



**RF Through DAAI (Suing as Guardian and Next Friend of RF) & another v Andayi
& 4 others; Kenya Christian Professionals Forum & another (Interested Parties)
(Constitutional Petition E008 of 2024) [2025] KEHC 2295 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E008 OF 2024**

**AC BETT, J
MARCH 5, 2025**

BETWEEN

**RF THROUGH DAAI (SUING AS GUARDIAN AND NEXT FRIEND OF
RF) 1ST PETITIONER
SS THROUGH PAO (SUING AS GUARDIAN AND NEXT FRIEND OF
SS) 2ND PETITIONER**

AND

**GETRAY ANDAYI 1ST RESPONDENT
EMUSANDA HEALTH CENTRE 2ND RESPONDENT
THE CABINET SECRETARY, MINISTRY OF HEALTH 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
THE COUNTY GOVERNMENT OF KAKAMEGA 5TH RESPONDENT**

AND

**KENYA CHRISTIAN PROFESSIONALS FORUM INTERESTED PARTY
KENYA CATHOLIC DOCTORS ASSOCIATION INTERESTED PARTY**

RULING

1. This is a ruling on a Notice of Motion dated 8th of April 2024 where the Petitioners pray that this court do issue an order certifying that the Petition herein raises substantial questions of law warranting the empanelment of a bench of not less than three (3) Judges by the Chief Justice for purposes of hearing and determining the Petition.



2. It is the Petitioners' contention that the Petition raises substantial questions of law whose determination will not only affect the parties herein but transcend the circumstances of this particular case. Additionally, the Petitioners argue that the Petition raises novel issues and will have significant bearing on public interest.
3. The genesis of the petition as that on 4th August 2020, the Petitioners, who were then aged 12 and 14 years respectively were approached by a community health worker and taken to Emusanda Health Centre the 2nd Respondent herein where they were assembled alongside other adolescent girls ostensibly to collect free sanitary towels but in the process, healthcare workers gave them a hormonal contraceptive injection known as Implanon NXT®, 68 mg, Implant, Etonegestrel.
4. Through their guardians, the Petitioners claim that the deceptive facilitation and administration of the hormonal contraceptive injection which injection has hazardous effects without securing their informed consent or that of their parents was in violation of their right to life under Article 26 of *the Constitution*.
5. The Petitioners also claim violation or threat to violate their right to inherent dignity under Article 28, right to freedom and security of the person under Article 29, right to access to information held by another under Article 35 and right to the highest attainable standard of healthcare under Article 43 (1) of *the Constitution*.
6. Additionally, the Petitioners claim that the Respondents violated Articles 45, 46 and 53 of *the Constitution* by undermining the positions of their parents as care givers, failing to give them information as consumers, and violated or threatened the Petitioners' rights as children to healthcare, protection from abuse, neglect, violence, inhuman treatment and exploitation.
7. The application for certification of the Petition was supported by an Affidavit sworn by Anthony Simiyu, the Advocate for the Petitioners.
8. The Respondents opposed the application and the parties were directed to file written submissions to enable the court make its determination.
9. Before the court could make its ruling, Kenya Legal & Ethical Issues Network on HIV and Aids (KELIN) applied vide a Notice of Motion dated 19th December to be enjoined as the Third Interested Party in this Petition and to be granted leave to file their Affidavit in reply to the Petition. By an order dated 28th January 2024, the said Applicants were granted their prayers as sought and are therefore enjoined to the Petition.
10. Arising from the Petition, the issues that the court will need to determine are as follows:-
 - a. Whether Article 53(1) (c), (d) and (e) of *the Constitution* condone the administration of birth control contraceptives to children below the age of eighteen (18) years.
 - b. Whether the Respondents' facilitation and eventual administration of hormonal birth control to children below the age of 18 years without the consent of their parents or guardians is in the public interest and is in conformity with Article 53 (1) (c), (d) and (e) of *the Constitution*.
 - c. What constitutes informed consent.
 - d. What is the scope of parental care and protection as provided under Article 53 (e) of *the Constitution* in the context of medical treatment of children below the age of 18 years.
11. The Petition has already attracted the attention of three organizations to wit; the Kenya Christian Professionals Forum, the Kenya Catholic Doctors Association and the Kenya Legal & Ethical Issues



Network on HIV and Aids (KELIN), who are enjoined as the 1st, 2nd and 3rd Interested Parties respectively.

