



**LNW v Kumba & another; Kenya Medical Practitioners and Dentist Council
(Interested Party) (Petition E366 of 2023) [2025] KEHC 16534 (KLR)
(Constitutional and Human Rights) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E366 OF 2023
LN MUGAMBI, J
NOVEMBER 13, 2025**

BETWEEN

LNW PETITIONER

AND

DR.LAZARUS OMONDI KUMBA 1ST RESPONDENT

LADNAH HOSPITAL 2ND RESPONDENT

AND

**KENYA MEDICAL PRACTITIONERS AND DENTIST
COUNCIL INTERESTED PARTY**

JUDGMENT

Introduction

1. The Petition dated 19th September 2023 is supported by the Petitioner’s affidavit in support of equal date and a supplementary affidavit sworn on 29th April 2024.
2. The Petitioner’s main grievance is that the Respondents inattentively handled the Petitioner during uterus removal surgery and caused the removal of her ovaries without her consent. The Respondents’ actions are said to have been in violation of her constitutional rights under Articles 2, 19, 20, 21, 22, 23, 28, 29 (d), (f), 43 (1) (a) of *the Constitution*.
3. The Petitioner as a result seeks the following reliefs against the Respondents:
 - a. A declaration that the Petitioner’s constitutional rights protected under Articles 2, 19, 20, 21, 22, 23, 28, 29 (d), (f), 43 (1) (a) of *the Constitution* have been violated.



- b. A declaration that the Petitioner's rights as protected under Articles 3, 4, 5, 6,7 and 16 of the African Charter on Human and People's Rights have been violated.
- c. General damages for violation of the Petitioner's Constitution rights and rights under African Charter on Human and People's Rights.
- d. Costs of the Petition.

Petitioner's Case

4. For context, the Petitioner stated that she was diagnosed with fibroids in the year 2013 at Mama Lucy Kibaki Hospital where she had been going for treatment since the year 2010. Following a medical diagnosis, she was admitted in hospital on 15th March 2016 for surgery to remove fibroids and cysts and that operation was successful.
5. She depones that the removed cyst was then taken to Lancet Laboratory to ascertain whether or not it was cancerous. The tests confirmed that it was non-cancerous prompting her to be discharged from the hospital on 20th March 2016.
6. In November 2018; she developed pain and bleeding and went back to Mama Lucy Kibaki Hospital. The medical tests conducted showed that fibroid growth had resurfaced and that explained the bleeding. She was recommended for surgery to remove her uterus. However, since there was no blood in the Hospital at that time, she could not be admitted.
7. This situation persisted up until June 2019 when she resolved to seek medical treatment at Kenyatta National Hospital. The tests confirmed similar results as those of Mama Lucy Kibaki Hospital. The Petitioner depones that she went back to Mama Lucy Kibaki Hospital with the results and sought urgent treatment.
8. During her visit to Mama Lucy Kibaki Hospital on 1st August 2019, she was attended to by the 1st Respondent (Dr. Lazarus Omondi Kumba). He indicated that he would do the surgery but at another hospital because it was going to take long to secure an admission at the Mama Lucy Kibaki Hospital.
9. As such, he referred her to the 2nd Respondent and assured her that the surgery cost would be catered to by NHIF.
10. At the 2nd Respondent, preliminary procedures such as signing the consent form for removal of her uterus and service agreement were done. A Dr. Kariuki, conducted a pre-anesthetic assessment which indicated that she was stable for surgery.
11. Thereafter, the 1st Respondent performed the surgery. The following day, the 1st Respondent visited her with a bowl that contained the organs he had removed during surgery.
12. The 1st Respondent informed her that he had removed the uterus and a single ovary and this shocked her. This is because the previous tests that had been conducted at Mama Lucy Kibaki Hospital showed that her ovaries were fine.
13. She states that the 1st Respondent further asked her to pay Ksh.20, 000 so that the specimens can be sent to South Africa for further tests. He added that she would only be discharged once this payment was made. The Petitioner was confounded as all her previous test had been conducted at Lancet Laboratory. Furthermore, the 1st Respondent directed her to be attending his Clinic instead of Mama Lucy Kibaki Hospital at the cost of Ksh.3800 for each consultation.



