

# A Decade of Existence:

## Track Report

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Revealing Progress,  
Reversals, and  
Betrayal of a  
National  
Compromise

June, 2020.



# Tracking Implementation of Article 26(4) of the Constitution

## Acknowledgement

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“... a constitution is ultimately a piece of paper. Although its effectiveness depends in part on internal mechanisms for enforceability, its success depends fundamentally on public attitudes and the commitment to constitutionality.”

— The People's Choice: The Report of the Constitution of Kenya Review Commission, Short Version, September 18, 2002, page 19

# Abbreviations and Acronyms

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## **CoE**

Committee of Experts

## **CKRC**

Constitution of Kenya Review  
Commission

## **DMS**

Director of Medical Services

## **KFCB**

Kenya Film Classification Board

## **KMPDB**

Kenya Medical Practitioners and  
Dentists Board

## **MoH**

Ministry of Health

## **PAC**

Post-Abortion Care

## **PSC**

Parliamentary Select Committee

## **RHDC**

Revised Harmonized Draft  
Constitution

## **RHN**

Reproductive Health Network

## **WHO**

World Health Organization



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## Recommendations

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### **To end violations in prosecution of abortion-related offences and toward enhanced legal protection for access to safe abortion services as guaranteed in Article 26(4) of the 2010 Constitution**

For the effective implementation of Article 26(4) of the constitution, it is essential to promote women's access to safe abortion services and abortion-related care within the context of all relevant Kenyan law. This report makes the following recommendations for these organizations:

#### **The Ministry of Health**

- > Develop robust public education and awareness on lawful and unlawful abortion under Article 26(4) of the constitution, including available services for access to safe abortion.
- > Ensure that all health facilities and trained health professionals have essential medicines and equipment for safe and legal abortion in accordance with the Constitution of Kenya.
- > Implement policy framework on access to safe abortion services with a guarantee for access and availability across the country and within reach of all women and girls, regardless of their social or economic status.

#### **The Director of Public Prosecutions and the National Police Service**

- > Develop capacity of criminal justice actors, including police and prosecutors, on interpretation and application of Article 26(4), and on identifying and addressing gender stereotypes — on pregnancy, termination of pregnancy, and legal abortion — during investigations and prosecutions. Capacity development must be sustained and regular to ensure shift of attitudes. It must also be evidence-based, to address the contextual realities of affected women and girls.
- > Direct all prosecutors to ensure that duly trained doctors, nurses, midwives, and clinical officers who provide legal abortion services to women and girls are not harassed through spurious extortion, arrests, and prosecution.

#### **The National Assembly**

- > Commence the amendment of sections 158, 159, 160, and 240 of the penal code to incorporate key elements provided in Article 26(4) of the constitution, the Sexual Offences Act, and all relevant laws.
- > Draft and pass legislation on reproductive health care to offer more clarity regarding legalities, systems, and procedures on Article 26(4).

#### **The Chief Justice**

Pronounce judicial recognition of the permitted grounds under Article 26(4) of the constitution as an immediate obligation in criminal and civil cases — arguments that can be applied in the present context, even before the necessary legal reforms take place.

## I. Introduction

### BACKGROUND

In the years leading up to the 2009-2010 constitutional reform process, an estimated 2,600 women died annually in Kenya from complications of unsafe abortion.<sup>1</sup> In the early 2000s, 35% of maternal deaths in Kenya were attributable to unsafe abortion.<sup>2</sup> That rate was nearly triple the worldwide average of deaths from unsafe abortions (13%).<sup>3</sup>

The high maternal mortality rate in Kenya, coupled with the critical national goal of protecting women's health and lives, informed the constitutional reform debates on abortion. Public health and human rights concerns were both key drivers for advocates of progressive reforms on abortion. Indeed, a recognition of this public health data on the contribution of unsafe abortion to maternal deaths and morbidities contributed to the constitutional provisions aimed at protecting and promoting women's rights to life and health, in part, by making safe abortion legal under limited circumstances.<sup>4</sup> In a national referendum on August 4, 2010, 67% of voters accepted the draft constitution with the article allowing for abortion under certain conditions.<sup>5</sup>

Despite the constitutional provisions, the situation of unsafe abortion has not changed much. A study by the Ministry of Health (MoH) and the African Population and Health Research Center estimated that nearly a half-million induced abortions (464,690) were performed in 2012. Furthermore, it estimated that 157,762 women received care for complications



A mobile clinic outreach by Marie Stopes at Rabai hospital . Photo credit: Jonathan Torgovnik / Getty Images.

from induced and spontaneous abortions in health facilities (public and private) in the same year, and of these, 119,912 received care for complications from induced abortions.<sup>6</sup> The subsequent cost of treating complications arising from unsafe abortion in public facilities was estimated to be 432.7 million Kenyan shillings (about US\$ 5.1 million) in 2012.

In a further study in 2013, this position was reaffirmed and seen to be an accurate reflection of the reality on the ground.<sup>7</sup>

### OBJECTIVE OF THE REPORT

It is against this backdrop that this study examines the implementation of the 2010 Kenyan constitutional provisions on access to legal abortion with an emphasis on the legal sector implementation. In particular, the study traces the interaction of the police and the courts with cases related to abortion, and critically analyzes their interventions for conformity with the legal provisions. The objective of the study is to understand the status of implementation of

the constitutional provisions on abortion and subsequent laws that provide for abortion, such as the Health Act (2017); to identify potential gaps in implementation; and to offer recommendations to ensure that women who qualify for abortion under the law are not prevented from accessing the same.

