof that indeed she had undergone Tubal Ligation, a fact her medical records at Pumwani Maternity Hospital confirmed.

- *The 4th Petitioner:*

26. The 4th Petitioner, *A.M.M*, contended that in the year 2004, while attending antenatal care at *Mathare North*, she tested positive for HIV. Her confirmatory test at Pumwani Maternity Hospital indicated that she was indeed HIV positive.
27. The 4th Petitioner continued to attend antenatal care at the 2nd Respondent and on 8th March 2005, she delivered normally at the facility. She was advised not to breastfeed to minimize the risk of infecting the baby and to that end was advised to collect baby formula milk weekly from the facility.

28. The 4th Petitioner was, however, continuously cautioned that if she did not agree to undergo tubal ligation, she would cease to qualify to receive baby formula milk.
29. It is the 4th Petitioner's case that she eventually gave in on 4th May 2005 where she attended a medical clinic at Lions Clinic in *Huruma* where professionals from Marie Stopes, while conducting family planning drive, underwent tubal ligation.
30. It is her case that she was given a form to sign, whose contents she could not remember as they were not explained to her and she could not read. It is her case that she was not given any education on family planning on other options available.
31. The 4th Petitioner was subsequently issued with a pink card by Marie Stopes Clinic indicating that she had undergone BTL.
32. As a result of the procedure, A.M.M contended that she was always in pain especially during cold season and could not undertake heavy chores.

The Petition:

33. Through the Amended Petition dated 10th September 2015, supported by the Petitioners' respective Affidavits deposed to on a similar date, the Petitioners approached this Court claiming various constitutional violations in respect their sexual and reproductive health occasioned by surgical procedure of BTL they underwent at the hands of the Respondents.
34. The six Petitioners approached this Court on the premise that they needed to vindicate the constitutional rights of women living with HIV regarding the importance of being given specific information on sterilization and alternative procedures for family planning.
35. The Petitioners further founded the Petition on the need to guard against the surgical procedure of bilateral tubal ligation, a permanent family planning method, being done without first obtaining a patient's voluntary informed consent.

36. In setting out the particulars of unconstitutionality, the Petitioners averred that the Respondents failed in their obligation to respect, protect and fulfil their fundamental rights guaranteed under Article 26(1), 27(1-8), 29(d)(f), 31(a), 33(1), 35(1b), 43(1)(a), 45, 46(1)(a-c) which entitled them to the right to life, non-discrimination, freedom from torture, cruel and inhuman and degrading treatment, the right to privacy, to access information, to highest attainable standard of health including reproductive health, to found families and to be given services of reasonable quality respectively.
37. The Petitioners contended that the threat by the 2nd Respondent to withhold food portions from the 1st to 4th Petitioners violated their right to life, equality and highest standard of health, dignity and freedom from torture guaranteed by the Constitution.
38. The Petitioner further asserted that involuntary sterilization of the 1st to 4th Petitioners was unlawful, unreasonable, unjustifiable and unconstitutional and unnecessary in the circumstances in light of available alternative family planning methods.
39. In citing Article 2(5-6) of the Constitution, the relevant provision allowing rules of international law to form part of Laws of Kenya, the Petitioner posited that there was violation of Article 25 of the *Universal Declaration of Human Rights* (UDHR) that guarantees everyone the right to a standard of living adequate for health and well-being of himself and his family.
40. It was further the Petitioner's case that the Respondent had an obligation under Article 12 of *International Covenant on Social Economic and Cultural Rights* (ICESCR) to take steps to achieve full realization for the creation of conditions which would ensure to all medical service and medical attention in the event of sickness.
41. Further the Petitioners quoted violation of Article 12 of Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which requires state parties to take steps to ensure elimination of all forms of discrimination against women in health care in order to ensure, on the basis of equality, access to health care services included those related to family planning.

42. The Petitioner further posited that Article 14 of African Convention on Human and Peoples' Rights (ACHPR) and Article 14 of Protocol to the ACHPR on the Rights of Women in Africa on the entitlement of people to enjoy the best attainable state of physical and medical health was violated by the Respondents.
43. On violation their right to be free from torture, cruel and inhuman and degrading treatment, the Petitioners relied on Article 5 of UDRR, Article 7 of ICCPR.
44. On substratum of the Petition, the Petitioners averred that under Article 10(h) of CEDAW, the State was under an obligation to ensure that women have access to specific educational information to help ensure that the health and wellbeing of families including information and advice on family planning.
45. The Petitioners posited that according to Article 14 of Maputo Protocol, the State was under an obligation to provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.
46. Further to the foregoing, the Petitioners averred that as per general comment No. 2, the State was under the duty to ensure that necessary legislative measures, administrative policies and procedures are taken to ensure that no woman is forced because of her HIV status, disability, ethnicity or any other situation to use specific contraceptive methods or undergo sterilization or abortion.
47. It was the position that according to the general comment No. 2 on Article 14(a), (b), (c) and (f) and 14.2(a) and (c) of the protocol of the African Charter on Human and Peoples Rights on the Rights of Women in Africa, the use of family planning contraception and safe abortion service by women should be done with their own informed and voluntary consent.
48. The Petitioners further averred that the Respondents' actions denied them the right to marry and found a family in contravention of Article 23 of the ICCPR which recognizes the right of men and women of marriageable age to marry and to found a family.

49. In reference to the Special Rapporteur to the UN on the right to health it was reiterated that reproductive freedom should never be limited by individuals or states as a family planning method, HIV & AIDS prevention, or any other public agenda.
50. It was the Petitioner's case that the Special Rapporteur on Torture unequivocally declared that non-consensual sterilization was an act of violence, a form of social control, and a violation of the right to be free from torture and other cruel inhuman degrading treatment.
51. With respect to municipal laws, the Petitioners averred that save from the Constitution, there was no specific legislation in force addressing the issue of informed consent before medical procedures.
52. The Petitioners, however, posited that according to The National Family Planning Guidelines for Service Providers (2010), there is emphasized the need for informed consent and voluntary consent prior to female surgical sterilization and allows a woman to change her mind even after initially consenting.
53. To further buttress the conditions under which consent could not be sought, the Petitioners referred to *International Federation of Gynaecology and Obstetrics* (FIGO) where it was observed, among other reasons, that it could not be sought as a medical emergency for future pregnancy, that no minimum number of children could be used as a criterion, be adequately informed of the alternatives, and that only women could ethically give consent
54. In the 4th Petitioner's supplementary Affidavit, deposed to on 27th November 2017 in response to the Affidavit by *Dr. Mark Ayallo* deposed to 28th December 2016, AMM deposed that the 3rd Respondent had neither produced in evidence any internal documents that outline policies of its staff on the highest standards contained in the National Family Planning Guidelines for Service Providers nor reports of such trainings to demonstrate that indeed staff members were trained.
55. It was her case that the 3rd Respondent did not provide her with a counselling either as a group or individually by a qualified staff at the point the 3rd Respondent undertook BTL on her and was not

given an opportunity to choose a suitable family planning method to enable her make an informed choice.

