Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) (Constitutional Petition 244 of 2019) [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021) (Judgment)

Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2021] eKLR

Neutral citation: [2021] KEHC 450 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 244 OF 2019

LA ACHODE, K KIMONDO & MW MUIGAI, JJ

MARCH 17, 2021

BETWEEN

TATU KAMAU ..... PETITIONER

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

ANTI-FEMALE GENITAL MUTILATION BOARD ..... 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3RD RESPONDENT

AND

EQUALITY NOW ..... INTERESTED PARTY

EQUALITY COMMISSION ..... INTERESTED PARTY

FEDERATION OF WOMEN LAWYERS (FIDA-K) ..... INTERESTED PARTY

SAMBURU GIRLS FOUNDATION ..... INTERESTED PARTY

MSICHANA EMPOWERMENT KURIA ..... INTERESTED PARTY

KENYA WOMEN'S PARLIAMENTARY ASSOCIATION (KEWOPA) ..... INTERESTED PARTY

CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) ..... INTERESTED PARTY

MEN FOR EQUALITY BETWEEN MEN AND WOMEN .. INTERESTED PARTY

AMREF HEALTH AFRICA IN KENYA ..... INTERESTED PARTY

JOHN KIPLANGAT ARAP KOECH ..... INTERESTED PARTY

AND

KATIBA INSTITUTE ..... AMICUS CURIAE

KELIN & ISLA ..... AMICUS CURIAE

Female genital mutilation is unlawful regardless of consent from the victim.

Reported by John Ribia

Constitutional Law *– fundamental rights and freedoms – right to human dignity – prohibition of female genital mutilation (FGM) – whether the prohibition of FGM on consenting adult women violated their right to human dignity - whether FGM performed with consent was legal - Constitution of Kenya, 2010, article 28 and 44(1); Prohibition of Female Genital Mutilation Act, 2011, section 19.*

Constitutional Law *– national values and principles of governance – public participation - what was the nature of public participation – Constitution of Kenya, 2010, article 10.*

Constitutional Law *- constitutional petitions - form and content - particulars to be pleaded - requirement for the petitioner to set out with a reasonable degree of precision what he complained of, provisions claimed to have been infringed, and the manner in which they were alleged to be infringed - what was the effect of failure to state with specificity the provisions of the Constitution alleged to have been violated in a constitutional petition - Anarita Karimi Njeru v Republic*

Constitutional Law *– fundamental rights and freedoms – limitation of fundamental rights and freedoms – factors to be considered in the limitation of rights – limitation of freedom of conscience, religion, belief and opinion - whether the rights relating to culture, religion, beliefs and language could be limited - whether a cultural practice could be deemed to be a national heritage – Constitution of Kenya, 2010, articles 11, 32, 44 and 259.*

Constitutional Law *– fundamental rights and freedoms – right to the highest attainable standard of health - what was the nature of the State's obligation with regard to the right to health – Constitution of Kenya, 2010, article 2(6) and 43.*

Constitutional Law *– fundamental rights and freedoms – equality and freedom from discrimination – claim that female genital mutilation (FGM) had been criminalized while male circumcision had not been criminalized -factors to be considered in deliberating upon an unfair discrimination claim - whether criminalization of FGM while allowing male circumcision amounted to unreasonable discrimination – Constitution of Kenya, 2010, article 27.*

Words and Phrases *– participation – definition of participation - the act of taking part in something, such as partnership - Black's Law Dictionary 10th Edition; Thomas Reuters, at page 1294.*

Words and Phrases *– harm – definition of harm - injury, loss, damage; material or tangible detriment -Black's Law Dictionary 10th Edition, page 832.*

Words and Phrases *– bodily harm – definition of bodily harm - physical pain, illness or impairment of the body - Black's Law Dictionary 10th Edition, page 832.*

Words and Phrases *– choice – definition of choice - an act of choosing; the right of ability to choose; a range from which to choose; something chosen- Concise Oxford English Dictionary, 12th edition.*

Words and Phrases *– freedom – definition of freedom - the power or right to act, speak, think freely; the state of having free will; the state of being free; the state of not being subject to or affected by (something undesirable) - Concise Oxford English Dictionary, 12th edition.*

Words and Phrases *– freedom of choice – definition of freedom of choice – unfettered right to do what one wants when one wants, and do so - excluded doing something that would harm one's self or another - Black's Law Dictionary, 2nd Edition.*

Words and Phrases *– discrimination – definition of discrimination - differential treatment - especially a failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured - Black's Law Dictionary, 10th Edition at page 1566.*

Brief facts

The petitioner challenged the constitutionality of the Prohibition of Female Genital Mutilation Act and the Anti-Female Genital Mutilation Board formed thereunder (the impugned Act and the Board respectively). The petitioner pleaded that sections 2, 5, 19, 20 and 21 of the impugned Act contravened articles 19, 27, 32 and 44 of the Constitution of Kenya, 2010, (Constitution) by limiting women's choice and right to uphold and respect their culture; ethnic identity; religion; beliefs; and, by discriminating between men and women.

The petitioner contended that section 19(1) of the impugned Act expressly forbade a qualified medical practitioner from performing female circumcision, thereby denying adult women access to the highest attainable standard of health, including the right to healthcare. The petition sought among others, orders that a declaration be issued that sections 5, 19, 20, 21 and 24 of the Prohibition of Female Genital Mutilation Act were unconstitutional and thus invalid.

Issues

i. Whether female genital mutilation performed with consent was lawful.
ii. What was the nature of public participation?
iii. What was the effect of failure to state with specificity the provisions of the Constitution that were alleged to have been violated in a constitutional petition?
iv. Whether a cultural practice could be deemed to be a national heritage.
v. What were the factors to be considered in the limitation of rights and fundamental freedoms and whether the rights relating to culture, religion, beliefs and language could be limited?
vi. What was the nature of the State's obligation with regard to the right to health?
vii. What were the factors to be considered in deliberating upon an unfair discrimination claim?
viii. Whether the criminalizing of female genital mutilation and allowing male circumcision amounted to unreasonable discrimination.
ix. Whether the prohibition of female genital mutilation on consenting adult women violated their right to human dignity.

Relevant provisions of the Law

Prohibition of Female Genital Mutilation Act (No. 32 of 2011)

Section 19 - Offence of female genital mutilation

(1) A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person commits an offence.

(2) If in the process of committing an offence under subsection (1) a person causes the death of another, that person shall, on conviction, be liable to imprisonment for life.

(3) No offence under subsection (1) is committed by an approved person who performs—

(a) a surgical operation on another person which is necessary for that other person's physical or mental health; or

(b) a surgical operation on another person who is in any stage of labour or has just given birth, for purposes connected with the labour or birth.

(4) The following are, for the purposes of this Act, approved persons—

(a) in relation to an operation falling within paragraph (a) of subsection (3), a medical practitioner;

(b) in relation to an operation falling within paragraph (b) of subsection (3), a medical practitioner, a registered midwife or a person undergoing a course of training with a view to becoming a medical practitioner or midwife.

(5) In determining, for purposes of subsection (3)(a), whether or not any surgical procedure is performed on any person for the benefit of that person's physical or mental health, a person's culture, religion or other custom or practice shall be of no effect.

(6) It is no defence to a charge under this section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that such consent had been given.

Held

1. The principles for interpreting the Constitution were well settled. The court should aim at promoting the purposes, values and principles of the Constitution and to advance the rule of law, human rights and fundamental freedoms in the Bill of Rights. The Constitution should be given a purposive interpretation where all provisions were read as a whole with each provision sustaining the other.
2. Article 2(5) and (6) of the Constitution expressly recognized treaties ratified by Kenya as part of its domestic law but the treaties were subordinate to the Constitution. Despite some of the interested parties trying to expand the boundaries of the petition, the primary dispute remained as pleaded by the petitioner and as answered by the three respondents.
3. The evidential burden to prove that the impugned Act or some of its provisions were unconstitutional fell squarely on the petitioner. Furthermore, there was a rebuttable presumption of the constitutionality of statutes. Until the contrary was proved, a legislation was presumed to be constitutional. It was a sound principle of constitutional construction that, if possible, a legislation should receive such construction as would make it operative and not inoperative.
4. The guiding values and principles of governance included the rule of law; accountability; democracy; and, participation of the people enshrined in article 10(2) of the Constitution. Public participation was a means by which citizens took part in the conduct of public affairs, directly or through their chosen or elected representatives. However, there were no hard and fast rules for public participation. The public could become involved in the business of the National Assembly as much by understanding and being informed of what it was doing by participating directly in those processes.
5. The petitioner failed to discharge the evidential burden to demonstrate that there was inadequate or no public participation. From the proceedings in the departmental committee and the debates by representatives of the people in the whole House, the court could not say that the Bill did not receive any public participation. The court was also alive to the general power to pass legislation delegated to Parliament by the people under article 94(1) and (5) of the Constitution.
6. The impugned statute re-defined female circumcision to the more graphic term of female genital mutilation (FGM) and to expand application to adult women. The proviso to section 19 of the Prohibition of Female Genital Mutilation Act (impugned Act) was a contradiction. It was not clear how a sexual re-assignment procedure that would totally alter the female *genitalia* be permissible or less invasive than Type I FGM as classified in section 2(a) of the impugned Act.
7. The impugned Act fell short of criminalizing Type IV FGM. According to the Inter-agency Statement by the World Health Organization, 2008, the reasons, context, consequences and risks of the various practices subsumed under Type IV varied enormously. Because the practices were less known than Types I, II, and III, examples included: pricking, piercing and scraping; stretching; cauterization, cutting into the external genital organs; and, the introduction of harmful substances. The World Health Organization (WHO) concluded that it was not always clear, however, what harmful genital practices should be defined as Type IV. Some of the practices omitted by the impugned Act included cosmetic surgeries, labiaplasty, piercing and burning of female genitalia with corrosive substances among others.

8. It was not an idle point that the impugned Act favoured a minuscule of the population who practiced aspects of Type IV FGM including women who could afford labiaplasty or the cutting favoured by some religious sects.
9. Section 3 of the impugned Act established the Board as a corporate entity with a seal and perpetual succession. It was composed of a chairperson appointed by the President; the principal secretaries of the ministries for the time being responsible for matters relating to gender, finance, health, education, youth affairs and three other members appointed by the Cabinet Secretary. The petition did not plead with specificity the element of the functions of the Board that were unconstitutional. The petitioner ought to have specifically set out the provisions of the Constitution that were alleged to have been violated; provided the particulars of the alleged violation; and, how the respondent had violated those rights.
10. It was instructive that the petitioner had named the Board as the 2nd respondent and stated that the Board served to infringe on the petitioner's rights and as such ought to be disbanded. However, no cogent evidence was placed before the court to demonstrate how the activities of the Board had infringed on the petitioner's rights.
11. It was not entirely true that a cultural practice could not be deemed to be a national heritage because article 11 of the Constitution posited that culture was the foundation of the nation and the cumulative civilization of the Kenyan people and nation.
12. The exception in section 19(3) of the impugned Act to a surgical operation on another person which was necessary for that other person's mental health had not been substantiated. Indeed, there was no evidence of a correlation between the circumcision of men or women and mental health. However, there was clear expert evidence that male circumcision had some health benefits including reduced rates of infection or reduced transmission of HIV.
13. There were some merits in the exception for that other person's physical health or in the course of childbirth under section 19(3)(b) of the impugned Act. However, therein also lay some gap that had been exploited by traditional circumcisers. From the evidence, FGM/C was often disguised and carried out on women during their labour. It was also carried out at a young age, sometimes as early as nine years.
14. There was a conflict between the impugned Act and the Constitution . However, the Constitution made certain exceptions and allowed derogation of rights in some cases. When it came to beliefs or personal faith, the court could only undertake a limited inquiry into the genuineness of a person's professed faith. However, the petitioner was unable to demonstrate a clear nexus between FGM and her right to manifest her religion or belief. The court was unable to impeach the offences created by sections 19, 20 and 21 of the impugned Act. The Board was properly created and its functions were in conformity with the Act and the Constitution.
15. FGM, female circumcision and female cut referred to all procedures involving partial or total removal of the external female *genitalia* or other injury to the female genital organs or any harmful procedure to the female *genitalia* for non-medical reasons. The Act defined FGM to comprise all procedures involving partial or total removal of the female *genitalia* or other injuries to the female genital organs, or any harmful procedure to the female *genitalia*, for non-medical reasons.
16. The WHO included FGM Type IV which was unclassified or any other procedure involving genital pricking, piercing (and adorning with jewelry or other decorations), scraping, cauterizing, incising and stretching of the clitoris or labia (with tongs or scissors including razor blades).
17. The Penal Code defined harm as bodily hurt, disease or disorder whether permanent or temporary, while grievous harm meant any harm which amounted to a maim or dangerous harm, or seriously or permanently injured health, or which was likely so to injure health, or which extended to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense. It also defined dangerous harm as harm endangering life.

