



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 2B OF 2017**

**LEGAL RESOURCES FOUNDATION TRUST.....PETITIONER/APPLICANT**

**AND**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF HEALTH.....3<sup>RD</sup> RESPONDENT**

**AND**

**THE COUNCIL OF GOVERNORS.....1<sup>ST</sup> INTERESTED PARTY**

**LAW SOCIETY OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**INTERNATIONAL JUSTICE MISSION.....3<sup>RD</sup> INTERESTED PARTY**

**J U D G M E N T**

**A. Introduction**

1. This petition dated the 8<sup>th</sup> day of May 2017 seeks for the following orders: -

*a) A declaration that resonating the intention as contained in the Constitution under Article 187(2)(b) as read together with the Fourth Schedule under Section 28 of Part 1 thereof that health policy is a preserve duty of the National Government; to be fully complied with by all the respondents herein and all government and county government facilities and institutions.*

*b) A declaration that resonating the policy as contained in the Police forms and specifically the P3 Form that “they are not for sale” to be fully complied with by the Respondents herein and all government and county facilities and institutions both at issuance and at filing stages.*

*c) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are jointly and severally in violation of the basic principles of access to justice and that the payment and or levy of any fees for the police forms either at issuance or at filing stage is illegal, unlawful and unconstitutional hence null and void.*

*d) This honourable court be pleased to issue and order of PROHIBITION against the Respondents and the National Government and County Government health facilities and institutions from receiving, asking, soliciting, demanding and or intimidating any person with any form of payment, levy or otherwise when they are seeking for any of the police forms particularly the P3 Forms and their filing by a duly authorized medical practitioner in compliance with the law.*

*e) This Honourable Court be pleased to issue compensatory order to all identifiable victims that have been levied and or paid the unlawful P3 Form fee within any National and or County Government facility or medical institution either bat issuance and or at the filing stage.*

*f) That there be no orders as to costs of these proceedings, the same being a public spirited petition with public interest issues of access to justice for the general public good.*

## **B. Petitioner's Case**

2. The Petitioner contends that the respondents have arbitrarily introduced, allowed, ignored and/or refused to curb and stop the illegal levying of costs on police forms in contravention of Articles 48 and 50 of the Constitution.
3. The petitioner further contends that the act of the respondents impedes access to justice to the very vulnerable in the society who in most cases may not afford the charges levied by the agents of the respondents that range from Kenya shillings Three Hundred Shillings (300/=) up to Kenya Shillings Three Thousand (3,000/=).
4. The petitioner further contends that the actions of the respondents is against the Kenya National Health Policy 2014-2030 which aims at providing the highest standards of healthcare.
5. It is further contended that county governments have taken inspiration from the national government and proceed to pass financial laws legislating fees for P3 forms.

## **C. Respondents' Case**

6. The respondents filed their grounds of opposition dated 19<sup>th</sup> October 2017 and a replying affidavit by Dr. Jackson Kioko the Director of Medical Services. It was stated that the petitioner had misconstrued the rationale of levying of the requisite fees stated as the fees charged were for services rendered for medical examination as opposed to fees for the issuance of P3 forms.
7. The respondents further stated that in any case the P3 forms were available for download for free online and that the issue of issuance cost does not arise.
8. The respondents stated that the petition disclosed no cause of action and as such orders sought therein should not be issued, further that the petitioner had not adduced any evidence to prove that any of its officers had charged the alleged fees.
9. The respondents further opposed the petition on the ground that the petitioner had an opportunity to lodge complaints with the officer in charge of any police stations, officers commanding police divisions and/or any county commanders in accordance with the Service Delivery Charter of the Kenya Police Service where anyone was not satisfied with the services rendered.
10. The respondents further agreed that the petition was merely speculative and amounted to an abuse of the court process and ought to be dismissed.
11. The 1<sup>st</sup> Interested Party was duly served with the petition but did not file a response or even participate in any way.

