

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 428 OF 2018

NETWORK FOR ADOLESCENTS

AND YOUTH OF AFRICA1ST
PETITIONER

JACKLINE MARY KARANJA.....2ND
PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST

RESPONDENT

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

RESPONDENT

THE DIRECTOR OF MEDICAL SERVICES,
MINISTRY OF HEALTH.....3RD

RESPONDENT

THE KENYA MEDICAL PRACTITIONERS &
DENTISTS BOARD.....4TH

RESPONDENT

KENYA FILM CLASSIFICATION BOARD.....5TH

RESPONDENT

AND

KENYA CONFERENCE OF

CATHOLIC BISHOPS (KCCB).....1ST INTERESTED

PARTY

KENYA CHRISTIAN PROFESSIONALS

FORUM (KCPF).....2ND INTERESTED

PARTY

PEARLS AND TREASURES TRUST.....3RD

INTERESTED PARTY

REPRODUCTIVE HEALTH NETWORK.....4TH INTERESTED

PARTY

FEDERATION OF WOMEN LAWYERS

(FIDA KENYA)5TH INTERESTED

PARTY

KENYA LEGAL & ETHICAL ISSUES

NETWORK ON HIV & AIDS (KELIN).....6TH INTERESTED

PARTY

KENYA NATIONAL COMMISSION

**ON HUMAN RIGHTS (KNHCR).....7TH INTERESTED
PARTY**

**KENYA CATHOLIC DOCTORS ASSOCIATION.....8TH
INTERESTED PARTY**

AND

**WOMEN'S LINK WORLDWIDE.....1ST AMICUS
CURIAE**

**CENTRE FOR THE STUDY OF ADOLESCENCE.....2ND
AMICUS CURIAE**

JUDGMENT

Background

1. In August 2018, Marie Stopes Kenya, (Marie Stopes), launched a nine-week public awareness campaign in conjunction with Radio Africa Group on the reproductive health services its institutions offered.

The campaign sought to, among others, highlight statistics and dangers of unsafe abortion, abortion stigma and discrimination women and girls who had undergone unsafe abortion encountered.

2. On 11th September 2018 the Chief Executive Officer of Kenya Film Classification Board, (Kenya Film) issued a press statement that it had banned the radio advertisements by Marie Stopes. The press statement was widely circulated by media houses and online platforms.

3. By letter dated 7th September 2018 to Marie Stopes which was received on 2nd October 2018, Film Kenya alleged that Marie Stopes was in contravention of the *Programming Code for Free-to-Air Radio and Television Services* in Kenya and proceeded to ban

the advertisements on the public awareness campaign. A copy of the letter was sent to Radio Africa Group.

4. On 4th October 2018, Radio Africa Group responded denying violating the Communication Authority of Kenya's *Programming Code for Free to Air Radio and Television Service*. Radio Africa suggested that any complaints regarding the radio advertisement contents be addressed through the complaints' mechanisms provided for in the Communication Authority of Kenya's Procedure for Handling Complaints related to Broadcasts.

5. On 5th November 2018 the CEO of the Medical Practitioners and Dentists Board (the Medical Board) wrote to Marie Stopes over various advertisements

that continued to be broadcast through Radio Africa advocating for abortion, despite the ban by Film Kenya. The letter stated that the advertisements were in contravention of article 26 of the Constitution and the Medical Practitioners and Dentists (Advertising) Rules, 2016.

6. The Medical Board invited the Marie Stopes' Country Director to appear before the Medical Board's Preliminary Inquiry Committee (the Inquiry Committee) on 7th November 2018 and to submit various reports before close of business on 6th November 2018. A hearing thereafter took place before the Inquiry Committee on 7th November 2018.

7. On 10th November 2018, the Inquiry Committee issued a ruling against Marie Stopes in the matter of

Ann Kioko v Marie Stopes Kenya. One of the orders, Marie Stopes was directed to immediately stop offering any form of abortion services in all its facilities in the country.

8. On 20th November 2018, the Director of Medical Services sent a letter to Marie Stopes further banning Marie Stopes from providing any form of post abortion care in all its facilities.

The petition

9. The petitioners filed this petition challenging the decisions by Kenya Film, the Medical Board and Director of Medical Services. The petition was against the Attorney General, the Cabinet Secretary, Ministry of Health, the Director of Medical Services,

Ministry of Health, the Medical Practitioners and Dentists Board and the Kenya Film as the 1st to 5th respondents.

10. Joined in the proceedings were Kenya Conference of Catholic Bishops), Kenya Christian Professionals Forum, Pearls and Treasures Trust, Reproductive Health Network, Federation of Women Lawyers (FIDA-Kenya), Kenya Legal & Ethical Issues Network on HIV & AIDS(KELIN), Kenya National Commission on Human Rights and Kenya Catholic Doctors Association as the 1st to 8th interested parties. Women's Link Worldwide and Centre for the Study of Adolescence were joined as the 1st and 2nd *amicus*.

Petitioners' case

11. The petitioners asserted that Kenya Film had no regulatory mandate over radio programming and broadcasting; that Marie Stopes being a Non-Governmental Organization (NGO), the Medical Board has no regulatory mandate or control over NGO's and health facilities and the decision to ban Marie Stopes from providing any form of abortion services lacked any nexus with the allegations that were before the Inquiry Committee.

12. The petitioners were concerned with the constitutionality and legality of the ruling by the Medical Board, the effect of the letters by Kenya Film and the Director of Medical Services in curtailing provision of emergency medical treatment in the form of safe abortion and post abortion care to women and girls.

13. It is the petitioners' case, that the actions by Kenya Film, the Medical Board and Director of Medical Services violated the provisions of articles 24 (1) and (3); 25(a), 26(4); 27; 29(d), (f); 35(1), (3); 43 (1) (a),(2); 47 and 232 of the Constitution; sections 4 (3), 5 of the Fair Administrative Actions Act; section 6 of the Health Act, 2017 as well as various international laws ratified by Kenya.

14. The petitioners asserted that the need for access to comprehensive reproductive health information and services for adolescents is important; media plays a vital role in bringing sexual health and rights issues to the forefront as a health and development issue and utilize media platforms to reach the target audience.

15. The petitioners stated that they were familiar with some of Marie Stopes programmes on radio and some of the contents generated through social media which were properly delivered in an accessible and acceptable way to young people.
16. The petitioners maintained that owing to several challenges they had identified with regard to the state of access to reproductive health information and services for adolescents, there was concern that the actions by Kenya Film and the Medical Board worsened the situation with the effect of violating rights of adolescents and teenage girls which is guaranteed under articles 24(3), 27, 33(1) (a), 35(1) and (3), 43 and 47 of the Constitution. The impugned actions were also not in line with the

Ministry of Health National Adolescent Sexual and Reproductive Rights Policy, 2015.