14. She states that she sent her sisters to pay the 1st Respondent Ksh.14, 000. The sisters and were then informed by the 1st Respondent that he had removed both ovaries and the uterus contrary to what he had told the Petitioner. The balance of Ksh.6000 was paid via Mpesa.
15. The Petitioner asserts that the 1st Respondent did not attend to her again and was discharged on 4th August 2019 by the 2nd Respondent.
16. A few days later, the Petitioner became very sick and contacted the 1st Respondent on 6th August 2019. He advised her to go to his Clinic at Reinsurance Plaza in Nairobi. She states that she visited the Clinic but the 1st Respondent was not there, her wound was instead dressed by the lady who was at the Clinic.
17. Her condition worsened and she had to be rushed to Mama Lucy Kibaki Hospital on 9th August 2019.
18. She went back to Mama Lucy Kibaki Hospital on 22nd August 2019 and met the 1st Respondent. He harshly told her to collect the test results from the 2nd Respondent, take them to his Clinic and to pay consultation fee. She did so, on 30th August 2019.
19. While there, she also enquired about her test results from South Africa. However, the same had been signed off by the 1st Respondent and an attempt to call him to find out how the results came out was futile.
20. The Petitioner returned to Mama Lucy Kibaki Hospital on 27th September 2019 and sought to see a gynecologist. Dr. Igambo who attended to her. The doctor was puzzled that her uterus and both ovaries had been removed despite her medical records showing they were both fine.
21. As a result, he referred the matter to the Hospital Chief Executive Officer, Dr. Musa who directed that she writes a statement. Her further attempt to contact the 1st Respondent was unsuccessful.
22. In the light of the above, she lodged a complaint with the Interested Party (Kenya Medical Practitioners and Dentist Council) on 26th March 2021 which upheld the decision of the Committee and issued the following orders on 28th September 2021:
 - i. Dr. Lazarus Omondi Kumba be and is hereby admonished for failing to take a proper consent for the procedure.
 - ii. Dr. Lazarus Omondi Kumba be and is hereby admonished for failing to carry out the necessary diagnostic and pre-operative tests before taking the patient to theatre.
 - iii. Dr. Lazarus Omondi Kumba do initiate mediation with the view to compensate the complainant and thereafter inform the chair of the Kenya Medical Practitioners and Dentists Council within sixty (60) days from the date hereof.
 - iv. Dr. Lazarus Omondi Kumba do pay a fine of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/) within Thirty (30) days from the date hereof.
 - v. In the event of non-compliance with the directions in (iii) and (iv) above the Kenya Medical Practitioners and Dentists Council shall be at liberty to suspend, withdraw or cancel the respondent's practice license.
23. The Petitioner depones that on 30th November 2021; she wrote to the Interested Party and informed it that the 1st Respondent never reached out to her following its Ruling. This was followed up by a Demand letter issued to the Respondents on 15th February 2022 by her Counsel seeking that they admit liability so that they could amicably compute the compensation due to her. It is noted that this letter was equally disregarded by the 1st Respondent and not responded to.



24. The Petitioner argues that as a result of the 1st Respondent's actions, she has become reliant to pressure medication. This has in turn led to a significant reduction in her libido, profoundly impacting her sex life. She informs that this led to her separation with her partner in the end. In addition, she has suffered depression necessitating treatment since 25th November, 2022.
25. Additionally, she faults the 2nd Respondent for failing to instill proper measures to deter such acts of the 1st Respondent. She contends further that the 2nd Respondent did not disclose that it was independent of the 1st Respondent in terms of liability. This is even more so in light of the fact that she paid the 2nd Respondent for the services. In fact, she postulates that if it were not for her complaint to the Interested Party, the 2nd Respondent would have not suspended the 1st Respondent.
26. Consequently, she asserts that the Respondents actions have contravened her constitutional rights and further that both are equally liable for the impugned acts. She adds that their actions went beyond negligence as claimed since they violated her constitutional rights. This she states could not have been ventilated before the Interested Party or be addressed through an ordinary civil suit.

1st Respondent's Case

27. In reaction to the Petition, the 1st Respondent filed a Notice of Preliminary Objection dated 14th November 2023 on the basis that:
 - i. Section 4(2) of the *Limitation of Actions Act* (Chapter 22, Laws of Kenya) provides that an action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action arose.
 - ii. The Petitioner's claim against the 1st Respondent is premised on the tort of negligence and the cause of action arose on 1st August, 2019.
 - iii. The claim against the 1st Respondent is statute barred as it has been brought after more than three (3) years from the date on which the cause of action arose.
 - iv. Accordingly, the Court lacks jurisdiction to hear and determine the case.
28. Correspondingly, the 1st Respondent filed his Replying Affidavit sworn on 29th February 2024. To begin with, he depones that he is a qualified and registered doctor with the requisite professional and practice qualifications.
29. He asserts that the Petition is an abuse of the Court process as is founded on a claim of the tort of negligence disguised as a constitutional petition. As such, he argues that the claim is time barred by virtue of Section 4(2) of the *Limitation of Actions Act*. That this Court thus lacks jurisdiction to entertain the instant Petition.
30. He further argues that the Petition does not sufficiently state how the fundamental rights and freedoms were violated. Nonetheless, he contends that he is not a government agency for violation constitutional rights to be sought against him.
31. He depones that when he attended to the Petitioner on 1st August, she had been bleeding from the uterus for one year owing to the uterine fibroids. Reiterating the facts outlined by the Petitioner, he avers that since the Petitioner could not secure admission at both Kenyatta National Hospital and Mama Lucy Kibaki Hospital, he recommended her to seek treatment at the 2nd Respondent which is a private hospital.