## **D. 2<sup>nd</sup> Interested Party's Case**

12. The 2<sup>nd</sup> Interested party did not file an affidavit. He chose to rely on that of the 3<sup>rd</sup> Interested Party sworn by Mercy K. Wambua who described herself as the Chief Executive Officer of the Law Society of Kenya. He added that the petition should succeed on account that the petitioner had shown and proved the violations of the Constitution perpetrated by the respondents and further that the petitioners had backed up their case with factual research as well as gathered sufficient evidence to support the petition.
13. The 2<sup>nd</sup> interested party further emphasized the importance of the P3 form as it is a requirement to prove the existence of injuries in both criminal and civil cases. As such, the levy on the issuance of the form would surely impede the access to justice as enshrined in Article 48 of the Constitution.
14. The 2<sup>nd</sup> interested party further stated that the provisions of Article 22 (3) (c) that provided that the Chief Justice may make rules to waive fees for filing suits was an indication that the Constitution did not intend for a party to incur any fees when protecting his rights and further that charging such high fees would not assist in ensuring that citizens enjoy their rights and freedoms as guaranteed by Article 27 of the Constitution.
15. The 2<sup>nd</sup> interested party further urged the court to take into consideration of the tough economic conditions that the common citizen has been undergoing in trying to make ends meet.

## **E. 3<sup>rd</sup> Interested Party's Case**

16. The 3<sup>rd</sup> Interested Party relied on the affidavit of Mercy K. Wambua in putting forth the argument that P3 form was a prerequisite to satisfy the ingredients of various offences and that the institution of charges at issue and filling stage was an impediment to access to justice.
17. It was further contended that the requirement by the respondents for a person seeking a P3 form to be re-examined and further that the person pays additional fees amounted to re-traumatizing of the victim and in some instances affected the evidentiary value of the medical reports.
18. The 3<sup>rd</sup> interested party further stated that the requirement to produce a P3 form was not backed by any law and that the procedural mandatory requirement proposed by the respondent was both illegal and unjust and ought to be halted.

## **F. Petitioner's Submission**

19. The petitioner submitted that the health docket was a dual function between the national and county governments and that the 3<sup>rd</sup> respondent being charged with policy formulation had failed and/or neglected its duty thus leading to the rampant violation of the citizen's fundamental rights.

20. On jurisdiction, the petitioner submitted that this court was well clothed with the necessary jurisdiction to entertain the petition by virtue of article 165 (3) (d) (ii) and (iii) of the Constitution.

21. The petitioner further submits that the respondents have jointly and severally participated and overseen the continuous violation of this fundamental human right knowing very well that they are under a strict duty of ensuring the highest attainable standards of health care services are available to all its citizenry.

22. The petitioner submitted that the issue of the levying fees as has been raised and discussed in the National Assembly on several occasions over the last few years with no solution whereas selective victims were getting waivers on the levy as was happening in Kwale County for sexual and gender based violence victims and that the court was the hope of the vulnerable victims.

23. The petitioner further submitted that the interlocutory orders issued pending the hearing and determination of this petition had the effect of waiving the P3 form levy and that the prayers sought would have the effect of ensuring full compliance across the country.

24. Finally, the petitioner submitted that the disregard by the respondents to properly regulate the illegal P3 form levy constituted a wide scale violation of the constitution against the citizenry and as such the court cannot exercise restraint in the face of such wide scale violation.

## **G. Respondents' Submission**

25. The respondents submitted that the levying of fees for the administration of the P3 form is justified as there are laws in place to justify the same. The respondent cited Article 209 (4) of the Constitution in its argument that the two levels of government have the constitutional backing of levying fees on services.

26. The respondents further submit that the charge levied on P3 forms does not amount to an impediment to access of justice as the forms merely indicate that a reported incident occurred and the victim sustained injuries. It was further submitted that the Victim Protection Act acknowledges the levying of funds save for victims who are vulnerable as enshrined in the Victims Protection Act.

27. It was further submitted that the Post Rape Care form which is more detailed than the P3 form can also be used in court as evidence and this proves that lack of P3 form does not bar any individual from accessing justice as there are alternative forms. The respondents in support of their argument relied on the case of **Godfrey Mudulia v Republic, Criminal Appeal 151 of 2014** and **Stephen Kariuki Murage v Republic, Criminal Appeal 445 of 2013.**

28. It was further argued that the money paid is not for filling the P3 forms but for services rendered for medical examination and that to envision a scenario where the petitioner states that such services ought to be free would require progressive realisation of such a right.

29. It was the respondents' further submitted that the petitioner failed to demonstrate who in particular ought to be compensated the damage suffered in the process of levying the arbitrary fee thus rendering the prayer by the petitioner misleading and untenable.