17. The petitioners took the view, that Marie Stopes' advertisements conformed with the National Guidelines for Provision of Youth Friendly Services Guidelines. The Ministry of Health has a responsibility to be proactive in providing comprehensive, scientific and age-appropriate reproductive health information devoid of moral, religious or other bias. Unavailability of comprehensive sexual and reproductive health information jeopardizes women and girls' access to health services.

18. The petitioners asserted that the letter by the Director of Medical Services directing Marie Stopes

Clinics not to provide post abortion care services violated the State's obligation to ensure the right to life and to reduce women's exposure to the risk of life-threatening injury and death from unsafe abortion. Negative publicity around Marie Stopes would have a negative impact on adolescents' access to other services it offered.

19. The petitioners stated that they had encountered incidents of young girls and women who died after seeking unsafe abortion services from unqualified persons and failed to go to hospitals for immediate help to save their lives.

20. The challenge of unsafe abortion among young girls in informal settlements was worsened by the fact that there were few facilities that offer friendly

reproductive health services to the youth, including post abortion care services. There is also lack of clarity on when abortion care is allowed within the legal framework which is precipitated by lack of information available particularly from public health facilities and their medical staff. This prevented eligible women and girls from accessing vital and lifesaving safe abortion care. It further prevents trained health care professional from providing these vital services for fear of stigma, intimidation, harassment, arrest and prosecution.

21. The cumulative effect of the ban regarding information on prevention of unsafe abortions and post abortion care services creates fear amongst healthcare workers resulting in hesitation to take appropriate and timely decisions on whether or not

to provide safe and legal abortion services to those in need.

22. The petitioners maintained that the action by Kenya Film, the Medical Board and the Ministry prohibiting information on safe legal abortion and legal abortion services violates women's and adolescent girls' right to access comprehensive, accurate and evidence-based health related information. This forces them to resort to inaccurate information through informal sources thus, exposing them to severe health complications. The action further violates the right to highest attainable standard of health.

23. Unsafe abortion is a leading cause of maternal mortality and morbidity in Kenya due to the

complications as demonstrated by the Ministry of Health's Report on The Costs of Treating Unsafe Abortion Complications in Public Health Facilities in Kenya (February 2018).

24. It was the petitioners' position, that complications arising from unsafe abortion such as haemorrhage and infections which are treatable with antibiotics along with evacuation of any remaining pregnancy tissue from the uterus ought to be treated immediately and as soon as possible as delays can be fatal. The Directive by Director of Medical Services that Marie Stopes refers patients in need of post abortion care violates section 7(2), (3) of the Health Act and the medical guidelines on the management of post abortion complications.

25. They maintained that a trained health professional has a professional, ethical and legal obligation to offer emergency care and assistance and stabilize any patient who presents herself to a medical facility exhibiting complications from unsafe abortion or is in need of post abortion care. The decision by the Director of Medical Services creates confusion in the medical service providers as well as women and girls seeking service at the facility on whether the intention of the Ministry is to ban all other services in the context of post abortion care, including family planning and counselling services. The directive contradicts the Ministry of Health regulations in the National Post Abortion Care Reference Manual (2013). The restrictions are unreasonable and violate article 26 (4) and 43 (1) & (2) of the Constitution.

26. The petitioners asserted that in the absence of a specific finding of unlawful conduct by a medical practitioner in the employment of Marie Stopes Clinic relating to the provisions of abortion services, the Medical Board and the Director of Medical Services have no legal basis to ban services offered by the facility.

27. The petitioners maintained that at the time the Medical Board made the decision, there were no statutory provisions conferring on it the mandate to license medical institutions or conduct disciplinary proceedings against medical institutions. The Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000 purporting to give the

Medical Board powers beyond those granted by the Act are *ultra vires* the Act.

28. The petitioners urged that there was no complaint from any member of the public to the Medical Board against any media advertisements by Marie Stopes. The Medical Practitioners and Health Facilities (Advertising) Rules do not apply to Marie Stopes because it is not a registered health facility.

29. The petitioners asserted that the Medical Board is supervised by and answerable to the Ministry of Health; the Director of Medical Services having written to the Medical Board on 2nd November 2018 to ensure Marie Stopes is closed, did not write a further letter on the 5th November 2018 as alleged.

They maintained that there was no correlation between the complaints allegedly received by Ministry of Health or the Medical Board and the action taken by the Medical Board and the Director of Medical Services in addressing the complaints.

30. Based on the above concerns, the petitioners sought several declarations and orders to invalidate the impugned actions as unconstitutional and illegal.

1st, 2nd and 3rd respondents' response

31. The 1st, 2nd and 3rd respondents opposed the petition through a replying affidavit sworn by Dr. Patrick Amoth. These respondents asserted through Dr. Amoth, that the Ministry received complaints from members of the public regarding advertisements aired on radio about abortion

services rendered at Marie Stopes' clinics. By letter dated 5th November 2018, the Ministry instructed the Medical Board to undertake an inquiry on the complaints, prepare and submit a report with recommendations to the Cabinet Secretary.

32. An inquiry was conducted by the Medical Board's Inquiry Committee which established that Marie Stopes provided a wide range of medical services, including abortion services; undertook abortion guided by its own indicators and conducted a campaign program on sexual and reproductive health care through diverse forums and platforms. It was also established that the advertisements violated the provisions of the Medical Practitioners and Dentist (Practice and Health Facilities)

(Advertising) Rules, 2016 and were not approved by the Ministry of Health.

33. The 1st 2nd and 3rd respondents asserted that the right to the highest attainable standard of health, including the right to reproductive healthcare begins with the right to accurate information and is based on the right quality of healthcare service which were disregarded by Marie Stopes.

34. They stated that immediate action was taken on 20th November 2018 when the Director of Medical Services issued the ban on the basis of article 43 (1) (a) and sections 14, 15, 16, 17 and 18 of the Health Act. The matter was further conclusively dealt with in an inquiry conducted by the Medical Board and disciplinary action taken. They maintained that the

Ministry executed its mandate in accordance with the Constitution and the Health Act.

35. The 1st, 2nd and 3rd respondents stated that the Ministry, has developed the National Reproductive Health Policy 2022-2032 as the overall guide to all stakeholders in the reproductive health sector and is the principal reference document in Reproductive Health matters.

4th respondent's response

36. The 4th respondent also opposed the petition through a replying affidavit sworn by Dr. Jackson Kioko. The 4th respondent contended that the Medical Board has the mandate to license and register medical and dental practitioners, license medical institutions and conduct disciplinary

inquiries on complaints lodged against practitioners and medical institutions under the Medical Practitioners and Dentists Act.

37. The 4th respondent asserted that under rules 6, 10 and 11 of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000, the Medical Board has power to regulate and grant licenses to private clinics and medical institutions; revoke licenses issued to those institutions and carry out inspections in the institutions. The 4th respondent asserted that Marie Stopes' Clinics are licensed and regulated by the Medical Board.

38. It was stated that the Medical Board received complaints concerning advertisements by Marie Stopes and petitions from Thomas Ileri and Ann

Kioko requesting the Cabinet Secretary for Health to initiate investigations into the operations of Marie Stopes' clinics.