32. He informs that when the Petitioner arrived at the 2nd Respondent she was informed that her NHIF cover only caters for the surgery and thus the other tests would have to be catered personally by her. He notes that upon explaining the nature of surgery, the Petitioner consented for the surgery of removal of the uterus.
33. He undertook the surgery on 1st August 2019. During the procedure he did not find fibroids but instead tumors on both her ovaries. He avers that he decided to remove both ovaries and the uterus since they could be cancerous. He informs that he did so since the Petitioner was already under anesthesia and could not give further consent.
34. He depones that he informed the Petitioner of the same the following morning. Additionally, he advised her that they needed to carry out tests for histology. He states that he took the specimen samples to a private pathologist who carried out the test.
35. The 1st Respondent avers that he was called from Mama Lucy Kibaki Hospital and informed that the Petitioner had gone to complain of his absence. He avers that he released the test results to the hospital. He did not meet her after.
36. He states that he directed the Petitioner to visit him thereafter at Mama Lucy Hospital or at his clinic. He accuses the Petitioner of failing to visit the Clinic in a timely manner. Also did so without an appointment and came at odd times when he was not present. He alleges that the Petitioner choose to go back to Mama Lucky Kibaki Hospital where she was attended to by other gynecologists.
37. Furthermore, he avers that the Petitioner published false information with media houses against him while demanding compensation. In addition, he states that the Petitioner lodged a complaint with the Hospital which ruled against him. He alleges that the Petitioner never paid him the Ksh.20, 000 for the tests.
38. The 1st Respondent depones that while what happened to the Petitioner was unfortunate, he is not guilty of negligence on his part. First, since not all medical procedures that are subject to complaints are as a result of a doctor's negligence. Secondly, that the procedure was done within the required degree of care and skill. Finally, that any other reasonable man would have done the same in his position.

2nd Respondent's Case

39. The 2nd Respondent's Chief Executive Officer, Dr. Kanyenje Karangaita Gakombe filed its Replying Affidavit sworn on 8th March 2024.
40. He depones that the 2nd Respondent offers quality medical services through its professionally qualified personnel. He states that patients are primarily admitted either by the hospital and referred to as hospital patients or through a private medical consultant and referred to as private patients.
41. It is deponed that the 1st Respondent is not an employee of the 2nd Respondent but an independent contractor consultant Obstetrician-gynecologist, with admitting rights at the 2nd Respondent. As such, he informs that the Petitioner was admitted by the 1st Respondent on 1st August 2019, as a private patient.
42. He avers that the Petitioner's intended procedure according to the documented history and informed consent form signed by the 1st Respondent was for removal of the uterus. Moreover, the Petitioner was also required to sign the Hospital's Service Agreement.



43. He informs that the 2nd Respondent is only required to provide proper hygiene and adequate theatre and medical facilities, which it did throughout. He avers that the 2nd Respondent only bills for these services not the surgery fees.
44. It is claimed that the surgery was done successfully and Petitioner discharged on 3rd August 2019. The removed organs are said to have been collected, signed and taken away by the 1st Respondent according to the Hospital register. He points out that the Hospital was not instructed to handle any testing thereafter or disposal of the specimens. Furthermore, he states that the Petitioner's hospital bill was catered for by NHIF.
45. He depones that later on the Interested Party called for the medical records of the Petitioner in this matter, which it availed. He notifies that following the Petitioner's complaint to the Interested Party, the 2nd Respondent suspended the 1st Respondent's admission rights and exited him from its e-system till date.
46. In view of the foregoing he emphasizes that the Petitioner was a private patient and never requested the 2nd Respondent for a different specialist. Equally, it is noted that the Petitioner never complained about the services offered by the 2nd Respondent. He contends that the 2nd Respondent did not in any way violate the Petitioner's constitutional rights as alleged.
47. He stresses that the 2nd Respondent, relied in good faith and in the normal course of a consultancy relationship on the 1st Respondent's professional expertise. He states that the complaint to the Interested Party advisedly against the 1st Respondent of Mama Lucy Kibaki Hospital only not the 2nd Respondent (which it has no connection with). In the end, it is noted that the Committee did not reach an adverse finding against the 2nd Respondent.
48. He asserts that the 2nd Respondent is not vicariously or otherwise liable to the Petitioner for any of the impugned acts on the part of the 1st Respondent. Accordingly, he argues that the Petitioner has no justifiable cause of action against it.
49. He proclaims further that the Petitioner ought to have pursued enforcement of the Interested Party's decision by way of an ordinary suit. He avers that the claim being a tort has unnecessarily been elevated to a constitutional petition. He concludes that the Petition ought to be dismissed with costs.

Interested Party's Case

50. This Party's response to the Petition is not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

51. The Petitioner through its Counsel Magee Law LLP filed submissions dated 24th and 25th June 2024. Counsel highlighted the issues for discussion as: whether the suit is time barred by virtue of Section 4 (2) of the Limitation of Action Act, whether the Petitioner should have filed an ordinary civil suit instead of the Petition herein, whether a non-governmental institution can be sued for constitutional violations, whether *the constitution* rights of the Petitioner violated and what is the quantum of damages payable.
52. Counsel submitted in the first issue, that the allegation was unfounded as there is no time limit for filing constitutional petitions. Counsel submitted that this Petition primarily resolves around enforcement of the Petitioner's fundamental rights and freedoms.