### RESEARCH METHODOLOGY

This research is based on desk research and key informant interviews with relevant stakeholders, including medical experts in the field of sexual and reproductive rights, health service providers who have specifically interacted with law enforcement officers in the context of abortion, and women and girls who have interacted with law enforcement officers and courts in the context of abortion.

The literature review methodology adopted included desktop research on existing reports, laws, policies, international human rights normative frameworks, principles and standards, Kenyan jurisprudence on



A total of 29 cases filed in criminal courts between 2010 and 2019, with charges relating to provisions of the penal code that prohibit abortion and related acts were identified, reviewed, and analyzed.

Key informant interviews were undertaken in three counties in Kenya (Kiambu, Nairobi, and Nakuru)



Members of the Young Mothers, and Breast Feeding women group gather to discuss sexual and reproductive health, family planning options and self empowerment. Photo credit: Jonathan Torgovnik / Getty Images.

women and girls' access to abortion. This was followed by field research that entailed a manual review of court registers at the various law courts' registries.

A total of 29 cases filed in criminal courts between 2010 and 2019, with charges relating to provisions of the penal code that prohibit abortion and related acts were identified, reviewed, and analyzed. The court stations records review was conducted from October 2018 to November 2019 in Makadara and Kibera Law Courts in Nairobi County, Limuru and Kiambu Law Courts in Kiambu County, Kilifi Law Courts in Kilifi County, Nakuru (Central) Law Courts in Nakuru County, and Machakos (Town) Law Courts in Machakos County.

Key informant interviews were undertaken in three counties in Kenya (Kiambu, Nairobi, and Nakuru) by the Center for Reproductive Rights (hereinafter “the Center”) between October 2017 and

February 2019 and sought to understand:

- > Service providers' understanding of the legal framework on abortion in the 2010 Constitution.
- > The experiences of women, girls, and health practitioners as they interacted with law enforcement officers and courts seeking to enforce abortion laws.

#### LIMITATIONS OF THE STUDY

The study acknowledges that implementation of the abortion provisions as per the Constitution of Kenya, 2010, requires a multisectoral approach. However, this study emphasizes mostly legal sector implementation of the constitutional provisions. In addition, despite efforts to obtain other key stakeholders' perspectives through consultations and multistakeholder forums, the study was unable to receive input from the MoH and law enforcement officials on the issues raised herein.

## 2. The Legal Framework

### A. BACKGROUND: PROHIBITION OF ABORTION IN KENYA'S PRE-2010 LEGAL FRAMEWORK

In contrast to the current constitutional approach, which focuses on protection of the right to health and life of women, legal provisions on abortion were contained only in the penal code, particularly under “*offences against morality*” in Chapter XV, sections 158 to 160, and under “*offences connected with murder and suicide*” in Chapter XXI, sections 221 to 228.

The Kenyan penal code prohibited “*unlawful administration*” or “*unlawful supply or procurement*” of any substance, force, or means to “*unlawfully... procure the miscarriage of a woman*” but failed to include corresponding provisions explicitly indicating circumstances when abortion could be considered lawful.

Section 240 of the penal code under Chapter XXII, which lists “*offences endangering life and health*,” introduced an implied exception to the prohibition against abortion. It states that “*a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.*” Thus, this provision

permits a surgical operation on an unborn child as a lawful act, if it was considered *reasonable* to perform, for the preservation of the woman's life, even though its result may include an abortion.

No further guidance was provided within the penal code or any other Kenyan law on how the provision would be operationalized. Moreover, the wording of section 240 of the penal code implied that only an abortion resulting from the performance of a surgical operation on a fetus could be permitted, suggesting that any other methods of treatment, such as medical abortion, even when applied to preserve a woman's life, could be considered unlawful.

Preceding section 240 of the penal code was the 1938 landmark United Kingdom case, *Rex v. Bourne*.<sup>8</sup> In that case, a surgeon was charged, under section 58 of the Offences against the Person Act 1861, with unlawfully procuring the abortion, through surgical operation, of a 14-year-old girl who was pregnant as a result of rape. The jury was directed that it was for the prosecution to prove beyond reasonable doubt that the surgical operation was not performed in good faith for the purpose, only, of preserving the life of the girl. The court and jury were guided by and concurred with the surgeon's opinion, based on his expert knowledge and experience. He had not waited until the patient was in peril of immediate death but was certain that the pregnancy resulting from rape would be “most prejudicial” to the physical and mental health of the young girl, thereby posing a significant threat or risk to her life.<sup>9</sup> The surgeon was acquitted.

The standard established in *Rex v. Bourne* was subsequently affirmed in a Kenyan case, *Mehar Singh Bansel v. R* (1959). The trial court held that the prosecution had proven that the surgical operation in consideration was performed by the surgeon “for some purpose other than ... with a view to saving the life or preventing

from prejudicing the health of the deceased,” thereby making it illegal.<sup>10</sup>

The MoH sought to provide guidance to medical professionals through the Medical Practitioners and Dentists Board Code of Professional Conduct and Discipline (MPDB Code) and the 2004 National Guidelines on Medical Management of Sexual Violence,<sup>11</sup> which provide standards of care that health providers are expected to adhere to in the provision of health services.