56. It was her case that, at Huruma Lions Health Centre, she alongside other women were asked to sign a form whose contents she did not know and was not explained to. She stated that the mere act of signing the form was not indicative of informed consent.
57. In sum AMM deposed that she was not given an opportunity to either accept or decline the procedure of BTL. She referred Court to the card, marked AMM2, which the 3rd Respondent gave her indicating that she had undergone bilateral tubal ligation.
58. The 2nd Petitioner's supplementary Affidavit deposed to on 27th November 2017 contained similar deposition as those of the 4th Petitioner on how she was handled by the 3rd Respondent before being subjected to bilateral tubal ligation.
59. On the foregoing comprehensive factual and legal backdrop, the Petitioners prayed for the following reliefs.
 - a. *This Court declares that the act of sterilization of the 1st 2nd 3rd, and 4th Petitioner by way of bilateral tubal ligation as done by the 2nd and 3rd Respondent amounted to a violation of the human and constitutional rights of the 1st -4th Petitioners as outlines in the Petition herein.*
 - b. *This Honourable Court declares that the act of threatening to withhold the provision on food portions and formula milk and lifesaving ingredients by the 1st and 2nd respondent is a violation of the Human and Constitutional rights of the 1st to 4th Petitioners as outlined in the Petition herein.*
 - c. *This Honourable Court declares that it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when and how often to bear children.*
 - d. *This Honourable Court issues an order directing the 4th and 5th Respondents to put in place guidelines, measures and training for health care providers and social workers that are in line with FIGO guidelines on sterilization and informed consent.*
 - e. *This Honourable Court issues an Order directing the 4th and 5th Respondents to conduct in depth mandatory training of all*

practising gynaecologists and obstetricians on the revised FIGO ethical guidelines on performance of tubal ligation.

- f. This Honourable Court issues an Order directing the 5th Respondent to review the National Family Planning Guidelines for Service providers to address the provisions that are discriminatory.*
- g. This Honourable Court issues an Order directing that there be instituted a mandatory waiting period between the time a woman freely requests tubal ligation and the performance of the surgery.*
- h. This Honourable Court issues an Order directing the 4th and 5th Respondent to conduct public awareness campaigns to educate patients and citizens about their rights to informed consent, privacy and information to ensure that information on patient's rights is immediately accessible within health care facilities.*
- i. This Honourable Court issues an order directing the 2nd -5th Respondents to establish clear procedural guidelines for following up on complaints of rights violations and strengthen administrative accountability at hospitals.*
- j. This Honourable Court issues an Order directing the 4th and 5th Respondents to create a monitoring and evaluation system to ensure full implementation of laws and policies regarding the performance of tubal ligation.*
- k. This Honourable Court issues an Order directing issue a circular directing all medical and health facilities (both public and private) that forceful or coercive sterilization of women living with HIV is not a government policy.*
- l. This Honourable Court is pleased to the 1st 2nd, 3rd, 4th, and 5th Respondents to jointly and severally pay general damages and exemplary damages on an aggravated scale to the 1st, 2nd, 3rd, and 4th Petitioners for the physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.*
- m. This Honourable Court issues an Order that since this Petition is in the public Interest each party should bear its own costs.*
- n. t This Honourable Court issues an Order directing the Respondents within 90 days of the Court Judgment to file affidavits in this Court detailing out their compliance with orders d, e, f, g, h, i, j, k and l.*

- o. *This Honourable Court be pleased to make such order as it shall deem just and fit.*

The Petitioners' oral testimonies:

60. Further to the Petition and the deposed affidavits, the Petitioners adduced oral evidence. A recap thereof follows.

The 2nd Petitioner:

61. In her oral evidence, the 2nd Petitioner, SWK, stated that she was a widow living with HIV and has 4 children. She stated that in the year 2009, she conceived and the 1st Respondent advised her on how to deliver a child without transmitting the virus.
62. It was her testimony that one *Benta Anyango* gave her a card which would enable her give birth. She stated that when labour came, she was taken to Pumwani Hospital where a nurse told her that she would undergo Caesarean Section.
63. It was her evidence that she signed the document after she was informed that she was going to the theatre and later after birth, she went to the 1st Respondent where she was informed that if she did not show proof of Tubal Ligation, she would not be given card for rations.
64. Deriving from the foregoing, she testified that she went to Pumwani Hospital and got the card showing that she had undergone tubal ligation, took it to 1st Respondent and then is when the nurse agreed to attend to her.
65. The 2nd Petitioner referred to an undated Medical Report by *Dr. Khisa Wakasiaka* and Psychological and Psychiatric evaluation by *Dr. Elizabeth Khaemba* and *David Bukusi*.
66. She prayed that the Court compensates her for violation of her rights and stated that women should not be treated and subjected to tubal ligation without knowledge or consent.

67. During cross examination, she testified that she did not agree to undergo Tubal Ligation in order to receive food portions.
68. It was her case that the nurses and doctors did not force her to undergo the process

The 3rd Petitioner:

69. The third Petitioner, GWK, testified that she was violated and wanted her rights protected by this Court. During examination-in-chief she referred to the annextures in her Affidavit including a medical card and medical report dated 8th October 2014 by *Dr. Khisa Weston*, her letter dated 2nd September 2014 and a Psychological and Psychiatric Evaluation Report by *Dr. David Bukusi* and *Eliza Beth Khaemba* as her evidence.
70. In cross-examination, it was her evidence that she went to school up to form four and sat for examinations in English and Kiswahili.
71. It was her testimony that it is a nurse from Pumwani Hospital that asked her to undergo tubal ligation and had to show proof of it in order to get formula milk for her baby.
72. She stated that she did not know the nurse at Pumwani who talked to her before going into the theatre. It was her evidence that she signed some papers but did not know what she was signing because she was in pain.
73. During re-examination, she testified that she went to Pumwani Maternity Hospital for information on family planning.
74. She stated that it was true that she did not tell the psychiatrist that she was required to provide proof of BTL before she could get formula milk.

The 4th Petitioner:

75. AMM testified that she was married with three children. It was her case that she tested positive in the year 2004 and upon going to

Pumwani Hospital, it was confirmed that that she was indeed positive and she started taking ARVs until she gave birth in the year 2005.

76. It was her evidence that she decided to give her child formula milk and the nurse by the name *Mercy* asked to start family planning so that she could collect formula milk.
77. She testified that she later went to Lions Clinic and upon confirming that she knew why she was there; Tubal Ligation was performed on her. It was her case that her husband could then collect formula milk.
78. She testified that she later came to know through the 6th Petitioner that she underwent tubal ligation and has since suffered for not being informed of the process and that she could not get a child.
79. She stated that she was operated on at Marie Stopes Clinic on 4th May 2005 and went for check up on 11th May 2005. She stated that her letter requesting for her records was not responded to by the 3rd Respondent.
80. On cross-examination, she testified that she was not forced to go to Lions Clinic in Huruma. It was her case that she did not ask why she was signing forms at the clinic.
81. It was her evidence that no one told her of the effects of tubal ligation. It also was her testimony that she declined to undergo an independent examination as requested by the 3rd Respondents advocates.

The 6th Petitioner:

82. *Gladys Kilo*, the Programme Manager of the 6th Petitioner adopted her affidavit as her evidence. It was her case that African Gender on Media Initiative Trust interviewed women in a bid to find the underlying cause of the matter. She stated that she participated in the study and the four Petitioners herein were part of the interviewees.

83. During cross examination it was her case that the 6th Respondent did not provide any monetary compensation to the participants.
84. She testified that none of the women remembered names of doctors who did Tubal ligation. It was her evidence that nurses or nutritionist are the people coerced patients.
85. It was further deposed that the staff of the 1st Respondent, particularly Benta and Beatrice would ask each of the 1st, 2nd and 3rd Petitioners if they had undergone family planning before giving them food and milk portions.
86. It was also stated that Benta who was not a nurse worked unsupervised and continually harangued the 2nd Petitioner to provide evidence of family planning. It was argued that because of the food portions and formula milk, the 1st Respondent was in a position of power over the women including the 1st, 2nd and 3rd Petitioners.