53. To buttress this point reliance was placed in on *Bon Opondo & 441 others v Chinese Overseas Engineering Group Company Limited (COVEC) & 3 others* [2021] eKLR where it was held that:

“In our view, subject to the limitations in Article 24 of *the Constitution*, fundamental rights and freedoms cannot be tied to the shackles of Limitations Act. However, each case is to be decided on its own merit.”

54. Turning to the second issue, Counsel submitted that the acts complained of by the Petitioner go beyond a mere civil suit of negligence. Counsel stressed that the act of removing the Petitioner’s ovaries without her consent violated her constitutional rights as outlined in the Petition. It was noted that Article 258 of *the Constitution* grants every person the right to institute proceedings claiming that *the Constitution* has been contravened.

55. Reliance was placed in *Mumo Matemua vs. Trusted Society of Human Rights Alliance & 5 Others* [2013] KEHC 1569 (KLR) where it was held that:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*.”

56. On the third issue, Counsel answered in the affirmative. Counsel submitted that Article 20 (1) of *the Constitution* makes it plain that the Bill of Rights applies to all and binds all state organs and all persons. Equal reliance was placed in *Attorney General v Kituo cha Sheria & 7 others* [2017] eKLR where it was held that:

“rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

57. Flowing from this, Counsel submitted in the fourth issue that indeed the Petitioner’s rights had been violated by the Respondents. Particularly, Counsel submitted that the Respondents by removing her ovaries without her consent violated Article 28 of *the Constitution* and Article 4 of the African Charter on Human and People Rights, thus affecting her ability to conceive and bear children. This action is argued to also be contravention to Section 9 of the *Health Act*. Reliance was placed in *MAO & another v Attorney General & 4 others* [2015] eKLR where it was held that:

“The right to health and the right to dignity are inextricably related. In providing health care of acceptable quality, health care institutions must respect the dignity of their patients. They must also be responsive to the needs of their patients and provide acceptable care. In



this situation, when patients are not given care that affords them the right to dignity, it can negatively affect their well-being."

58. Counsel further argued that the Respondents violated Article 29 of *the Constitution* and Article 5 and 6 of the African Charter on Human and People's Right. This is because of the psychological and emotional torture the Petitioner was exposed to following the 1st Respondent's act of removing her ovaries. It is stated that the 1st Respondent deceived the Petitioner into being admitted at the 2nd Respondent. Equally it was argued that there was no counseling following the surgery. In addition, the 1st Respondent ignored the Petitioner when she needed her test results. It was argued that all these amount to cruel, inhuman or degrading manner.
59. Dependence was placed in Irene Wangari Gacheru & 6 others V The attorney General [2017]eKLR where it was held that:
- "The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word torture is often used to describe in human treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him on an act against his will or conscience. "
60. Like dependence was placed in Joseph Njuguna Mwaura and 2 Others v R [2013] eKLR.
61. Similarly, Counsel submitted that the Petitioner's right under Article 43 of *the Constitution* and Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) were also violated. This is because her right to access reproductive health was violated by the Respondents' act of removing her ovaries. This resulted in her permanently being unable to bear children. As such, the Respondents are accused of failing to protect this right.
62. Reliance was placed in PAO & 2 others v Attorney General; Aids Law Project (Interested Party) [2012] eKLR where it was held that:
- "A fundamental human right indispensable for the exercise of other human rights" and "[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."
63. In light of this, Counsel submitted that the Petitioner had met the threshold outlined in Anarita Karimi Njeru v Attorney General [1979] KLR 154 in this case and so prays that the Court grants the orders sought.
64. Additional reliance was placed in Trusted Society of Human Rights Alliance (supra) and Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR.
65. On the quantum of damages, Counsel submitted that the Court in W.J & another v Astarikoh Henry Amkoah & 9 others [2015]eKLR awarded Ksh.2,000,000 in damages while in SWK & 4 others v Médecins Sans Frontiers - France & 5 others; Secretariat of the United Nations Programme on HIV/AIDS (UNAIDS) Secretariat & 2 others (Amicus Curiae); International Community of Women Living with HIV (ICW) & another (Interested Parties) (2023) KEHC 22424 (KLR), Kshs. 3,000,000 which are similar cases. Like dependence was also placed in JOO (also known as J M) v Attorney General & 6 others [2018] eKLR where a sum of Ksh. 2,500,000 was awarded.



66. Guided by this, Counsel submitted that an award of Ksh.4,000,000/- in this matter would be sufficient as damages for violation of the Petitioner's constitutional rights.

1st Respondent's Submissions

67. Lesinko Njoroge and Gathogo Advocates on behalf of the 1st Respondent filed two sets of submissions dated 28th June 2024 and 2nd December 2024. The issues for discussion addressed in both were: whether the Petitioner's claim is statute-barred and preliminary objection merited, whether the Petitioner's constitutional rights were violated by the 1st Respondent and whether the Petitioner is entitled to any of the orders sought.