Although the MoH's guidance helped to fill a legal and policy vacuum, it nonetheless introduced further restrictions, ambiguities, and uncertainties in the application of section 240 of the penal code by health professionals. The MPDB Code defined a skilled professional, for purposes of performing an abortion, to include only medical doctors and gynecologists, excluding clinical officers and nurses who form the bulk of the health workforce, especially in semi-urban and rural areas, and who are trained to intervene in cases of post-abortion care (PAC).

The requirement in the code, which “strongly advised” medical practitioners to consult with at least two senior and experienced colleagues and obtain their opinion in writing before performing an abortion, introduced an additional hurdle for medical doctors in settings where there were no senior and/or experienced colleagues to consult, let alone enough professionals within the cadre of medical doctors. The situation was compounded by the misperception and misrepresentation among medical trainers and providers that the two senior colleagues referred to in the code should include a gynecologist and psychiatrist, who were even more challenging to access in the majority of health facilities in Kenya.

Further, the code's requirement that medical doctors could perform the operation if they considered themselves “competent to do so in the absence of a gynecologist” was often misconstrued to mean that abortion procedures required specialization in

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gynecology, thereby causing non-specialized doctors to shy away from offering abortion-related services.

The 2004 National Guidelines on Medical Management of Sexual Violence required psychiatric evaluation and recommendation before women and girls who became pregnant from rape could access termination-of-pregnancy services. Furthermore, the majority of health professionals were not aware of the provisions of the MoH's guidance on interpretation of lawful exceptions to termination of pregnancy, mostly owing to lack of pre- and post-service training and varied interpretations of the law. This resulted in inconsistencies in teaching curricula.<sup>12</sup>

Consequently, despite lawful exceptions to the prohibition against abortion, particularly when necessary to preserve the life or health of an expectant woman, the scope of access to corresponding services remained ambiguous, unclear, and restrictive. In most cases, health professionals preferred to err on the side of caution, applying a conservative approach that considered all instances of abortion, except “the most extreme and indisputable circumstances,” which were the rarest cases, to be unlawful.<sup>13</sup>

Criminal cases involving health professionals, women, and girls alleged to have unlawfully provided or procured abortions prior to the enactment of the 2010 constitution reveal that the criminal justice sector adopted a similar stance as the health sector — that abortion was unlawful under all circumstances, without due regard to the lawful exceptions recognized in section 240 of the penal code and related interpretation by courts and the MoH.

Research conducted in Nyeri and Kisumu in 2010 revealed that approximately three new cases of procurement of abortion, mostly involving women and girls, were filed in lower courts every week.<sup>14</sup> Such cases were mostly initiated when community members lodged reports, triggering investigations by local administration and police officers, and eventual prosecution. In most cases, accused persons did not have legal representation; they pleaded guilty and were often convicted without much evidence.<sup>15</sup> The courts rarely sentenced the accused to the jail terms provided for in the penal code, and instead ordered them to serve short-term probationary periods and perform community service.<sup>16</sup>

## Pre-2010 Cases Against Health Professionals

One such renowned case was *Republic v. John Nyamu & 2 Others*.<sup>17</sup> Dr. Nyamu, a well-known gynecologist who provided reproductive health services, was arrested and charged, along with two nurses working at his clinic, for the alleged murder of two fetuses that were dumped on a highway in Nairobi. The allegation was that the fetuses were illegally aborted at Nyamu's clinic. Although the media and public narrative focused on the provision of alleged illegal abortions, Dr. Nyamu and the two nurses were charged with two counts of murder. The court determined that besides “wide yawning gaps” in the facts and evidence submitted by the prosecution, fetuses were not capable of being murdered as established in section

214 of the penal code, which provided that “a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.” The court ruled that the prosecution had failed to prove a case of murder against Dr. Nyamu and the two nurses and found them not guilty.<sup>18</sup>

In another case, *Republic v. Jackson Tali*, the trial court found Tali, a registered health worker operating a clinic guilty of murder and sentenced him to death after a young woman with pregnancy complications died in his care. The trial court determined that there was an unlawful act of procuring an abortion or attempted abortion, causing excessive bleeding and anemia resulting in the death, which was enough proof of *malice aforethought*. The trial court convicted Tali despite the lack of any form of medical or forensic evidence to prove that the deceased had undergone an abortion or that Tali had performed the abortion, unlawfully, outside the exceptions in section 240 of the penal code. Moreover, the trial court disregarded the government pathologist's expert evidence showing that at the time of the postmortem examination there were no signs of an attempted abortion.

When Tali appealed his conviction, the Court of Appeal took issue with the above and with the way the explanation provided by the accused during his initial trial was dismissed. The Court of Appeal was “far from satisfied that the offence of murder was proved beyond any reasonable doubt,” finding instead that all that was established was “suspicion that the appellant may have had a hand in the death of the deceased, but mere suspicion, however strong, is never probative of an offence in our criminal justice system.”<sup>19</sup>

While abortion was alleged to be the underlying unlawful act resulting in death in both cases, no attempts were made by the courts to determine whether the prosecution had proved beyond a reasonable doubt that

Two renowned cases are:

*Republic v. John Nyamu  
& 2 Others.*

and

*Republic v. Jackson Tali.*



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the alleged abortions had not been performed in good faith to preserve the lives or health of the affected women, a standard that was established in the *Rex* and *Mehar* cases.