30. The respondents urged the court to be guided by the reasoning in **Baby A (Suing through the Mother EA) & another v Attorney General & 6 Others [2014] eKLR**, as well as in **Mitu-Bell Welfare Society v Attorney General & 2 Others [2013] eKLR** and accord the Respondents time to look into the policy to enhance the enjoyment rights with a view of ensuring that the right to health is upheld.

## **H. 2<sup>nd</sup> Interested Party's Submission**

31. The 2<sup>nd</sup> Interested Party submitted that the allegations that the fees charged on the P3 forms are for medical examination was not true as the medical practitioner who fills it is a government employee.

32. It was submitted that the fact that the form are indicated as being free creates a legitimate expectation that the medical examination will also be free. On the principle of legitimate expectation, the 2<sup>nd</sup> interested party relied on the case of **Republic v Principal Secretary Ministry of Mining Ex-Parte Airbus Helicopters Southern Africa (PTY) Ltd (2017) eKLR.**

33. It was the 2<sup>nd</sup> Interested Party further submission that the argument by the respondent that only vulnerable victims should be exempt from paying for the medical services is contradictory to their argument of progressive realization of rights. It was further argued the respondents' citation of the case of **Seif Juma Mohammed (supra)** and **Francisca Njeri Mwangi (supra)** as erroneous as it shows how a criminal case can collapse without a P3 form and fails to address its argument on vulnerable victims.

## **I. 3<sup>rd</sup> Interested Party Submissions**

34. The 3<sup>rd</sup> Interested Party submitted that the actions of the 2<sup>nd</sup> respondent's agents in charging fees for issue of a P3 form are unconstitutional considering the economic standing of majority of the victims. It was further submitted that without a P3 form the victim would be denied access to justice due to loss of the evidential value contained in the P3 form.

## **J. The issues for Determination**

35. The issues for determination in this petition are as follows: -

- a) Whether the petitioner has established that the respondents are charging fees for issue and for filing P.3 forms in various government and county health institution and whether the practice is illegal and contrary to the Health policy 2014 – 2030.*
- b) Whether by charging the fees, the rights of the victims of the offences of assault, sexual based violence among others for access to justice have been violated.*
- c) Whether the petitioner is entitled to the reliefs sought.*
- d) Who among the parties will meet the costs of this petition.*

## **K. Jurisdiction**

36. The jurisdiction of this court is donated by **Article 165(1) of the Constitution** which establishes the High Court and vests in its vast powers including the power to **‘determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened’** and the jurisdiction **‘to hear any question respecting the interpretation of the Constitution.’**

37. **Article 23** provides that;

**“23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”**

38. In the case of **Ssemogerere & 2 Others Vs Republic** the court in addressing the issue of jurisdiction held: -

***The court is thus unreservedly vested with jurisdiction to determine any question as to the interpretation of any of the constitution, the court’s jurisdiction is unlimited and unfettered.***

It is therefore a fact that this court has jurisdiction to determine this petition.

## **L. The Law Applicable**

39. In interpreting the relevant articles of this constitution, this court will be guided by Articles 10 and 259(1) of the Constitution.

40. **Article 10 (1)** binds all state organs, state officers, public officers and all persons whenever any of them: -

- a) applies or interprets this Constitution;*
- b) enacts, applies or interprets any law; or*
- c) makes or implements public policy decisions.*

41. **Article 10 (2)** further provides that: -

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
- (c) good governance, integrity, transparency and accountability; and*
- (d) sustainable development*

42. **Article 259(1)** enjoins this court to interpret the Constitution 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*
- (d) contributes to good governance.*

43. Articles 185, 186 and 187 has distributed certain functions and responsibilities to the county and national government and in respect of this petition making the healthy policy. The county governments are charged with the promotion of primary health care and health facilities and pharmacies in their respective counties. Article 187 empowers the respective governments to transfer functions of power of government at one level to a government at the other level by agreement.

44. It ought to be noted that any function or power that has not been transferred falls within the concurrent jurisdiction of the two levels of government.

#### **M. The Analysis**

45. What is a P.3 form? A P.3 form is a Medical Examination Report Form used by the Police to make request for examination in medical facilities for victims of crime. The P3 form is used as evidence in criminal and sexual offences cases to support allegations of a victim that injuries were sustained in the course of the commission of the alleged crime.

46. The importance of the P3 form can be inferred from the outcomes following the tendering or otherwise of the report in a criminal or civil suit. In sexual offences cases in addition to the Post Rape form, and it is thus a vital document in the collection of evidence. The P3 form is thus a vital evidential document.