68. In the first issue, Counsel submitted that the Petitioner's claim is one of negligence disguised as a constitutional petition. It was stressed that this Court is called to adjudicate on whether or not the 1st Respondent was negligent. For this reason, it was argued that the Petition is time barred in view of Section 4(2) of the *Limitation of Actions Act*. Counsel pointed out that the instant Petition had been filed 4 years and 2 months late.

69. To buttress this point reliance was placed in Janmohammed (SC) (Suing as the Executrix of the Estate of t_he Late H.E. Daniel Toroitich Arap Moi) & another v District Land Registrar Uasin Gishu & 4 others [2024] KESC 39 (KLR) where it was held that:

“The argument that a constitutional petition such as this one, automatically ousts the provisions of the *Limitation of Actions Act*, is not legally tenable. There is not/zing on record to show that the 2nd respondents provided any explanation for the delay beyond stating that theirs was a constitutional petition and not a claim based on statute.”

70. Like dependence was placed in Bon Opondo & 441 others (supra) and Safepak Limited -vs-Henry Wambega & 11 others (2019) eKLR.

71. Furthermore, it was argued that the Petitioner in by passing this provision was guilty of invoking the doctrine of constitutional avoidance. Reliance was placed in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where it was held that:

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis... I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

72. On this premise, Counsel argued that this Court lacks jurisdiction to entertain this suit as issues raised herein ought to have been dealt with in a normal civil suit. As such, the 1st Respondent's Preliminary Objection is reasoned to be merited. To buttress this point reliance was placed in Christine Mwambua v Parliamentary Service Commission (2018) eKLR where it was held that:

“The facts here are hotly contested hence it would not be prudent to resolve issues in contestation based on affidavit evidence. The matter is best resolved through a trial on merit where evidence will be called and witnesses cross-examined.”

73. Equal dependence was placed in Koinange Investment & Development Ltd v Nairobi City County Government & another; Koinange & another (Interested Parties) [2023] KEELC 18037 (KLR) and State v Titus Kipchirchir Kurui [2022] eKLR.



74. On the second issue, Counsel commenced by submitting that it is not enough to just state that a violation of *the Constitution* has occurred. The Petitioner has to prove that the constitutional violation occurred as held in *Andrew Laird White vs. Director of Criminal Investigations & 2 Others; Betty Tett & Another (Interested Parties) [2019]eKLR*. In this matter, Counsel submitted that the Petitioner had failed to do so.
75. Counsel added that the 1st Respondent in carrying out the procedure was not rash and undertook the expected inquiries as is evidenced in the affidavit. He notes that the Petitioner after being explained for the procedure voluntarily signed the Service Agreement and Informed Consent Form.
76. Counsel stressed that whereas it would be prudent that the consent of a patient be sought and obtained before medical procedures are carried out, the mere fact that a particular procedure is undertaken even where such consent is required and not obtained would not necessarily make the doctor negligent and liable in damages. In these circumstances, Counsel argued that the 1st Respondent's actions were justified and further the same was explained to the Petitioner the day after the surgery.
77. Counsel relied in *Herman Nyangala Tsuma -vs- Kenya Hospital Association T/a The Nairobi Hospital & 2 Others (2012) eKLR* where it was observed that:
- “It is not enough to state that some doctor or a team of doctors of greater or equal skill and knowledge have said so, or would have prescribed a different way of treatment, or is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, although a body of adverse, opinion also existed along medical men.”
78. Comparable reliance was placed in *BK v TD Patel & another (2014) eKLR*.
79. On the final issue, Counsel submitted that the Petitioner having failed to prove her allegations was not entitled to the reliefs sought. That said, Counsel reasoned that should the Court find that the Petitioner is entitled to general damages, an award of Kshs.250,000/- would be sufficient as was awarded in *Shiverenje Simani v Star Newspaper & another [2021]eKLR*.

2nd Respondent's Submissions

80. On 8th April 2025, the 2nd Respondent through Adera and Company Advocates filed submissions and outlined the issues for discussion as: whether the Petition fatally offend the doctrine of ripeness and constitutional avoidance, whether the Petitioner has any justiciable cause of action against the 2nd Respondent, whether the Petitioner's rights were violated and what is the quantum, if any, of general damages.
81. On the first issue, Counsel submitted that the suit revolves around removal of the Petitioner's ovaries. It was noted that the 1st Respondent was to obtain payment for the services through NHIF. Thus the relationship between the parties was one of doctor-patient flowing out of a private commercial contract. Equally, Counsel submitted that the matter herein is a tort of negligence which ought to have been handled by way of a civil suit not a constitutional petition. Being a tort, it is argued that the same is



statute barred. Reliance was placed in *Omar-Vs-Attorney General 3 Others* (2024) KEHC 6181 KLR where it was held that:

“The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system.”

