

FIDA KENYA & 3 OTHERS VS. ATTORNEY GENERAL & 2 OTHERS CONSTITUTIONAL PETITION NO 266 OF 2015

Enforcing Kenya's obligation to
provide legal abortion services



women's **L I N K** worldwide

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ENFORCING KENYA'S OBLIGATION TO PROVIDE LEGAL ABORTION SERVICES

IMPACT OF LACK OF CLARITY ON ABORTION IN KENYA: THE CASE OF JMM

JMM, a schoolgirl from a poor family in rural Kisii, was born in 2000. Her mother, PKM, is a casual laborer, earning about Kshs. 100 (approx. USD 1) a day. When JMM was 14 years old, she was forced into sexual intercourse by an older man. She suspected that she could be pregnant after two months when she started feeling nauseous.

As is the case with many rape survivors, JMM did not receive information on post rape care she was entitled to as a rape survivor. Aware of the blame always placed on rape survivors and fearing that she would be held responsible and rejected by society, she turned to the only person she thought would help her without judging her – an older girl with whom she shared a bedroom. The girl introduced her to an unqualified provider who helped her procure an unsafe abortion. After the procedure, JMM was advised to go home and wait for the completion of the abortion process.

At home, she began vomiting and bleeding heavily. She was taken to a nearby dispensary that was not well equipped. Besides, the dispensary lacked skilled staff. After a few hours, JMM was transferred to Kisii County Referral Hospital, the highest-level public facility in that county, located about 15.6 Km away from her home. She stayed at the hospital for three nights and received some treatment. The hospital established that JMM needed specialized treatment, a service they could not provide. She was therefore referred to Tenwek Mission Hospital for dialysis, a hospital of a lower classification, located about 50 Kms away. At Tenwek, JMM was immediately admitted to the Intensive Care Unit. By this time, she could not talk. She was discharged from Tenwek after seven days without adequate treatment on grounds that the hospital did not have a dialysis machine and could therefore not provide the services for which she had been referred and admitted for.

Twelve days after the unsafe abortion, JMM arrived at Kenyatta National Hospital – (KNH) the biggest referral hospital in the country – where she received the post abortion care and dialysis. KNH diagnosis indicated that she had a septic abortion, hemorrhagic shock and had developed chronic kidney disease. About 68 days later, she was discharged but was detained at the facility as she was unable to pay for the hospital bill that had risen to Kshs. 39,500 (approximately USD 395). Consequently, she slept on a mattress on the floor at a “detention centre” in the hospital. She fell sick again and was taken to the main hospital for treatment for four days and later returned to “detention” for a further two weeks before her bill was finally waived when the hospital established she could not pay.

JMM lived with kidney disease arising from the unsafe abortion for three years and required dialysis every month. She passed away in June 2018 due to complications from the kidney disease.

SOCIAL CONTEXT:

- Unsafe abortion is one of the leading causes of maternal mortality in Kenya. An estimated 28 women and girls die from unsafe abortion each week.
- The Ministry of Health has developed technical guidelines for managing all other leading causes of maternal mortality except for unsafe abortions.
- Under Kenya's Constitution, a trained health professional can perform legal abortions when the health or life of a pregnant woman is in danger, in cases of emergency, or if allowed by any other written law.
- In Kenya, unqualified providers operate freely. There exists lack of skilled personnel at the lowest levels of health care where majority of Kenyans access health care services as exemplified by the case of JMM.
- Many women and girls are raped in Kenya. There is no adequate protection or rehabilitation for survivors of sexual violence and referral systems are poor.
- Medical facilities charge high fees for post abortion care which poor women and girls cannot afford, leaving many to die or living with lifelong disabilities that would otherwise be preventable.

CASE HISTORY

- In 2011, to address the challenge of unsafe abortion and lack of a comprehensive policy framework to enable provision of services, the Ministry of Health (MoH) made positive steps to implement the constitutional provisions on abortion. It set up a multi-sectoral working group with a wide range of stakeholders, including representatives from the Health Ministry, health regulatory bodies and associations, religious sector, development partners and civil society organizations, to draft Standards and Guidelines for managing: all the aspects of prevention of unintended and risky pregnancies, cases of unintended and risky pregnancies and post abortion care. The Guidelines also set standards for the audit, monitoring and evaluation of comprehensive abortion care in Kenya.
- The Standards and Guidelines were adopted by MOH in September 2012 and became a tool that guided clinicians and patients in making decisions about appropriate abortion care and treatment. The Standards set the minimum requirements that each health facility and service provider should meet to provide safe legal abortion services. At its adoption, the MOH indeed conceded that the one missing link in reducing maternal mortality had been the absence of technical and policy guidelines for preventing and managing unsafe abortions to the extent allowed by law.
- On 3rd December, 2013, the Director of Medical Services wrote to all County Directors of Health and other stakeholders, including health organizations and a religious body, advising them of the immediate withdrawal of Standards and Guidelines, and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies. The Director said it

had come to the attention of MOH that the guidelines and curriculum were not being used for their intended purposes.