These cases seemed to have been intended to send a clear message to health professionals that there would be no reprieve for procuring abortions even when they fall within legal exceptions established in the penal code; the perceived prohibition against abortion **under all circumstances** persisted as if section 240 of the penal code did not exist.

The stance within the criminal justice sector had a chilling effect on health professionals and led to further limitation and stigmatization of access to safe abortion, PAC, and other reproductive and maternal health services associated with pregnancies, including in situations that could result in death.

To wit, when the charges of murder against the accused in *Republic v. John Nyamu & 2 Others* failed, the state then attempted to charge them with the offence of killing an unborn child. Although the charges were withdrawn within one month of being initiated, this was enough to instill fear in health professionals who handle cases of preventable maternal death on a routine basis.

The criminal cases further caused apprehension among women and girls who would otherwise freely seek services for conditions affecting their health during pregnancy or even in cases resulting in unintended, involuntary, or inevitable abortions or miscarriages; in the latter situations, women and girls faced the threat of being charged with the offence of killing an unborn child or concealing birth.

The police, the office of the prosecutor, and the judiciary did not implement public awareness to inform women and girls of the lawful exceptions to the prohibition against abortion.

## B. CONSTITUTIONAL REVIEW PROCESS: THE MAKING OF ARTICLE 26(4) IN THE 2010 CONSTITUTION

The ambiguity, confusion, and stigma surrounding the circumstances when abortion may be lawfully permitted reared its head during Kenya's constitution reform processes leading up to the promulgation of the 2010 constitution.

Abortion first emerged as a contentious issue in the Constitution of Kenya Review Commission (CKRC) Draft Constitution. However, this draft was rejected by 57% of the votes cast through a national referendum in 2005, primarily due to differing political views on proposed changes to the executive and legislature.<sup>20</sup> The constitutional review process was reignited following the widespread violence experienced in Kenya after the 2007 general election. A Committee of Experts (CoE) was established in 2009 to “facilitate the completion of the review of the Constitution of Kenya.”<sup>21</sup>

Sections of the clergy threatened to take legal recourse to amend the Revised Harmonized Draft Constitution (RHDC) that had been developed and to reject it at the national referendum if it failed to recognize that life begins at conception and ends in natural death. The religious sector eventually persuaded the Parliamentary Select Committee (PSC), which was offering recommendations to the CoE, to reopen debate on the clauses on the right to life during its review of the RHDC.

The outcome was the insertion of two new clauses by the PSC into the RHDC stating that “the life of a person begins at conception” and that “abortion is not permitted unless, in the opinion of a registered medical practitioner, the life of the mother is in danger.” The CoE adopted the new clauses introduced by the PSC. Notably, the CoE broadened the scope of the abortion clause, to:

- > Recognize the opinion of any trained health professional, and not only a registered medical practitioner, in determining whether an abortion is required.
- > Provide for additional exceptions to the general prohibition of abortion beyond circumstances presenting a danger to the life of a mother, to include situations when there is need for emergency treatment or the health of the mother is in danger.
- > Leave room for enactment of future legislation to permit additional exceptions to the prohibition against abortion.

Groups from the religious sector outright opposed the proposed constitution and actively disseminated distorted information and propaganda on the implication of Article 26(4). These groups purported that the constitution would permit abortion on demand.<sup>22</sup> They also asserted that the recognition of the opinion of any trained health professional in the constitution implied that any person working in a hospital, including mortuary attendants, would be permitted to perform abortions.<sup>23</sup>

The proposed constitution was subsequently accepted with all its provisions, including the articles on right to life and abortion, by 68.55% of the voters who cast their ballots in a referendum in August 2010.<sup>24</sup>

### Effects of Article 26(4) of the Constitution

The constitution eventually affirmed women and girls' right to life and health, including reproductive health. While adopting the position advanced by the religious sector that life begins at conception, the 2010 constitution nonetheless affirms the position established in international human rights law and medical practice.

As such, it did away with the debate over whether abortion could be lawfully permitted in situations affecting the life or health of a woman, besides those requiring emergency treatment, as had been envisaged in section 240 of the penal code.

Article 43 (1) (a) of the Constitution provides that

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

“Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”

Constitution of Kenya (2010), Article 26(4). Right to Life

Article 35 – Access to Information – provides that:

**(1) Every citizen has the right of access to: (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**

**(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**

Article 26(4) of the constitution paves the way for:

- a. Robust, sober, open, and transparent state-driven public education, sensitization, awareness, and discourse among citizens on the legal parameters for and access to lawful abortion services, when read in line with Article 35 of the constitution on access to information.
- b. Provision of safe abortion and other comprehensive reproductive health services to expectant women as a component of their right to the highest attainable standard of health, by the state, when read with Article 43 of the constitution.
- c. The development of a legal and policy framework, including future legislation, regulations, guidelines, and standards, and corresponding competency-based training, to guide health professionals in forming an opinion on circumstances when termination of pregnancy may be lawfully permitted as emergency treatment or to protect the life or health of an expectant woman.
- d. Legal reforms, including in the penal code, to align provisions of existing laws with Article 26(4) of the constitution, and provision of clear guidance and training to law enforcement officers, prosecutors and judicial officers on the nature of civil and/or criminal cases that may be instituted in relation to Article 26(4), and the criteria for determining or adjudicating such cases.
- e. Progressive adjudication and determination of cases on abortion and related offences by judicial officers in tandem with the provisions of Article 26(4) of the constitution.
- f. Progress in addressing wanton harassment and intimidation of women, girls, and health professionals by police officers and in the criminal justice system, by clarifying the lawful exceptions to abortion in Article 26(4).