47. It has been submitted by the respondent that the fact that the P3 forms are marked as being free does not mean that the medical examination carried out on the victim should be free. It is the medical examination fee levied that the petitioner argues that it is arbitrary and illegal.

48. The petitioner and the interested party was contended that the medical practitioner who fills the P3 form is in most cases a government employee who is on a monthly salary from the government. It is also noteworthy that the service charge for the issuance of the P3 form in the Service Delivery Charter of the National Police Service is given as free service. Further the 2<sup>nd</sup> Interested Party further submits that the fact that the form are indicated as being free creates a legitimate expectation that the medical examination will also be free.

49. I disagree with the argument that the petition is merely speculative for the simple reason that it deals with events that have already taken place. The alleged violation of the rights to access to justice has been demonstrated by evidence that includes court rulings and judgments dismissing the cases for want of proof of injuries sustained by the victims.

50. In support of this argument, the petitioner and the 2<sup>nd</sup> Interested Party relied on the following decided cases where the principle was explained: -

**i. De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6<sup>th</sup>Edn. Sweet & Maxwell**

**ii. Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280**

**iii. R vs. Devon County Council ex parte P Baker [1955] 1 All ER**

51. The petitioner has annexed several affidavits of victims claiming that their rights have been violated in respect of the issue and filling of the P.3 forms. The first is one Bancy Karimi Njuki who was a complainant in Embu Criminal No. 503 of 2015 she paid Kshs. 1,200/= for filing of the P.3 form which was not receipted at Embu Provincial hospital. As a victim of assault, she expresses her struggle and pain in obtaining the P.3 form. The case was eventually dismissed because the doctor who filled the P.3 did not present himself to court to testify. Bancy condemns the levying of the fees as illegal and an impediment to access to justice.

52. One Martha W. Mwangi a victim of violence strenuously raised Kshs. 1,000/= for the filing the P.3 form. She avers that the prosecution on a second occasion withdrew her case for she could not raise the fee for the P.3 which was critical in proving the offence of assault.

53. On a third occasion, Martha reported another assault incident against her husband at Naivasha police station and had to pay Kshs. 1,000/= for the P.3 form. She laments that the fees levied is an impediment of the access of justice.

54. At the Coast General hospital, one Gatwiri Rosemary was charged Kshs. 1,500/= for filing of the P.3 form and was issued with receipt No.1946103 dated 27/10/2016.

55. Several receipts from different hospitals were attached to the petition where victims paid different amounts for filing of the P.3 forms ranging from Kshs. 100/= to 1,500/=.

56. The petitioner relied on Kitale HCCA No. 15 of 2011 where the High Court acquitted the appellant for lack of medical evidence overturning the conviction by the learned Principal Magistrate for lack of medical evidence.

57. The provision of the Embu County Finance Act, 2016, it was argued it does not recognize that it is a right of a victim to be provided with the P.3 form. It was recommended by the interested parties that the forms be kept at hospitals to make them more accessible to victims.

58. The petitioner annexed a report by FIDA(K), Kituo Cha Sheria and other organisations on “Violence Against Women and Children in Kenya” delivered in November 2008 in which it was acknowledged that: -

***The cost of filing P.3 form is also not standardised and varies from station to station. The Government should ensure that the***

*form is easily available and duly filled out and signed by the necessary official free of charge.*

59. The 3<sup>rd</sup> interested party supported the petitioner's petition that the respondents had violated the rights of victims of torture, domestic violence, assault and of sexual offences in Kenya. It was submitted that the compulsory requirement of a P.3 form which may take a long time to be issued and filled by the doctor at an affordable fee to most of the victims is unconstitutional and ought to be discarded.

60. It was further stated that the practice further hinders citizens from actualising their constitutional rights to access to justice. Their representations were supported by several annexures and including correspondences related to issuance and filling of P.3 forms.