82. Equal dependence was placed in *Maya Duty Free Ltd V Attorney General & Anor* 2019 KEHC 6745 (KLR).

83. Counsel moving on submitted that the Petition does not raise any reasonable cause of action against the 2nd Respondent. This is because the 1st Respondent carried out the impugned surgery not as an employee of the 2nd Respondent but as an independent contractor with admission rights in the Hospital. It was stressed that the 1st Respondent met the Petitioner at Mama Lucy Kibaki Hospital where he offered his services.

84. Additionally, it was noted that the complaint before the Interested Party solely concerned the 1st Respondent. Counsel stressed that throughout, the 1st Respondent maintained the exclusive decision making in the manner he carried out the impugned surgery and care thereafter such as carrying out of further tests on the uterus. On this basis, Counsel stressed that the 2nd Respondent cannot be held vicariously liable for the 1st Respondent’s actions.

85. Reliance was placed in *Herman Nyangala Tsuma*(supra) where it was held that:

“On the issue whether the 1st defendant is vicariously liable for acts of the 2nd and/or 3rd defendant, it is clear that the 2nd defendant was employed by the 1st defendant. The second defendant was not an independent contractor. That he was a locum or was in temporary employment is neither here nor there ... He for example had no admission rights and was reporting to the 1st defendant. I therefore have no difficulty in finding that the 1st defendant is vicariously liable for the acts and omissions of the 2nd defendant.

... The position that was taken by Denning, LJ in *Cassidy vs. Ministry of Health* [1951] 2 KB 342 at 359 was that the liability of doctors on the permanent staff dependent on this: “Who employs the doctor or surgeon - is it the patient or the hospital authorities? If the patient himself selected and employed the doctor or the surgeon, the hospital authorities are not liable for his negligence, because he is not employed by them. Accordingly, in the present matter the 1st defendant would not be liable for Dr Chungé’s actions.”

86. Counsel in the next issue argued that since the matter stems from a common law tort and Petitioner failed to raise a reasonable constitutional issue against the 2nd Respondent, the Petition fails the test set out in *Anarita Karimi Njeru* (supra).

87. Finally, Counsel submitted that the Petitioner had failed through medical evidence to prove the alleged side effects following the surgery. According to Counsel, no nexus whatsoever had been established between the surgery and the complaints that had been alleged. Considering this, it was argued that the reliefs were unwarranted. That said, Counsel stated that should the Court find merit in this matter, an award of Ksh. 600,000 as can be gleaned in the case of *Lucy Njeri Ngugi & Anor, v Avenue Healthcare Ltd & 2 Others* (20181 KEHC 7297 (KLR) would be sufficient.



Interested Party's Submissions

88. Kounah and Company Advocates for this party file submissions dated 11th November 2024 and underscored the issues for determination as: whether or not there was a violation of the Petitioner's rights under *the Constitution* of Kenya and International instruments and what legal considerations do the Courts make in granting damages in constitutional petitions.
89. Counsel on a preliminary note submitted that the Interested Party received a complaint from the Petitioner on 4th February 2020 concerning the Respondents' actions. This instigated commencement of Disciplinary Cause No.11 of 2020 against the 1st Respondent following their investigations. Counsel noted that after consideration of the issues before it, the Interested Party found in favour of the Petitioner and attendant orders issued.
90. On the first issue, Counsel submitted that the Petitioner is entitled to enforce any other rights recognized or conferred by law as envisaged under Article 19(3)(a) of *the Constitution*. According to Counsel the essence of the Petitioner's case is recognition that the highlighted right violations occurred, that remedies such as compensation and orders to cease harmful activities that may influence policies that prevent future violations and deterrence to ensure state authorities or any actors at all do not repeat these same violations. To achieve the same, Counsel stated that the Petitioner bears the onus of proof as held in *Leonard Otieno V. Airtel Kenya Limited* [2018] eKLR. Like dependence was placed in *Mumo Matemo* (supra).
91. Counsel concerning violation of the Petitioner's rights highlighted the case of *S V Makwanyane and Another* [1995] ZACC 3 where it was observed that:
- “The rights to life and dignity are the most important of all human rights, and the source of all other personal rights ... By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others...the importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.”
92. Counsel submitted that according to the Interested Party, the results of the Respondents actions caused the Petitioner psychological and emotional torture following removal of her ovaries which in turn permanently affected her reproductive health. This was argued to be in violation of her right to dignity. Counsel noted that the Interested Party in its Ruling determined that the 1st Respondent did not exercise his discretion properly and for the benefit of the patient as such the Interested Party found him culpable. It was argued that if a doctor does not act with reasonable care and skill in dealing with a patient, it amounts to negligence.
93. Reliance was placed in *LAW ft 2 others vs Marura Maternity ft Nursing Home ft 3 others*; *International Community of Women Living with HIV (ICW) (Interested Party)*; *Secretariat of the Joint United Nations Program on HIV/AIDS ft 2 others (Amicus Curiae)*(Constitutional Petition 606 of 2014) [20221 KEHC 17132 (KLR)] where it was emphasized that:
- “A healthcare provider was the custodian of the information that facilitated a patient's informed consent. That information was always not readily available to patients. It was indeed a fact that in most cases there was a grave imbalance of knowledge and information between the healthcare provider and the person receiving the professional services. As such, a



healthcare provider was under an obligation to ensure that such information was accurately broken down and communicated to the patient and in a language that the patient or user understood."