Dr. Khisa Wakasiaka's evidence:

87. In reference to his Affidavit deposed to 30th December 2017, *Dr. Khisa* evidence was that he is an Obstetrician and Gynaecologist at Kenyatta National Referral Hospital and does private practice at Hurlingham Family Health Clinic.
88. It was his evidence that he saw the Petitioners herein on various dates at his clinic for purposes of confirming whether they had undergone BTL.
89. He testified that he had the option of using x-ray but that would not give good result but used image/camera which gave good results.
90. It was his evidence that 2nd Petitioner underwent the second option and arrived at the conclusion that she had undergone tubal ligation. He testified that he did the same procedure for all other petitioners and his conclusion was that their tubes were indeed blocked. To that end, he referred to his medical reports in his affidavit produced as Petitioners' Exhibits 1 - 4.

91. During cross-examination, it was his evidence that it was not possible to tell when the BTL was done on the Petitioners but it was certain that that procedure was carried out.
92. It was his position that the undated Medical Reports belonged to him.

The Petitioners' submissions:

93. Based on the foregoing, the Petitioners cumulatively submitted that the 1st and 3rd Petitioners were coerced into attending the 2nd Respondent and likewise the 2nd and 4th Petitioners were coerced into attending the 3rd Respondent.
94. The Petitioners submitted that the violations meted out on them met the constitutional threshold set out in the case of *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR.
95. In distinguishing the circumstances of the Petitioners to those of the women who testified on behalf of the Respondents, it was submitted that the two categories of women were different since the 1st, 2nd and 3rd Petitioners were more vulnerable to the 1st Respondent due to the socio-economic status, low literacy level and health status.
96. It was the Petitioners' case that the circumstances are unique to women like the Petitioners and to demand a comparator in order to prove discrimination would result in miscarriage of justice.
97. To buttress the foregoing, the decision in *Carole Louise Webb -vs- EMO Air Cargo (UK) Ltd, European Court of Justice, 1994* was relied upon where it was held that the dismissal of a woman on the grounds of pregnancy was automatically direct discrimination and there was no need to establish if men were treated in a similar way because men could not find themselves in such situations.
98. As the Petition was supported by the 2nd Interested Party, suffice to capture the party's input.

The 2nd Interested party's case:

99. *International Community of Women Living with HIV - Kenya Chapter*, urged its case through written submissions dated 5th October 2016.
100. It was its case that the actions of the Respondents have affected women living with HIV in various spheres of their lives and more so in the family set up and have suffered mentally, socially, economically and in health.
101. It submitted that the additional burden of HIV women not being able to bear children while in a family set up has double the stigma of women living with HIV.
102. It was its case that as a result of the stigma, victims have committed suicide, fled their homes and has left the burden to the 2nd Interested party to provide shelter, food, medicine and counselling to them.
103. In submitting on unlawfulness of the forced sterilization, the 2nd interested Party stated that it amounts to cruel, inhuman and degrading treatment and interferes with the Petitioner's right to dignity and health in violation of Article 29(f) of the Constitution as read with Article 7 of ICCPR.
104. It was its case that in carrying out non-consensual sterilization on the Petitioners and other women living with HIV the respondent were in breach of world Medical Association International Code of Medical Ethics which entitles patients to accept or refuse treatment, not allow their judgment to be influenced by personal profit or unfair discrimination and to be given competent medical service with compassion and human dignity.
105. In the end, the 2nd Interested Party urged that the reliefs be allowed as prayed.
106. The Petition was vehemently opposed by the Respondents. As such, their cases are up next.

The 1st Respondent's case:

107. *Médecins Sans Frontières* challenged the Petition through the Replying Affidavit of *Beatrice Runo*, the Supervisor at the Prevention

of Mother to Child Transmission (PMTCT) room at Blue House Clinic in Mathare.

108. She deposed that Blue House Clinic was offering wide range of services to people infected with HIV/AIDS in Mathare area and the consultations rooms were staffed with Doctors, Nurses, Clinical officers, social workers and counsellors.
109. She deposed that the PMTCT room offered services exclusively to pregnant women suffering from HIV/AIDS and one of the services available was ante-natal learning/counselling sessions conducted every week in English and Swahili sessions.
110. It was her case that during ante-natal sessions, their clients would not receive food support from PMTCT room.
111. She deposed further that initial ration of milk would be given to mothers who opted for replacement feeding and any client who opted to breastfeed would receive flour and cooking oil to enable her remain healthy enough to produce sufficient milk for her baby.
112. As for postnatal sessions, she deposed that client were encouraged to attend sessions conducted by herself and one *Ms. Onyango* for examination of the client and the baby.
113. She stated that they would discuss feeding methods, hygiene, first aid and family planning. On the family planning it was her case that she was solely responsible for advice and Blue House Clinic offered implants, Intra Uterine Coil Device (IUCD), pills and injectables.
114. It was her case that in conducting family planning sessions, she applied Ministry of Health Guidelines on Reproductive Health and Family Planning Policy that among other things, emphasized the client's right to choose the method, the right to privacy and confidentiality and the right to refuse any types of examination.
115. She deposed further that when a client indicated that she wanted to undergo BTL, she would conduct individual counselling sessions and follow the Ministry of Health guidelines which emphasised the need of informed consent sue to permanence of the method. It was her

case that she informed her clients of the advantages, limitations and side effects of the procedure and gave them time to think about their choice, consult and revert.

116. She stated that during post-natal sessions, she made it clear that family planning was optional.
117. She deposed that it was not true that they threatened clients with withdrawal of formula milk if proof of BTL was not produced. It was her case that proof was not a precondition to receiving the formula milk and other services from Blue House Clinic.
118. To buttress its case, the 1st Respondent called witnesses. Following is their testimonies.

Beatrice Runo (1RW1):

119. *Beatrice Runo* stated that she used to work with the 1st Respondent between the period of September 2008 and November 2012. She stated that her responsibility was to oversee family planning methods including training.
120. She stated that she was following the guidelines of Ministry of Health in performing her duties especially on the aspect of informed consent.
121. It was her evidence that she knew *Benta Onyango* an assisting nurse working in the Department of *Prevention of Mother to Child Transmission*.
122. It was her evidence that she used to assist her in providing formula milk and in pre-natal and ante- natal sessions, but did not have authority in counselling on tubal ligation.
123. She testified that during her period, there were no record of complaints of people being forced to undergo family planning. She stated that no one would be denied formula milk for failing to undergo family planning.

124. During cross-examination, it was her evidence that she did not know the delivery of the 1st, 2nd and 3rd Petitioners. She, however, stated

that she counselled the 1st Petitioner during group counselling on family planning which targeted women at the high-risk categories.

125. She stated that the 1st Respondent could not get informed consent because the 1st Respondent was not doing tubal ligation. It was her case that the relationship between the 1st Respondent and 2nd Respondent was to advise women who had HIV/AIDS to deliver in Pumwani Hospital and to that end had a memorandum of understanding.
126. It was her evidence that they dealt mainly with women from Mathare and with respect to the 1st Petitioner, she stated that she did not know whether she knew how to read or write.
127. It was further her evidence that the person doing the surgical operation would be responsible for obtaining consent from the patient

Benta Awuor Onyango (1RW2)

128. *Benta Awuor*, an employee of Medicines Sans Frontières adopted her Affidavit deposed to on 27th April 2015.
129. In her oral testimony, she stated that she was a Nurse Assistant at AHF Kenya normally known as Blue House and her role was that of a Nutritionist Assistant at the Department of Prevention of HIV Transmission from Mother to Child.
130. She stated that she would try to know whether mothers were on family planning but it was not tied to getting food or formula milk.
131. It was her evidence that she did not ask any mother to go for family planning for them to get food or formula.
132. During cross-examination, she testified that she identified clients' needs of family planning services and referred as appropriate. It was her case that she is not trained in family planning but would ask whether one needs family planning.