61. Of interest is a letter from the Director of Medical Services addressed to All County Directors of Health sent through 3<sup>rd</sup> respondent dated 15<sup>th</sup> May 2018. The letter acknowledges that victims of assault, sexual offences and gender-based violence after being attended to at government health facilities are sent to the police surgery offices for filling of the P.3 forms. The letter stated in part: -

*This has led to prolonged agony to these victims for they have to be re-examined again and most of the time the injuries and evidence to be used in court are no longer there. The police surgery offices have only three doctors who have to see more than 60 patients daily in addition to testifying in court.*

*The result of this is congestion at the said offices and delay in cases, some of which are thrown out of courts for it is impossible for the doctors to testify in all the cases.*

*For the purpose of justice for these victims, I and hereby direct that the clinicians examining and treating the patients in your facilities must also fill the P.3 forms.*

62. In a letter by one Hon. Francis Gwama in charge of Health Services Kwale County addressed to all Medical Superintendents of medical facilities in the County dated 25<sup>th</sup> July, 2018, it was directed: -

*Please be notified that all gender based sexual and assault cases should be promptly handled and no fee charged. All p.3 forms related to the above should be filled free and other generations P.3s be paid and an official receipt obtained.*

*It is illegal for clinicians to solicit for cash for filling any P.3 form. Facilitation to attend court should be done by the facility.*

63. The 2<sup>nd</sup> interested party supported the petition and associated itself with the submissions of the petitioner. It also relied on the affidavit of Mercy K. Wambua an employee of the 3<sup>rd</sup> interested party. The 2<sup>nd</sup> respondent added that the cost of all documentation required in criminal cases is an impediment of the right to access to justice which requires to be addressed. It was further submitted that the powers of the Director of Public Prosecution conferred by Article 157(6) of the Constitution are a demonstration that the State has a responsibility of instituting and prosecution of all criminal cases as well as providing protection to victims with a view of preventing violation of their rights.

64. As such the P3 form issue and filling should be a cost to be met by the State and not the victim. The medical officers and clinicians are employees of the State who ought not charge an extra fee for filling P.3 forms.

#### **N. The Determination**

65. The respondent did not dispute the occurrence of the various incidents cited for levying of fees for filling the forms, the inaccessibility of the forms to victims, the variance of the fees charged by different county hospitals and other health institutions, the concerns raised in numerous reports of the National Assembly and other organisations dealing with torture and violence against men, women and children.

66. The respondents urged the court to give them time to develop the necessary policy on the issues related to accessibility and levying of fees of the P.3 forms. It was submitted that the policy docket is a preserve of the 2<sup>nd</sup> respondent who is ready and willing to prepare the necessary policy on P3 form matters in line with the recommendations in various reports by various organizations including the Ethics and Anti-Corruption Commission (EACC).

67. From the various incidents cited by the petitioner and the 3<sup>rd</sup> interested party which are not denied by the respondents the following observations may be made: -

*i. That the issue of P.3 forms challenges as outlined in this petition cuts across the board in this country.*

*ii. That the P.3 according to the 2<sup>nd</sup> respondent's charter is a free document for the victims of assault, sexual offences and gender based violence.*

*iii. That despite the document being free, there are some police stations who charge a fee of between Kshs. 100/= to Kshs. 200/= or thereabout to issue the form contrary to the provisions of the charter.*

*iv. That some government and county health facilities charge different amounts of money some of which are not receipted while a few others do not do so thus resulting in lack of uniformity.*

*v. That the 3<sup>rd</sup> respondent and the 1<sup>st</sup> interested party who are in charge of the health institutions in the country are aware of the*

*unlawful practices and have not taken the necessary action to stop the practice.*

*vi. That the 2<sup>nd</sup> respondent cannot be said to be unaware of the violation of its charter by some of its police stations who have over the years issued the P.3 forms at a fee however minimal.*

68. It is my view that the practice of charging fees for filling P.3 forms is the norm rather than the exception in most government and county health facilities. This is well supported by the evidence of the petitioner and that of the 3<sup>rd</sup> interested party.

*i. Is the Levy Illegal*

69. It was argued by the respondents that the charging by the health facilities of the fee for filling a P.3 form is authorised by the law and it is not illegal. The respondent relied on Article 209(4) of the Constitution which provides that: -

***The national and County Governments may impose charges for the services they provide.***

70. The respondent also argued that the petitioner did not produce evidence that its officers had charged any fee in regard to the P.3 form. It is my view that the evidence on oath of the victims which was not controverted was sufficient to demonstrate levying of fees by the respondents' officers.

71. It was the submissions of the respondent that the P.3 form maybe downloaded from the internet at minimal cost. I take judicial notice that a good part of the Kenyan population have no access to the internet due to various challenges including lack of electricity and the required machines and gadgets. This part of the population continues to pursue the hard copy P.3 form issued at the police stations. The P.3 form issue and filling fee is still unaffordable for most victims of crime.