94. Comparable dependence was placed in *R. Vs Bateman* 1925 94 L.J. K.8. 791 and *Pope John Paul's Hospital & Another V. Bahr Kosozi* (1974) E.A. 221.
95. On grant of the award of damages, Counsel submitted that the same is discretionary on the Court. Reliance was placed in *Gitobu lmanyara & 2 others V Attorney General* [2016] eKLR where it was held that:
- "The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases, a suitable declaration may suffice to vindicate the right; in other cases, an award of damages, including substantial damages, may seem to be necessary."
96. Like dependence was placed in *Dendy V University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 and *Supreme Court of Canada in Vancouver (City) V. Ward*, 2010 sec 27, [2010] 2 S.C.R. 28.

Analysis and Determination

97. It is my humble view that the issues that arise for determination in this matter are:
- i. Whether this Court has jurisdiction to entertain this suit.
 - ii. Whether the Petition raises any cause of action against the 2nd Respondent.
 - iii. Whether the Petitioner's rights under Articles 28, 29 (d), (f), 43 (1) (a) of *the Constitution* were violated by the Respondents.
 - iv. Whether the Petitioner is entitled to the relief sought.

Whether this Court has jurisdiction to entertain this suit.

98. Both Respondents rely on the doctrine of Constitutional avoidance to defeat the instant Petition. They argue that this Petition raises issues of medical negligence which is tortious liability claim hence the Petitioner should have pursued the remedies under the law of tort via a civil suit and not a Constitutional Petition. The Petitioner disagrees stating that what she was subjected to following the botched surgery that led to removal of her ovaries without her knowledge or consent not only violated her dignity as a human being but have caused her gross psychological and mental torture which directly violates her rights under Article 28 and 29 of *the Constitution* as well as right to receive the highest standards of medical care under Article 43.
99. The principle of constitutional avoidance was elaborated by the Supreme Court in *Communications Commission of Kenya* (supra) as follows:

“(256) ... The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional



Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

100. Equally, in *Lugo v Director of Public Prosecutions* [2022] KEHC 10574 (KLR) the Court observed as follows:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. Currie and de Waal opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author states: - When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

11. An important and critical issue arises from the above statements by Currie and de Waal. It is a fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware, however, of the singleness of the legal system. This is embodied in the fact that the supremacy of *the Constitution* does not detract from the usefulness of the rest of the body of law. In essence, all other laws give full expression to the ideals of *the Constitution* until found to be inconsistent with it.

....

The exceptions to the application of the doctrine of constitutional avoidance are: -

- i. where the constitutional violation is so clear and of direct relevance to the matter,
- ii. in the absence of an apparent alternative form of ordinary relief and
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”

101. As is discernible from the above authorities, the doctrine of Constitutional avoidance applies to ensure the Constitutional Court is not necessarily clogged with ordinary disputes which can be resolved



under statutory or other legal principles instead of invoking *the Constitution*. However, there exists an exception, such as where the Constitutional violation is clear and of direct relevance to the matter.

102. In the instant case, it is not contested that as a result of negligent handling of the Petitioner by the 1st Respondent and the 2nd Respondent's Hospital, on 1/8/2018 who had been admitted at the facility for the removal of her uterus; the operation resulted in her losing her ovaries which was never the target of the said surgery. The negligence on the part of the 1st Respondent was confirmed by the Kenya Medical Practitioners and Dentists Council per Disciplinary and Ethics Committee- DC case Number 11 of 2020 delivered on 28th September, 2021 in which the 1st Respondent was found culpable for the mismanagement and professional misconduct. The committee stated:

“26... The Committee finds the consent given by the patient was wanting as it failed to disclose the frequently occurring risks and other complications and other procedures which may become necessary. Consequently, the Committee holds that the complainant did not consent to the bilateral salpingo oophorectomy.

27. The Committee considered the second issue for determination and notes the patient saw the doctor at Mama Lucy Hospital on 1st August 2019 at 11.00 a.m. The doctor drew her a directional map to Ladnan Hospital where he indicated he would perform the operation. The patient was admitted at the said hospital and the operation done the same day. Of note was that the procedure was not an emergency, and the doctor could not explain the alacrity in carrying out the procedure the same day. Consequently, the Committee finds the doctor rushed the process of taking the patient to the theatre before carrying out the expected investigations which included repeat imaging and other preoperative tests. The action fell below the expected standard of care.

28. The Committee evaluated the documents before it and the evidence by Dr. Kumba and finds that the removal of both ovaries under the circumstances was unwarranted. The Doctor under appropriate circumstances ought to have removed the right ovarian fibroma as it was solid and adherent to the retroperitoneum but left the left ovary in situ after cystectomy...”