### 3. Implementation of the Constitutional Provisions on Access to Safe Abortion

#### A. The Standards and Guidelines for Reducing Morbidity & Mortality from Unsafe Abortion in Kenya

A study by the MoH, conducted in 2012, emphasized the importance of set guidelines for medical practitioners and acknowledged that the missing link in reducing maternal mortality has been the absence of technical and policy guidelines for preventing and managing unsafe abortions, to the extent allowed by Kenyan law.<sup>25</sup>

In 2011, the MoH set up a working group that included a wide range of stakeholders, including representatives from the medical profession, the religious sector, development partners, and civil society to draft guidelines to manage all the aspects of prevention, management of unsafe abortion, and provision of PAC, using the multisectoral approach in line with the constitution.<sup>26</sup> The Standards and Guidelines on Reducing Mortality & Morbidity from Unsafe Abortion in Kenya — which included guidance from 2012 World Health Organization (WHO) safe abortion guidelines — were published in September 2012.<sup>27</sup> They were seen as a tool for implementation of Article 26(4) and articulated the responsibility of service providers and the state with regard to the provision of safe abortion.<sup>28</sup>

However, on December 3, 2013, the Director of Medical Services (DMS) at the MoH, wrote a letter addressed to the County Directors of Health and various stakeholders, including medical professionals and religious bodies, indicating that the Standards and Guidelines, and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies had been withdrawn, effective immediately.<sup>29</sup>

On February 24, 2014, the Office of the DMS circulated a memo informing health care professionals that they would face professional and legal sanctions for undergoing training on safe abortion practices and the use of the abortion drug Medabon, a brand name for a combination of mifepristone and misoprostol. On the same date, the DMS also reprimanded the Kenya Obstetrical and Gynecological Society over research and training on safe abortion and for developing a policy document and training curriculum on safe abortion.<sup>30</sup>

The letter withdrawing the Standards and Guidelines and the Training Curriculum claimed there was a need for wider stakeholder consultation. This despite the Ministry's own earlier concession that the development of the Standards and Guidelines had been accomplished with wide consultation. It is notable that when the MoH withdrew the Standards and Guidelines, its officials said that they would be reintroduced later. However, this never happened and it was five years later that a Constitutional Court decision eventually declared the withdrawal of the Standards and Guidelines and National Training Curriculum arbitrary and illegal.<sup>31</sup> As of the date of publication of this report, the Ministry has not addressed reinstatement and implementation of the Standards and Guidelines and has filed a notice to appeal the decision.

#### B. Impact of Withdrawal of the Standards and Guidelines and the Training Curriculum

The action of withdrawing the Standards and Guidelines confused service providers and left “health care professionals with no direction about their responsibilities or protections when providing legal abortion services — and numerous women, including those eligible to access abortion services under the law, with no options other than unsafe abortion.”<sup>32</sup> Public health facilities stopped offering abortion services, while the police resumed harassing and demanding bribes from reproductive health workers that they accused of performing abortions.

The lack of clarity and the palpable fear of prosecution and criminal sanctions caused health professionals to err on the side of caution and refrain from providing services altogether, even to women who needed the services and were legally eligible.<sup>33</sup> This further resulted in larger numbers of women, especially poor and rural women, going to health facilities with complications from unsafe abortions.

The withdrawal of the Standards and Guidelines also left a gap in referrals. The Standards and Guidelines provided clear guidance on conscientious objection and referral in this case, making it clear that conscientious objection should not result in a complete denial of services. The withdrawal of the Standards and Guidelines also reinforced the stigma around abortion,<sup>34,35</sup> which has resulted in health professionals being unwilling to provide abortion openly or exempting themselves from providing abortion-related care.<sup>36</sup> Abortion stigma also harms women in fundamental ways. It results in the segregation of one reproductive health care service from the mainstream health care system, reducing women's ability to obtain that service. It also encourages incomplete and false information about abortion and abortion providers, undermining women's ability to make decisions with informed consent.<sup>37</sup> It has also been argued that at the policy level, stigma influences the resources

available to address unsafe abortion.<sup>38</sup> The prevailing stigma, compounded by the lack of service delivery policies in form of the Standards and Guidelines, left women and girls in a position where they sought services from unqualified providers, risking their health.<sup>39</sup>

The training ban potentially had an impact on PAC as training for provision of safe abortion and PAC are not markedly different.<sup>40</sup>

Unlike doctors who are taught about safe abortion practices in medical school, other health professionals, such as nurses and clinical officers, who often work in rural and low-income areas and who are accessible to the community members around them, rely on training led by medical associations and private institutions because the MoH has failed to offer such training. The ban on safe abortion training impacts these professionals. From the outset, it has been found that gaps still “exist with respect to provider skills despite trainings conducted by different partners,” which in itself suggests “the need for a standard approach to improving the capacity of providers to offer safe abortion services including having a standard training curriculum.”<sup>41</sup>

The Health Act, 2017, envisions that training would be offered when it refers to persons who are considered eligible to provide services that may include abortion services as, “... a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women ...”