18. The phrase harmful cultural practice was not defined by Kenyan statutes. However, articles 53 and 55 of the Constitution referred to harmful cultural practices in the protection of children and the youth. The Maputo Protocol in article 1(g) defined harmful practices as all behavior, attitudes and/or practices that negatively affected the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity. Article 5 of the Maputo Protocol called for the elimination of harmful practices, by prohibiting and condemning all forms of harmful practices which negatively affected the human rights of women and which were contrary to international standards.
19. The definition of FGM/C and harm articulated the negative effect of harmful practices on women and girls' right to life, health, dignity, education and physical integrity. That underlined how the commitment to eliminate harmful practices was linked not only to promoting the health and well-being of women but also to women's human rights.
20. The assumption was that anyone above the age of 18 years underwent FGM voluntarily. However, that hypothesis was far from reality, especially for women who belonged to communities where the practice was strongly supported. The context within which FGM/C was practiced was relevant as there was social pressure and punitive sanctions. Those who underwent the cut were involved in a cycle of social pressure from the family, clan and community. They also suffered serious health complications while those who refused to undergo it suffered the consequences of stigma. Women were thus as vulnerable as children due to social pressure and could be subjected to the practice without their valid consent. The rationale for FGM/C varied from one community to another.
21. Medicalization of FGM/C did not mitigate the harm to the girl/woman as demonstrated by the FGM/C survivors who deposed affidavits and/or testified in court, they were consistent and had similar experiences after FGM/C.
22. The Constitution was the most significant legal instrument in the legal system. It impacted on common law, international laws, traditional African religion and customary practices. Article 2(1) of the Constitution stated that the Constitution was the supreme law of Kenya and bound all persons and all State organs at both levels of Government. Under article 2(4) any law, including customary law that was inconsistent with the Constitution was void to the extent of the inconsistency and any act or omission in contravention of the Constitution was invalid.
23. Some harmful cultural practices were valued as traditional cultural heritage in some communities. Cultural rights intertwined with human rights in certain social spaces and were not easy to separate but the Constitution offered the first most important standard against which the relevance of all other laws, religions, customs, and practices were to be measured. The Constitution also restricted customary law and religions through certain other provisions whose overall effect was to rid of harmful traditional practices.
24. FGM/C was harmful to girls and women due to the removal of healthy genital parts. The FGM/C caused immediate, short term and long-term physical and psychological adverse effects. The purposes of FGM/C were community culture-centered and not individual benefit centered. The culture custodians in communities were clan/elders who determined when, where, how and for what FGM/C was conducted within the specific community.
25. The preamble to the Constitution recognized the culture and customs of the Kenyan people. Articles 21 and 27(6) of the Constitution directed the State to take legislative measures to redress the disadvantages suffered by individuals or groups due to past discrimination. Articles 27, 28, 43, 53 and 55 of the Constitution protected all persons from all forms of discrimination and shielded the youth and children from harmful cultural practices. They also guaranteed the right to dignity and the right to the highest attainable standard of health and reproductive health.
26. Article 25 of the Constitution prescribed fundamental rights and freedoms that should not be limited. The right to enjoy one's culture religion and belief as envisaged in articles 11, 32 and 44 were derogable. Article 24 of the Constitution prescribed that the right and fundamental freedom could be limited to

the extent the limitation was reasonable and justifiable based on human dignity equality and freedom. The limitation should be proportionate to the legitimate aim. Despite the rights enshrined in articles 11, 32 and 44 of the Constitution relating to culture, religion, beliefs and language, the rights could be limited due to the nature of the harm resulting from FGM/C to the individual's health and well-being.

27. Section 2 of the impugned Act defined FGM/C Type I, II and III but excluded Type IV which the WHO included as unclassified. The latter included any other procedure involving, genital pricking, piercing with tongs or scissors including razor blades, incising and stretching of the clitoris/labia. Section 19 of the impugned Act criminalized FGM/C except where it was a surgical operation for a person's physical and mental health or at any stage of labour or birth. It further provided that culture, religion, custom or practice or consent would not be a defence.

28. From the standpoint of criminal law, there was a *lacuna* created that hampered the effective enforcement of the impugned Act. The criminalization of the three types of FGM/C and not Type IV, which was unclassified, made it difficult to effectively enforce the Act. There seemed to be no objective or professional process to distinguish between the various types of FGM/C during investigation or prosecution.

29. A reading of section 19(6) of the impugned Act revealed that it was no defence to a charge under the section that the person on whom the act involving FGM was performed consented to that act, or that the person charged believed that the consent had been given. The implication of that was FGM/C could not be rendered lawful because the person on whom the act was performed consented to that act. No person could licence another to perform a crime. The consent or lack thereof of the person on whom the act was performed had no bearing on a charge under the Act.

30. Article 44(1) of the Constitution provided that every person had the right to use the language and to participate in the culture, of the person's choice. Freedom was therefore an underlying element of the exercise of one's right under the Bill of Rights, which included the right to participate in one's cultural life. From the evidence of the survivors and those who escaped the cut, they all confirmed the misinformation, deception and societal pressure they were subjected to, to undergo the cut.

31. The right to the highest attainable standard of health which included the right to health care services, including reproductive health care for every person was provided under article 43 of the Constitution. The right to the highest attainable standard of health received mention in various international treaties and covenants which were part of the laws of Kenya by dint of article 2(6) of the Constitution.

32. The State's obligation with regard to the right to health encompassed not only the positive obligation to ensure that her citizens had access to health care services and medication, but had to also incorporate the negative duty not to do anything that would in any way affect access to such health care services and medication. That included an obligation to ensure that women had access to reproductive health care. The right to health bore upon other rights enumerated in the Bill of Rights.

33. Decisions on the violation of constitutional rights should not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of the violation of constitutional rights was not a mere technicality; rather, it was essential to a proper consideration of constitutional issues. Decisions on the violation of constitutional rights could not be based upon unsupported hypotheses.

34. The general principle governing the determination of cases was that a party who made a positive allegation bore the burden of proving it. That was stipulated under section 107(1) of the Evidence Act. The onus was therefore on the petitioner to demonstrate that her ability to exercise the fundamental right had been infringed and that the infringement or conduct was not justifiable in a modern democratic state by dint of article 24 of the Constitution. The petitioner failed to do so.

35. For differentiation of treatment to be unconstitutional and impermissible, it had to meet the threshold of article 27 of the Constitution which stipulated the grounds upon which discrimination was prohibited. It, therefore, followed that the principle of equality of the sexes was recognized, and

discrimination on any basis prohibited under the Constitution and international and regional treaties to which Kenya was a party.

36. In deliberating upon an unfair discrimination claim, the court had to interrogate:
    1. Whether the provision differentiated between people or categories of people. If so, whether the provision bore a rational connection to a legitimate purpose. If it did not, then there was a violation of the Constitution. Even if it bore a rational connection, it could nevertheless amount to discrimination.
    2. Whether the differentiation amounted to unfair discrimination. That required a two-stage analysis;
        i. whether the differentiation amounted to discrimination. If it was on a specified ground, then discrimination would have been established. If it was not on a specified ground, then whether or not there was discrimination would depend on whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
        ii. Whether the differentiation amounted to discrimination, and whether it amounted to unfair discrimination. If it was found to have been on a specified ground, then the unfairness would be presumed. If on an unspecified ground, unfairness would have to be established by the complainant. The test for unfairness focused primarily on the impact of discrimination on the complainant and others in his or her situation. If at the end of that stage of the inquiry, the differentiation was found not to be unfair, then there would be no violation.
    3. If the discrimination was found to be unfair then a determination would have to be made as to whether the provision could be justified under the limitation clause.

37. Mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason was an unacceptable phenomenon. However, where there was a legitimate reason, then, the conduct or the law complained of could not amount to discrimination. Consequently, the law which promoted differentiation had to have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.

38. Whereas the evidence adduced pointed to discrimination, the discrimination was not unreasonable. The evidence of the medical experts confirmed the grim reality of the challenges posed by female circumcision ranging from difficulty in consummating marriages to difficulty in childbirth, and in certain instances, death of the victims.

39. The Constitution entrenched respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, as its foundational values. Article 28 of the Constitution provided for the right to the inherent dignity and the right to have that dignity respected and protected. Human dignity was that intangible element that made a human being complete. It went to the heart of human identity. Every human had value. Human dignity could be violated through humiliation, degradation or dehumanization. Each individual had inherent dignity which the Constitution protected. Human dignity was the cornerstone of the other human rights enshrined in the Constitution. The impugned Act did not violate the Constitution or women's right to dignity.

40. The Protection of Traditional Knowledge and Cultural Expressions Act defined cultural heritage. Under that Act, intangible cultural heritage was defined as the practices, representations, expressions, knowledge and cultural spaces associated therewith communities, groups and, in some cases, individuals recognized as part of their social cultural heritage. Culture was dynamic and not static and would continue to grow to respond to new factors. It was also fluid and changed from time to time. It was susceptible to be swayed by many factors such as religion, education, and influence from other communities, inter-marriage and urbanization. However, there were certain aspects of culture that

identified a particular group, their history, ancestry and way of life and that diversity was recognized and protected by the Constitution.

41. The Constitution granted the freedom to exercise one's culture. However, that freedom had to be carried out in line with the other constitutional provisions. Culture entailed various modes of expression. Therefore, what was limited was any expression that would cause harm to a person or by a person to another person. FGM/C fell into the latter category.

42. While the Constitution had a general underlying value of freedom, that value of freedom was subject to a limitation that was reasonable and justifiable. Additionally, it had not inscribed the freedom to inflict harm on one's self in the exercise of those freedoms. That was why the Penal Code prescribed offences such as attempted suicide in section 226 and abortion and allied offences in sections 158 to 160.

Petition dismissed.

Orders

i. *The Attorney General (1st respondent) was to forward proposals to the National Assembly to consider amendments to section 19 of the Prohibition of Female Genital Mutilation Act (No. 32 of 2011) with a view to prohibiting all harmful practices of FGM as set out in the judgment.*

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

Citations

Cases

Kenya

1. *Ajuang, Joan Akoth & another v Michaels Owuor Osodo - Chief Simur Kondiek, Ukwala Location & 3 others; Malaika Foundation (Proposed Interested Party* Constitutional Petition 1 of 2020; [2020] KEHC 5840 (KLR) - (Mentioned)
2. *Anarita Karimi Njeru v Republic (No1)* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); (1979) KLR 154; [1976- 80] 1 KLR 1272 - (Mentioned)
3. *ANN v Attorney General* Petition 240 of 2012; [2013] KEHC 6004 (KLR) - (Mentioned)
4. *Attorney General v Law Society of Kenya & 4 others* Civil Appeal 426 of 2018; [2019] KECA 283 (KLR) - (Mentioned)
5. *Baadi, Mohamed Ali & others v Attorney General & 11 others* Petition 22 of 2012; [2018] KEHC 5397 (KLR) - (Mentioned)
6. *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] 1 KLR 458 - (Mentioned)
7. *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others* Constitutional Petition 40 of 2011; [2015] KEHC 1762 (KLR) - (Explained)
8. *County Government of Nyeri & another v Ndungu* Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR) - (Mentioned)
9. *Elisha, Dullu Kora v Kenya School of Law & another* Petition 248 of 2017; [2017] KEHC 2808 (KLR) - (Explained)
10. *Federation of Women Lawyers Kenya (FIDA K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR) - (Explained)
11. *Haki Na Sheria Initiative v Inspector General of Police & 3 others* Civil Appeal 261 of 2018; [2020] KECA 566 (KLR) - (Mentioned)
12. *Institute of Social Accountability & another v National Assembly & 4 others* Petition No 71 of 2014; [2015] KEHC 6975 (KLR) - (Mentioned)
13. *JK (Suing on Behalf of CK) v Board of Directors of R School & another* Petition 450 of 2014; [2014] KEHC 7490 (KLR) - (Explained)
14. *Kandie, Karen Njeri v Alassane Ba & another* Petition 2 of 2015; [2017] KESC 13 (KLR) - (Mentioned)