SW (1RW3)

133. While adopting her Affidavit deposed to on 22nd April 2015, SW stated that Benta Awuor used to teach them on issues of nutrition. It was her case that she was never denied milk at any one time yet she was not using family planning methods. It was her evidence that she was not aware of any person who was denied formula milk due to family planning issues.
134. On cross-examination, she testified that she had never been employed by the 1st Respondent. She stated that it only knew her as a client.

EAM (1RW4):

135. In reference to her Affidavit deposed to on 22nd April 2015, EAM testified that she was on family planning method and used to get food and milk from the 1st Respondent unconditionally.
136. She stated that in the year 2005, she got pregnant and after giving birth, Benta never asked her whether she was on family panning methods.
137. It was her evidence that despite losing several babies, Blue House Clinic gave her the much-needed counselling and support with respect to information, nutrition and food supplies and allowed her the liberty to elect not to undergo family planning as she was optimistic of falling pregnant again.
138. She was of the position that Blue House was very supportive in paying her medical bills, providing treatment and food support and if anyone went through BTL, they must have decided for themselves.
139. It was her evidence that there was a suggestion box for complaints and several nurses to attend to them.

PB (1RW5):

140. PB adopted her Affidavit deposed to on 22nd April 2015. In her testimony she stated that she delivered at Huruma Alliance and was diagnosed with HIV when she had a child. She stated that she was advised by the Doctor that it was unsafe to breastfeed the child and

was told to get food and milk from the 1st Respondent even before BTL.

141. It was her case that before undergoing BTL she was counselled on the permanency of the method and other side effects and was asked if she had discussed it with her spouse.
142. She corroborated the fact that they were never denied food or milk and was not aware of any person who was denied food or milk on account of not undergoing family planning.
143. During cross-examination, she testified that after counselling she decided to go through bilateral tubal ligation and whereas she consented to it, they never gave her the consent document.

The 2nd and 4th Respondent's case:

144. *Pumwani Maternity Hospital and County Executive Member In charge of Health Services, Nairobi City County* opposed the Petition through Ground of Opposition dated 19th November 2020. They were the 2nd and 4th Respondents respectively.
145. It was their case that the Petition was fatally incompetent for failing to attach evidence of the violation in question.
146. They contended that the 2nd Respondent informs all its clients, in detail, of the full range of family planning options in a language the client understands including pros and cons of each option thus enabling them to make an informed decision.
147. They stated that where no consent was obtained from the patient, no procedure would be conducted since the 2nd Respondent adheres strictly to the National Family Planning Guidelines for Service Providers.
148. It was urged that the 2nd Respondent was not a participant in any form of coerced or forced sterilization of the Petitioners and this Court ought to uphold and protect them from falsehood that may tarnish their goodwill and reputation before the public.

The Submissions

149. The 2nd and 4th Respondents filed written submissions dated 10th March 2021. It was their case that prior to any surgical procedure, it is mandatory for a patient to be informed of the procedure, the potential risk after which the patient is given the opportunity to either accept or decline the procedure.
150. In respect to the 1st Petitioner, it was submitted that she went to Blue House in the year 2005 and attended 4 ante-natal and 12 post-natal sessions at the PMTCT room.
151. It was their case that during ante-natal sessions, group sessions were conducted where information on infant feeding options and nutrition was provided. To that end, it was their case that the 1st Petitioner elected to breastfeed her child and for that reason received food support in the form of flour and cooking oil.
152. It was reiterated that food support could not be withdrawn on the basis of a client failing to practice any form of family planning.
153. As for the 2nd Petitioner it was submitted that she only attended post-natal sessions and that it was not a precondition that she had to undergo BTL in order to get milk formula. It was their position that the 1st Respondent had not such authority.
154. The 2nd and 4th Respondents pointed out that the 2nd Petitioner declined invitation by the 3rd Respondent for examination to ascertain her position.
155. For the 3rd and 4th Petitioners, it was submitted that it was not possible for clients to collect both food support and milk formula from the PMTCT room as the said Petitioners alleged.
156. It was submitted that after a client delivered, it was inquired from her as to whether she was on family planning and since she was not sure, her uncertainty was registered and was advised to get documentation but nonetheless continued to receive formula milk.

157. In rebutting the allegation of lack of consent, the 2nd and 4th Respondents submitted that the Petitioners did not meet the threshold of Section 107 of the Evidence Act for failing to provide proof of coercion in the form of a witness or document.

158. The 2nd and 4th Petitioners relied on **Benson Owenga Anjere -vs- Kivati Nduoto & Another** (2013) eKLR where the English decision in *Pao On -vs- Liau Yiu Long* (1980) AC 614 was quoted for stating as follows;

... In determining whether there was coercion of will such that there was no true consent, it is immaterial to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not...

159. Reference was further made to the decision in **PBS -vs- Archdiocese of Nairobi Kenya Registered trustees & 2 Others** (2016) eKLR on the issue of consent and it was stated that there is evidence that a written consent was obtained from each of the Petitioners before the procedure was carried out.

160. The 2nd and 4th Respondents submitted that the Medical Report was simply an opinion of an expert witness and could not assist much in determining the case as it did not indicate an exact reflection of what was seen during examination.

161. It was stated that the report was not of any substantive assistance to Court. To buttress the position, the decision in **Shah & Another -vs- Shah & Others** was relied on where it was observed;

The opinion of an expert is not binding upon the Court but is considered together with other relevant facts in reaching a final decision...

162. In conclusion it was submitted that the Petitioners' rights were not violated for failing to prove their case. In any event, it was their case

that the claim of permanent sterilization was not true since the procedure is reversible.

The 3rd Respondent's case:

163. *Marie Stopes Kenya* opposed the Petition through the Preliminary Objection dated 27th November 2015 and the Replying Affidavit of Dr. Fred Oyombe Akonde deposed to on 10th April 2018.
164. The Preliminary Objection was tailored in the following manner;
1. *The petition filed herein discloses a purely ordinary civil dispute which is disguised as constitutional issue contrary to clear statutory procedures laid down in the Civil Procedure Act and it is an abuse of Court Process.*
 2. *The civil dispute disclosed in the Petition revolves around a private matter between private persons over disputed consent given by the Petitioners to the Respondents.*
 3. *Civil remedies would be available to the Petitioners and the said petitioners have not contended that this Court in exercise of its civil jurisdiction is unable to award them remedy at all should they be successful or that the remedies known in law are either inadequate or non-existent or unconstitutional.*
 4. *The Petition does not expressly disclose any infringement of the fundamental rights of any of the Petitioners by the State.*
165. In the Replying Affidavit, Dr. Akonde, an Obstetrician Gynaecologist with the 3rd Respondent deposed that the 3rd Respondent is an outfit present in 42 countries and abides by the principles of voluntarism, informed choice and informed consent.
166. It was his deposition that its staff undertake ongoing training and monitoring to always ensure adherence to the highest standards in the National family Planning Guidelines for Service Providers.