12. Article 165 (3) (b) (d) and 165 (4) of *the Constitution* of Kenya allow for certain disputes which touch on a right or fundamental freedom in the Bill of Rights and the interpretation of *the Constitution* and which by their nature, raise substantial questions of law to be referred to the Chief Justice for purposes of appointment of an uneven number of Judges to hear and determine.
13. In the case of *Law Society of Kenya v. Attorney General & Another* Petition No. 3 of 2016, the Court identified the ingredients that may help a Court determine whether a substantial question of law has been raised. They are:-
 - a. Whether the matter is complex.
 - b. Whether the matter raises novel points of law.
 - c. Whether the matter by itself requires a substantial 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.
14. It is well settled that certification should be made sparingly and with caution. It should therefore be the exception rather than the general rule and caution should be exercised in making the order. This was held in the case of *Wycliffe Ambetsa Oparanya & 2 Others v Director of Public Prosecutions* [2016] eKLR.
15. I am also alive to the ruling in *J. Harrison Kinyanjui v. Attorney General & Another* [2012] eKLR where Majanja J. stressed the need to be cautious in exercising the discretion donated under Article 165 (4) and held as follows:-

“In my view, the reference to the Chief Justice for the empanelling of a three judge bench should be the exception rather than the rule and a higher burden is cast on the party who applies to the court to certify the matter for reference to the Chief Justice.”
16. The principles to be applied in order to certify a Petition under Article 165 (4) were further considered in the case of *Esther Awuor Adero Ang’awa v. Cabinet Secretary Responsible for Matters Relating to Basic Education and 7 others; Kenya Private Schools Association (KPSA) & 4 others* [2021] eKLR where the court stated as follows:-
 - i. The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of *the Constitution*.
 - ii. The matter must raise substantial question(s) of law.
 - iii. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest.
 - iv. The applicant must show that there is a state of uncertainty in the law.



- v. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.
- vi. The matter is of immense public importance and has unique significance in our constitutional democracy.
- vii. Whether the matter is complex.
- viii. Whether the matter raises novel points of law.
- ix. Whether the matter by itself requires a substantial amount of time to be disposed of.
- x. The effect of the prayers sought in the Petition.”

17. I am further guided by the decision in *Okiya Omtata Okoiti & Another v. Anne Waiguru, the Cabinet Secretary Devolution and Planning & 3 others* [2015] eKLR where the Court held that a decision of a bench of three (3) or more Judges would bear more jurisprudential weight and that a substantial question should require a substantial decision.
18. I have considered the application and the submissions made in opposition thereto. The Respondents argue that the Petitioners have not met the threshold required for the certification of this Petition.
19. Having perused the Petition and the Affidavits sworn by Dr. Jean Wamaitha Kagia and Dr. Lucy Wairimu Kabare, both Consultants in Obstetrics and Gynecology in which they allude to serious side effects and medical complications arising from the administration of hormonal contraceptives on children, I am satisfied that the Petition presents novel and complex issues to be determined by the court that would best be handled by a multi-Judge bench. This is in view of the opinion held by the Respondents that the restriction of minors from accessing essential sexual and reproductive health rights by insisting on parental consent would undermine the best interests of the minors by blocking them from accessing the highest attainable standard of health, including reproductive healthcare and information.
20. The dichotomy between the arguments by Petitioners and the 1st and 2nd Interested Parties and those of the 1st, 2nd and 5th Respondents and the 3rd Interested Party require a substantial amount of time to dispose of.
21. I am also of the view that the prayers sought shall impact on a huge segment of the Kenyan Public. According to the latest data from the National Council for Population and Development, 11.6 million Kenyans are aged between 10 years and 19 years old, representing 22.2% of the total population. The said age bracket constitutes adolescents a significant number of whom are children who will be affected by any decision of the court in this Petition.
22. In the end, I am persuaded that the Petition has met the threshold for certification under Article 165 (4) of *the Constitution*.
23. I hereby allow the Petitioner’s application dated 8th April 2024 and refer the matter to the Honourable the Chief Justice for empaneling of a bench of an uneven number of Judges, to hear and determine the Petition.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF MARCH 2025.

A. C. BETT



JUDGE

In the presence of:

Mr. Mutuli & Mr. Chidi for the Petitioners

Mr. Opiyo holding brief for Ms. Tindi for the 1st, 2nd & 5th Respondents

Ms. Namulanda for the 3rd Interested Party

Mr. Leakey holding brief for Mr. Kanjama (S.C) for the 1st Interested Party

Court Assistant: Polycap