15. *Karani, Stephen Wachira & another v Attorney General & 4 others* Constitutional Petitions 321 & 331 of 2017 (Consolidated); [2017] KEHC 2184 (KLR) - (Mentioned)
16. *Katiba Institute & another v Attorney General & another* Constitutional Petition No 209 of 2016; [2017] KEHC 4648 (KLR) - (Mentioned)
17. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* Constitutional Petition 86 of 2017; [2018] KEHC 7494 (KLR) - (Mentioned)
18. *Konchellah, Leina & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties)* Petition E291, E300 of 2020; E302 of 2020; E305 of 2020; E314 of 2020; E317 of 2020; E337 of 2020; 228 of 2020; 229 of 2020 & JR E1108 of 2020 (Consolidated); [2021] KEHC 12609 (KLR) - (Explained)
19. *Mbugua, Simon & another v Central Bank of Kenya & 2 others* Petitions 210 & 214 of 2019 (Consolidated); [2019] KEHC 4223 (KLR)
20. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition Nos 305 of 2012; 34 of 2013 & 12 of 2014 (Consolidated); [2015] KEHC 473 (KLR) - (Mentioned)
21. *Mumo, Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
22. *Munialo, Jack Mukhongo & 12 others v Attorney General & 2 others* Petition 182 of 2017; [2017] KEHC 9625 (KLR) - (Mentioned)
23. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Munya 2)* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Applied)
24. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Applied)
25. *Mutunga v Republic* [1986] KLR 167 - (Mentioned)
26. *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others* Petition 328 of 2017; [2017] KEHC 4466 (KLR) - (Mentioned)
27. *Nchoe, Katet & another v Republic* Criminal Appeals 115 & 117 of 2010 (Consolidated); [2011] KEHC 4081 (KLR) - (Explained)
28. *Okuta, Jacqueline & another v Attorney General & 2 others* Petition 397 of 2016; [2017] KEHC 8382 (KLR) - (Mentioned)
29. *Omare, Gideon v Machakos University* Petition 11 of 2019; [2019] KEHC 592 (KLR) - (Explained)
30. *Ramogi, William Odhiambo & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petitions 159 of 2018 & Petition 201 of 2019 (Consolidated); [2021] KEHC 3392 (KLR) - (Explained)
31. *Republic v Kenya National Examination Council & another Ex-parte Audrey Mbugua Ithibu* Judicial Review 147 of 2013; [2014] KEHC 8265 (KLR) - (Explained)
32. *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* Civil Appeal 172 of 2014; [2017] KECA 751 (KLR) - (Mentioned)
33. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Mentioned)
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3. Constitution of Kenya (Repealed) section 82(3) - (Interpreted)
4. Evidence Act (cap 80) section 107(1) - (Interpreted)
5. Penal Code (cap 63) sections 158, 160, 226 - (Interpreted)
6. Prohibition of Female Genital Mutilation Act (cap 62B) sections 2, 3(2); 5; 19; 20; 21 - (Interpreted)
7. Protection of Traditional Knowledge and Cultural Expressions Act (cap 218A) In general - (Cited)
8. Sexual Offences Act (cap 63A) In general - (Cited)

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   article 4, 5, 17, 18

2. African Charter on the Rights and Welfare of the Child (ACRWC), 1990
3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
4. Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979
   article 1, 2, 5
5. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
   article 12
6. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo Protocol, 2003
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Advocates

None Mentioned

JUDGMENT

1. Dr Tatu Kamau (hereafter the petitioner) is a medical doctor. She challenged the constitutionality of the *Prohibition of Female Genital Mutilation Act* (No 32 of 2011) and the Anti-Female Genital Mutilation Board formed thereunder (hereafter the Act and the Board respectively).

2. She sued the Attorney General and the Board. Later, the Director of Public Prosecutions applied and was enjoined by the court as a respondent (We shall hereafter refer to them as the respondents).

3. The petitioner pleaded that sections 2, 5, 19, 20 and 21 of the Act contravene articles 19, 27, 32 and 44 of the *Constitution* by limiting women's choice and right to uphold and respect their culture; ethnic identity; religion; beliefs; and, by discriminating between men and women. She opines that the Act is an "imperialist imposition from another culture that holds a different set of beliefs or norms".

4. She contended that section 19(1) of the Act expressly forbids a qualified medical practitioner from performing female circumcision, thereby denying adult women access to the highest attainable standard of health, including the right to healthcare enshrined under article 43(1)(a) of the *Constitution*.

5. When the petitioner testified, she claimed to speak on behalf of communities that practice female circumcision; and, for the women who have been jailed for carrying out the rite.

6. One of the main issues in the petition is whether it is constitutional to prohibit an adult woman from freely choosing to undergo the rite under the hand of a trained and licensed medical practitioner.

7. This petition was first lodged at the High Court at Machakos on July 24, 2017 and amended on November 20, 2017. The ten interested parties and two amici curiae listed above were subsequently granted leave to join the Petition.

8. On June 14, 2018, the single judge (Kemei J), certified the matter as raising substantial questions of law and referred it to the Honourable Chief Justice for appointment of an uneven number of judges. The present bench was empaneled on July 9, 2018.

9. The petitioner received support from the 10th interested party, John Kiplangat Arap Koech, a member of Sarum Amabet Welfare Association. The Petition is however opposed by all the respondents and all the other interested parties.

10. Due to the nature of the matter, some of the evidence was taken *viva voce* and some through depositions and expert opinions. Owing to the Covid-19 pandemic, the final submissions were heard electronically on October 8, 2020.

Petitioner's Case

11. The amended petition seeks the following reliefs:

    a) A declaration that the legislature contravened the provisions of articles 19, 27(1) (2) & (3) 32 and 44 of the *Constitution* by enacting the Act;

    b) A declaration that the sections 5, 19, 20, 21 and 24 of the Act are unconstitutional and thus invalid;

    c) A declaration that the numerous provisions of the Act that violate the *Constitution* cumulatively render the entirety of the Act untenable and therefore constitutionally invalid ab initio;

    d) A declaration that the 1st respondent purportedly established by this Act is illegal as it [is] created without the authority of the law;

    e) Any other relief that the court deems fit and just to grant.

12. The petition was predicated upon the following grounds:

    a) That the definition of female circumcision as female genital mutilation in section 2 of the Act presupposes malice and intention to incapacitate and destroy. She pleaded that female circumcision is part of national heritage and that women from circumcising communities have been as biologically functional and productive as other communities.

    b) That section 19(1) of the Act expressly forbids a qualified medical practitioner from performing female circumcision thereby denying willing adult women access to the highest attainable standard of health including the right to healthcare enshrined under article 43(1)(a) of the *Constitution*.

    c) She averred that that no particular culture is superior to another. She argued that the rights of willing women from communities that practice the rite of female circumcision have been violated; and, that their consent has been disregarded by sections 19(6), 20 & 21 of the Act.

    d) She was of the view, that criminalizing female circumcision is a violation of the rights of women to uphold and respect their culture and also contravenes articles 18 & 22 of the *Universal Declaration of Human Rights*.

13. The petitioner (PW1) relied on her supporting and supplementary affidavits, the original set of documents and her further documents. She said that she is a medical doctor in the area of public health and worked in various parts of the country among both circumcising and non-circumcising communities. Her evidence was that willing adult women from circumcising communities should be allowed to undergo the rite under a trained medical practitioner. She contended that the Act is an imperialist imposition from another culture with a different set of beliefs or norms.

14. She submitted that the Act limits women's choice and right to uphold and respect their culture; ethnic identity; religion; beliefs; and by discriminating between men and women. She argued that the Act contravenes articles 19, 27(1)(2) & (3) 32, 43 and 44 of the *Constitution* and various international instruments to which Kenya is a state party.

15. She also submitted that protection from harmful cultural practices prescribed by article 55(d) does not mean to proscribe but rather to mitigate the harm. She questioned the unfair application of the law which prohibits FGM but still allows some harmful contemporary practices such as consumption of alcohol, and smoking.

16. She relied on her written submissions dated September 8, 2020. She cited among other cases, the decision in *ANN v Attorney General*, High Court Nairobi Pet 240 of 2012 [2013] eKLR.

10th Interested Party's Case

17. The 10th interested party supported the petitioner. He relied on his affidavit sworn on May 4, 2018 and another one of June 19, 2019. He testified that the Act is inconsistent with the *Constitution* by infringing on women's rights to perform their respective cultures. He took issue with the term "female genital mutilation" in the impugned Act. In his view, the proper terminology for the rite should be female circumcision.

18. He said that the association opposes the jailing of women circumcisers who "are practicing our African way of life". In a nut-shell his evidence was that willing adult women from circumcising communities should be allowed to undergo the rite as part of their culture.

Respondents' Case

19. The 1st and 2nd respondents relied on their joint Grounds of Opposition dated November 1, 2017. They also relied on the evidence of the CEO of the impugned Board, one medical expert, two survivors of FGM, and two persons dealing with advocacy against FGM.

20. They submitted that the Act enjoys the presumption of constitutionality and that the petitioner did not discharge the evidential burden to prove her case. They argued that the petition failed to demonstrate with reasonable precision the provisions of the Act that violate articles 19, 27, 32, 43 & 44 of the *Constitution*. They contended that the enactment of the Act was lawfully done in accordance with Parliamentary power as required under article 94(1) & (5) of the *Constitution*. They also submitted that the Board is lawfully established under the Act and no cogent reasons have been advanced for its disbandment.

21. They asserted that there is no external cultural practice that has been imposed on the petitioner, on the contrary, it is the harmful cultural practice of FGM that has been outlawed. In their view, a cultural practice cannot be deemed to be a national heritage. They asserted that no gender has been favored against the other and that the Act seeks to protect vulnerable members of society including young girls and women from harmful cultural practices.

22. The 3rd respondent (ODPP) supported the case for the 1st and 2nd respondents. It relied on the replying affidavit of Cliff Machogu sworn on February 20, 2018 and submitted that the impugned statute was in conformity with the *Constitution*. It added that the case raises an issue of public interest that goes beyond individual and community rights but also touches on the State's obligations under various international human rights instruments.

1st to 9th Interested Parties' Case

23. The 1st to the 9th interested parties largely supported the submissions by the three respondents. All of them except the 5th and 7th interested parties filed replying affidavits. Some of them also called witnesses at the trial. We have clustered their evidence into categories of medical evidence, survivors, perpetrators and those in anti-FGM advocacy.

24. DW3, Prof Guyo Jaldesa, is an Obstetrician/Gynaecologist and Senior Lecturer at the Department of Obstetrics/Gynaecology at the University of Nairobi with 25 years' experience. He largely relied on his replying affidavit of April 16, 2018.

25. From his research, practice and consultations in Africa Coordinating Centre for the Abandonment of FGM/C (ACCAF) & East, Central & Southern African Obstetrical & Gynecological Societies (ESCAOGS) he has dealt first hand with challenges faced by victims of FGM/C.

26. He testified that FGM/C increases risks associated with women's reproductive and sexual health. Such women are more susceptible to infections and sexually transmitted diseases as well as increased risk of child and maternal mortality. He added that removal or damage to healthy genital tissue interferes with the functioning of the body and causes several immediate and long-term health consequences such as bleeding, severe pain, shock, infection, septicemia, urine retention, anaemia, cysts, keloids, vulval abscess, clitoral neuroma, infertility, reproductive tract infections, acute and chronic pelvic infection, fistulae, incontinence, vaginal obstruction and ulcers.

27. DW3 also stated that women who have undergone FGM/C, as they grow older, may develop psychological conditions including but not limited to feelings of incompleteness, loss of self-esteem, depression, chronic anxiety, phobias and even psychotic disorders.

28. He distinguished FGM/C from male circumcision which involves only removal of the foreskin. He said that the latter reduces the risk of transmission of sexually transmitted infections and diseases including HIV and has health benefits. Male circumcision is thus part of the curriculum for medical professionals' training.

29. DW3 opined that FGM/C which involves partial or total removal of clitoris, reduces a woman's sexual feelings and is anatomically comparable to removal of the tip of the penis. In his opinion, FGM/C is not equivalent to male circumcision in as far as the structures removed from either sex and effects and consequences of the cut are different.

30. He deposed that FGM/C is usually performed on girls ranging from 4 to 14 years as a rite of passage or to preserve virginity for marriage. He said that in some communities FGM/C is done upon being married or during the first pregnancy or labour. The age and purpose for FGM/C varies depending on the ethnic group, geographical location and rationale for the practice.

