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Challenging Institutional Stigma Against Abortion Care in Kenya

Network for Adolescent and Youth of Africa (NAYA-Kenya) & Another V. Attorney General & 4 Others. Nairobi High Court Petition No. 428 of 2018

Article 26 (4) of the Constitution provides the right to access abortion when in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the pregnant woman is in danger. Unsafe abortion is among the 5 leading causes of maternal deaths and injuries in Kenya.



On November 30, 2018, the Center for Reproductive Rights, appearing for NAYA-Kenya and Jackline Karanja filed a case against the Ministry of Health, the Kenya Medical Practitioners and Dentists Board, (KMPDB) and Kenya Film and Classification Board (KFCB).

The three public institutions had banned Marie Stopes Kenya (MSK) from providing information to adolescents and youth on the magnitude and impact of unsafe abortion in Kenya — including where to get help from — through radio and online platforms.

They also banned MSK from providing any kind of abortion care even where legal, including post abortion care, despite the same being emergency treatment under the right to health.

BACKGROUND

Since 1985, Marie Stopes Kenya (MSK) has been providing high quality affordable sexual and reproductive health (SRH) services for all people across Kenya. As one of the leading specialized SRH providers in Kenya, MSK works with the Government of Kenya and other stakeholders to ensure the poorest and hardest to reach clients can

access affordable SRH services that meet their needs. MSK implements a service delivery approach that is free from stigma, judgement, and discrimination regardless of age, location, background, marital, or economic status. MSK provides all modern methods of contraception and comprehensive post-abortion care (CPAC), ante- and post-natal care, sexual health counseling, gynecological check-ups, cervical

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In Kenya, an estimated 464,690 induced abortions occurred in the year 2012.

In the same year, an estimated 157,762 women received care for complications of induced and spontaneous abortions in health facilities.

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cancer screening and treatment, and testing and treatment of HIV and other sexually transmitted infections. In 2018, over 1,200,000 clients were reached through MSK's service delivery points spread across the country.

Beginning August 22, 2018, MSK, began a 9-week public awareness campaign on Comprehensive Reproductive Health and information together with Radio Africa Group of media houses. The objective of the campaign was to provide adolescents and youth with relevant SRH information in addressing the rising morbidity and mortality from unsafe abortion in Kenya. The campaign highlighted the statistics on unsafe abortions in Kenya, the dangers of unsafe abortion, abortion stigma and discrimination of women and girls who have undergone unsafe abortion. It directed members of the public in need of pregnancy crisis counselling to call Marie Stopes-Kenya customer care helpline.

On September 11, 2018, the KFCB banned the Marie Stopes campaign claiming it *'clearly promotes abortion contrary to Article 26(4) of the Constitution'* and on November 5, 2018 the KMPDB directed Marie Stopes to immediately cease offering any form of abortion services in all its facilities within Kenya on grounds that the advertisements were erroneous and not approved by the Board. Shortly thereafter, on November 20, 2018, the Director of Medical Services (DMS,) further banned MSK from providing any form of post abortion care in any of its facilities within the country. MSK was also ordered to pull down all reproductive health information on its website which the Board considered to be in violation of the guidelines set by the Medical Practitioners rules on advertisement.

The ban against MSK was arbitrary and MSK was never given a fair hearing. Equally, the finding of the KMPDB was

not based on the actual complaint or any material evidence presented before it as the complaint to KMPDB was on the legality of the campaign whereas the decision made by the KMPDB did not address the campaign but proceeded to stop all kinds of abortion services offered by MSK.

WHAT THIS CASE IS ABOUT

In Kenya, an estimated 464,690 induced abortions occurred in 2012. In the same year, an estimated 157,762 women received care for complications of induced and spontaneous abortions in health facilities. Severe complications of unsafe abortions were most common among women aged 19 years or younger. Young women and girls comprised about half of the patients treated for complications of unsafe abortions in 2012¹ making it imperative for any responsible government to develop programs that target this category of persons including through information that reduces stigma and prevents unsafe abortions.

This case challenges the blanket attempts to limit a constitutionally guaranteed health care service through back door channels without justifiable grounds. It confronts efforts to restrict reproductive health information and services including legal abortion in Kenya that is perpetuated by public institutions through the actions of individual officers at the helm of those institutions based on their personal convictions. It seeks to hold the institutions and the individuals personally responsible for the violation of the rights of women and girls in the pretext of executing nonexistent mandates or wrongfully using lawful authority. It confronts practices that perpetuate the chilling effect created by unreasonable restrictions on access to abortion information and services which deters women and girls from seeking evidence-based care.

1. African Population and Health Research Centre, Ministry of Health [Kenya], Ipas, and Guttmacher Institute. 2013. Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study. Nairobi, Kenya, African Population and Health Research Center.

WHAT THIS CASE IS NOT ABOUT

This case is about the critical role that information plays as a gateway right for the rights to health, dignity, life and equality and the core mandate of making health care services accessible without stigma or consideration of extraneous factors.

This case does not seek to introduce any new ground for access to abortion but for full implementation of article 26 (4) of the Constitution and stopping public institutions from wrongfully limiting the rights of citizens protected in the constitution without justifiable grounds or due process.

WHAT THIS CASE IS ASKING THE COURT TO DO

Decisions like the ones rendered by KMPDB and KFCB undermine women's constitutional rights by denying countless women, including rape survivors, access to information and safe, legal abortion even under circumstances permitted by the Kenyan Constitution. It stigmatizes post abortion care which is emergency care which Ministry of Health has been encouraging as part of strategies for addressing the high incidents of maternal deaths and injuries from unsafe abortions.

The bans not only deny women life-saving reproductive health services but also constitute several unjustifiable violations of fundamental human rights protected under the Kenyan Constitution, including:

- Right to a fair & administrative action
- Right to access information
- Right to the freedom of expression
- Right to health

- Right to equality & freedom from discrimination and the right to equal protection from the law
- Right to life
- Right to freedom from torture and cruel, inhuman, or degrading treatment
- Right to human dignity

The case asks the court to:

- a) Declare that decisions of the DMS, KFCB and KMPDB were unconstitutional and violated the rights of women and girls of reproductive age.
- b) Give an order quashing the decisions of the DMS, KFCB AND KMPDB to ban MSK from providing abortion information and services.
- c) Give an Order barring all government agencies from interfering with provision of accurate information and lawful healthcare services and an order restricting government agency from issuing misleading information on Abortion.
- d) Give an Order compelling the Ministry of Health to disclose information proactively and fully on abortion and make available and accessible information on legal and safe abortion that is accurate, transparent uncensored.

NOTE:

Following the filing of the case and advocacy from reproductive rights organizations, the Minister for Health withdrew the ban on provision of post abortion care on the 20th December 2018.

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