103. This finding of the Committee squares out the issue of negligent particularly on the 1st Respondent. It concretely indicates there was fault found against the 1st Respondent in the manner he managed and operated on the Petitioner, that he did not conform to the recommended standards of medical practice. This Petition does not seek to make or enter a finding of negligence, nay, the Petitioner's grievance here is centered on the aftermath of these actions on her inherent dignity as well as psychological torture which are rights that are directly protected by *the Constitution*.

104. I thus find the argument that this Petition is barred by the doctrine of Constitutional avoidance untenable in the circumstances of this case. Again, being a Constitutional Petition, there is an abundance of authorities that it cannot be time barred by statute of limitation.

Whether the Petitioner's rights under Articles 28, 29 (d), (f), 43 (1) (a) of *the Constitution* were violated by the Respondents.

105. Article 43 (1) of *the Constitution* grants every person the right

As to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.



106. In the instant case, the Respondent 1st Respondent was found by the Medical body to be guilty of the failure to provide the Petitioner with the highest standards of medical care which led to loss of her two ovaries. The realization by the Petitioner that she had lost her two functional and healthy organs subjected her to in-depth psychological trauma hence this action violated her rights under Article 29 (d) of *the Constitution*. It also robbed her the dignity of a mother to bear children of her own which violated Article 28 of *the Constitution*.

107. At paragraph 43 of the supporting affidavit sworn on 19 September, 2023; the Petitioner swore as follows:

“...I have found myself reliant on pressure medication. This medication has inadvertently led to significant reduction in my libido, consequently having profound and detrimental impact on my sexual life. Regrettably, as a direct result of this decline in libido, my partner and I have undergone separation. Furthermore, I have also been grappling with the burden of depression, necessitating treatment since 25th November 2022. (attached hereto marked LNW 13 is a copy of the letter from Mathari National Teaching & Referral Hospital conforming the same)”

108. The failure to accord the Petitioner proper and/or adequate quality medical care directly exposed the Petitioner to the violations of the above rights producing the aforesaid consequences that now afflict her.

109. One of the arguments advanced by the 1st Respondents was they are not State Agencies hence are incapable of violating rights. That argument is fallacious. Article 3 of *the Constitution* is binding on all persons; it states:

“Every person has an obligation to respect, uphold and defend this Constitution.”

110. Article 20 on the Bill of Rights reinforces Article 3 by emphatically stating thus:

“The Bill of Rights applies to all law and binds all state organs and all persons”

111. This right to the highest attainable standard of health under Article 43 (1) (a) implies that those that seek treatment or health services expect that those charged with that responsibility to discharge in the manner described by the Court in JMA (Suing through BOA as Next Friend) & another (supra);

“....21. In the case of Jimmy Paul Semenye v Aga Khan Hospital & 2 Others [2006] eKLR cited by the Plaintiffs, the court stated thus:

“There exists a duty of care between the patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty; -

- i. Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same specialty;
- ii. Possess the skills required of a reasonable competent health care practitioner engaged in the same specialty;
- iii. Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty; and



- iv. Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty...”

112. The 1st Respondent actions did not meet the above standards as established by the Medical Board and as results violated of petitioners aforesaid.

Whether the Petition raises any cause of action against the 2nd Respondent.

113. The 2nd Respondent sought to avoid blame by stating that it only provided its facility to the 1st respondent to practice his medical specialist skills, There is however no documented evidence to assert this position. On the contrary, the consent form, the anesthetic and operation form are all in the name of the 2nd Respondent.

114. This position therefore which the 2nd Respondent advances is unconvincing in view of the above observations and is thus rejected. I find both the 1st and 2nd Respondents liable for the violations visited upon the Petitioner under the circumstances of this case.

Whether the Petitioner is entitled to the reliefs sought.

115. The Court of Appeal addressing the nature of a constitutional relief in *Gitobu Imanyara & 2 others* (supra) pronounced as follows:

“...the South African Case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

116. Further, the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* [2021] KECA 328 (KLR) noted as follows with reference to an award of compensation:

“15. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:.

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required



than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.”

117. In the LAW case (supra) stated:

- “246. In Republic ex parte Chudasama v The Chief Magistrate’s Court, Nairobi and another Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from *the Constitution* itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See Gaily v Attorney-General [2001] 2 RC 671; Ramanoop v Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna v Republic [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See The Judicial Review Handbook (3rd Edn) by Michael Fordham at 361.”

118. Having regard to the above principles and the findings of this Court, I grants the following reliefs:

- i. A declaration is hereby issued that the Petitioner’s unwarranted removal of her both ovaries in the circumstances of this case violated her rights under Article 43 (1) (a) of *the Constitution* that guaranteed



the Petitioner the highest standards of healthcare, the right to inherent human dignity under Article 28 and the Right from being subjected to psychological or mental torture under Article 29 (d) of *the Constitution*.

- ii. An order of compensation to the tune of Kshs.3,000,000/- (Three Million Shillings Only).
- iii. Costs of this Petition

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH NOVEMBER, 2025.

.....

L N MUGAMBI

JUDGE