31. Prof Joseph Gatheru Karanja (DW4) is a health practitioner of many years' standing and has offered services to women and girls who have undergone FGM/C. He offered services of de-infibulation, removal of keloids and sebaceous cysts, complicated deliveries owing to obstructed labour particularly for women who had undergone infibulation who require episiotomies or caesarian sections.

32. He said that FGM/C leads to physical complications including, severe pain, injury to adjacent tissue of urethra, vagina, perineum and rectum, hemorrhage, neurogenic shock, acute urine retention, fractures or dislocations of clavicle, femur, humerus or hip joint, infections, fever, difficulties in menstruation, fistulae, painful sexual intercourse or sexual dysfunction and problems in child birth.

33. Dr Joachim Osur (DW5) is a specialist in sexual and reproductive health. His evidence was *in tandem* with that of DW3 and DW4. He said further complications of FGM/C included delays in the healing process of the wound, severe pain when the nerve is cut and swelling of genital tissues due to inflammatory response to infections. In the long term the women develop chronic genital and reproductive tract infections. He also stated that there is a higher tendency of babies born of women who have undergone FGM/C to have complications.

34. He testified that FGM/C leads to low self-esteem, a feeling of worthlessness, reduced social functioning, suicidal ideation, suicide and psychological lifelong consequences which call for lifelong psychological or psychiatric care. He added that the sexual health of women is highly compromised after FGM by suffering multiple disorders, loss of sexual desire, inability to have an orgasm and never having satisfying sexual experiences for the rest of their lives.

35. Dr Timothy Njoya (DW7) is the founder and CEO of Men for Equality of Men & Women (the 8th interested party). He referred to his affidavit sworn on April 17, 2018. He also made reference to various writings, books and research materials on the history and cultural basis of FGM in Kenya and Africa. He testified that FGM was first practiced as a substitute for human sacrifice and later as an aspect of slavery of black women by Egyptian masters. He said that the initial purpose of FGM/C was to enforce "a pre-conceived code against women by men; to enforce matrimonial fidelity against women by men". He opined that FGM was a tool of oppression by men over women.

36. He testified that FGM/C was performed on young girls in circumstances which could not have allowed them to consent to the practice but instead they subjected themselves to circumcision under cultural duress, fear and threats. In his view, FGM has not only lost relevance in the modern world as a cultural practice but also damages women's lives.

37. DW2 was SSH [particulars withheld], a survivor of FGM/C, relied on her replying affidavit dated February 19, 2018. She said that in her community girls are circumcised from the age of 3 to 10 years and that adults were not circumcised. She underwent Type III FGM, her legs were tied thereafter for two weeks and she suffered intense pain while carrying out regular biological functions. Upon marriage, the stitches in her private parts were removed which caused her excruciating pain. She had difficult and prolonged labour during her pregnancies and had to undergo a caesarian section at an added medical cost. Her sexual and reproductive health was compromised.

38. FASA, [particulars withheld] another survivor, deposed that at 12 years, her father took her and her 10-year-old sister for the cut at a hospital. She said the entire experience was traumatic and she felt her private parts roughly tugged at and was in excruciating pain. She experienced trauma long after undergoing the cut and had nightmares, anxiety and panic. She also suffers from incontinence and the entire experience prejudiced her intimacy with male partners.

39. The deponent suffered difficult and complicated labour and tore up her labia in the process. It took her three months to heal from the complications. She added that FGM was a rite of passage and also a requirement to be recognized as a member of the community. The practice is now conducted illegally in urban areas by medical practitioners.

40. SKNK [particulars withheld] also swore an affidavit on March 17, 2018 detailing the negative consequences of FGM/C which was performed on her at the age of 17. She summed it up as torturous and cruel.

41. RJK (DW1) [particulars withheld] relied on her replying affidavit dated February 19, 2018. She testified that her community practices FGM as a rite of passage. She averred that when she was 12 years, she ran away from home to avoid the cut. On returning three days later, she suffered beatings from her family

for embarrassing them. Failure to undergo the cut made her to be ridiculed, stigmatized and ostracized. She averred that to date she is regarded as a child for purposes of participating in the cultural life of the community despite being an adult and holding a bachelor's degree. She was finally forced to relocate.

42. CKN (DW6) [particulars withheld] is an Assistant Chief in a sub-county in Kajiado, a survivor of FGM, and is involved in advocacy for the rights of women. She underwent the cut at 12 years which was preceded by acts of deception, intimidation and coercion by her mother and uncle. She narrated her ordeal of undergoing FGM largely similar to that of DW2.

43. MNT [particulars withheld] is a former female circumciser in her community. In her affidavit sworn on March 15, 2018, she deposed that she has since abandoned the practice after receiving health education from the 9th Interested Party (AMREF). She deposed that FGM/C has no benefit and is a harmful practice.

44. BTK [particulars withheld] swore an affidavit on March 16, 2018. She is also an Assistant Chief in Kajiado and an FGM survivor. In conjunction with AMREF, they developed an alternative rite of passage graduation ceremony for girls that did not involve the cut.

45. Joshua Olodidio Oruma is a leader who is actively engaged in agitating for the abolition of FGM in the Maa community. He deposed that a girl who is yet to undergo the cut is not considered a woman to participate in social, cultural and economic life in the community. Further that the practice of FGM/C is done for the benefit of men in the community but ironically it denies the same men the pleasure of a fulfilling sexual experience with the women subjected to the cut.

46. In his view, women from his community lagged behind other women from non-cutting communities. This is because after the cut, women are encouraged to marry, remain at home and bear children unlike their peers in non FGM communities who are encouraged to continue their education and compete on national, regional, and international stages.

47. Phillip Lerno filed a replying affidavit on August 8, 2019. He is a Chief in Samburu County. He deposed that FGM/C was performed on young girls below 18 years as a rite of passage. He detailed the complications of FGM including death. He said he has effected arrests of parents and circumcisers who violated the Act and handed them over to the police for investigations and prosecution.

48. Lelein Kanunga (DW8) is a moran from the Maa community. He said that he together with other morans, elders and women have been educating the community on the dangers of FGM/C and that the community is slowly turning away from FGM/C. His community has abandoned other harmful cultural practices like ear piercing and removal of the two front teeth at infancy. He saw no reason why they should not abandon the practice of FGM/C which is harmful to women.

Submissions by Petitioner & 10th Interested Party

49. The petitioner submitted that the Board failed to adhere to article 10(2) (b) of the *Constitution* by using the derogatory term FGM. She contended that although the impugned Act purports to prohibit all procedures performed on the female genitalia for non-surgical reasons, it conveniently lists only three of the four procedures classified as FGM by WHO and omits female genital surgeries done for non-medical reasons. She argued that this is discriminatory and in breach of article 27(4).

50. The petitioner submitted that the enforcement of the impugned Act is based on the false assumption that all types of FGM have been criminalized leading to improper prosecutions.

51. The petitioner submitted that the Act contravenes international instruments ratified by Kenya by diminishing adult women agency and autonomy in cultural and religious spheres of their lives. She

argued that the Act entangles the rights of adult women by tying them with those of the girl child in violation of article 27(3) and (4) of the *Constitution*. Reference was made to the case of *ANN v Attorney General,* High Court Nairobi Pet 240 of 2012 [2013] eKLR, where the court cited with approval the decision of the South *African Constitutional Court in Barkhuizen v Napier* (CCT 72/05) [2007] ZACC 5 where it stated-self-autonomy, or the ability to regulate one's affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity

52. She submitted that the impugned Act was discriminatory against adult women who consent to undergo circumcision. She argued that section 19(6) of the Act that outlaws consent as a defence for undergoing a cultural ritual violated article 27(3) of the *Constitution*. She further argued that male circumcisers are trained on best health practices while the same is not accorded to traditional female circumcisers. It was her case that this was in violation of the highest standard of healthcare enshrined in article 43(1)(a) of the *Constitution*.

53. It was the petitioner's case that the protection of the youth against harmful cultural practices under article 55(d) of the *Constitution* was not meant to prohibit circumcision but to mitigate harm. She referred to article 25(a) & (b) on non-derogable rights. In her view, female circumcision does not amount to torture as defined in the Prevention of Torture Act, 2017.

54. In support of the petition, the 10th interested party stated that the impugned Act was never intended to protect the alleged victims, but to enable the Board to source for funds from foreign entities under section 3(2) of the Act. He asserted that none of the functions of the Board is to promote, protect and defend victims but to punish culprits who go against it.

55. He argued that the cultural practice of female circumcision cannot be equated with mutilation. He submitted that article 11(1) of the *Constitution* recognizes culture as the foundation of the nation which the Act violates. He also argued that the Act contravenes the national values and principles of governance in the *Constitution* which bind all state organs and officers including the respondents. He also relied on the *Protection of Traditional Knowledge and Cultural Expressions Act 2016* .

1st and 2nd Respondents' Submissions

56. The 1st and 2nd respondents filed joint submissions dated June 10, 2020 raising the following arguments. Firstly, that the petition was not pleaded with precision. They cited *inter alia*, the decisions in *Anarita Karimi Njeru v Republic* High Court, Nairobi Misc Crim Appl. 4 of 1979 [1979] eKLR and *Trusted Society of Human Rights Alliance v Attorney General & 2 others*, Nairobi, High Court Petition 229 of 2012 [2012] eKLR.

57. Counsel submitted that under articles 2(4) and 44 of the *Constitution*, the right to participate in cultural life is not absolute. Article 2(4) provides that "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid" while article 44(3) provides that "a person shall not compel another person to perform, observe or undergo any cultural practice or rite"

58. They relied further on article 25 which provides that the following rights cannot be limited: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*. It was submitted that the right to participate in the cultural life of the community is not one of the non-derogable rights. Counsel relied on the decisions in *Mutunga v Republic* [1986] KLR 16 and *R v Big M Drug Mart Ltd* (1985) 1 SCR 295.

59. They submitted that even under international legal instruments, cultural rights are neither absolute nor are they recognized as intrinsically valuable because some cultural practices harm their members. Reference was also made to various international instruments including the *Convention on Elimination of All Forms of Discrimination against Women*, *The Maputo Protocol*, *The Beijing Platform for Action* and the *African Charter on the Rights and Welfare of the Child*.

60. They contended that the right to participate in the cultural life, is not to be confused with individual liberties, but rather accrues to the community as a whole to enable the community establish its individual identity and the activities for the promotion of that identity. It follows that the petitioners premise that the decision to undergo FGM/C is an individual decision is a misnomer and cannot stand in the context of the cultures which the petitioner is allegedly seeking to protect.

61. They implored us to consider that statistical evidence leans towards the global standard of elimination of all forms of violence against women especially in the case of FGM/C which is a repugnant cultural practice.

62. Reliance was placed on article 21(3) for the proposition that women and members of particular ethnic and cultural communities are vulnerable persons in need of the protection of the State. They urged us to find that regardless of the context in which FGM/C is carried out, the harm remains the same and hence there are no less restrictive means by which the protection of dignity of women may be achieved. Reliance was also placed on articles 53, 55, 56 and 57 of the *Constitution*, The *Children Act*, The *Sexual Offences Act*, The *Penal Code* and the National Action Plan on the Abandonment of FGM. Counsel submitted that it is therefore necessary to criminalize FGM/C in order to accomplish a legitimate objective and cited *Jacqueline Okuta & another vs AG & 2 others*, Nairobi High Court Petition 397 of 2016 [2017] eKLR.

63. The respondents submitted that the petitioner was seeking to expand the boundaries of the petition by introducing evidence on Type IV FGM. Counsel argued that parties are bound by their pleadings and that the court ought not to go beyond the original petition.

64. The respondents recognized the right of every person to the highest attainable standard of health. However, with respect to FGM/C, they contended that it denies women the highest attainable standard of health. This is because no medical professionals are trained on FGM/C and the Hippocratic oath prohibits it. It was also submitted that that if FGM/C is conducted in a hospital or by a medical professional it would no longer form part of a cultural practice. 3rd respondent's Submissions

65. The 3rd respondent (ODPP) filed submissions dated October 15, 2019. As stated earlier, it associated itself fully with the submissions made by the 1st and 2nd respondents. In a synopsis, it stated that the impugned statute was fully in conformity with the *Constitution*. It also implored us to be alive to the State's obligations under various international human rights instruments.