39. The 4th respondent contended that rules 3(1) and 5(1), (c), (g) of the Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016 prohibit registered health institutions from directly or indirectly undertaking promotions which may be reasonably regarded as calculated to attract patients, clients for business except as provide for under the Act. Institutions are also prohibited from providing misleading information on the effectiveness of health services they offer.

40. According the 4th respondent by a letter dated 5th November 2018, the Medical Board was instructed to conduct an inquiry on the complaints and submit a report with recommendations to the Cabinet Secretary. On the same day, the Medical Board wrote to the Country Director of Marie Stopes and requested him to submit a comprehensive report addressing the allegations and a report of all procedures carried out in its facilities within the last three months. It also directed him to appear before the Inquiry Committee.

41. The 4th respondent maintained that the Medical Board and the Inquiry Committee discharged their mandate within the law. The complainants and the Kenya Film were invited to participate in the inquiry. All parties that participated in the inquiry were

accorded a hearing thus, the right to fair administrative action guaranteed under article 47 of the Constitution and the Fair Administrative Action Act was observed. The inquiry was conducted in compliance with the Medical Practitioners and Dentists Act and the rules.

42. The 4th respondent asserted that Marie Stopes' witnesses admitted during the inquiry to offering safe abortion services and undertaking a campaign program on sexual and reproductive health through various platforms and had submitted reports and documents on guidelines for safe abortion and post abortion care as well as data on the reproductive health services offered. The Inquiry Committee made a decision which was ratified by the full Board

in a special Board meeting and the decision was communicated to Marie Stopes.

43. The 4th respondent stated that there are over 10,000 registered health facilities in Kenya, including public, private and mission health facilities serving members of the public. The decision by the Inquiry Committee did not stop Marie Stopes from offering other health services save only to services relating to abortion, pending formulation of guidelines.

44. The 4th respondent denied violating the Constitution, the law or fundamental rights and maintained that Marie Stopes was given a fair hearing. The Medical Board took action to ensure the right to health guaranteed under article 43 (1) is

administered in compliance with article 26(4) of the Constitution.

45. The 4th respondent stated that Marie Stopes had complied with the orders of the Inquiry Committee, the Medical Board undertook an inspection of the facilities and following that inspection, the order to cease offering post abortion care services was lifted.

5th respondent's response

46. The 5th respondent opposed the petition through a replying affidavit sworn by Dr. Ezekiel Mutua. The 5th respondent stated that the Board has mandate to, among others, regulate, examine, classify, approve and issue certificate of approval with respect to all films and broadcast content to be

distributed, broadcast or exhibited privately or publicly either through cinemas, television, radio, internet or any other form of digital media.

47. The 5th respondent asserted that regulation 19(1) (e) of the Kenya Information and Communications (Broadcasting) Regulations 2009, mandates Kenya Film to examine, classify and approve broadcasting content for purposes of imposing age restrictions. The 5th respondent stated that although the Films Act and regulations are not clear on Kenya Films' mandate on broadcast content over the radio, nothing precludes it from exercising its regulatory mandate over audio advertisements because classification for purposes of imposing age restriction focuses on content of the advertisements and not mode of distribution.

48. The 5th respondent maintained that under section 3 of The Programming Code for Free -To-Air Radio and Television Services in Kenya the watershed period guidelines and the Classification guidelines prescribed by the Board apply to all programme and non-programme matters, including advertisements and infomercials.

49. According to the 5th respondent, under the interpretation section of the *Programming Code*, any audio/sound advertisement that has been produced by act of sound recording, taking part in or arranging scenes or episodes, recording on cassette, disc or any other audio recording medium and designated for broadcasting for payment or other valuable consideration to a broadcaster with the intention of selling to listeners any product or service; or

convincing listeners of a belief or course of action, person or organization promoting a product, service, belief, course of action, person or organization through radio, television or other forms of digital media is an advertisements in the context of the Films Act for purposes of classification and imposing restrictions.

50. The 5th respondent further stated that pursuant to regulations 33 and 34 of the Kenya Information and Communications (Broadcasting) Regulations, 2009, Kenya Film has mandate to give consumers advice, having regard to the protection of women and children against sexual exploitation and degradation in cinematography films, broadcasting content and on the internet. It has a duty to ensure that unsuitable content for children is not broadcast in

the presence of children or during watershed periods.

51. According to the 5th respondent, following several complaints from the public and after investigations, it discovered that Marie Stopes was broadcasting radio advertisements and running a campaign on radio intended to promote abortion services. Some parts of the advertisements contained claims and descriptions that were directly or indirectly misleading to the public regarding abortion services advertised as suitable alternative to pregnant women and girls.

52. Since Marie Stopes generated the audio content and paid the broadcaster to broadcast the advertisements, it amounted to distribution under

the Films Act and, therefore, fell within its regulatory mandate. The 5th respondent had an obligation to ensure that the advertisements complied with the law prior to being advertised upon examination, classification and approval.

53. The advertisements were intended for adult consumption, yet they were aired during watershed period (between 5:00am and 10:00pm) when young children were likely to be listening to radio broadcasting thus, it exposed children to unsuitable content.

54. The 5th respondent stated that on 7th September 2018, it wrote to Marie Stopes concerning the radio advertisements and directed them to stop airing those advertisements during watershed period and to submit the advertisements for examination and

classification. The directives were also issued to Radio Africa Group. Due to public outcry and several complaints, on 11th November 2018, it issued a press statement banning the advertisements because the directives had not been complied with.

55. On 2nd October 2018 and 4th October 2018, Marie Stopes and Radio Africa Group admitted broadcasting the impugned advertisements during watershed period. Radio Africa Group however denied jurisdiction of the Board to monitor, examine, classify and approve audio/sound commercial advertisements. Marie Stopes continued with advertisements during watershed period. The Medical Board's Inquiry Committee conducted the inquiry in compliance with article 47 of the Constitution and delivered its decision.

56. According to the 5th respondent, the decision to issue the press statement on 11th September 2018 was necessitated by the need to preserve the Constitution and protect society, particularly children and girls below the age of 18 years from misleading, indecent and harmful advertisements promoting abortion as the most suitable alternative to unplanned and unwanted pregnancies. The 5th respondent maintained that it lawfully exercised its statutorily mandate and denied violating any constitutional rights.

57. The 5th respondent maintained that the petitioners' right to access, receive, impart and disseminate information on abortion services through the impugned advertisements is subject to the State's obligation to protect the interest of

children by examining and classifying any broadcast content for purposes of imposing age restrictions prior to broadcasting.

1st interested party's case

58. The 1st interested party opposed the petition through a replying affidavit sworn by Fr. Daniel Rono. The 1st interested party asserted that the directives by the 3rd, 4th and 5th respondents were in conformity with the Bill of Rights.