167. It was his case that women who choose to undergo tubal ligation were counselled as a group and then individually in a language they understand on various family planning options.
168. He deposed that the foregoing was the case even in instances where a client was referred from another hospital notwithstanding whether they had been counselled or not.
169. Dr. Akonde deposed that he was a stranger to the deposition of the 1st and the 3rd Petitioners and denied the contents of the 2nd and 4th Petitioner.
170. He deposed that the 2nd and 4th Petitioners refused to avail themselves for purposes of examination by their designated medical practitioner on whether tubal ligation had been performed on them and as such, the Court ought to make an inference that they did not undergo tubal ligation.
171. It was his case that where informed consent is not obtained, a surgical procedure cannot be performed on a patient. He stated that he was stranger to the discussions between the 2nd and 4th Petitioners and their respective Nutritionist and or Nurse either from Blue House Clinic or from Pumwani Maternity Hospital.
172. It was his deposition that the 2nd and 4th Petitioners had the right to decline to attend the alleged family planning drive at *Lions Health Centre* for purposes of undergoing what was known as '*kufungwa kuzaa*'.
173. He deposed further that the 3rd Respondent was not a participant in any form of the alleged coerced and or forced sterilization of the 2nd and 4th Petitioners since their consents were given to Lions Clinic Huruma.
174. It was, therefore, Dr. Akonde's deposition that the 3rd Respondent cannot be held responsible for the effect of the 2nd and 4th Petitioners' choices flowing from their interaction with third parties who are not party to the Petition.

175. With respect to failure to avail records of the 2nd and 4th Petitioners, it was the 3rd Respondent's case that its records are maintained for a period of 7 years and there was not request made by the said Petitioners between the year 2005 and 2012.
176. Dr. Akonde also testified before Court. In his testimony, he stated that Marie Stopes provides comprehensive family planning and counselling. It was his evidence that there was counselling before a patient would be asked to choose the way forward, a universal procedure in Kenya for the 3rd Respondent.
177. It was his evidence that the 3rd Respondent has a Family Outreach drive where people are counselled on family planning. He stated that those who agree to the service sign a consent before the procedure takes-off.
178. It was his testimony that services are need-driven and the healthcare workers are usually trained and qualified to conduct the procedures.
179. He stated that the procedure was standard to all patients regardless of gender or HIV status and that the 3rd Respondent was not getting anything in return.
180. Upon cross-examination, it was his position that blockage of the tubes could have been caused by many other reasons. He referred to the report by Dr. Khisa and stated that it only confirms that the tubes were blocked but is not conclusive on what caused the blockage.
181. He testified further that he did not interact with the Petitioners before any procedure.
182. On re-examination, he stated that there was need for an independent medical opinion other than the one by Dr. Khisa. It was his case that the record of the procedure is usually kept at the facilities where the procedure is done.
183. In urging the Court to dismiss the Petition, he reiterated that the 2nd and 4th Petitioners were not robbed of any choice since they took themselves to Lions Health Clinic at Huruma and unequivocally

signified their consent after being informed and undertook the BTL procedure.

184. With those in support and those in opposition to the Petition tendering their cases, there were three amicus curiae who also took part in the matter. However, only one of them filed its submissions. That is the first one and a look at its submissions follow.

The 1st Amicus Curiae's submissions:

185. *The Secretariat of the United Nations Programme on HIV/AIDS (UNAIDS)* urged its case through written submissions dated 20th June 2017.
186. In reference to International Covenant of Economic and Social and Cultural Rights (ICESCR), it submitted that the right to reproductive health is an integral part of the right to health and includes the right to make free and responsible decisions and choices, free of violence, coercion and discrimination over matters concerning one's body and sexual reproductive health.
187. The 1st Amicus submitted that under Article 16 of the African Charter on Human and Peoples' rights, (ACHPR) there is an obligation to facilitate the highest attainable standard of health.
188. Further reference was made to Article 14 of the Rights of Women in Africa (Maputo Protocol) where it requires States Parties to ensure that women's right to health, including sexual and reproductive health is respected and promoted.
189. To buttress the foregoing, the provisions of General Comment No. 2 was relied on where it obligates States Parties to among other things, take all appropriate measures through policies, sensitization and civic education programs to remove all obstacles to the enjoyment by women of their right to sexual and reproductive health.
190. The 1st Amici further submitted that according Article 14 of Maputo Protocol as appreciated alongside Article 10(h) of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW),

women have the right to make informed decisions about their reproductive health and to retain their fertility.

191. Further to the foregoing, General Recommendation No. 24 of CEDAW was highlighted as requiring States to ensure women's rights to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research including likely benefits and potential adverse effects of proposed procedures and available alternatives.
192. It was submitted that States Parties should not permit forms of coercion such as non-consensual sterilization that violate women's rights to informed consent and dignity.
193. The 1st Amicus further argued that according to Article 17 of the International Covenant on Civil and Political Rights (ICCPR) there is prohibited arbitrary or unlawful interference with a person's privacy family or home as well as unlawful attacks on a person's honour and reputation.
194. To illustrate the foregoing, reference was made to the decision of Inter-American Court of Human Rights and European Court of Human Rights in **Artiva Murillo et al -vs- Coast Rica** and the one in **NB -vs- Slovakia**, Eur. Ct. H.R (2012) Application No. 29518/10; VC -vs- Slovakia (2011) App No. 18968/07 respectively where it was observed: -

... The right to private life and to personal integrity are directly and immediately linked to health care, which is violated when the means by which a woman can exercise the right to control her fertility are restricted....

195. The 1st Amicus further submitted that according to the resolution of the African Commission of Human and Peoples Rights, involuntary sterilization is a violation of the principle of autonomy. States Parties, it was stated, are required to put in place mechanisms to ensure that women living with HIV are not subject to coercion, pressure, duress and undue inducement by healthcare providers or institutions when they consent for sterilization.

196. In the end, the 1st amicus submitted that the involuntary sterilization of women living with HIV and the lack of informed consent for sterilization procedures infringe on human rights, undermine the effectiveness of HIV programmes and deter women living with HIV from seeking and receiving HIV Services.
197. It was its case that the legal and ethical requirement of informed consent is not only intrinsically right, it is also a public health imperative.

Analysis:

198. The 5th and 6th Respondents, 2nd and 3rd Amici Curiae and the 1st Interested Party did not take part in the Petition.
199. Having perused the documents filed, the parties' submissions and the decisions referred to, the following issues arise for determination:
- (a) *Whether the Petition raises any constitutional issues.*
 - (b) *In the event issue (i) above is answered in the affirmative, a brief consideration of the nature and scope of socio-economic rights in the context of the Petition.*
 - (c) *The issue of Informed Consent and whether the 1st to 4th Petitioners gave informed consent to undergo the bilateral tubal ligation medical procedure.*
 - (d) *What remedies, if any, ought to be granted.*
200. This Court must, however, disclose that it recently rendered itself in a matter similar to the instant one. As a result, the Court will greatly benefit from the said decision. The matter was *High Court of Kenya at Milimani Constitutional Petition No. 606 of 2014 **LAW & 2 Others vs. Marura Maternity and Nursing Home & Others*** which whose judgment was delivered on 16th December, 2022.
201. Having said as much, this Court will now deal with the issues in *seriatim*.

i. Whether the Petition raises any constitutional issues:

202. The issue was raised by way of a Notice of Preliminary Objection by the 3rd Respondent. It was contended that the Petition did not lie since it raised no constitutional issue for consideration by the Court. It urged the Court to dismiss the Petition.