Submissions of 1st to 9th Respondents and *Amici Curiae*

66. As we observed earlier, the 1st to 9th interested parties made submissions opposing the petition. We have also considered the submissions by the joint *amici curiae*. The main thread running through all their submissions is as follows. That whereas articles 11, 32 and 44 of the *Constitution*, guarantee the rights to participate in cultural life, practice religion, hold beliefs and use of language, those rights are not absolute. Further that FGM is a harmful practice inflicted on girls and women owing to their gender and reflects deep rooted inequality between the sexes and violates various human rights including but not limited to the right to highest attainable standard of health; freedom from torture; and freedom from discrimination.

67. Further that the State is obligated to take measures to ensure women and girls are protected against harmful cultural practices and to observe the Bill of Rights as stipulated in the *Constitution* and international conventions. In their view, consent cannot be a defence to a harmful cultural practice. Therefore, the impugned Act is constitutional because it seeks to prohibit a specific harmful practice and not all cultural practices.

68. They submitted that Parliament, in exercise of its legislative mandate, enacted the Act to ensure that the rights of women and girls are protected, promoted and respected. It was urged that in enacting the statute, Parliament followed all the requisite legislative procedures under article 94(1) & (5) of the *Constitution*.

69. The *amici curiae* submitted in general that the court should balance the various rights in issue and make a finding whether the limitations imposed by the impugned Act were reasonable and justifiable due to the harmful nature of FGM. They also emphasized the State's obligations under the *Constitution* and international law to protect individual's human rights. They argued that consent is immaterial in the case of a harmful cultural practice and the State has the responsibility to regulate such conduct.

70. We shall deal with those submissions in greater detail in the course of this judgment.

Issues for Determination

71. From the pleadings, evidence and submissions, the following broad issues arise for our determination:

    (i) Whether sections 2, 5, 19, 20 and 21 of the impugned Act are unconstitutional.

    (ii) Whether the 2nd respondent (the Board) was illegally created and its mandate infringes on the rights of women as enshrined in the *Constitution*.

    (iii) Whether FGM is a harmful cultural practice.

    (iv) Whether the rights of women to uphold and respect their culture and identity has been violated by the Act.

    (v) Whether the petitioner is entitled to the reliefs sought.

    (vi) Who should pay costs.

Analysis and Determination

72. The principles for interpreting the *Constitution* are well settled. The court should aim at promoting the purposes, values and principles of the *Constitution* and to advance the rule of law, human rights and fundamental freedoms in the Bill of Rights.

73. In *Leina Konchellah & others v Chief Justice of the Supreme Court of Kenya & others*, High Court Nairobi, Consolidated Petitions E291-E337 & JR E1108 of 2020 [2021] eKLR, the court restated the principle that the *Constitution* should be given a purposive interpretation where all provisions are read as a whole with each provision sustaining the other.

74. Article 259 of the *Constitution* provides:

    (1) This Constitution shall be interpreted in a manner that—

        a) promotes its purposes, values and principles;

        b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c) permits the development of the law; and contributes to good governance.

(2) .....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things.....

75. We are also well guided by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 26 of 2014 [2014] eKLR, where it held as follows:

> "In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:
>
> > The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.

76. This principle was restated by the Court of Appeal in *Attorney General v Law Society of Kenya & 4 others,* Court of Appeal, Civil Appeal 426 of 2018; [2019] eKLR. See also *Jack Mukhongo Munialo & 12 others v Attorney General & 2 others*, Nairobi, High Court Petition 182 of 2017; [2017] eKLR; *County Government of Nyeri & another v Cecilia Wangechi Ndungu*, Court of Appeal, Nyeri, Civil Appeal 2 of 2015; [2015] eKLR; *Stephen Wachira Karani & another v Attorney General & 4 others*, Nairobi, High Court Petition 321 of 2017 [2017] eKLR; *Institute of Social Accountability & another v National Assembly & 4 others*, Nairobi, High Court Petition No 71 of 2014; [2015] eKLR.

77. The preamble to the *Constitution* recognizes the centrality of culture and customs of the Kenyan people. It provides-

> We the Kenyan people are proud of our ethnic, cultural and religious diversity and determined to live in peace and unity.

78. Articles 21 and 27(6) of the *Constitution* direct the State to take legislative measures to redress the disadvantage suffered by individuals or groups due to past discrimination. We are however alive to the fact that the enactment of the impugned statute was made pursuant to a private member's Bill.

79. The following articles are relevant for determination of the issues raised in this petition: Articles 2, 10, 11, 23, 25, 26, 27, 28 ,29, 32, 43, 44, 53, 54 and 55 of the *Constitution*. Since articles 11, 32 and 44 are key we shall set them out in full.

80. Article 11 (1) provides as follows:

> " This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

81. Article 32 on the other hand states-

(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.

82. Lastly, article 44 provides-

> " (1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice.
>
> (2) A person belonging to a cultural or linguistic community has the right, with other members of that community—
>
> (a) to enjoy the person's culture and use the person's language;
>
> (b) to form, join and maintain cultural and linguistic associations and other organs of civil society.
>
> (3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite.

83. Kenya is a signatory to international and regional conventions. Article 2(5) and (6) of the *Constitution* expressly recognize treaties ratified by Kenya as part of our domestic law but the treaties are subordinate to the *Constitution*.

84. Some of the relevant treaties include the *Universal Declaration of Human Rights* [1948] articles 3, 5, 18, 22 and 27; the *International Covenant on Economic, Social and Cultural Rights [1966]* articles 3 and 12; the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984]*; the *Convention on Elimination of All Forms Of Discrimination Against Women (CEDAW)* [1979] article 1, 2 and 5; the *African Charter on Human and People's Rights (Banjul Charter)* [1981] articles 4, 5, 17 and 18; the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)* [2003] articles 2, 3 and 5.

85. Having set out the guiding legal framework, we shall now return to the issues that we framed above.

Whether sections 2, 5, 19, 20 and 21 the Act are constitutional

86. Some of the interested parties have tried to expand the boundaries of the petition. For instance, a majority of the replying affidavits and expert opinions have laid great emphasis on the harmful consequences of FGM carried out on children. The petitioner's case, as we understood it, is that the

Children Act already criminalizes female circumcision; and, that she is challenging the *Prohibition of Female Genital Mutilation Act* primarily for denying adult women from freely choosing whether to undergo the rite before a trained medical practitioner.

87. We are clear in our minds that the primary dispute remains as pleaded by the petitioner and as answered by the three respondents. We are well guided on that point by the Supreme Court in *Francis Karioko Muruatetu & another v Republic*, Consolidated Petitions Nos 15 & 16 of 2015 [2017] eKLR, where it was held:

> (41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
>
> (42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court." [Emphasis added]

88. Having said so, we shall now return to the petition. The impugned Act is challenged on several fronts. First, the petitioner contends that the statute or some key provisions are unconstitutional. The evidential burden fell squarely on the petitioner to prove the allegation. See generally section 107 of the *Evidence Act*.

89. Furthermore, there is a rebuttable presumption of constitutionality of statutes. See *Ndyanabo v Attorney General* [2001] EA 495 where the Tanzania Court of Appeal held:

> "Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative.

90. The decision was not entirely novel but a restatement of the English case of *Pearlberg v Varty* [1972] 1 WLR 534. See also *Olum & another v Attorney General (1)* [2002] 2 EA 508, *Katiba Institute & another v Attorney General*, Nairobi, High Court petition 209 of 2016; [2017] eKLR, *Haki Na Sheria Initiative v Inspector General of Police & 3 others* Nairobi Court of Appeal Civil Appeal 261 of 2018; [2020] eKLR.

91. The impugned Act is also attacked for want of public participation. The statute was the brainchild of the Kenya Women's Parliamentary Association (hereafter Kewopa), the 6th interested party. According to the separate but largely identical depositions of Purity Wangui Ngirichi MP, the chairperson of Kewopa and Fred Kapondi MP, the association introduced the Bill in the National Assembly as a private member's Bill Number 24 of 2011 in March 2011. It was sponsored by Fred Kapondi MP.

92. The deponents averred that the bill went through the first reading before it was committed to the Departmental Committee on Health and Security as per the House's Standing Orders. They deposed

that it was "subjected to the public participation process as required by the *Constitution* wherein the relevant stakeholders were invited to submit on the bill".

93. The Hansard Reports are attached marked as PWN2 and PWN 3 showing the debates in the House on April 12, 2011 and September 7, 2011 respectively. After consideration by the committee of the whole House, the Bill passed with amendments at the third reading. It was assented to by the President on 30th September 2011 and came into operation on October 4, 2011. No record of public hearings outside the House are attached. That explains the attack by the petitioner that there was insufficient public participation. We remain alive to the guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people enshrined in article 10(2) of the *Constitution*.

94. The *Black's Law Dictionary* 10th Edition, Thomas Reuters, at page 1294 defines participation as "the act of taking part in something, such as partnership.....".

95. Public participation is a means by which citizens take part in the conduct of public affairs, directly or through their chosen or elected representatives. In *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) the South African Constitutional Court defined public participation as follows:

> "The active involvement of members of a community or organization in decisions which affect them.... According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something.....

96. See also *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others,* Machakos, High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR. However, there are no fast and hard rules for public participation. In *King & others v Attorney Fidelity Fund Board of Control & another* (561)/2004)[2006] where the Court of Appeal of South Africa held:

> "The public may become involved in the business of the National Assembly as much as by understanding and being informed of what it is doing as by participating directly in these processes.

97. See also *National Super Alliance (NASA) v Independent Electoral & Boundaries Commission & others*, Nairobi, High Court Petition 328 of 2017; [2017] eKLR, *Simon Mbugua & another v Central Bank of Kenya & others,* Nairobi, High Court Petitions 210 & 214 of 2019; [2019] eKLR .

98. We thus find that the petitioner failed to discharge the evidential burden to demonstrate that there was inadequate or no public participation. From the proceedings in the departmental committee and the debates by representatives of the people in the whole House documented above, we cannot then say that the Bill did not receive any public participation. We are also alive to the general power to pass legislation delegated to Parliament by the people under article 94(1) & (5) of the *Constitution*.

99. We shall now focus a little deeper on some key provisions of the impugned Act. According to its preamble, it sought "to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation and for connected purposes".

100. The 6th interested party (Kewopa) submitted that the Act was meant to address some gaps in the National Policy for the Abandonment of FGM developed by the Ministry of Gender, Children and

Social Development on June 29, 2010. A notable weakness of the intervention by Kewopa and its advocacy programme was failure to harmonize the impugned statute with existing legislation, primarily the *Children Act* which criminalized female circumcision of children; and, the Penal Code which generally prohibited causing bodily harm to another. For instance, section 2 of the *Children Act* defined female circumcision as:

> " Female circumcision" means the cutting and removal of part or all of the female genitalia and includes the practices of clitoridectomy, excision, infibulation or other practice involving the removal of part, or of the entire clitoris or labia minora of a female person

101. Section 14 of the *Children Act* criminalized harmful practices against children including female circumcision. It provided that "no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development".

102. It is thus clear that the new statute re-defined female circumcision to the more graphic term of female genital mutilation and to expand application to adult women. The petitioner takes up cudgels on the term FGM as being derogatory or one that conjures up the image of malice or serious destruction.

103. To fully appreciate the petitioner's grievances, section 2 of the impugned act states:

> " Female genital mutilation" comprises all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons, and includes—
>
> (a) clitoridectomy, which is the partial or total removal of the clitoris or the prepuce;
>
> (b) excision, which is the partial or total removal of the clitoris and the *labia minora*, with or without excision of the *labia majora*.
>
> (c) infibulation, which is the narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the *labia minora* or the *labia majora*, with or without excision of the clitoris, but does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose.

104. But we find the proviso to section 19 to be a contradiction. How can a sexual re-assignment procedure that would totally alter the female genitalia be permissible or less invasive than say Type I FGM as classified in section 2(a) above. And as we shall discuss shortly, in what instances would a surgical procedure for FGM aid the mental health of the victim as provided in section 19 of the Act?

105. It is also apparent that the Act fell short of criminalizing Type IV FGM. According to the Interagency Statement by the World Health Organization 2008 (annexed as exhibit 7 to the affidavit of Guyo Jaldesa) the "reasons, context, consequences and risks of the various practices subsumed under Type IV vary enormously". Because the practices are less known than Types I, II and III, examples include: pricking, piercing and scraping; stretching; cauterization, cutting into the external genital organs; and, introduction of harmful substances. WHO concludes that "it is not always clear, however, what harmful genital practices should be defined as Type IV".