59. The 1st interested party asserted that the petition seeks to have abortion offered on demand as opposed to the specific grounds in article 26(4) of the Constitution. According to the 1st interested party, article 26(4) read with section 159 of the

Penal Code, the decision whether or not to perform an abortion is that of a trained health professional.

60. The 1st interested party maintained that the right to life is a fundamental right and any arbitrary denial of the unborn child the right to life by promoters of abortion on demand violates the right to access other human rights which amounts to cruel, inhuman and degrading treatment contrary to article 25(a) of the Constitution. The unborn child is also discriminated against on the basis of the environment in which it finds itself contrary to article 27 of the Constitution.

61. According to the 1st interested party, the right to information includes the right of women and girls to receive objective and unbiased information with

regard to abortion procedures and foetal development. The information in the advertisements was misleading to the extent that it created the general presumption that abortion on demand is acceptable and available in Kenya. The right to life of the unborn child faces an imminent threat of being grossly violated if the petition is allowed.

2nd and 3rd interested party's case

62. The 2nd and 3rd interested parties also opposed the petition through an affidavit sworn by Dr. Wahome Ngare. They stated through Dr. Ngare, that the terms “unwanted”, “unintended”, “mistimed”, cannot be applied in situations where pregnancy arises from consensual sexual intimacy between

persons competent to give consent because pregnancy is a natural outcome of sexual intimacy.

63. The 2nd and 3rd interested parties asserted that the right of the man and woman to reproductive health service of controlling their fertility, to decide whether to have children, the number and spacing of the children as well as the right to choose any method of contraception accrue before pregnancy. Once pregnancy is established, the man and woman have no right to kill the unborn child.

64. The 2nd and 3rd interested parties cited articles 19(2), (3) (a); 28; 29; 43(1) (a), (2) and 53 (1) of the Constitution for the position that the unborn child has a right to life, right to the highest attainable standard of healthcare, inherent dignity, right not to be subjected to violence, torture, treated or

punished in a cruel, inhuman or degrading manner, right to be protected from all forms of violence, inhuman treatment and punishment and parental care and protection.

65. They posited that under article 35 (1) of the Constitution, every child has a right to know their father and mother and that article 26(4) of the Constitution prohibits abortion or induced termination of pregnancy unless in the opinion of a trained health professional. it is necessary. The calibre and skills of the person making the decision to induce termination of pregnancy must be such that they are trained to the highest level of proficiency in decision making to ensure that the mother and unborn child get the highest attainable standard of health.

66. The choice of the location where induced termination of pregnancy should be conducted is dictated by the environment meeting the minimum medical standards to ensure the mother and unborn child receive the highest attainable standard of health care.

67. The 2nd and 3rd interested parties maintained that the opinion of the mother and/or man that a pregnancy they view as a crisis is unwanted, unintended or mistimed is not the same as the professional opinion referred to in article 26(4) of the Constitution and cannot be the basis for induced termination of pregnancy. A trained health professional relying on the personal opinion of a mother or a man that a pregnancy is unwanted, unintended or mistimed to induce termination of a

pregnancy, is offering termination of pregnancy on demand which is and unconstitutional.

68. The 2nd and 3rd interested parties asserted that under article 26(4) of the Constitution, a trained health professional does not have a free hand to terminate pregnancy. It has to be done within the limits set by the Constitution. In the event that termination of pregnancy is permitted by any other written law, the law must not be in conflict with the Constitution.

69. According to the 2nd and 3rd interested parties, the term abortion in article 26 (4) of the Constitution cannot mean deliberate termination of pregnancy. Article 26(4) of the Constitution is intended to protect the trained health professional from

prosecution for medical treatment option offered to the mother that leads to harm or death of the unborn child, outlaws non-medical reasons for termination of pregnancy and criminalises deliberate killing of the unborn child.

70. The 2nd and 3rd interested parties asserted that the advertisements by Marie Stopes were misleading the general public into believing that the killing of an unborn child through provision of safe abortion services is legal. Addressing the knowledge gap among women and girls on their fertility and how to use that knowledge to space births would reduce the incidence of crisis in pregnancy and the demand for deliberate and intentional killing of the unborn child.

4th interested party's response

71. The 4th interested party supported the petition through an affidavit sworn by Nelly Munyasia. The 4th interested party contended that maternal mortality is prevalent in both public and private hospitals and unsafe abortion is a major concern.

72. The 4th interested party asserted that maternal and new born health model recognises post abortion care services as one of its pillars and one of the strategies for improving maternal survival. To this effect, the Ministry has developed the National Post Abortion Care Training Curriculum for Healthcare Providers (MOH 2012) and the National Post Abortion care Reference Manual (MOH 2013).

73. According to the 4th interested party, women who seek abortion and post abortion care services,

include groups of different socio-economic, marital, education, religion status both in urban and rural set ups. Majority of those seeking these services live below poverty line, suffer chronic hunger and deprivation and have limited access to essential services, including family planning. They are also exposed to gender-based violence and unwanted pregnancies that often end up in unsafe abortion.

74. The 4th interested party stated that limited information among women and girls and limited access to use of contraceptives form some of the barriers to accessing lawful safe abortion. The 4th interested party maintained that it is the responsibility of the State to facilitate the right to lawful safe abortion within the requirements of the Constitution by ensuring that there are adequate

and well-equipped facilities for provision of lawful safe abortion services and that health practitioners are accorded adequate training on lawful safe abortion.

75. The 4th interested party asserted that the directive by the Medical Board was contrary to the Constitution with regard to reproductive and health rights of expectant women. The medical Board acted in excess of its mandate.

5th interested party's case

76. The 5th interested party also supported the petition through a replying affidavit sworn by Anne Wambeti Ileri. The 5th interested party just like the 4th interested party, asserted that information on

sexual and reproductive health and post abortion care are specific gender related healthcare services whose access, limitation, restriction and denial directly affect women and girls of reproductive age. The decisions taken by the Medical Board and Kenya Film are both a threat to, and a claw back on, the gains made in the realization of the right to reproductive health.

77. The 5th interested party maintained that access to sexual and reproductive health information and services is a determinant of the right to health, right to life and freedom from discrimination. The decisions by the Medical Board and Kenya Film amounted to limiting the right to access reproductive healthcare, emergency treatment and

information that is necessary for the exercise of the sexual and reproductive health rights.

78. According to the 5th interested party, access to sexual and reproductive healthcare services, including family planning, information and education directly contributes to the realization of women's socio-economic rights. The decisions by the Medical Board and Kenya Film are discriminatory to women and girls of reproductive age.

79. The 5th interested party was of the view, that there is a potential greater harm to the health and lives of women and girls of reproductive age if their access to emergency medical treatment and post abortion care is limited to facilities which may not be easily accessible in their localities. This may cause long-

term psychological trauma and emotional impact on them.

80. The 5th interested party asserted that according to the report on the status of safe abortion in Kenya published in 2019, Kenya is one of the countries with the highest prevalence of unsafe abortion leading to high mortality and morbidity rates. In that regard, the state has an obligation to protect human rights guaranteed under the Constitution and international law. The State, therefore, owes a duty to women and girls of reproductive age in ensuring protection of health and reproductive rights of women, including the right to choose any method of contraception, the right to have family planning and right to adequate, affordable and accessible health services.