- On February 24th, 2014, the Office of the Director of Medical Services (DMS) circulated a memo notifying all health care professionals that they would face professional and legal sanctions for attending trainings on safe abortion practices and the use of Medabon. On the same date, the DMS also reprimanded the Kenya Obstetrical and Gynaecological Society (KOGS) for developing a training curriculum on safe abortion and for spending 60% of time on abortion during their Annual Scientific Conference.

THE IMPACT OF THE ACTIONS OF THE MINISTRY OF HEALTH ON WOMEN, GIRLS AND SERVICE PROVIDERS

- The actions undermined women's and girls' ability to prevent pregnancy and to access legal abortion services and quality, humane post-abortion care. They also left health workers with no official guidance on safe legal abortion services.
- The uncertainty and confusion caused by the actions of the ministry created an environment where health providers were apprehensive of providing abortion services for fear of arrests and prosecutions.
- The actions interfered with women's and girls' access to information on where, when and from whom to seek abortion services.
- The ministry in singling out abortion services reinforced the stigma associated with abortion.
- The actions meant that there continued to be no trained mid-level service providers allowed to provide abortion services at community level.
- The actions created an environment where police, taking advantage of the lack of clarity on the legal status of abortion, constantly harassed and extorted money from health service providers.

THE COURT CASE

JMM, her mother, two women who work on human rights issues in informal settlements in Nairobi, and FIDA -Kenya (a national organization that works on women's human rights), represented by the Center for Reproductive Rights, filed a Constitutional Petition before the High Court. We argued that the actions of the MOH, in withdrawing the Standards and Guidelines on unsafe abortion and banning training of health services providers, went beyond the scope of their mandate and were therefore unlawful, irrational, arbitrary and without justification.

We also argued that these actions violated the following rights of women and girls:

- right to non-discrimination because they restricted access to safe abortion, a reproductive

service that only women and girls need.

- right to health because they restricted access to abortion which is a reproductive health service guaranteed in the Constitution and a health service that women and girls may need to save their lives or secure their health.
- right to information because they took away the Guidelines which were a source of and a tool for information for women and girls.
- consumer rights and right to scientific progress because the guidelines and Medabon represented the most current information and technology for dealing with unsafe abortion.

The Petitioners were supported in the case by the following interested parties:

- Article 19 Eastern Africa, an organization that promotes freedom of information and which argued that Kenya had an obligation to ensure that information about sexual and reproductive health is available to all individuals and groups.
- Physicians for Human Rights (PHR), an organization that documents severe human rights violations and advocates against the violations, which argued that the actions of the DMS, created an atmosphere where young girls like JMM and other women who suffer rape and defilement are unable to freely and safely access legal abortion.

The MOH opposed the Petition arguing that the Guidelines were withdrawn following disagreements on its contents by stakeholders and that the Memo banning the training of all health professionals was a consequence to the withdrawal of the Guidelines.

The Ministry's position was supported by: East Africa Center for Law and Justice, Kenya Christian Professionals Forum; Kenya Catholic Doctors Association; Rev John Mbugua; Nazlin Umar Rajput.

Three friends of the Court: Women's Link Worldwide, the National Gender and Equality Commission and the Kenya National Commission on Human Rights provided additional information to the Court on: unlawful restriction of women's and girls' access to scientific progress; the recent changes in law in other countries in Africa which provide for guidance on how to ensure access to safe and legal abortion for survivors of sexual violence; and the effect of MOH's actions of imposing hardship to poor and rural women seeking safe abortion services.

A WIN FOR WOMEN AND GIRLS IN KENYA!

On June 12, 2019, a five-judge bench of the High Court of Kenya delivered a groundbreaking judgement in which it affirmed the spirit and letter of the Constitution.

On all the issues raised, the Court found that:

1. The withdrawal of the Standards and Guidelines, the ban on training of health professionals on safe abortion and the use of Medabon, the threat of penal sanctions against the health

professionals by the Director of Medical Services were unlawful, illegal, arbitrary and unconstitutional and thus the Standards and Guidelines and the training curriculum should continue to exist as if they were never withdrawn.

2. The Constitution provides for a right to abortion where, in the opinion of a trained health professional there is need for emergency treatment, or that the life or health (mental or psychological or physical) of the woman or girl is in danger, or if permitted by any other written law.¹
3. Abortion is permitted in Kenya if a pregnancy results from rape or defilement, and if in the opinion of a trained health professional it endangers the physical, mental and social well-being of a woman or girl.²
4. The blanket prohibition of abortion under the Penal Code cannot stand because it is inconsistent with the provisions of the Constitution as well as the Sexual Offences Act.³
5. Kenya's refusal to be bound by Article 14 (2) (c) of the Maputo Protocol to the African Charter on Human and People's Rights has no effect to the extent that those provisions of the Protocol mirror those in Article 26 (4) of the Constitution of Kenya, which is binding.⁴
6. Trained health professionals permitted by the Constitution to make an opinion that an abortion is necessary include nurses, clinical officers and midwives in addition to doctors and specialist obstetrician gynaecologists. ⁵
7. The court agreed with and adopted the World Health Organization's definition of health to mean "a state of complete physical, mental and social well-being, and not only the absence of disease or infirmity".