72. A copy of the Police Charter was annexed stating that the P.3 form is a free document. It has further been established that there are some police stations who are in compliance with the charter and give the form free of charge. As for the health facilities run by the national and the county governments, some charge for filling, the P.3 form while some do not. The same facilities issue the Post Rape form free of charge whose purpose is complementary to that of the P.3 form to assist victims of rape and assault in their evidence in their criminal cases. The post mortem report in murder cases, the P.3 form for mental assessment and other forms are supplied by the state and the county governments free of charge.

73. The respondent did not explain why the levy of filling the P.3 form which is not based on any government policy and which is not charged by all its facilities, and also lacks uniformity in the amount of fees charged should be retained. The clinical officers and the doctors are salaried employees of the national and county governments. The government policy does not allow a salaried employee to charge fees for services rendered by the employee for his own benefit in the course of his/her official duties. This is supported by the fact that some levies are not receipted implying that the amounts paid by the victims may be going to individual officers who are on government salary.

74. I am in agreement with the respondent that Article 209(4) empowers the national the national and county governments to charge fees for services rendered. These charges must be done in accordance with the law and the relevant government regulations.

75. The respondent has admitted it has no policy in place governing fees and the filling of P.3 forms. There is no justification for the levy being made in some counties while it is not done in others. There must be legislation and regulations to facilitate implementation of any constitution provision such as Article 209(4). This court takes judicial notice that the national and county governments have in some cases implemented the provisions of Article 209(4) in other service areas other than filling of P.3 forms where the law has been complied with.

76. It was held in the case of **Republic Vs Attorney General & Another Exparte Waswa & 2 Others [2005] eKLR** that: -

***“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”***

77. The rationale for this doctrine was restated in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

***“...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”***

78. Considering the foregoing decision, I am convinced that the fee charged on the issue and filling of P.3 forms is illegal and that the victims of assault, sexual offences and related crimes are entitled to the benefits of the principle of legitimate expectation.

ii. Is the government obligated to protect or give assistance to victims?

79. The petitioner relied on **Article 50 of the Constitution** and the preamble of the Victims Protection Act No. 17 of 2014.

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

80. The 2<sup>nd</sup> and 3<sup>rd</sup> interested parties annexed judgments and rulings of some criminal cases in various courts. A perusal of the said cases affecting victims of assault and sexual offences.

81. The victims contend that their cases were dismissed either for lack of medical evidence, specifically the P.3 form or for the reason that the doctor was not available to give evidence. The Petitioner's evidence included the affidavit of a victim whose case had to be withdrawn because she was not able to meet the cost of filling of the P.3 form. The same deponent who was a victim of domestic violence explained her anguish and struggle to meet a similar cost in two other incidents.

82. It is important to note that the 3<sup>rd</sup> respondent has a health policy in place known as the Kenya Health Policy, 2014-2030 aimed at ensuring significant improvement in the overall status of health in Kenya in line with the Constitution of Kenya, the country's long term agenda, Vision 2030 and with global standards. The constitution obligates the state and every state organ to observe, respect, protect promote and ensure enjoyment of the Bills or rights and to take legislative measures including the setting of standards to achieve the progressive realisation of those rights.

83. It is therefore the constitutional duty of the 3<sup>rd</sup> respondent to ensure that it has an all-inclusive health policy that must be complied with by all its health institutions including the county governments. The 2<sup>nd</sup> respondent has left the county governments to legislate on matters, some of which are against its policy and against the policy of other government ministries and institutions in matters of health. An example is the levying of charges for filling the P.3 form in respect of which the 3<sup>rd</sup> respondent has expressed itself that it is free service since the doctors and the clinicians tendering the services are salaried employees.

84. The petitioner annexed evidence of the various levies legislated upon by the county government, for example, Kiambu, Narok, Embu, ranging between Kshs. 500 – 1500/=.

85. The 3<sup>rd</sup> respondent has also given exemptions to the filing of P.3 form fees to victims of some crime counties like Kwale in exclusion of others. These selective exceptions are not in line with the current health policy and is discriminative which is prohibited under Article 27 of the Constitution. If such a practice is allowed to continue contrary to the provisions of the Constitution and government policy, it is likely to lead to violation of the basic principles of the rule of law.

86. Article 27(4) enjoins the state not to discriminate directly or indirectly against any persons on other grounds specified therein. The court has a duty to ensure that law and order are maintained for the good of all citizens irrespective of the status in order to create a conducive environment for enjoyment of fundamental rights and individual freedoms.