203. As said above, this issue was also canvassed in the **LAW** case (supra). Since the arguments in this matter are similar to those in the other case, and this Court has not changed its position on the issue, I will reproduce what this Court rendered in the former matter. The Court stated as follows: -

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

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

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

139. *Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the*

*various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of **Langa, J** in **Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC)**: -*

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

140. *Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as **Lenaola, J** (as he then was) firmly stated in **Rapinder Kaur Atal vs. Manjit Singh Amrit** Petition No. 236 of 2011 (2011) eKLR ‘... Courts must interpret it with all liberation they can marshal...’*
141. *Resulting from the above discussion and the definition of what a constitutional issue entails, this Court agrees with the position in **Turkana County Government & 20 Others vs. Attorney General & Others** (2016) eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.*
142. *A Petition is, therefore, deemed to raise constitutional issues if the cause of action is based on an act or omission that results in an infringement or threat thereof of an entitlement spelled out in the Constitution or to the Constitution itself.*
143. *In disclosing constitutional issues, a Petitioner must identify with a reasonable degree of precision the alleged violations or threats thereof and demonstrate the nature and manner of violation or threats thereto.*
144. *The foregoing was a principle established in Miscellaneous Criminal Application 4 of 1979, **Anarita Karimi Njeru v Republic** [1979] eKLR when it was observed as follows thus: -*

... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the

provisions said to be infringed, and the manner in which they are alleged to be infringed...

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

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

146. *In the instant Petition, the 1st Petitioner's plight was instigated on the realization that she was unable to bear children. Upon tracing her medical history, it dawned on her that during the birth of her second child, she underwent bilateral tubal ligation, permanently extinguishing her ability to conceive.*
147. *The Petitioner thus founded her case on the alleged violation of her right to reproductive health care constitutionally guaranteed under Article 43 of the Constitution.*
148. *As a consequence of the failure to protect her right to healthcare, the Petitioner claimed that her right to dignity, to life, to found a family, to privacy and social justice was violated. The 1st Petitioner drew the nexus between her inability to have children to the indignity, social and mental anguish she has suffered.*
149. *The totality of the 1st Petitioner's case revolves around the contention as to whether the Respondents variously failed to uphold and protect the socio-economic rights pertaining to the 1st Petitioner's right to reproductive health care.*
150. *This Court, therefore, finds and hold that the instant Petition properly presents a serious constitutional issues for determination.*
151. *Having so found, a consideration of the rest of the issues follow.*

204. The foregoing position finds favour in this case. As such, this Court will consider the rest of the issues in the matter.

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

205. Again, this issue was considered *in toto* in the **LAW** case (supra). This is what the Court stated: -

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

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

6. Reproductive health:

- (1) *Every person has a right to reproductive health care which includes-*
 - (a) *the right of men and women of reproductive age to be informed about, and to have access to reproductive health services including to safe, effective, affordable and acceptable family planning services;*
 - (b) *the right of access to appropriate health-care services that will enable parents to go safely through pregnancy, childbirth, and the postpartum period, and provide parents with the best chance of having a healthy infant;*
 - (c) *access to treatment by a trained health professional for conditions occurring during*

pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.

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

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

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

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

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

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

... The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended

to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of socio-economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a constitutional obligation on the State, when confronted with a matter such as this, to go beyond the standard objection....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."

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

... Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

159. *In the context of this matter, therefore, the full realization of the Petitioner's right to reproductive health called upon the State to inter alia develop health policies, legislate on health, building and equipping hospitals, employ qualified health professionals and facilitate their training from time to time; among other things.*
160. *With the foregoing, the stage is set for consideration of the merits, or otherwise, of the Petition.*

206. In view of the above, the stage is now set for the consideration of the merits, or otherwise, of the Petition.

iii. The issue of Informed Consent and whether the 1st to 4th Petitioners gave informed consents to undergo the bilateral tubal ligation medical procedures:

207. Just like the previous issue, this issue was also substantially dealt with in the **LAW** case (supra). In that case, the Court dealt with various facets thereof.

208. The Court delineated two sub-issues as follows: -

- (a) *What entails informed consent.*
- (b) *Whether informed consent was obtained from the 1st Petitioner.*

209. On the aspect of **informed consent**, the Court rendered itself as under: -

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

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

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

Permission for something to happen or to be done.

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

Permission granted in the knowledge of the possible consequences.

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

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

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

- 1. A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.*
- 2. A patient's knowing choice about the medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical community would give to a patient regarding the risks involved in the proposed treatment or procedure – also termed as knowing consent.*

210. On the efforts taken by our country to ensure that health care services are provided to its citizens, the Court noted that Kenya had undertaken various initiatives. They include constitutional, statutory, policy interventions among many others.

211. The Court in **LAW** case (supra) went further and stated as follows: -

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

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

212. On the basis of the Kenyan legislation and policies, the **LAW** case discussed the concept of ‘informed consent’ as follows: -

171. *The Health Act defines ‘informed consent’ in Section 2 thereof as follows: -*

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

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

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

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

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

8. Right to informed consent to treatment:

To be given full and accurate information in a language one understands about the nature of one’s illness, diagnostic procedures, proposed treatment, alternative treatment and the cost involved for one to make and decision except in emergency cases

The decision shall be made willingly and free from duress.

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

213. In a way to effectuate the process of extraction of informed consent from a patient, the **LAW** case (supra) rendered itself as follows: -

176. *There is no doubt that a healthcare provider is the custodian of the information that facilitates a patient’s informed consent. That information is always not readily available to patients. It is indeed a fact that in most cases there is a grave imbalance*

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

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

8. Health information:

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

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

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

9. Consent

(1) *No specified health service may be provided to a patient without the patient's informed consent unless—*

(a) *the patient is unable to give informed consent and such consent is given by a person—*

(i) *mandated by the patient in writing to grant consent on his or her behalf; or*

(ii) *authorized to give such consent in terms of any law or court order;*

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

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

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

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

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

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

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

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

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

214. In respect to comparative jurisprudence on informed consent, the **LAW** case (supra) stated as follows: -

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

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

183. *The role of the healthcare provider in obtaining the informed consent was discussed in **Montgomery -vs- Lanshire Health Board** (2015) UKSC11 as follows: -*

...the doctors advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is in a

position to make an informed decision. The role will only be performed effect if the information provided is comprehensible. The doctor's duty is not therefore fulfilled by bombarding the patient with technical information.

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

.... to disclose information on the treatment, test or procedure in question, including the expected 'benefits and risks, and the likelihood (or probability) that the benefits and risks will occur...

.... the patient must comprehend the relevant information, and must grant consent, without coercion or duress...

215. Dealing with international instruments on the informed consent, the Court rendered itself as follows: -

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

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

1. No woman may be sterilised without her own, previously-given informed consent, with no coercion, pressure or undue inducement by healthcare providers or institutions.
2. Women considering sterilisation must be given information of their options in the language in which they communicate and understand.
3. Sterilisation for prevention of future pregnancy is not an emergency procedure. It does not justify departure from the general principles of free and informed consent.
4. Consent to sterilisation must not be made a condition of receipt of any other medical care, such as HIV/AIDS treatment, assistance in natural or caesarean delivery,

medical termination of pregnancy, or of any benefit such as employment, release from an institution, public or private medical insurance, or social assistance.