6th interested party's case

81. The 6th interested party also supported the petition through a replying affidavit sworn by George Makau Mutinda. The 6th interested party urged that abortion is a public health issue which requires a comprehensive and rights-based approach that puts women and girls at the centre. Unsafe abortion is prevalent in Kenya due to a high level of stigma and misinformation about abortion and a lack of information about available options for sexual and reproductive health services. There is therefore need for post abortion care.

82. The 6th interested party asserted that a blanket ban on all forms of abortion services negates the constitutional and legal responsibility of healthcare

workers to provide emergency post abortion care as required under section 7(3) of the Health Act. The decisions by Kenya Film, the Medical Board and the Director of Medical Services had caused stigma over abortion services.

83. According to the 6th interested party, the ban creates a culture of fear and silence so that women in need of safe abortion services often lack critical information on where to access such services. Delays in accessing post abortion care services increases risks of severe complication and even death.

84. The 6th interested party maintained that the medical Board and the Director of Medical Services have a responsibility to enhance access to

reproductive healthcare services and address abortion stigma by ensuring elimination of all barriers to accessing abortion services and related information.

8th interested party's case

85. The 8th interested party opposed the petition through a replying affidavit sworn by Dr. Stephen Kimotho Karanja. The 8th interested party asserted that allowing abortion services on demand will be contrary to the Constitution.

86. The 8th interested party maintained that the directives by the Medical Board are in line with the Bill of Rights in the Constitution. Availability of abortion services on demand would lead to loss of

lives of the unborn children a violation of article 26(1), (2) of the Constitution. It would also lead to severe maternal injury, morbidity and mortality to women and girls.

87. According to the 8th interested party, the mother and the unborn child enjoy protection under article 28 as read with article 29 of the Constitution. Under article 26(4) of the Constitution, abortion is illegal unless it meets the conditions spelt in the article. the 8th interested party asserted that article 26(4) outlaws abortion on demand, making it harder for any person to procure abortion in violation of human rights of the mother and the unborn child.

88. The 8th interested party maintained that the directive by the Medical Board did not violate any

rights since it has supervisory powers over the delivery of healthcare services and regulation of medical practitioners. The directive was within its mandate.

89. The response by the 7th interested party was not traced.

Submissions.

90. The court narrowed down the issues in this petition and directed parties to address the issue of whether Kenya Film, the Medical Board and the Director of Medical Services had power to make the decisions dated 7th September 2018 by the Kenya Film; 10th November 2018 by the Medical Board and 20th November 2018 by the Director of Medical

Services, which counsel for the parties agreed to limit their submissions to.

Petitioners' submissions

91. Mr Thondu, submitted on behalf of the petitioners and the 4th, 5th, 6th and 7th interested parties who supported the petition. Learned counsel argued that the 3rd, 4th and 5th respondents did not have power to make the impugned decisions. Learned counsel submitted that under section 10 of the Public Health Act, the 3rd respondent did not have power to make the decision of 20th November 2018.

92. It was learned counsel's further submission that the Medical Board did not also have mandate to make the decision of 10th November 2018 whether

on its own or through any of its Committees in view of section 11A of the Medical Practitioners and Dentists Act. Counsel maintained that Marie Stopes being a registered NGO, is regulated under the Non-Governmental Organization and Coordination Act.

93. Regarding the 5th respondent, Mr. Thondu submitted that under section 15 of the Kenya Films and Stage Plays Act, Kenya Films did not have power to ban public awareness information campaign by Marie Stopes through the directive issued on 7th September 2018. The decision and the press statement by its CEO of 11th September 2018 were made outside the 5th respondent' mandate thus, the decision violated articles 35, 43(1) (1) and (2) and 47 (1) of the Constitution.

94. Mr. Thondu again submitted that the decision by the Director of Medical Services affected the right to seek emergence treatment. Counsel relied on the decisions in *Alcoholic Beverages Association of Kenya v Kenya Film Classification Board & 2 others* [2022] KECA 1051 (KLR) and *Republic v Medical Practitioners and Dentists Board Ex-Parte Kenyatta National Hospital Board & another* [2017] KEHC 5582 (KLR).

95. Miss Njuguna, learned counsel for the 5th interested party supported the submissions by Mr. Thondu and argued that the impugned decisions have an enduring effect and the reliefs sought in the petition should be granted.

96. Mr. Kanjama, SC. Learned counsel for the 1st, 2nd, 3rd and 8th interested parties argued that the petition does not seek any declaration to invalidate any statute or instrument and the presumption is that all statutes in force at the respective dates were and remain constitutional. Learned senior counsel submitted that some of the existing laws predate the Constitution 2010 and urged the court to be guided by section 7 of the Sixth Schedule to the Constitution.

97. Regarding the source of power of the 3rd respondent, Mr. Kanjama, SC submitted that under section 10 of the Public Health Act, the 3rd respondent's office is mandated to promote public health, advise and direct county governments on matters affecting public health and generally carry

out powers and duties conferred by the Act in relation to public health. It was Mr. Kanjama SC's position that although section 10 of the Public Health Act was amended through the Health Act, 2017 to rename the Director of Medical Services as Director General of Health, the powers under the Public Health Act remained unchanged. Therefore, the letter dated 20th November 2018 while issued by the Director of Medical Services, referred to the Successor in title-Director General for Health.

98. Learned Senior Counsel cited sections 16, 17 (d), 17(i) and 17(l) of the Health Act on the establishment and functions of the Director General for Health to contend that the Director of Medical Services had power to make the decision of 20th November 2018. The Director of Medical Services was merely

implementing the ruling of the Medical Board dated 10th November 2018.

99. Regarding the Medical Board, Mr. Kanjama, SC argued that the Medical Board had power to make the decision dated 10th November 2018 under section 14A of the Medical Practitioners and Dentists Act; rules 3, 6, 10 and 11 of the Medical Practitioners and Dentists (Medical Institutions) Rules, 2000; rules 3, 4, 4(1), 4(3) (c), (d), (e) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (procedure) Rules, 1979 and rules 3(1), 4, 5 and 8 of the Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016.

100.Regarding the 5th respondent, Mr. Kanjama, SC submitted that Kenya Film had the power to act as it did on 7th September 2018. The decision was made pursuant to Kenya Film's mandate conferred by sections 15 (1) (a) (iii) and 17 of the Film Stage and Plays Act; section 46H of the Kenya Information and Communications Act and regulations 18-20 and 33 of the Kenya Information and Communications (Broadcasting) Regulations, 2009. Learned senior counsel maintained that the advertisements by Marie Stopes were covered under the Film and Stage Plays Act.

101.Mr. Kanjama, SC relied on the decision in *Alcoholic Beverages Association of Kenya v Kenya Film Classification Board & 2 others* (supra) and urged the Count to dismiss the petition.