THE COURT ORDERS

The Court made the following orders:

1. That by withdrawing the Standards and Guidelines and the training curriculum and by banning the use of Medabon, the MOH violated and or threatened the right of women and adolescent girls of reproductive age to: the highest attainable standard of health, right to non-discrimination, right to information, consumer rights, and right to benefit from scientific progress;
2. That by banning the training of health professionals and use of Medabon, the MOH violated and/ or threatened the rights of health care professionals to information, freedom of expression and association, consumer rights, and right to benefit from scientific progress;

1 Fida Kenya & 3 others vs AG & 2 others para 362
2 Id para 399
3 Id paragraph 369
4 Id paragraph 372
5 Id paragraph 358

3. That the acts of withdrawing the Standards and Guidelines and National Training Curriculum, the banning of training and use of Medabon were unlawful, illegal, arbitrary, unconstitutional, and were therefore void;
4. That abortion is allowed in cases of emergency, to save the life or health of pregnant women, and as provided by any other written law. Abortion is also allowed in cases of rape or defilement if in the opinion of a trained health professional the pregnancy poses a danger to the life or the health of the mother.
5. That the government of Kenya should compensate PKM for the physical, psychological, emotional and mental anguish, stress, pain, suffering and death of JMM occasioned by the violation of JMM's constitutional rights.

WHAT THE DECISION MEANS FOR:

1. HEALTH SERVICE PROVISION

- The law on abortion and provision of abortion services has been clarified and there should be no confusion, distortion and stigma premised on the wrong notion that abortion is totally illegal in Kenya.
- Legal abortion as a reproductive health service should now be available and accessible in all public health facilities across the country.
- The Standards and Guidelines and the National Training Curriculum have been reinstated.
- The Court paved way for continued use of the two documents to care for patients and training of health workers.
- Trainings of health professionals on provision of safe and legal abortion services should resume.
- Nurses, clinical officers and midwives trained to offer abortion services will provide safe legal abortion services.

2. WOMEN AND GIRLS

- a) Each time a pregnant woman or girl faces a risk to her physical, mental, psychological or social health, she has the option to terminate that pregnancy. This risk will be assessed by a trained health professional. Women and girls can ask for and should be provided with accurate and comprehensive information on abortion.
- b) Survivors of sexual violence resulting in pregnancy can access legal abortion services.
- c) Marginalized and poor women and girls, as well as those living in rural areas can equitably, access safe legal abortion services.

3. THE MINISTRY OF HEALTH AND COUNTY GOVERNMENTS

- a) The Ministry of Health and all County Governments must now widely disseminate the Standards and Guidelines.
- b) The Ministry and all County Governments must ensure that abortion as a reproductive health service is available and accessible within the limits of the law in all health facilities across the country.
- c) The Ministry should avail in all public health facilities, trained health professionals, essential medicines and equipment for safe legal abortion and post abortion care.
- d) The Ministry must reinstate the training of all nurses, clinical officers, midwives and doctors on provision of safe legal abortion services and post abortion care.
- e) The Ministry must resume proactive dissemination of complete and accurate information on abortion.

4. ABORTION RELATED CRIMINAL PROSECUTION

- The decision clarifies actions and omissions criminalized in sections 158 and 159 and 160 of the Penal Code and actions permitted under Article 26(4) of the Constitution of Kenya. Constant harassment by police based on reliance of section 158-160 of the penal code without due regard to article 26(4) of the Constitution should cease with immediate effect.
- Public prosecutors and courts should henceforth read the Penal Code sections 158, 159 and 160 with the necessary —alterations, adaptations, qualifications and exceptions to bring it into conformity with the Constitution. They must ensure that doctors, nurses, midwives and clinical officers who provide safe and legal abortion services to women and girls are not harassed through spurious prosecution.
- The leadership of the police service should immediately commence sensitization of police officers on the law regulating access to abortion services in Kenya to ensure clarification of values and destigmatize the police service.

5. PUBLIC OFFICERS EXERCISING THEIR DUTIES

- Public officers cannot make unilateral and arbitrary policy decisions. They must ensure that the constitutional standard on public participation is upheld during the development, amendment and withdrawal of public policies and their actions must always bring those policies in line with the Constitution.

6. REPARATIONS FOR REPRODUCTIVE RIGHTS VIOLATIONS

- Government officials will be held responsible for their direct actions or inaction as well as for the harm and damage that their acts or omissions cause to survivors of reproductive rights violations