5. *Forced sterilisation constitutes an act of violence, whether committed by individual practitioners or under institutional or governmental policies. Healthcare providers have an ethical response in accordance with the guideline on Violence Against Women (2007).*
6. *It is ethically inappropriate for healthcare providers to initiate judicial proceedings for sterilisation of their patients, or to be witnesses in such proceedings inconsistently with Article 23(1) of the Convention on the Rights of Persons with Disabilities.*
7. *At a public policy level, the medical profession has a duty to be a voice of reason and compassion, pointing out when legislative, regulatory or legal measures interfere with personal choice and appropriate medical care.*

216. In coming up with the tenets of properly obtained informed consent, the **LAW** case (supra) summed up as follows: -

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

- (i) *Ascertains the age of the patient.*
- (ii) *Ascertains if the patient is a minor or is under any disability that makes him/her unable to understand and consent, for instance, if one is too ill or mentally incapacitated.*
- (iii) *In the event the patient is a minor or is under any disability that makes him/her unable to understand and consent, such consent be obtained from another person legally authorised to give such consent.*
- (iv) *Ascertains the literacy level of the patient or the one legally authorised to give such consent, as the case may be.*
- (v) *Ascertains the language the patient wishes to use. An interpreter may be availed if need be.*

- (vi) *Ascertains, as much as possible, the background of the patient.*
- (vii) *Discloses the patient's health status under restrained by the law or a Court order.*
- (viii) *Explains the range of promotive, preventive and diagnostic procedures and treatment options generally available to the patient.*
- (ix) *Explains the benefits, risks, costs and consequences generally associated with each option.*
- (x) *Explains the patient's right to refuse the recommended medical options and the implications, risks, and legal consequences of such refusal.*
- (xi) *Takes all reasonable steps and ensure that the patient, or the one giving the consent, is reasonably free and not under any form of compulsion, duress or coercion.*
- (xii) *The explanations given to the patient to be, in as much as possible, in the nature of a dialogue with the aim of ensuring that the patient fully understands the seriousness of her/his condition, the anticipated benefits and risks of the proposed treatment and any reasonable alternatives so much so that the patient makes an informed decision. To a very great extent technical language be avoided.*
- (xiii) *The patient ought to be accorded time, if need be, to enable him/her consider the information given and to decide except in cases where the procedure is an emergency.*
- (xiv) *The consent must be in writing.*

217. Taking cue from the above, this Court will now apply the circumstances in this case to the foregoing in dealing with the second sub-issue.

Was informed consent obtained from the 1st to 4th Petitioners prior to the performance of the BTL procedures?

218. The answer to the above question rests on the interrogation of the steps undertaken by the health providers prior to the performance of

the BTL operations. For avoidance of doubt, the Petitioners' respective cases have been captured in great detail elsewhere above and as such there will be no need to reproduce them herein. The Court will, however, interrogate the cases.

219. The evidence of the 1st to 4th Petitioners reveal that the 1st to 3rd Petitioners went for pre-natal services at the 1st Respondent's Clinic in Mathare and gave birth at the 2nd Respondent's hospital. The 4th Petitioner was all through attended to and gave birth at the 2nd Respondent's hospital.
220. The Petitioners were all diagnosed to be HIV positive. They were then allegedly counselled on family planning and referred for tubal ligation procedures. The 1st to 3rd Petitioners underwent counselling at the 1st Respondent's Clinic and had the procedures performed at the 2nd Respondent's hospital. The 4th Petitioner was counselled at Lions Clinic and had the procedure performed at the 3rd Respondent's hospital.
221. The 1st to 3rd Petitioners' procedures were performed during the time they gave birth at the 2nd Respondent's facility and the 4th Petitioner's procedure was undertaken at the 3rd Respondent long after she had delivered at the 2nd Respondent's facility.
222. The 1st to 3rd Petitioners had their maternity bills fully paid for by the 1st Respondent and the continued receiving ARVs drugs and were also given free nutritional baby formula milk after giving birth.
223. The 4th Petitioner was continually asked by the 2nd Respondent's personnel to undergo the procedure otherwise she was going to be barred from receiving ARVs drugs and were also given free nutritional baby formula milk at the facility. She resisted, but when the pressure was too much, she gave in and had the procedure performed at the 3rd Respondent facility. She then continued receiving the drugs and the baby formula milk.
224. The Petitioners were all infected with HIV and had young babies. They largely depended on the drugs and the baby formula milk for their respective survival. They also came from very humble

backgrounds and fell in the low-income class of the society. Their educational backgrounds were also quite poor.

225. In such circumstances, there is no doubt that the Petitioners were vulnerable and at the mercy of the 1st and 2nd Respondents for the drugs and the food supplies. They must have found it extremely difficult to resist the offer and without any option, but to concede to the demand for the medical procedures.
226. Against the Petitioners' evidence was that of the Respondents. The 1st, 2nd and 3rd Respondents variously absolved themselves from any blame. They took the Court through how they discharged their duties. The 1st and 2nd Respondents denied making the giving of food rations and drugs to the Petitioners and like persons conditional on undergoing the impugned procedure.
227. The 1st and 2nd Respondents did not deny giving of the nutritional food rations and the ARV drugs to the Petitioners and all women in such status. The 1st Respondent also did not deny paying for the maternity fees for such women at the 2nd Respondent hospital.
228. There were some women of like status of the Petitioners who testified to the effect that they were properly counselled and underwent the procedures with full knowledge of what it all entailed.
229. The 1st Respondent did not avail evidence of the counselling sessions where the Petitioners attended and what was discussed and passed unto the attendees.
230. The 1st and 2nd Respondents are registered health providers. They undertook counselling services and ran other services mostly on maternal care. As medical practitioners, they are bound to keep records of all their activities.
231. The 1st to 3rd Petitioners gave the names of the representatives of the 1st Respondent whom they dealt with. It turned out that the said representatives were truly the ones who attended to the Petitioners. They also stated what they were told by the representatives.

232. On a balance of probabilities, this Court finds that the Petitioners were truthful. They testified and were examined in Court. There were no adverse observations by the Court on any of them. The Petitioners had no option, but to actualise what the 1st and 2nd Respondents wanted as far the tubal ligation procedures were concerned.
233. The 2nd and 3rd Respondents also conducted the medical procedures.
234. With the low level of literacy and understanding of family planning options and health, the 2nd and 3rd Respondents had a greater duty of care on the Petitioners. The circumstances, therefore, imposed upon the healthcare providers a high legal duty to facilitate their informed consents.
235. They 2nd and 3rd Respondents had the obligation to break down and convey in a language the Petitioners understood the information as to what BTL entailed in the first place, its implications and were to reaffirm that the Petitioners understood what was the procedure was all about.
236. In addition, the healthcare providers had a legal duty as required under Sections 8 and 9 of the Health Act to explain to the 1st to 4th Petitioners the available alternatives of family planning.
237. By juxtaposing the 1st to 4th Petitioners' positions and the legal requirements in obtaining informed consent side by side, it is apparent that the 2nd and 3rd Respondents did not obtain any such informed consent from the Petitioners. There is no evidence or at all that the 2nd and 3rd Respondents undertook any meaningful due diligence on the Petitioners in the quest to obtain the requisite consent.
238. It is in evidence that the Petitioner were casually asked to sign forms before performing the BTL procedures. Some of the enquiries were made just before the operations began. No consent forms were produced in evidence by the 2nd and 3rd Respondents which are the facilities that conducted the BTL procedures.

239. The medical professionals, if any, who obtained the consents from the Petitioners did not tender any evidence on how they procured the consents.
240. The Petitioners must, therefore, have made up their minds on the premise that it was not tenable to have children when they were HIV positive, a position which is not medically accurate.
241. The consents obtained from the Petitioners, hence, appears to have been borne out of fear and apprehension that having more children would pose danger not only to them, but also to the children they would carry.
242. It is also not lost on this Court that the healthcare providers took advantage of the Petitioners' economic vulnerability, low level of understanding occasioned by their illiteracy to subject them to the BTL operations. It cannot, therefore, be alleged that the consents were freely obtained.
243. By and large, the 2nd and 3rd Respondents did not, in the least, adhere to the procedure provided in the law in the manner the consents were obtained, if any. In the end, the consents were obtained contrary to the law and did not amount to an informed consent.
244. There was another angle to the issue of the consent raised by the 3rd Respondent. It alleged that by the time the 4th Petitioner arrived at the facility for the BTL procedure, she had already given her informed consent at the Lions Clinic and as such, 3rd Respondent did not have a further obligation to obtain a fresh consent.
245. This issue also dealt with in the **LAW** case (supra). The Court in the negative and expressed itself as follows: -

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

216. This Court has carefully gone through the provisions of the Health Act and did not come across instances where consent

*may be transferred. **What comes out throughout the statute is that the law places individual responsibility on health care providers and health care professionals while providing their services.***

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

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

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

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

221. In the end, this Court finds and hold that the 1st Respondent did not obtain the informed consent from the 1st Petitioner prior to performing the BTL medical procedure on the 1st Petitioner.

