



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.266 OF 2015

BETWEEN

FEDERATION OF WOMEN LAWYERS (FIDA-KENYA).....1ST PETITIONER

J.M.M. THROUGH P.K.M.2ND PETITIONER

(Suing as a guardian and next friend of J.M.M)

RUTH MUMBI MESHACK.....3RD PETITIONER

VICTORIA ATIENO AWOUR.....4TH PETITIONER

AND

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

THE CABINET SECRETARY MINISTRY OF HEALTH..... 2ND RESPONDENT

THE DIRECTOR OF MEDICAL SERVICES.....3RD RESPONDENT

RULING

1. On 17th December 2015, Parties agreed that based on matters on record, this Court should determine whether the Petition herein is one fit for referral to the Hon. Chief Justice for the constitution of a bench under **Article 165(4)** of the **Constitution**.
2. From the record, there is also an Application dated 21st August 2015 by the Petitioners stating that the Petition raises substantial questions of law on three grounds;
 - i. That the issues raised are weighty.
 - ii. That the matters in contest are of great public importance.
 - iii. That the said issues are also complex and would require the interpretation of a multiplicity of regional and international human rights laws and instruments to be considered in the context of the **Constitution 2010**.

3. To put matters into perspective, the Petition dated 26th June 2015 was triggered by a letter dated 3rd December 2013 from the Director of Medical Services and his Memo dated 24th February 2013 addressed to “**All Health Workers**” entitled “**Training on safe Abortions and use of Medafon for Abortions.**” It directed all health workers not to participate in any training on safe abortion and use of Medabon (Mifepristone + Misoprostol) and warned them of dire legal consequences if they did so.
4. It is the Petitioners’ case that the said letter and memo have profound implications on the conduct of safe abortions in the context of **Articles 26 and 29 of the Constitution** as well as *inter alia* **Article 4 of the Banjul Charter, Article 4 of the Maputo Protocol and Articles 4 and 5 of the Africa Charter on the Rights of the Child.**
5. They therefore pray for the following orders;

“(a) A declaration that the right to the highest attainable standard of health, right to non-discrimination, right to life, right to be free from cruel, inhuman, and degrading treatment, right to benefit from scientific progress of the 2nd, 3rd, and 4th Petitioners as women of reproductive age and other women and adolescent girls of reproductive age whose interest they represent has been violated and/or threatened by the 3rd Respondent’s letter of 3 December 2013, reference number MOH/CIR/2/12, and Memo dated 24 February 2014, reference number MOH/ADM/1/1/2.

(b) A declaration that the right to freedom of expression, freedom of conscience, freedom of association, the right to assembly, the right to information, the right to benefit from scientific progress, and the right to equal protection of the law of health care workers has been violated and/or threatened by the 3rd Respondent’s letter of 3 December 2013, reference number MOH/CIR/2/12, and Memo dated 24 February 2014, reference number MOH/ADM/1/1/2.

(c) An order that the 3rd Respondent’s letter dated 3 December 2013, reference number MOH/CIR/2/12, and the Memo dated 24 February 2014, reference number MOH/ADM/1/1/2, are unlawful, illegal, arbitrary, unconstitutional, and thus null and void ab initio, and are hereby quashed; consequently, reinstating the guidelines.

(d) An order restraining the Respondents or their representatives and/or agents in any manner whatsoever from restricting the training of health care workers, threatening and or intimidating health care workers with punitive measures or prohibiting them from obtaining any instruction, teaching, or learning about safe abortion care.

(e) An order directing the Respondents to publish and circulate the orders issued by this Honourable Court to all stakeholders, and more particularly to all parties to whom the impugned letter and memo were directed.

(f) A declaration that rape/defilement is one of the legal grounds for termination of pregnancy in Kenya as allowed by the Ministry of Health National Guidelines on the Management of Sexual violence.

(g) An order directing the 2nd and 3rd Respondents to publicise the Ministry of Health Guidelines on Management of Sexual Violence in Kenya and to adopt effective administrative measures for practical realisation of appropriate health services to survivors of sexual violence.

(h) An order against the Respondents to make comprehensive reparations to the 2nd Petitioner (JMM) which include indemnification for material and emotional harm suffered and to undertake measures to guarantee non-repetition.

(I) An order requiring the Respondents to provide free healthcare services for all the medical needs of the 2nd Petitioner (JMM) that have arisen as a result of the violations occasioned to her.

(j) That this Honourable Court mention this case six (6) months after delivery of judgment to confirm compliance with any such order issued.

(k) An order for all parties to bear their own costs of the suit, because the Petition is brought in the public interest.

(l) Any other or further orders that the Honourable Court may deem fit to grant.”

6. Do the above issues raise substantial questions of law for me to invoke **Article 165(4)** of the **Constitution**? That Article provides as follows;

“(1) ...

(2) ...

(3) ...

(4) Any matter certified by the Court as raising a substantial question of law under clause(3) (b) or (d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.

(5) ...

(6) ...

(7) ...”

7. In interpreting the above provision, our Courts have taken the view that referral thereto is a matter of discretion and subject to a number of other criterion. The case of **Chunilal Mehta vs Century Spinning and Manufacturing Co. AIR 1962**, is the leading authority on the subject where the Supreme Court of India stated thus;

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”

8. Further, in **Martin Nyaga and Others vs Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR** it was stated that some of the applicable principles are;

(a) Whether the matter is complex.

(b) Whether the matter raises a novel point.

(c) Whether the matter by itself requires a substantial amount of time to be disposed of.

(d) The effect of the prayers sought in the Petition.

- (e) The level of public interest generated by the Petition.
9. In that context, it is the view of this Court that while the above principles are a general guide on what a Judge should consider in any application under **Article 165(4)**, each case ought to be looked at in its unique circumstances and whether in those circumstances an appraisal of the factual and legal matrix would establish the existence of a substantial question of law.
10. In the Petition before me, it cannot be contested that abortion as a subject is a matter of great public concern and interest. Moral, ethical, legal and factual questions with debatable and difficult implications would arise in determining what constitutes safe abortion.
11. In addition, whereas abortion is unlawful in Kenya by dint of **Article 26(4)** of the **Constitution**, the proviso thereto is to the effect that it may be permissible where in the opinion of a trained health practitioner, the life of the mother is in danger *inter alia*. That proviso to my knowledge has never been the subject of judicial determination by a superior Court and the parameters thereto have never been settled.
12. I also note that the use of the medicines known as Mifepristone and Misoprostol to create Medabon for abortion purposes is a contested matter and requires expertise in determining their safety and general use. Whether the directive not to use them is a violation of any right under the Constitution is also a contestable matter.
13. The last issue to address is whether the right to health and life were contravened under the Constitution and under a multiplicity of international instruments relating to those rights. These are weighty issues that are yet to be resolved by any of our Courts in the context of the issues in the Petition.
14. Without saying more, I am convinced that the Petition herein raises substantial questions of law and I hereby exercise discretion and refer the matter to the Chief Justice to constitute a bench of Judges under **Article 165(4)** to hear and determine those questions issues in contest.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ndubi and Miss Waweru for Petitioners

Mr. Chigiti for Amicus Curiae

No appearance for other parties

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

19/2/2016