102. In a brief rejoinder, Mr. Thondu submitted that sections 46 and 46H of Kenya Information and Communications Act confers power on the Commission and not Kenya Film. Regarding the decision in the *Alcoholic Case*, he argued that paragraph 55 of the decision acknowledges that the authority is conferred on the Commission. Learned counsel argued that at the time the Director of Medical Services made the decision, the operating statute was the Medical Practitioners and Dentists Act, by which time there was no mandate or power to make the decision.

103. Mr. Thondu further submitted that the Director of Medical Services' decision through Dr. Kioko Jackson was made after the position of Director of Medical Services had been abolished and replaced by that of

Director General of Health. Learned counsel maintained that the rules relied on by Mr. Kanjama SC did not give power to the Medical Board. The Medical Practitioners and Dentists (Private Medical Institutions) 2000 were the subject of litigation in *Republic v Medical Practitioners and Dentists Board Ex-Parte Kenyatta National Hospital Board & another* [2017] eKLR and the Act had to be amended to give the Board power on medical institutions.

Determination

104. I have considered the pleadings and arguments by counsel for the parties, including the Amicii. Although the pleadings raised several issues, the court, with concurrence of the parties, narrowed down the issues to whether those who made the decisions dated 7th September 2018, 10th November

2018 and 20th November 2018 had power to make those decisions. In short, where was the source of power to make those decisions?

105. This was informed by the fact that many of the issues that had been pleaded in the pleadings had been the subject of litigations including *Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others*; *East Africa Centre for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* [2019] KEHC 6928 (KLR); *PAK and another v Attorney General & 3 others* [2022] KEHC 262 (KLR) and *Mwikali & 3 others v Cabinet Secretary Ministry of Health & another*; *Kenya Obstetrical Gynaecology Society & 2 others (Interested Parties)* [2025] KEHC 13908 (KLR). The only issue was therefore whether

the impugned decisions in the present petition were lawful.

Decision by Kenya Film-5th respondent

106. The first decision to be impugned was made by Kenya Film on 7th September 2018. In that decision, the 5th respondent banned Marie Stopes from advertising its programmes and services through radio platforms.

107. Although the petitioners argued that Kenya Film had no mandate to issue the directive, the respondents and some of the interested parties opposing the petition, maintained that Kenya Film acted within its mandates, citing sections 15 (1) (a) (iii) and 17 of the Film Stage and Plays Act; section

46 H of the Kenya Information and Communications Act and regulations 18-20 and 33 of the Kenya Information and Communication (Broadcasting) Regulations, 2009.

108. The long title to the Film and Stage Plays Act, states that it is an *“Act of Parliament to provide for controlling the making and exhibition of cinematograph films, for the licensing of stage plays, theatres, cinemas; and for purposes incidental thereto and connected therewith.”*

109. Section 11 of the Act establishes the Board; section 11A is on the composition and membership of the Board while section 15 delineates the functions of the Board.

110. The functions of the Board are to—

(a) regulate the creation, broadcasting, possession, distribution and exhibition of films by

—

(i) examining every film and every poster submitted under the Act for purposes of classification;

(ii) imposing age restriction on viewership;

(iii) giving consumer advice, having due regard to the protection of women and children against sexual exploitation or degradation in cinematograph films and on the internet;

(b) license and issue certificate to distributors and exhibitors of films.

(2) The Board may from time to time prescribe—

(a) the procedure for application for licensing as a distributor or

exhibitor of films; and

(b) guidelines to be applied in the classification of films

111. The Kenya Film's function is to regulate the creation, broadcasting, possession, distribution and exhibition of films and in doing so, may take the broad actions enumerated in section 15 in relation to regulating films. As it is, section 15 does not seem to give Kenya Film mandate to regulate activities falling outside creation, broadcasting, possession, distribution and exhibition of films. In that regard, the Act and in particular, section 15 thereof does not give Kenya Film mandate to issue the directive of 7th September 2018.

112. Section 17 which was also relied on, relates to *"Films unsuitable for children."* The section states

that if the Board considers that any cinematograph film is unsuitable for general exhibition, the Board is to record its ruling in one of the following forms—

(a) for adults only;

(b) unsuitable for children under the age of sixteen years;

(c) unsuitable for children under the age of ten years.

(2) Where the Board records its ruling in the form “for adults only” it has to issue a certificate of approval subject to the condition that no child should be admitted to the exhibition thereof.

(3) The ruling of the Board under subsection (1) has to be mentioned in all advertisements and on all posters of the film concerned, and announced on the “cinema screen” immediately before the film is exhibited.

113. Once again section 17 relates to films and does not confer on Kenya Film mandate to regulate other broadcasts and therefore to issue the impugned directive or ban against Marie Stopes' advertisements.

114. The respondents again relied on section 64H of Kenya Information and Communications Act as the source of power for Kenya Film to act as it did. Section 46H under the subhead Commission to prescribe programme codes, gives power to the Commission to set standards for the time and manner of programmes to be broadcast by licensees under the Act, including prescribing programme codes; reviewing the programming codes at least once every two years and prescribing watershed period programming when large numbers of children are

likely to be watching or listening to programmes and ensure compliance with programming code prescribed under the section.

115. The respondents went further to rely on regulations 18, 19, 20 and 33 of Kenya Information and Communications (Broadcasting) Regulations 2009, as granting Kenya Film mandate to issue the directive. These regulations were made pursuant to section 46K which confers on the Cabinet Secretary powers to make regulations on broadcasting with respect to;

- (a) the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas
- (b) financing and broadcast of local content

(c) mandating the carriage of content, in keeping with public interest obligations, across licensed broadcasting services.

(d) prescribing anything that may be prescribed under this part.

116. Regulations 18 through 20 fall in Part IV of the Regulations on Content. Regulation 18 on minimum standard states that content prescribed in this part shall form the basis upon which the Commission or a recognized body of broadcasters shall prepare their respective programme codes.

117. Regulation 19 on General requirements, states that:

(1) A licensee shall ensure that no broadcasts by its station:

- (a) contains the use of offensive language, including profanity and blasphemy;
- (b) presents sexual matters in an explicit and offensive manner;
- (c) glorifies violence or depicts violence in an offensive manner;
- (d) is likely to incite, perpetuate hatred, vilify any person or section of the community, on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person or section of the community; or
- (e) has no program rating from Kenya Films Classification Board indicated prior to the commencement of such programmes.

118.Regulation 20 on Protection of Children states that
a licensee shall—

(a) ensure that due care is exercised in order to avoid content that may disturb or be harmful to children, that has offensive language, explicit sexual or violent material, music with sexually explicit lyrics or lyrics which depict violence;

(b) not broadcast programmes with the content specified in paragraph (a) during the watershed period;

(c) request for permission to conduct an interview with a minor from the minor's parents or guardian before conducting an interview with a minor.

119.Regulation 33 on advertisement provides that:

(1) A licensee shall ensure that it only broadcasts advertisements that are lawful, honest, decent and conform with the principles of fair competition.