Health professionals cannot be expected to feel confident to provide medical services for which they are not trained, even in emergency situations in which such services are required to save life. The banning of training altogether exacerbates this situation.<sup>42</sup>

## 4. Legal Sector Implementation of Article 26(4) of the Constitution

This section discusses the legal sector implementation of the constitutional provisions and presents the experience of medical providers as well as women and girls who have interacted with law enforcement officials and courts in the context of abortion.

### A. SNAPSHOT OF ABORTION-RELATED OFFENCES IN THE CRIMINAL JUSTICE SYSTEM IN POST-2010 CONSTITUTIONAL ERA

The Center conducted a rapid assessment to establish the status of abortion-related cases filed in various courts between August 2010, when the new constitution went into effect, and November 2019. The assessment was carried out through a thorough review and analysis of criminal case registers and court files with charges on abortion and related offences in six high court stations, in Kibera, Makadara, Limuru, Machakos, Kilifi, and Nakuru.

The review established that at least 27 criminal cases on abortion and related offences had been filed in five of the court stations during the nine-year period.<sup>43</sup> The reviewed files include eight cases of attempts to procure abortion by woman with child, one case of supplying drugs or instruments to procure abortion, three cases involving killing of an unborn child, and 15 cases of concealing birth.

The majority of the cases involved charges of concealing birth, which constituted 47% of the reviewed files, followed by attempts to procure abortion, constituting 22% of the reviewed cases. Most of the cases had been concluded and a determination on sentencing made by the various courts, while no more than

four cases were ongoing at the time of the review.

In addition, this analysis discusses two constitutional cases seeking interpretation of Article 26 of the constitution, one completed and the other ongoing.

### Persons Accused of Abortion-Related Offences

#### a. Persisting stigma and misperceptions on abortion in the public and criminal justice system

Virtually all the reviewed cases originated when family members, relatives, neighbors, or community members reported women and girls after the loss of advanced pregnancies. The prosecutions in these cases proceeded mostly based on the women and girls admitting they had committed the alleged offences, as well as on eyewitness testimony and circumstantial evidence. In the cases of concealing birth, accused women were mostly linked to dead fetuses that were found disposed of in hidden locations. In other cases, women were allegedly caught in the act of concealing the birth of fetuses.

The complaints were triggered by the persisting public misperception that all instances of loss of pregnancy must amount to criminal conduct. The facts provided in the charge sheets indicate that any sign of a terminated pregnancy, dead fetus, or unidentified disposed fetus were explained only as unlawful. This resulted in a “public lynch mode,” where affected women and girls were all accused of being criminals without investigation of the circumstances surrounding the terminations of their pregnancies. That not only violates their right to be free from cruel, inhumane, and degrading treatment but also hampers access to any health or psychosocial support that they may require. In one case, a paralegal testified that she had to call the police and report an alleged abortion incident to avoid a rowdy crowd that had gathered around the accused person.<sup>44</sup> This narrative was replicated in every criminal

case: Once an accusation had been made by the public, the police took over the case with the aim of obtaining evidence, often self-incriminating and circumstantial, to establish the guilt of the accused person.

Twenty-one of the cases reviewed were filed against women and girls accused of self-induced abortions, concealing birth, and killing an unborn child. Only six of the cases involved the accused and health professionals who provided medical skills, instruments, or drugs to procure unlawful abortions. This data suggests that most of the accused persons were either unaware that access to safe abortion is lawfully permitted to safeguard the life or health of an expectant woman or were afraid to seek such services due to fear of being stigmatized, reprimanded, or prosecuted—even in cases where girls conceived as a result of defilement, and when expectant women and girls were suffering from varied health problems, including mental health conditions.

## **b. Application of Article 26(4) of the constitution by courts adjudicating cases on abortion and related offences**

Article 26(4) of the 2010 constitution can be examined, interpreted, and applied by courts in two concomitant strands.

- a. First, it asserts that “abortion is not permitted”, thereby invoking the application of penal sanctions against procuring abortion.
- b. Second, it elucidates that the prohibition against abortion is not absolute and can be permitted under specific circumstances when, “in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”

Therefore, the application of the first part of Article 26(4) of the constitution is, by

default, triggered within criminal judicial proceedings involving offences or conduct that violate the general prohibition against abortion. The second part ought to be applied to determine whether a procured abortion falls within the exceptions listed in the constitution, to establish if it is lawful or unlawful.

Eight of the reviewed cases involved charges for the offence of “attempts by a woman with child to procure abortion,” contrary to section 159 of the penal code.<sup>45</sup> Two cases included a charge for the offence of “supplying drugs or instruments to procure abortion,” contrary to section 160 of the penal code.<sup>46</sup>

However, none of the courts adjudicating the eight reviewed cases explicitly referred to or applied Article 26(4) of the constitution to its full extent, either during the proceedings or in their final determinations. This is primarily due to the lack of provisions incorporating elements of Article 26(4) in the penal code. While the penal code includes offences of unlawfully procuring and supplying drugs or instruments to procure an unlawful abortion, there are no corresponding provisions to protect women, girls, and health professionals who fall within the exceptions listed in Article 26(4) of the constitution when abortions are lawfully permitted.