246. From the said discussion, the prevailing position in this case is, therefore, that the 2nd and 3rd Respondents did not obtain any informed consents from the Petitioners prior to undertaking the impugned medical procedures. Since the 2nd Respondent hospital was under the direct power and control of the 4th Respondent, the entity is also found liable for the actions of the hospital.

247. In the end, this Court finds the 1st to 4th Respondents variously culpable. The 1st Respondent stand guilty of coercing the 1st, 2nd and 3rd Petitioners to undergo the impugned medical procedure whereas

the 2nd and 4th Respondents are also guilty of equally coercing the 4th Petitioner to undergo the procedure. Further, the Court finds the 2nd and 4th Respondents in breach of the legal requirement to obtain informed consents from the 1st, 2nd and 3rd Petitioners and the 3rd Respondent also suffers the same fate by failing to obtain the informed consent from the 4th Petitioner.

248. Having found the 1st to 4th Respondents variously culpable, suffice to address the status of the 5th and 6th Respondents. The **LAW** case (supra) also dealt with a similar and in absolving the two entities from any blame in the circumstances of this matter stated as follows:

-

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

236. *It has been demonstrated in this judgment that the National Government has not only passed legislation on informed consent, (that is the **Health Act**), but it also passed relevant national policies and even assented to and adopted international treaties and instruments on health including the aspect of informed consent.*

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

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

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

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

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

249. In a like fashion, this Court finds no fault on the 5th and 6th Respondents in this case.

(iv) Remedies:

250. The **LAW** case (supra) comprehensively also dealt with the aspect of remedies. The Court rendered as follows: -

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

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

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

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

226. *The upshot is that the 1st Petitioner's rights and fundamental freedoms were variously infringed. For instance, the right to the highest attainable standard of reproductive health under **Article 43(1)(a) of the Constitution** was infringed.*
227. *Closely linked to the above is the right to the dignity of the 1st Petitioner guaranteed under **Article 28 of the Constitution**. The dignified right of the 1st Respondent as a woman to have children was unlawfully taken away. The 1st Petitioner now stands perpetually ridiculed especially going by the manner in which women who are unable to conceive, have babies and maintain families in the African communities are generally treated with contempt.*
228. *The right to a family provided for under **Article 45** of the Constitution was likewise infringed. The 1st Petitioner demonstrated how her second marriage came to an end when her husband realized that she had undergone sterilization. She has since then remained unmarried.*
229. *Further, the BTL procedure underwent by the 1st Petitioner was differential treatment purely based on sex, gender and her HIV status.*
230. *The above aspects were dealt with in High Court at Nairobi in Petition Nos. 56, 58 & 59 of 2019 (Consolidated), **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)** [2020] eKLR. The High Court discussed the various facets of discrimination and instances when differential treatment does not amount to discrimination. It observed*
231. *As stated above, this Court is satisfied that the BTL procedure underwent by the 1st Petitioner indeed was differential treatment purely based on sex and HIV status. It was unfair discrimination that served no rational purpose and cannot be justified in a liberal well-functioning constitutional democracy and society.*
232. *As a result, **Article 27** of the Constitution was infringed.*
251. *On the basis of the foregoing, this is case where there was horizontal and vertical infringement of the rights and fundamental freedoms of the Petitioners. The vertical infringement was by the 2nd and 4th Respondents, being State actors and duty bearers, in failing to apply the dictates of the Constitution and to uphold the law and the*

horizontal violation was by the non-state or private party, that is the 1st Respondent.

252. In the **LAW** case (supra), the Court went on to address the issue of liability as follows: -

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

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

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

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

246. *In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006, [2008] 2 EA 311, Rawal, J** (as she then was) stated.....*

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

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

248. *This Court has before discussed monetary compensation and instances where such compensation is inappropriate. In **Patrick Alouis Macharia Maina & 3 others v Shoprite Checkers Kenya Limited** [2021] eKLR this Court stated*
249. *Taking cue from the foregoing, this Court finds and hold that the 1st Petitioner's rights and fundamental freedoms ought not only be vindicated by appropriate declarations, but also by an award of damages which will go a long way in curbing the failure to obtain informed consents before any medical procedures as well as curbing the manipulation and misleading information used to sterilize HIV positive women.*
250. *In settling the award of damages, this Court is alive to the fact that the 1st Respondent is a private medical facility providing services to many people and this decision may generate many like litigations and the Court would also wish to have the 1st Respondent continue offering appropriate services to the public, going forward. Further, it is expected that the 1st Respondent will undertake immediate, if not yet, steps to ensure that faults on its part in this judgment are corrected.*
251. *It is also expected that the 2nd Respondent will forthwith take appropriate steps and ensure that the information given to the public is correct. This Court has also considered the proposals by the Petitioners under this head.*
252. *Drawing from the foregoing, this Court shall render suitable remedies based on the fact that the 1st and 2nd Respondents variously infringed upon the 1st Petitioner's rights and fundamental freedoms.*
253. In line with the foregoing, this Court finds, and the for purposes of compensation only, that the 1st Respondent be held liable at **20%**, the 2nd and 4th Respondents be jointly and severally held liable at **50%** and the 3rd Respondent be held liable at **30%**.

Disposition:

254. In the end, the Court finds the Petition is merited and do hereby issue the following final orders: -

- (a) The claims against the 5th and 6th Respondents are hereby dismissed.**
- (b) A Declaration hereby issue that it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when and how often to bear children.**
- (c) A Declaration hereby issue that referral medical institutions (such institutions where patients are referred to for further medical attention) must obtain fresh informed consents from the patients for purposes of undertaking any medical operations except in cases of emergency.**
- (d) A Declaration hereby issue that the act of sterilization of the 1st to 4th Petitioners herein by the 2nd and 3rd Respondents by way of bilateral tubal ligation was undertaken without obtaining the 1st to 4th Petitioners informed consent and as such they amounted to violation of the 1st to 4th Petitioners' constitutional rights and fundamental freedoms under Articles 27, 28, 43(1)(a) and 45 of the Constitution.**
- (e) Each of the 1st to 4th Petitioners are hereby awarded compensation in the sum of Kshs. 3,000,000/- (Kenya Shillings Three Million Only). Payment thereof shall be on the basis of 20% against the 1st Respondent, the 2nd and 4th Respondents be jointly and severally held liable at 50% and the 3rd Respondent be held liable at 30%.**

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

255. It is so ordered.

DELIVERED, DATED and SIGNED at KITALE this 21ST day of SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for the Petitioners.

Miss Nerea Learned Counsel for the 1st Respondent.

Miss Nazi for Mr. Kibe, Learned Counsel for the 2nd – 4th Respondent.

Miss Chemjor Learned Counsel for the 3rd Respondents.

N/A for for the 1st Interested Party and the Amicus Curiae.

Regina/Chemutai – Court Assistants.