106. Some of the practices omitted by the Act include cosmetic surgeries, labiaplasty, piercing and burning of female genitalia with corrosive substances and so forth. It was telling that the respondents would

quickly raise objections whenever the petitioner tried to submit on that issue or refer to the WHO statement.

107. It is thus not an idle point that the Act favours a miniscule of the population who practice aspects of Type IV FGM including women who can afford labiaplasty or the cutting favoured by some religious sects such as the Dawood Bohras. During the 2nd reading of the Bill on April 12, 2011, Millie Odhiambo-Mabona MP, moved that such unclassified forms of FGM be included in the penal provisions but Parliament failed to do so.

108. The petitioner's case is that there is a clash of cultures; and, that the circumcising communities are discriminated and forced to adopt the culture of non-circumcising communities. Since men can opt to undergo the rite, there are trained medical practitioners who perform male circumcision. Hence the petitioner's contention of discrimination because there can be no lawful training for FGM surgeons. As the practice is carried underground, it is conducted by untrained women in an unhygienic environment which further endangers the victims.

Whether the Board was illegally created and its mandate infringes on the rights of women as enshrined in the *Constitution*.

109. Section 3 of the Act establishes the Board as a corporate entity with a seal and perpetual succession. Its composition is made up of a chairperson appointed by the President; the Principal Secretaries of the Ministries for the time being responsible for matters relating to gender, finance, health, education, youth affairs and three other members appointed by the Cabinet Secretary.

110. The petitioner challenges section 5 of the Act which deals with the functions of the Board. It provides:

The functions of the Board shall be to—

(a) design, supervise and co-ordinate public awareness programmes against the practice of female genital mutilation;

(b) generally advise the Government on matters relating to female genital mutilation and the implementation of this Act;

(c) design and formulate a policy on the planning, financing and co-ordinating of all activities relating to female genital mutilation;

(d) provide technical and other support to institutions, agencies and other bodies engaged in the programmes aimed at eradication of female genital mutilation;

(e) design programmes aimed at eradication of female genital mutilation;

(f) facilitate resource mobilization for the programmes and activities aimed at eradicating female genital mutilation; and

(g) perform such other functions as may be assigned by any written law.

111. The petition does not plead with specificity the element of the functions that are unconstitutional. The principles governing the precision with which a constitutional petition should be pleaded were well stated in *Anarita Karimi Njeru v Republic* High Court, Nairobi, Misc Crim Appl 4 of 1979; [1979] eKLR. The petitioner should specifically set out the provisions of the *Constitution* that are alleged to have been violated; provide the particulars of the alleged violation; and, how the respondent has violated those rights. See also *Martin Nyaga Wambora & others v Speaker of the Senate & 6 others* High Court, Kerugoya, Petition 3 of 2014 [2014] eKLR and *Mumo Matemu v Trusted Society of Human*

Rights Alliance & 5 others Court of Appeal, Nairobi, Civil appeal 290 of 2012; [2013] eKLR. In *Mumo Matemu's* case the Court of Appeal observed as follows:

> (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole action of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.....
>
> [42]....In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with the rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the Civil Procedure Act cap 21..... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in the *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle....

112. It is however instructive that the petitioner has named the Board as the 2nd respondent and states at paragraph 25 of the amended Petition that the Board "serves to infringe on the aforementioned rights and as such ought to be disbanded". But no cogent evidence was placed before us to demonstrate how the activities of the Board have infringed on the petitioner's rights. To be fair to the Petitioner, we understood her to say that to the extent that the Board aims at a total eradication of the rite, then it stands in the way of adult women who consent to the procedure and criminalizes the matter.

113. The 1st and 2nd respondents retort on the point is rather argumentative. In its grounds of opposition dated November 1, 2017 it states that "no external cultural practice has been imposed on the petitioner...on the contrary, it is the harmful cultural practice of FGM that has been outlawed'". In its view, a cultural practice cannot "be deemed to be a national heritage". We find that statement is not entirely true because article 11 of the *Constitution* posits that culture is the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

114. The amended petition primarily attacks the penal provisions in section 19 of the Act. The section provides:

> (1) A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person commits an offence.
>
> (2) If in the process of committing an offence under subsection (1) a person causes the death of another, that person shall, on conviction, be liable to imprisonment for life.
>
> (3) No offence under subsection (1) is committed by an approved person who performs—
>
> (a) a surgical operation on another person which is necessary for that other person's physical or mental health; or

(b) a surgical operation on another person who is in any stage of labour or has just given birth, for purposes connected with the labour or birth.

(4) The following are, for the purposes of this Act, approved persons—

(a) in relation to an operation falling within paragraph (a) of subsection (3), a medical practitioner;

(b) in relation to an operation falling within paragraph (b) of subsection (3), a medical practitioner, a registered midwife or a person undergoing a course of training with a view to becoming a medical practitioner or midwife.

(5) In determining, for purposes of subsection (3)(a), whether or not any surgical procedure is performed on any person for the benefit of that person's physical or mental health, a person's culture, religion or other custom or practice shall be of no effect.

(6) It is no defence to a charge under this section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that such consent had been given.

115. The petitioner contends that section 19(1) bars a qualified medical practitioner from carrying out female circumcision thereby denying adult women their right to the highest attainable standard of health. This argument is important because of the secret nature of the manner in which the rite is conducted and the poor conditions and environment in which it is performed.

116. We have racked our mind and have to agree with the petitioner that the exception in section 19(3) to a surgical operation on another person which is necessary for that other person's mental health has not been substantiated. Indeed, we saw no evidence of a co-relation between circumcision of men or women and mental health. However, there was clear expert evidence that male circumcision had some health benefits including reduced rates of infection or reduced transmission of HIV.

117. But we found some merits in the exception for that other person's physical health or in the course of child birth under subsection 3(b). But therein also lies some gap that has been exploited by traditional circumcisers. From the evidence before us, FGM/C is often disguised and carried out on women during their labour. From the evidence before us, FGM/C on women is carried out at a young age, sometimes as early as nine years.

118. Section 19(5) raises the complex issue of consent by an adult woman. We earlier set out the full text of article 44 of the *Constitution*. Clearly, there is a conflict between the statute and the *Constitution*. However, the *Constitution* makes certain exceptions and allows derogation of rights in some cases.

119. There is then the related right of freedom of conscience, religion, thought, belief and opinion enshrined in article 32 of the *Constitution*. In *JK (suing on behalf of CK) v Board of Directors of R School & anor* High Court Petition No 450 of 2014; [2014] eKLR, the High Court held-

> "While the wearing of dreadlocks for cultural or religious reasons is in my view entitled to protection under the *Constitution* and should be accorded reasonable accommodation, the sporting of dreadlocks for fashion or cosmetic purposes is not, and an institution such as the representative school is entitled to prohibit it in its grooming code.

120. We are cognizant that when it comes to beliefs or personal faith, the court can only undertake a "limited inquiry into the genuineness of a person's professed faith". See *Seventh Day Adventist Church (East Africa) Ltd v Minister for Education & 3 others*, Civil Appeal 172 of 2014; [2017] eKLR. However,

the petitioner was unable to demonstrate a clear nexus between FGM and her right to manifest her religion or belief.

121. Sections 20 and 21 on the other hand deal with aiding and abetting of FGM; and, procuring the commission of the offence outside Kenya respectively. Section 20 provides as follows:

> " A person who aids, abets, counsels or procures—
>
> (a) a person to commit an offence under section 19; or
>
> (b) another person to perform female genital mutilation on that other person, commits an offence.

122. Section 21 seeks to prohibit carrying out the rite on a Kenyan out of jurisdiction. It provides:

> " A person commits an offence if the person takes another person from Kenya to another country, or arranges for another person to be brought into Kenya from another country, with the intention of having that other person subjected to female genital mutilation.

123. From the foregoing reasons, we are unable to impeach the offences created by sections 19, 20 and 21 as urged by the petitioner. We also find that the Board was properly created and that its functions are in conformity with the Act and the *Constitution*.

Whether FGM is a harmful cultural practice

124. Female genital mutilation, female circumcision and female cut refer to all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs or any harmful procedure to the female genitalia for non-medical reasons.

125. The Act defines female genital mutilation to comprise all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons.

126. The World Health Organization (WHO) includes FGM Type IV which is unclassified or any other procedure involving, genital pricking, piercing (and to adorn with jewelry or other decorations), scraping, cauterizing, incising and stretching of the clitoris or labia (with tongs or scissors including razor blades).

127. According to Prof Jaldesa (DW3) the term "female genital mutilation" is the internationally accepted term to refer to all procedures that involve the alteration, removal and/or damage of healthy female genital tissue for non-medical reasons. He further stated that the term "mutilation" as used with reference to FGM/C has further been adopted by the United Nations and related agencies dealing with FGM/C in order to provide for a distinction between the practice of FGM/C and male circumcision, thereby avoiding the confusion created by use of the same terminology. That the term "mutilation" signifies and reinforces the point of difference between the two practices and helps promote national and international advocacy towards its abandonment.

128. The petitioner posited that no particular culture is superior to another. She submitted that the rights of willing women from communities that practiced the now prohibited cultural ritual of female circumcision have been violated by the Act. She was of the view that their consent has been disregarded by sections 19(6) 20 & 21 of the Act contrary to articles 18 & 22 of *UNDHR* that prescribe the right to culture, religion, belief and opinion.

129. To answer these issues, it is necessary to examine FGM, its causes and consequences and whether they occasion harm. There is also the question of choice and consent to undergo FGM as the right to culture in enjoyment of human rights. The *Penal Code* defines "harm" as bodily hurt, disease or disorder whether permanent or temporary, while "grievous harm" means "any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense". It also defines "Dangerous harm" as "harm endangering life".

130. The *Black's Law Dictionary 10th Edition* Page 832 defines harm as "injury, loss, damage; material or tangible detriment" and bodily harm as "physical pain, illness or impairment of the body"

131. The phrase "harmful cultural practice" on the other hand is not defined by Kenyan statutes. However, articles 53 and 55 of the *Constitution* refer to harmful cultural practices in protection of children and the youth. The Maputo Protocol in article 1(g) defines Harmful Practices as:

> " all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.

132. In *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others,* Malindi High Court Constitutional Petition No 40 of 2011; [2015] eKLR, Chitembwe J stated that the phrase harmful cultural practices should be broadly interpreted:

> " It is at this point that the idea of "harmful cultural practice" must be broadly interpreted to include religious practices which are currently not in line with the *Constitution*.

133. We shall thus evaluate the evidence before us to determine whether FGM has reached the threshold of a harmful cultural practice. article 5 of the Maputo Protocol calls for the elimination of harmful practices, by prohibiting and condemning "all forms of harmful practices which negatively affect the human rights of women and which are contrary to international standards".

134. The definition of FGM/C and harm articulate the negative effect of harmful practices on women and girls' right to life, health, dignity, education and physical integrity. This underlines how the commitment to eliminate harmful practices is linked not only to promoting the health and well-being of women but also to women's human rights.

135. The assumption is that anyone above the age of 18 years undergoes FGM voluntarily. However, this hypothesis is far from reality, especially for women who belong to communities where the practice is strongly supported. The context within which FGM/C is practiced is relevant as there is social pressure and punitive sanctions. From the evidence, it is clear that those who undergo the cut are involved in a cycle of social pressure from the family, clan and community. They also suffer serious health complications while those who refuse to undergo it suffer the consequences of stigma. Women are thus as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent.

136. From the evidence before us, it is clear that the rationale for FGM/C varies from one community to another. In some communities FGM/C is a rite of passage to adulthood or womanhood; it fosters virginity and modesty and makes for better marriage prospects. In other communities it is a measure to curb women's sexual desire while in others it confers social status in the community. In some cultures, if an uncircumcised woman marries into the community she is at risk of undergoing FGM/C upon being married or during her first pregnancy or labour.

137. All survivors disclosed devastating immediate, short-term and long-term effects FGM/C. They underwent FGM/C at young and tender age of 9 to 14 years.

They told the court that they experienced excruciating pain during cutting and thereafter until the wound healed and on occasions that they undertook biological functions. They suffered bleeding, incontinence and in the long term psychological and even psychotic conditions from trauma. FASA experienced difficulties in marriage, during pregnancy and childbirth of her two children.

138. The medical experts' evidence of DW3, DW4 and DW5 captured above leaves no doubt on the short term and long term adverse impact of FGM/C on women's physical, emotional and psychological health.