(2) A licensee shall ensure that advertisements broadcast by its station do not—

(a) contain any descriptions, claims or other material which may, directly or by implication, mislead members of the public in relation to the product or service advertised, or about its suitability for the purpose recommended; and

(b) unfairly attack or discredit, directly or by implication, any other advertisers, products or advertisements.

(3) A licensee shall, before broadcasting an advertisement, ensure that any descriptions or

claims in the advertisement have been adequately substantiated by the advertiser.

(4) A licensee shall not unreasonably discriminate against or favour any advertiser.

(5) A licensee shall exercise responsible judgment when scheduling advertisements that may be unsuitable for children during periods when large numbers of children are expected to be watching or listening to programmes.

(6) A licensee shall ensure that—

(a) any advertising breaks are clearly distinguishable from broadcast programmes;
and

(b) its presenters, when reading advertisements, make a clear distinction between the programming material and the advertisements they deliver.

120. The question that arises here is who should exercise the mandate under section 64H of Kenya Information and Communications Act? Section 46H relates to the Commission under the Act and not Kenya Film. Section 46H is therefore inapplicable in so far as Kenya Film's mandate is concerned. This fact seems to have also been admitted during the Inquiry Committee's proceedings at paragraph 50 where the witness, Eunice Mwanzia, the legal officer at Kenya Film, admitted that "*the existing Regulations were not clear on KFCB's mandate on content's owners like the respondent*" (Marie Stopes).

121. Similarly, with regard to the regulations relied on, even though the respondents cited those regulations

to support their assertion that the regulations gave Kenya Film mandate to act, the respondents did not point out which section of the parent Act- Kenya Information and Communications Act, donated power to Kenya Film to take the action it did. Only where the parent legislation donates power, can a subsidiary legislation require the public body to act pursuant to such regulations. Regulations *per se*, cannot confer mandate on a public body otherwise not authorized by the parent legislation.

122. A public body accused of acting or having acted contrary to law but which maintains that it acted or is acting in compliance with its mandate, must demonstrate to the satisfaction of the court, the source of its power. The source of such power can only be traced to its constituting law or any other

law authorizing the public body to act. Absent the source of power, the public body will have acted outside its mandate and its action will be *ultra vires* its mandate.

123. In the present circumstances, the respondents did not identify a provision that authorized Kenya Film to issue the impugned directive either expressly or by necessary implication. Kenya Film also failed to point out the law that allowed it to act as it did. In other words, Kenya Film failed to justify its action of 7th September 2018.

Decision by the Medical Board -4th respondent

124. Kenya Medical Practitioners and Dentists Board (the 4th respondent) also made a decision through its Inquiry Committee on 10th November 2018 which was impugned on the same grounds that there was

no mandate to make that decision. The impugned decision, was a ruling made in an inquiry by the Inquiry Committee said to be pursuant to the provisions of the Medical Practitioners and Dentists Act and the rules made thereunder.”

125. The inquiry was on Ann Kioko as the complainant against Marie Stopes. The complaint was that Marie Stopes had colluded with Radio Africa through Classic FM, Kiss 100, Radio Jambo and the Star Newspaper, to advertise its services on abortion.

126. Following some complaints, the Director of Medical Services forwarded the complaints to the Medical Board. The Inquiry Committee conducted an inquiry; arrived at conclusions and made several orders against Marie Stopes.

127. Marie Stopes was directed to cease and desist from offering any form of abortion services; to submit weekly returns to the Medical Board for sixty days for all services rendered in its facilities; review existing guidelines for reproductive health services to be in conformity with the law and the draft guidelines be submitted the Medical Board within sixty days. Marie Stopes was admonished for contravening the Medical Practitioners and Dentists (Practitioners and Health Facilities Rules, 2016.

128. Marie Stopes was also directed to pull down the misleading information from its website and any other information channels with immediate effect. Any future information would have to comply with the rules. Marie Stopes was directed to separate health service delivery function from advocacy

program. It was also to provide to the Chairperson of the Medical Board with evidence of compliance with those directions/orders within sixty days. The Medical Board would, upon review of the evidence submitted on compliance, be at liberty to make such further directions as it would deem fit in line with its statutory mandate.

129. The petitioners argued that the Medical Board did not have mandate to issue the orders against Marie Stopes because it did not supervise that facility as it was not registered by the Medical Board. The respondents maintained that the Medical Board acted lawfully and within its mandate.

130. According to the impugned ruling, the Inquiry Committee undertook an inquiry in accordance with the provisions of the Act and as provided for under

rule 4 (1)(a) of The Medical Practitioners and Dentists (Disciplinary Proceedings) Rules. The Inquiry Committee observed at Paragraph 52 (vi), that Marie Stopes is registered as an NGO under the Non-Governmental Organization and Coordination Act to conduct advocacy and provide public health awareness in areas of reproductive health. And operates health institutions which are registered and licensed by the Medical Board.

131. At para 52(vii), the Inquiry Committee observed that the advertisements undertaken as part of reproductive health campaign were not approved by the Ministry of Health which has the mandate to ensure that all health messages which are aired for health promotion are appropriate and in line with the operational Guidelines and Standards for Health

Promotion 2013-2018 which describe essential elements of interventions that facilitate better design and management of health promotion activities.

132. The Inquiry Committee found that the advertisements contravened provisions of the Medical Practitioners and Dentists (Practitioners and Institutions) Advertisement) Rules, 2016 and, in particular, rule 5(1)(c) which provides that: A practitioner or health institution shall not provide the following information in an advertisement under these rules-

Information that creates or is likely to create unrealistic or unwarranted expectation about effectiveness of the health services offered and Deceitful, erroneous or misleading information.

133. The petitioners argue, and the Inquiry Committee seemed to agree, that Marie Stopes is a non-governmental organization registered under the Non-Governmental Organization and Coordination Act to conduct advocacy and provide public health awareness in areas of reproductive health. The Inquiry Committee however stated that Marie Stopes operates health institutions which are registered and licensed by the Medical Board.

134. Whereas there would appear to be no dispute that Marie Stopes is a non-governmental organization, the Inquiry Committee observed that Marie Stopes operates health institutions that were registered and licensed by the Medical Board.

135. The inquiry was conducted against Marie Stopes as an institution which runs medical facilities. The petitioners argued that the Medical Board had no power to conduct inquiry proceedings against the institution but the respondents maintained the opposite view.

136. I have considered the arguments by parties on this issue. There is no dispute that the inquiry and consequent orders and directives were against an institution and not medical practitioners and dentists. The respondents maintained that the Medical Board had statutory mandate to conduct the inquiry and disciplinary proceedings and issue the orders it did against Marie Stopes as an institution. The respondents however did not point out a provision in the Medical Practitioners and Dentists Act that gave power to the Medical Board to conduct

the inquiry proceedings and take disciplinary action against an institution.