The penal code has maintained section 240, which provides a limited defense to abortion-related offences, when abortion is performed “as a surgical operation upon an unborn child for the preservation of the mother's life.” This excludes the broader scope of permitted grounds in the constitution and Sexual Offences Act, 2006, including provision of abortion as emergency treatment or when the health of an expectant woman is in danger as well as in cases of rape or defilement. It further fails to recognize the provisions in the Sexual Offences Act, a subsequent legislation that addresses the same issue. (If the provisions in a piece of legislation are inconsistent with the provisions in earlier legislation, the earlier legislation may be implied to be

repealed by the provisions in the later legislation.) The penal code also fails to recognize medical abortion as a lawful means of procuring abortion within the permitted circumstances.<sup>47</sup> As such, charges are still framed and prosecuted based on the provisions of the penal code as they existed prior to the enactment of the 2010 constitution. This gap in the legal framework limits the ability of judicial officers to determine whether cases charged as abortion-related offences fall within or outside the constitutional exceptions. As a result, courts have failed to assert the constitutional protection for women and girls who seek services from health professionals to obtain lawfully permitted abortions. Health professionals are also left exposed, with no legal framework to seek for protection in instances where they provide lawfully permitted abortions; while they shield themselves from prosecutions, women and girls are left vulnerable to unsubstantiated criminal charges and convictions. The upshot: The criminal justice system continues to operate under the notion that abortion is unlawful and criminalized in all circumstances.

Notably, four of the reviewed cases included charges of attempted abortion, one against a woman and a second against a girl who had sought abortion services from two clinics.<sup>48</sup> The other two cases were against health professionals. Yet the courts did not require the prosecution to adduce evidence to establish whether an opinion had been formed by the two health professionals to affirm the need for the alleged abortions as emergency treatment or to safeguard the lives or health of the expectant woman and girl. None of the accused persons provided evidence of an opinion from health professionals<sup>49</sup> as a defense against the charges.

## **c. Stereotyping in abortion and other termination-of-pregnancy cases within the criminal justice system**

In addition to the gaps in the legal framework, the reviewed cases revealed a clear pattern of stereotyping in the initiation of charges and prosecution of abortion and



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related offences. This is particularly evident in the types of charges instituted against accused women and girls, and the processes undertaken to initiate and determine related charges. The majority of the reviewed cases were determined and concluded without full investigation of the facts and evidence presented in judicial proceedings. Many times, the testimony of accused women and girls was disregarded.

Conspicuously, the offences of concealing birth and killing an unborn child were mostly preferred in cases where abortion was suspected but the available evidence was insufficient to support an abortion-related charge. These charges were preferred to ensure that accused persons face punishment under all suspected circumstances, using any means and alternative offences available under the penal code. This is evident in some of the charge sheets, which conflated the charges with alleged acts of abortion. For instance, in one of the cases, the charge sheet for the offence of killing an unborn child stated that the accused, “by an act of abortion, prevented from being born alive a child who was to be delivered ...”<sup>50</sup> In this case, the offence of abortion seems to have been

mischarged as killing an unborn child, with the latter offence holding a potential penalty of life imprisonment, compared with a 14-year prison term for abortion.

In another case charged as concealing birth, the probation officer, while proposing a probationary sentence, reported to the court that the accused, a single mother of six other children, had “previously aborted two years ago.”<sup>51</sup> In two other cases of concealing birth, the prosecution presented medical evidence, in one case indicating that an examination conducted on the accused person had confirmed that she had procured an abortion,<sup>52</sup> and in another case stating that the accused was presented to a health facility by a police officer for examination on the basis of a report alleging that she had aborted a 36-week-term baby.<sup>53</sup>

In at least nine of the reviewed cases,<sup>54</sup> the adjudicating courts sentenced the accused persons after they pleaded guilty to the charges. It could be construed from the general context of the cases' origins that the guilty pleas were motivated by a pre-existing belief among the accused women and girls that any termination of pregnancy, induced or spontaneous, was immoral and unlawful. Thus, the guilty pleas conformed to the expected societal moral standards and stereotypes, rather than the nature and content of the offences under which they were charged. Regardless, the courts almost entirely relied on the accused persons' pleas and failed to give due attention to other facts and evidence, which could have changed the outcome and proved the cases beyond reasonable doubt, as required in criminal proceedings, in arriving at their determination.

As was the case in the majority of the reviewed cases, eyewitnesses and complainants were not required to present testimony in court to prove the circumstances or other elements of the offences. Further, although probation reports with details of the circumstances of the offences, history of previous offences, and

socioeconomic status of the accused women and girls were provided, they were primarily used to advise the courts on the necessity of noncustodial sentences.

In some cases, medical evidence with findings of physical examinations conducted on accused persons were presented in police medical forensic forms, a.k.a. P3 forms. Health professionals who performed the examinations were often listed as prosecution witnesses to give evidence of their findings during court proceedings. However, such medical evidence merely confirmed that an accused person had been expectant and that a fetus was expelled from her uterus within the period when the abortion or related offence is alleged to have been committed. The medical evidence did not establish the circumstances surrounding, or the potential causes of, the termination of pregnancies. The evidence failed, altogether, to aid the courts in determining whether such termination was lawful or unlawful. (See *R v. Anne Mbethi Kilonzo* and *R v. Naentie Linnet Nangai*).<sup>55</sup>

#### **d. Investigating the function of criminal sanctions in abortion and related offences**

The review findings depict the challenges experienced in prosecution and proffering criminal sanctions against individuals charged with abortion and related offences. Approximately 46% of the reviewed cases resulted in discharges, withdrawals, and acquittals; 30.8%, in noncustodial sentences, including probation and community service. Only 11.5% resulted in custodial sentences ranging from one year to 18 months' imprisonment. In 11.5% of the reviewed cases, sentencing was pending at the time of the review.