139. In *Katet Nchoe & another v Republic*, High Court Nakuru, Consolidated Criminal Appeals Nos 115 & 117 of 2010; [2011] eKLR, the accused persons were charged with manslaughter arising out of FGM. The 2nd appellant had approached 1st appellant to perform FGM/C on her 16-year-old. The court held:

> " In our case, FGM is certainly harmful to the physical and no doubt psychological and sound well-being of the victim. It may lead to child birth complications, in this case, it led to premature death of a teenager. That kind of custom could be truly well discarded and buried in the annals of history, just as we no longer remove our 2, 4 or 6 teeth from our lower jaw, or adorn our faces, cheeks with healed blisters.

140. The petitioner contended that section 19(1) of Act expressly forbids a qualified medical practitioner from performing female circumcision thereby denying willing adult women access to the highest attainable standard of health including the right to healthcare enshrined under article 43(1)(a) of Constitution.

141. Medicalization of FGM/C does not mitigate harm on the girl /woman as demonstrated by the FGM/C survivors who deposed affidavits and/or testified in court were consistent and had similar experience after FGM/C. Witnesses or deponents all underwent FGM/C within their respective communities while FASA and her sister were taken to a doctor who conducted FGM/C.

142. The *Constitution* is the most significant legal instrument in the legal system. It impacts on common law, international laws, traditional African religion and customary practices. article 2(1) of the *Constitution* states that the *Constitution* "is the supreme law of the Republic and binds all persons and all State organs at both levels of government". Under article 2(4) any law, including customary law that is inconsistent with the *Constitution* is void to the extent of the inconsistency and any act or omission in contravention of the *Constitution* is invalid.

143. Some harmful cultural practices are nonetheless valued as 'traditional cultural heritage' in some communities. Cultural rights intertwine with human rights in certain social spaces, and are not easy to separate but the *Constitution* offers the first most important standard against which the relevance of all other laws, religions, customs, and practices are to be measured.

144. The *Constitution* also restricts customary law and religions through certain other provisions whose overall effect is to rid of harmful traditional practices. For instance, article 55 requires that the youth be "protected from harmful cultural practices".

145. From the evidence on record FGM/C is harmful to girls and women due to removal of healthy genital parts. The FGM/C causes immediate, short term and long term physical and psychological adverse effects. The purposes of FGM/C were community culture-centered and not individual benefit

centered. The culture custodians in communities are clan/elders who determine when, where, how and for what FGM/C is conducted within the specific community.

146. The preamble to the *Constitution* recognizes the culture and customs of the Kenyan people. Articles 21 and 27(6) of the *Constitution* direct the State to take legislative measures to redress the disadvantages suffered by individuals or groups due to past discrimination.

147. Articles 27, 28, 43, 53 and 55 of the *Constitution* protect all persons from all forms of discrimination and shield youth and children from harmful cultural practices. They also guarantee the right to dignity and the right to the highest attainable standard of health and reproductive health.

148. The challenge is one of balancing the competing rights under articles 26 (right to life), article 27 (on equality and freedom from discrimination), article 28 (on human dignity) article 29 (on freedom and security of the person) and article 43 (on the highest attainable standard of health and reproductive healthcare) against the rights in articles 11, 32 and 44 (on culture, religion, belief and language).

149. Article 25 of the *Constitution* prescribes fundamental rights and freedoms that shall not be limited. The right to enjoy one's culture religion and belief as envisaged in articles 11, 32 and 44 are derogable.

150. Article 24 prescribes that the right and fundamental freedom may be limited to the extent the limitation is reasonable and justifiable based on human dignity equality and freedom. The limitation shall be proportionate to the legitimate aim.

151. The principle of proportionality was considered by the Supreme Court in *Karen Njeri Kandie v Alassane Ba & another* Petition 2 of 2015 [2017] eKLR. It is well captured by Mativo J, in *Dullu Kora Elisha v Kenya School of Law & another*, Nairobi High Court Petition 248 of 2017 [2017] eKLR on the two applicable tests

    i. The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;

    ii. The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24(1) of the *Constitution* provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society"

152. See also *Kenya Human Rights Commission v Communications Commission of Kenya,* Constitutional Petition 86of 2017 [2018]; *Haki Na Sheria Initiative v Inspector General of Police & 3 others* Nairobi Court of Appeal Civil Appeal 261 of 2018; [2020] eKLR.

153. We thus find, that despite the rights enshrined in articles 11, 32 and 44 of the *Constitution* relating to culture, religion, beliefs and language, the rights can be limited due to the nature of the harm resulting from FGM/C to the individual's health and well-being.

154. We shall now comment briefly on the exclusion of Type IV FGM/C. Section 2 of the Act defines FGM/C Type I, II & III but excludes Type IV which the WHO includes as "unclassified". The latter includes any other procedure involving, genital pricking, piercing with tongs or scissors including razor blades, incising and stretching of the clitoris/labia.

155. Section 19 of the Act criminalizes FGM/C except where it is a surgical operation for a person's physical and mental health or at any stage of labour or birth. It further provides that culture, religion, custom or practice or consent shall not be a defence.

156. We find that from the stand point of criminal law a lacuna is created that hampers the effective enforcement of the Act. The criminalization of the three types of FGM/C and not Type IV, which is unclassified, makes it difficult to effectively enforce the Act. There seems to be no objective or professional process to distinguish between the various types of FGM/C during investigation or prosecution.

Whether the enactment of the FGM Act violated the right of women to uphold culture and identity

157. Culture, and in particular the desire to preserve one's cultural identity, is the central plank of the petitioner's case in support of FGM/C. As stated elsewhere, the preamble to the *Constitution* recognizes the culture and customs of the Kenyan people by providing that "we the Kenyan people are proud of our ethnic, cultural and religious diversity and determined to live in peace and unity."

158. The *Constitution* also gives prominence to national values and principles of governance. These include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.

159. According to the 4th interested party, the enactment of the Act was necessitated by the need to shield women in communities that advocate for FGM/C and who have no say or capacity to give the consent when it comes to FGM/C. The practice prior to the enactment of the Act was that the decision of when, where and who will perform the act was decided by men. It was urged that whereas article 44(1) and (2) of the *Constitution* guarantees a person's right to participate in the cultural life of his or her choice and to enjoy his or her culture, sub-article (3) thereof prohibits a person from compelling another to perform, observe or undergo any cultural practice or rite.

160. The Petitioner however argued that consenting female adults should not be prevented or prohibited from undergoing female circumcision which she says is an age old valued tradition among certain communities. She urged that the FGM Act, by outlawing female circumcision, is out rightly infringing on the rights of women to perform their respective cultures and particularly adult women who are capable of giving consent.

161. A reading of section 19(6) of the Act reveals that it is no defence to a charge under the section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that the consent had been given. The implication of this is that FGM/C cannot be rendered lawful because the person on whom the act was performed consented to that act. No person can licence another to perform a crime. The consent or lack thereof of the person on whom the act is performed has no bearing on a charge under the Act. This was aptly stated in *R v Donovan* [1934] 2 KB 498.

162. Additionally, in *R v Coney* [1882] 8 QBD 534, the court in holding that a prized-fight was unlawful elaborated the issue of consent thus:

> " The principle as to consent seems to me to be this: when one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such nature, or is inflicted under such circumstances, that its infliction is injurious to the Public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because the prize-fights are disorderly exhibitions, mischievous

on many obvious grounds. Therefore, the consent of the parties to the blows which they mutually received does not prevent those blows from being assaults"

163. The question that arises therefore is whether willing women have freedom of choice to consent to the cut. Article 44(1) provides that every person has the right to use the language, and to participate in the culture, of the person's choice. The *Concise Oxford English Dictionary*, 12th edition, defines "choice" as "an act of choosing; the right of ability to choose; a range from which to choose; something chosen" and freedom as "the power or right to act, speak, think freely; the state of having free will; the state of being free;...the state of not being subject to or affected by (something undesirable)".

164. According to the *Black's Law Dictionary*, 2nd Edition "Freedom of Choice" is the "unfettered right to do what one wants when one wants, and do so. Also excluded is doing something that would harm one's self or another." Freedom is therefore an underlying element of the exercise of one's right under the Bill of Rights, which includes the right to participate in one's cultural life.

165. In *MEC for Education: Kwazulu-Natal and others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) the South African Constitutional Court opined thus:

> " Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of "human dignity, equality and freedom". These values are not mutually exclusive but enhance and reinforce each other...

A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues." ...that we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

166. In *United Millers Limited & another v John Mangoro Njogu* Nyeri, High Court, Civil Appeal 118 of 2011; [2016] eKLR, Mativo, J stated thus:

> " A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

167. From the evidence of the survivors SSH, FASA and those who escaped the cut like RJK, they all confirmed the misinformation, deception and societal pressure they were subjected to, to undergo the cut. For instance, when FASA told her parents that she did not want to go through the cut, her mother told her that no one would marry her if she missed the cut. She threatened to report her mother to the Police. Nevertheless, her father took her and her sister to the doctor and they underwent the cut. RJK may have escaped the cut, but she suffered beatings from irate family members and was shunned by the community and prospective suitors. She finally relocated to Nairobi.

168. Additionally, the petitioner argued that by enacting the act, the 1st and 2nd respondents are in violation of article 43 which guarantees the right to the highest attainable standard of health care and article 27 which guarantees equality and freedom from discrimination. On their part, the Respondents argued that FGM/C is a harmful practice which imposes both psychological and physical harm to the health of women.

169. What constitutes a harmful practice is defined under article 1 of the Maputo Protocol which we have already set out elsewhere in this judgment. Alluding to the Hippocratic Oath that medical practitioners "Do No Harm", the respondents contended that there is no safe way to conduct FGM/C.

170. According to the 2nd respondent, the context in which FGM/C is practiced within the various communities is a conundrum affecting not only women from communities practicing FGM/C but also women married into communities practicing FGM/C who are forced to undergo the cut in order to fully participate in the lives of the community and gain 'respect and acceptance from their loved ones and elders' in the communities into which they have married.

171. It therefore behooves us to interrogate the arguments advanced by each of the parties hereto to determine the import of the Act on the enjoyment of the constitutionally enumerated rights and freedoms, particularly the right to health, the right to participate in a cultural life of one's choice and freedom from discrimination.

172. The right to the highest attainable standard of health which includes the right to health care services, including reproductive health care for every person is provided under article 43. The right to the highest attainable standard of health receives mention in various international treaties and covenants which are part of the laws of Kenya by dint of article 2(6) of the *Constitution*.

173. Article 12 of the International Covenant on Economic, Social and Cultural Rights obligates state parties to recognize the right of everyone to health and to the enjoyment of the highest attainable standard of physical and mental health. This is also entrenched in article 16 of the African Charter on Human and People's Rights (Banjul Charter). Additionally, the Maputo Protocol expressly provides for the right to health of all women and the promotion and respect of women's sexual and reproductive health. We therefore considered the right to health in a broad sense in deliberating upon the arguments advanced in this respect.

174. Of note also is the International Conference on Population and Development Program of Action 1994, which states thus:

> "reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so."

175. The state's obligation with regard to the right to health therefore encompasses not only the positive obligation to ensure that her citizens have access to health care services and medication, but must also incorporate the negative duty not to do anything that would in any way affect access to such health care services and medication. This includes an obligation to ensure that women have access to reproductive health care.

176. The right to health therefore bears upon other rights enumerated in our Bill of Rights. In *Purohit v Gambia*, Comm 241/2001, 16th ACHPR 49 AAR Annex VII (2002-2003) the African Commission on Human and Peoples' Rights stated at paragraph 80 thus:

> "Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind."

177. Additionally, in the CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (art 12), the Committee on Economic, Social and Cultural Rights remarked that:

> " Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."

178. The petitioner stated that by enacting the act, the 1st and 2nd respondents had failed in their duty to ensure that willing adult women have in place conditions to safely practice FGM/C. That as such, the respondents were in violation of article 43(1). It is curious however, that no evidence was placed before this court to support the assertions.

179. Decisions on violation of constitutional rights should not, and must not, be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses.

180. The general principle governing determination of cases is that a party who makes a positive allegation bears the burden of proving it. This is stipulated under section 107(1) of the *Evidence Act*. The onus was therefore on the petitioner to demonstrate that her ability to exercise the fundamental right had been infringed, and that the said infringement or conduct is not justifiable in a modern democratic state by dint of article 24 of the *Constitution*. This she failed to do.

181. On discrimination, the petitioner contended that the impugned Act overtly favours the cultural practices of one gender against the cultural practices of the other gender in contravention of article 27 of the *Constitution* which provides for equality and freedom from discrimination based on gender. It was urged that while men were free to undergo a similar surgical procedure, the Act showed open intolerance to adult women who wished to undergo female circumcision to uphold their culture.