137.I have also carefully read the ruling of the Inquiry Committee dated 10th November 2018 which was said to have been ratified by the Medical Board. The Inquiry Committee merely referred to the Act without mentioning any specific provision under which it was acting. It only mentioned specific rules but not provisions of the Act.

138.As already stated with regard to the mandate of Kenya Film, only where the parent legislation donates power, can a subsidiary legislation require the public body to act pursuant to such regulations. Regulations *per se*, cannot confer mandate on a public body otherwise not authorized by the parent legislation and it is the duty of the public body to

demonstrate that it has that mandate under the statute or any other law, which the respondents failed to demonstrate.

139. On whether the Medical Board had mandate to conduct disciplinary proceedings against a medical institution was the subject of litigation in *Republic v Medical Practitioners & Dentists Board & 2 others Ex-parte Majid Twahir & another* [2016] KEHC 7851 (KLR) where the court held that “*under the Medical Practitioners and Dentists Act, the Board has no power to institute disciplinary proceedings against medical institutions as opposed to individual medical practitioners and dentists.*”

140. The above holding was followed in *Republic v Medical Practitioners and Dentists Board Ex-Parte*

Kenyatta National Hospital Board & another
(Miscellaneous Civil Application 220 of 2016) [2017]
KEHC 5582 (KLR) where the court stated:

[132] This court on the whole is unable to find any ambiguity in the Act capable of being filled by the subsequent amended rules. In other words, I have no hesitation in finding that Rules do not fill gaps in a statute. Accordingly, I decline to find that the disciplinary action towards the individual practitioners applies to institutions as well. Albeit it was contended that there was a lacuna in the law which was cured by the promulgation of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000 by the Minister, in my view, if there was a lacuna in the Act, such lacuna could only be cured by the amendment of the Act and not sneaked in by way of subsidiary

legislation where there is no express power in the Act enabling such subsidiary legislation to be made.

141. Courts in the above decisions held, and I agree, that the Medical Board had no power to conduct disciplinary proceedings against medical institutions whether on its own or through its Inquiry Committee. The proceedings against Marie Stopes were not supported by any law and the rules relied on by the Medical Board and the Inquiry Committee could not confer power over institutions when the parent legislation did not confer such power.

142. In the circumstances, I agree with the petitioners that the proceedings before the Inquiry Committee and its subsequent decision were not based on any law and were therefore *ultra vires* and unlawful.

3rd respondent's decision

143. The other decision that was impugned was by the Director of Medical Services, the 3rd respondent. The Director of Medical Services issued a letter dated 20th November 2018 addressed to the Country Director of Marie Stopes and headed "Complaints against Marie Stopes Clinics" stating that the decision given by the Medical Board's Public Inquiry Committee remains in force.

144. The letter signed by Dr. Kioko, Director of Medical Services, then concluded:

In view of the above, Marie Stopes is hereby directed to refer patients in need of Post Abortion Care (PAC) to the nearest facilities providing such

services without delay in order to ensure effective patient management.

145. The petitioners argued that the Director of Medical Services had no power to issue such a letter and, in any case, that office had ceased to exist. The respondents maintained that the Director of Medical Services acted properly.

146. The Office of Director of Medical Services existed prior to 2017 when that office was replaced by the office of Director General of Health established under section 16 of the Health Act, 2017, a fact Mr. Kanjama SC admitted. Section 17 of the Act delineates the functions of the office of Director General of Health. The Health Act was assented to on 21st June 2017 and commenced on 7th July 2017. This means that on 20th November 2018 when the

impugned letter was written, the office of Director of Medical Services had ceased to exist and Dr. Kioko could not have written the impugned letter as Director of Medical Services.

147. The respondents did not demonstrate that when the impugned letter was written (on 20th November 2018), Dr. Kioko had mandate to act as Director of Medical Services and could sign the letter in that capacity when the office of Director General of Health had been established.

148. In the circumstances, I agree with the petitioners that the 3rd respondent did not have mandate to write the impugned letter because there was no office of Director of Medical Services and, therefore, the letter was from a non-existent office and by a non-existing officer.

Conclusion

149. Having considered the pleadings, arguments by parties, the law and decisions relied on, the court comes to the following conclusions.

First, Kenya Film Classification Board did not have mandate to issue the directive dated 7th September 2018 either under the Film and Stage Plays Act, Kenya Information and Communications Act, the rules made under the Act or any other law. The respondents were unable to identify any provisions in those Acts and the regulations they cited that conferred on Kenya Film Classification Board mandate to act as it did.

Second, the Medical Practitioners and Dentists Board had no power to conduct disciplinary proceedings against medical institutions whether on its own or through its Inquiry Committee. The proceedings against Marie Stopes were not supported by any law and the rules relied on by the Medical Board and the Inquiry Committee could not confer power over medical institutions when the parent legislation did not confer such power. The proceedings before the Inquiry Committee and its subsequent decision were not based on any law and were therefore *ultra vires* and unlawful.

Third, the office of Director of Medical Services ceased to exist when the Health Act, 2017 introduced the office of Director General of Health. The Director of Medical Services having ceased to

exist Dr. Kioko did not have mandate to write the letter dated 20th November 2018 because there was no office of Director of Medical Services and therefore, the letter was from a non-existent office and by a non-existing officer. In any event, there was no lawful decision to communicate since the Medical Practitioners and Dentists Board did not have disciplinary mandate over medical institutions.

150. Consequently, and based on the above conclusions, the court makes the following declarations and orders it considers appropriate.

- 1. A declaration is hereby issued that the decision by the Kenya Film and Classification Board made on 7th September 2018 to ban advertisements by Marie Stopes Kenya on*

reproductive health services was made without authority and was therefore unconstitutional and unlawful.

2. A declaration is hereby issued that the Proceedings and Ruling of the Inquiry Committee of the Medical Practitioners and Dentists Board made on 10th November 2018 in the matter of Ann Kioko v Marie Stopes Kenya, was made without jurisdiction and was therefore unconstitutional, illegal, null and void

3. A declaration is hereby issued that the decision by the Director of Medical Services dated 20th November 2018 to Marie Stopes Kenya was made by a non-existent officer and was therefore unlawful

4. An order of certiorari is hereby issued quashing the decision of Kenya Film Classification Board - the 5th respondent, made on 7th September 2018 banning advertisements by Marie Stopes Kenya on public awareness campaign on reproductive health services through Radio Africa Group.

5. An order of certiorari is hereby issued quashing the Proceedings and Ruling of the Medical Practitioners and Dentists Board -the 4th respondent, in the matter of Ann Kioko v Marie Stopes Kenya dated 10th November 2018 in its entirety

6. An order of certiorari is hereby issued quashing the letter by the Director Medical Services dated 20th November 2018 Ref: MOH/ADM/UI barring

*Marie Stopes Kenya from offering Post Abortion
Care Services.*

*7. This being a public interest litigation, each party
shall bear their own costs.*

**Dated and delivered at Nairobi this 18th Day of
December 2025**

E C MWITA

JUDGE