87. The **Victim Protection Act, 2014** pronounces its purpose in its preamble as follows: -

***An Act of Parliament to give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes.***

88. The law was purposed to help the victims of crime and abuse of power. The assistance included providing better information and support services to vulnerable victims. Such services are explained in Section 2 of the Act as "**all services offered to the victim of the offence to secure restoration of their emotional, mental, physical, legal or economic status from any harm occasioned by the offence committed**".

89. **Section 4(2)(g)** provides for the victim to be accorded "**legal and social services of his or her own choice .....**"

90. The Act generally provides for the rights of the victim including fair hearing, protection, legal representation among other benefits.

91. It is my view that the enactment of the Act was informed by the awareness of the State that it has a constitutional duty to protect its citizens and to ensure the realization of their rights under the Bill of Rights.

92. The right to information under the Victims Act includes all the material that a victim may need in the prosecution of his case against the perpetrator. It is my considered view that, a P.3 form is part of this vital information that will be needed in proof of criminal cases of assault and sexual offences

(iii) Has the Respondent violated the rights of the victims herein?

93. The State has an obligation under the Constitution to ensure that the victim of a crime enjoys his right to a fair hearing under Article 50 and the right to access justice under Articles 48 of the Constitution.

94. In this regard, several victims of crime have demonstrated that their cases have been dismissed for lack of proof for the reason that the

P.3 form was not produced, or that the doctor was not available to testify even after the fee for filling the P.3 form has been levied. Some complaints lodged with the police by the victims never saw the light of the day because the victims could not afford the fees for filling the P.3 form charged different in health facilities. The 3<sup>rd</sup> respondent has for a long time not acted to rectify the situation.

95. It has been established that the 2<sup>nd</sup> respondent has not moved to stop the illegal actions of its officers who have been issuing the P.3 form to victims at a fee despite the fact that it has been declared free service under its charter.

96. The 1<sup>st</sup> respondent is the Principal Legal Advisor of the Government and is in charge of advising various national government ministries in areas of need. The issue of the P.3 form affects many Kenyans citizens on daily basis in this country and it is unfortunate that the 1<sup>st</sup> respondent has not taken any action in full view of the violation of the rights of victims. The agony, the pain and mental anguish suffered by the victims is beyond measure in their pursuit of obtaining medical evidence in their cases. This is indeed a major hindrance to access to justice.

97. In view of the foregoing, I reach a conclusion that the respondents by their separate acts or omissions have violated the right to access to justice of the victims in this petition contrary to **Article 48 of the Constitution**.

98. It is not in doubt that the 3<sup>rd</sup> respondent has a duty to comply with the constitutional provisions as to its responsibilities as set out in Article 187 of the Constitution. The Health Policy of the Nation Government binds all the respondents in their respective dockets and equally binds the county health institutions. The 3<sup>rd</sup> respondent is under a duty to enforce compliance with its policy.

99. In regard to the prayer for compensation of victims, I am of the view that a host of victims have suffered the violation of their rights to access to justice and fair hearing. The few who have been named in the petition may just be a tip of the ice bag. The victims did not adduce evidence as to the damage suffered and the quantum thereof.

100. I do not find any basis of granting said prayer and it is hereby declined.

101. It is my finding that the petition is successful and it is hereby allowed on the following terms: -

*i. That a declaration do hereby issue that the respondents are jointly and severally in violation of the basic principle of access as to justice in levying of fees for issue and for filling of the Medical Examination Form popularly known as P.3 form.*

*ii. That a declaration do hereby issue that the Medical Examination Form, that is the P.3 form or any form required or issuable to victims of crime is free of charge and that no levy shall be imposed.*

*iii. That an order of prohibition do hereby issue prohibiting the respondents, their agents or any medical officers in charge of public health facilities at both levels of government from levying fees for issue or for filling of the Medical Examination Forms (P.3s).*

*iv. That this being a public interest litigation, there will be no order as to costs.*

102. It is hereby so ordered.

**DELIVERED DATED AND SIGNED AT EMBU THIS 4<sup>TH</sup> DAY OF APRIL, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Njoroge for Petitioner**

**Mr. Siro for the Respondents**

**Mr. Abubakar for 2<sup>nd</sup> Interested Party**

**Ms. Kihuria h/b for Mr. Kilonzi for 3<sup>rd</sup> Interested Party**