182. For a differentiation of treatment to be unconstitutional and impermissible, it must meet the threshold of article 27 which stipulates the grounds upon which discrimination is prohibited. Article 27(4) and (5) provides that:

> " (4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
>
> (5) A person shall not discriminate directly or indirectly against another on any of the grounds specified or contemplated in clause (4).

183. The principle of equality and non-discrimination has its underpinnings in various International conventions. The *United Nations Universal Declaration on Human Rights (UDHR)* provides at article 1 that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Article 7 states further that, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination."

184. The preamble to the *Convention on Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)* captures the effect of discriminatory practices against women in the following terms:

> Discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

185. Under article 2 of *CEDAW*, State Parties are obligated to condemn discrimination against women in all its forms, and to pursue, by all appropriate means, a policy of eliminating discrimination against women including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

186. Additionally, article 2 of the African Charter on Human and Peoples' Rights stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. Article 28 further states that every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

187. It therefore follows that the principle of equality of the sexes is recognized, and discrimination on any basis prohibited under the *Constitution* and International and regional treaties to which Kenya is a party.

188. According to the *Black's Law Dictionary, 10th Edition* at page 1566 discrimination is "differential treatment; esp. a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

189. In *Peter K Waweru v Republic* High Court, Nairobi, Misc Civil Appl 118 of 2004; [2006] eKLR, a three-judge bench of the High Court stated the term discriminatory as defined under section 82(3) of the independence *Constitution* thus:

> " "Discriminatory" means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

190. Additionally, in *Federation of Women Lawyers (FIDA-K) & 5 others v Attorney General & another* Nairobi, High Court Petition 102 of 2011; [2011] eKLR, a three-judge bench of the High Court (Mwera, Warsame & Mwilu, JJ as they then were) articulated the difference between mere differentiation and differentiation or unequal treatment that is constitutionally proscribed when they expressed themselves thus:

> "In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective

the legislature had in view or which the *Constitution* had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the *Constitution*. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

191. The test for determining whether a claim based on unfair discrimination should succeed was laid down by the South African Constitutional Court in *Harksen v Lane No and others* (CCT 9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300. At para 50 in deliberating upon an unfair discrimination claim, the court must interrogate:

(a) Whether the provision differentiates between people or categories of people? If so, whether the provision bears a rational connection to a legitimate purpose? If it does not, then there is a violation of the *Constitution*. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Whether the differentiation amounts to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it is found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause

192. A similar approach was adopted in the case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* Nairobi High Court Petition 16 of 2011; [2011] eKLR which cited *Jacques Charl Hoffmann v South African Airways*, CCT 17 of 2000 and set out the criteria for determining whether the provision or conduct resulted in unequal treatment when it stated that:

> " This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation bears a rational connection to a legitimate government purpose. If the differentiation bears no such connection, there is a violation of section 9(1). If it bears a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the

limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.

193. The principle from these persuasive authorities is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is an unacceptable phenomenon. However, where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination. Consequently, the law which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.

194. In advancing her grounds for discrimination, the petitioner contended that in the enforcement of the provision of the impugned Act, women in communities practicing female circumcision have been targeted through state sanctioned harassment and ridicule. The question that arises is whether the Petitioner has proved the allegation of discrimination as a whole and that women had been subjected to different treatment with regard to the practice of FGM/C.

195. The second stage of analysis is to interrogate whether the prohibition of female circumcision while allowing male circumcision resulted in unfair discrimination. Indeed, the reality of our society is that men and women are treated differently with regard to cultural rites.

196. Whereas the evidence adduced hereto points to discrimination, we are not convinced that the said discrimination was unreasonable. The evidence of the medical experts hereto confirmed the grim reality of the challenges posed by female circumcision ranging from difficulty in consummating marriages to difficulty in child birth, and in certain instances, death of the victims.

197. The 1st and 2nd respondents argued that FGM/C was a harmful cultural practice and was not similar to male circumcision. It was their evidence that equating FGM/C to male circumcision was flawed stating that unlike male circumcision which boasts of health benefits, female circumcision was both harmful and with no health benefits. This was affirmed by the medical experts who testified in support of the respondents and 1st to 9th interested parties. On her part, all the petitioner did was state that there was an illegitimate purpose for prohibiting the practice of FGM/C, without more.

198. The petitioner's case is that the enforcement of the impugned provisions violates women's right to dignity and privacy. The substance of the complaint is that by virtue of the impugned provisions, the police subject practitioners of female circumcision to state sanctioned harassment and ridicule in violation of their rights under article 19(2). The respondents position is that no violation has been established and that if at all there is limitation as alleged, it is reasonable and justifiable under article 24.

199. The *Constitution* entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, as its foundational values. Article 28 provides for the right to inherent dignity and the right to have that dignity respected and protected. Whereas the article does not define the word "dignity" the role and importance of human dignity as a foundational constitutional value, has been emphasized in numerous decisions.

200. In *Republic v Kenya National Examinations Council & another ex parte Audrey Mbugua Ithibu* Nairobi, High Court JR 147 of 2013; [2014] eKLR human dignity was defined as:

> "that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanization. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the *Constitution*.

201. When the court is confronted with a claim of violation of a fundamental right, and a contention is made that there is no violation or that the right is limited, it is important to determine whether indeed there is an infringement, or a limitation, which is justifiable under article 24. This is because under article 165(3)(b) and (d) as read with article 23, the mandate of this court is to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, or, whether any law is inconsistent with or in contravention of the *Constitution*. In so doing, we are guided by the rules of constitutional and statutory interpretation underpinned by article 259 of the *Constitution*.

202. After a careful examination of the provisions of the Act against those of article 28 of the *Constitution*, we are of the considered view that the impugned Act does not violate the *Constitution* or women's right to dignity.

203. On the main issue of whether the right to culture has been violated, the petitioner faulted the Act for condemning and misrepresenting the age old tradition as violent and dangerous. In particular, that the Act defines 'female circumcision' as 'mutilation' which connotes an intention to incapacitate and destroy. She took the view that female circumcision is part of the national heritage and history. This, the petitioner argued, infringed upon women's right to practice the cultural life of their choice making the Act contra-constitution.

204. Article 11(1) of the *Constitution* recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Article 11(2)(a) obligates the state to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.

205. The *Protection of Traditional Knowledge and Cultural Expressions Act* No 33 of 2016 defines Cultural heritage to mean:

(a) tangible cultural heritage including—

(i) movable cultural heritage;

(ii) immovable cultural heritage; and

(iii) underwater cultural heritage;

(b) intangible cultural heritage;

(c) natural heritage including natural sites with cultural aspects such as cultural landscapes, physical, biological or geological formations; or

(d) heritage in the event of armed conflict

206. Under the Act, intangible cultural heritage is defined as the practices, representations, expressions, knowledge and cultural spaces associated therewith communities, groups and, in some cases, individuals recognized as part of their social cultural heritage.

207. Culture is dynamic and not static and will continue to grow responding to new factors. It is also fluid and changes from time to time. It is susceptible to be swayed by many factors such as religion, education, and influence from other communities, inter-marriage and urbanization. But there are certain aspects of culture that identify a particular group, their history, ancestry and way of life and this diversity is recognized and protected by the *Constitution*. See *Mohamed Ali Baadi & others v Attorney General & 11 others* [2018] eKLR.

208. The Supreme Court of India in *Keshavananda Bharati v State of Kerala* [1973] 4 SCC 225 stated;

> " The fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the *Constitution* makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied....

209. Arguments against FGM/C are that it falls short as a cultural practice because it inflicts harm on women and girls thereby infringing upon their worth and dignity. In *Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others; Law Society of Kenya & another* Siaya, High Court Petition 1 of 2020; [2020] eKLR, Aburili, J restated the Constitutional provisions on culture thus:

> " Article 11 of the *Constitution* recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and further obligates the state to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.

Article 44(1) provides that every person has the right to use the language, and to participate in the cultural life, of the person's choice. Under article 44(2) of the *Constitution* a person belonging to a cultural or linguistic community has the right, with other members of that community-(a) to enjoy the person's culture and use the person's language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society.

210. The *Constitution* grants the freedom to exercise one's culture. However, that freedom has to be carried out in line with the other constitutional provisions. From the law we observe that culture entails various modes of expression. Therefore, what is limited is any expression that will cause harm to a person or by a person to another person. FGM/C falls into the latter category.

211. It therefore follows that while our Constitution has a general underlying value of freedom, this value of freedom is subject to limitation which is reasonable and justifiable. Additionally, it has not inscribed the freedom to inflict harm on one's self in the exercise of these freedoms. That is why the *Penal Code* proscribes offences such as attempted suicide in section 226 and abortion and allied offences in section 158 to 160.

212. Deliberating on the issue of freedom of choice in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties),* High Court, Mombasa, Petition 159 of 2018; [2020] eKLR, a five-judge Bench of the High Court aptly stated thus:

> " ...In its various principles as well as in its structure and variety of civil, political, social, economic, cultural and group rights which the *Constitution* enumerates, the *Constitution* plainly envisages a directive role of the state in respecting, promoting and fulfilling the various enumerated fundamental rights of individuals and groups...Put differently, it is true of the Kenyan Constitution, as it is of the US Constitution, that:

The liberty secured by the *Constitution*...to every person...does not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold

restraints to which every person is necessarily subject for the common good. *Jacobson v Massachussets*, 197 US 11, 25 Sup Ct Rep 358, 49 L ed.

213. In *Gideon Omare v Machakos University Machakos*, High Court Petition 11 of 2019 [2019] eKLR, it was held:

> " [140] In considering the test of reasonableness and proportionality set out in the Oakes case, Emukule J, in his decision in *Martha Karua v Radio Africa Ltd t/ a Kiss FM Station & 2 others* [2006] eKLR observed as follows:
>
> > " On the issue of reasonableness in relation to the limitation we fully approve and endorse the reasoning in the Canadian case of *R v Oakes* (1986) 26 DLR 4th 200. One of the principles in the case concerning reasonableness of the limitation is that the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of the limitation. Our interpretation of the use of reasonableness in the limitation clause is that since what is at stake is the limitation of fundamental rights, that must mean the legislative objective of the limitation law must be motivated by substantial as opposed to trivial concerns and directed towards goals in harmony with the values underlying a democratic society.

214. The evidence before us demonstrates that the practice of FGM/C implicates not only the right to practice cultural life but also the right to health, human dignity and in instances when it results in death, the right to life. The provisions of international treaties reproduced hereto are also clear that not all traditional practices are prohibited, but only those that undermine international human rights standards.

215. In sum there is no doubt that FGM/C was central to the culture of some communities in Kenya including the Kikuyu to which the petitioner belongs. However, from the medical evidence, and as discussed earlier, we are left in no doubt about the negative short term and long term effects of FGM/C on women's health. We have also discussed the absence of consent by victims who undergo the rite which violates article 44(3) of the *Constitution*. We are not persuaded that one can choose to undergo a harmful practice. From the medical and anecdotal evidence presented by the respondents, we find that limiting this right is reasonable in an open and democratic society based on the dignity of women.

Disposition and Final Orders

216. Our final orders shall be as follows:

a) That the amended petition is devoid of merit and is hereby dismissed.

b) That the Attorney General (1st respondent) shall forward proposals to the National Assembly to consider amendments to section 19 of the *Prohibition of Female Genital Mutilation Act* (No 32 of 2011) with a view to prohibiting all harmful practices of FGM as set out in this judgment.

Who should pay costs?

217. Costs ordinarily follow the event and are at the discretion of the court. We find that the amended petition raised constitutional issues in the public interest. The order that commends itself to us is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2021.

L. A. ACHODE

JUDGE

K. KIMONDO

JUDGE

M. W. MUIGAI

JUDGE

Judgment read in open court in the presence of:

Dr.....Petitioner (in person).

Ms.....for the 1st & 2nd Respondents

Mr.....for the 3rd Respondent.

Mr.....10th Interested Party (in person)

Mr.....for 1st Interested Party

Ms.....for 2nd Interested Party

Ms.....for 4th Interested Party

Ms.....for 3rd Interested Party

Ms.....for 4th Interested Party

Mr.....for 5th Interested Party

Ms.....for 6th Interested Party

Mr.....for 8th Interested Party

Ms.....for 9th Interested Party

Mr.....for 1st amicus curiae

Ms.....for 2nd amicus curiae

Messrs.....Court Assistants.