Only three of the 27 reviewed cases involving charges of unlawful abortion, killing an unborn child, and concealing birth, resulted in custodial sentences ranging from one year to 18 months' imprisonment. The offence of concealing birth is classified as a misdemeanor in the penal code and should attract a penalty of

either a fine or imprisonment for a period not exceeding six months. However, in one of the cases the accused person was sentenced to one year of imprisonment after she pleaded guilty and evidence of a pathology report was produced in court confirming that the fetus had been strangled to conceal the birth.<sup>56</sup> In the second case, despite the accused woman's testimony that she had suffered a spontaneous miscarriage, she was sentenced to one year of imprisonment with no indication that any evidence had been adduced to rebut her assertion.<sup>57</sup> The third case resulted in 18 months' imprisonment, but the details of the judgment were not available in the court registry.<sup>58</sup>

Twelve of the 27 cases were dismissed or withdrawn or resulted in discharge or acquittal of the accused persons. This was mainly due to accused persons and witnesses failing to appear in court for lengthy periods of time, and delays in presentation of substantive evidence and witnesses by the prosecution.

Three of the 12 cases involving charges of the offence of killing an unborn child,

which is a felony that attracts a life sentence, were withdrawn by the prosecution under section 87(a) of the Criminal Procedure Code. There were no clear reasons provided for the withdrawal in two of the cases. However, one of the cases was withdrawn after eight prosecution witnesses failed to appear in court.<sup>59</sup>

Notably, in two of the 12 cases, accused persons separately charged with concealing birth were unconditionally discharged under section 35(1) of the penal code as the courts determined that it was "inexpedient to inflict punishment" and that a probation order would not be appropriate in either case.

In one of these cases the magistrate stated that the trauma caused by the premature loss of the accused woman's child because of medication she took to treat her illness was beyond what "neither a prison nor a probationary sentence can take away."<sup>60</sup> In the second case, the magistrate stated that a woman accused of concealing birth needed assistance rather than punishment as she seemed to be experiencing mental health problems, and advised her to seek counseling.<sup>61</sup>

The courts provided noncustodial sentences in eight of the cases.<sup>62</sup> In several of the cases resulting in noncustodial sentences and unconditional discharges, judicial officers determined that abortion-related offences go far beyond criminal intent to include other socioeconomic and cultural factors that are often not prosecutable in criminal proceedings.

These findings suggest that post-2010 constitutional reform, courts have largely applied noncustodial sentences over custodial sentences or imprisonment in abortion and abortion-related cases before them. They necessitate an investigation of the function and appropriateness of criminal sanctions in abortion and related offences and suggest that it is time to review and reform the penal code's provision criminalizing abortion.

## B. IMPACT OF "ENFORCEMENT" OF ABORTION LAWS AFTER 2010

### Experiences of Health Providers

Police appear to use the penal code, the confusion caused by the withdrawal of the standards, and general abortion stigma as opportunities to harass, entrap, and extort both service providers and women and girls. The Center interviewed at least six health care providers. Patterns of arrest with no intent to prosecute, as well as prosecutions not progressing because of a lack of evidence after long periods in courts, were apparent.

**Rose**, a 59-year-old female community health nurse and midwife working in Nakuru County; **Mwita**, a 39-year-old male clinical officer from Kayole, Nairobi; **Elizabeth**, a 42-year-old nurse based in Kiambu County; and **Justus**, a 58-year-old male registered nurse, also from Kayole, Nairobi, were among the providers interviewed. They all had similar stories to tell about their interaction with police. They faced police harassment, were forced to pay bribes to police, faced discrimination due to the stigma surrounding abortion, and were threatened with criminal prosecution in the course of providing safe and legal abortion services. The other providers, who requested anonymity, provided similar information, and told of police harassing and extorting several of their colleagues.

Health service providers have attempted to take a stand against the actions of law enforcement. In 2014, service providers convened and shone a spotlight on the issue. It was reported that "police threats against patients and medics they accuse of giving 'illegal abortions,' coupled with reversals in Kenyan policies, are stirring fears likely to reduce access to safe abortions ..."<sup>63</sup>

Jackson Tali had been sentenced to death in the month before the meeting, and police intimidation had increased. Health professionals highlighted that the police were taking advantage of Tali's conviction,

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referring to it when harassing and scaring providers and visiting clinics every Friday to seek bribes. The health professionals were concerned that the “fear provoked by the Tali ruling will make it harder for women to receive safe abortions or post-abortion care.”<sup>64</sup> The Reproductive Health Network (RHN), a network of health professionals at private and public facilities committed to comprehensive sexual and reproductive health and rights, advocacy, and service provision, said that many in their 467-member network had reported police harassment and that others had been charged and taken to court. The RHN felt compelled to “work alongside lawyers to defend them, yet their work is protected by the constitution.”<sup>65</sup>

## Experiences of Women and Girls Seeking Abortion Services After 2010

The Center interviewed seven women and girls who shared their experiences seeking abortion after 2010. An analysis of their experiences reveals two patterns.

First and foremost is the severe lack of information and perennial misinformation on abortion, and post-abortion care, that is disseminated to women in the community by the police and the public. This leads to exploitation, harassment, and arrests, and constitutes a violation of the right of access to information on sexual and reproductive health care services, which in turn impacts access to the right to health.<sup>66</sup> Accused women and girls, often victims of a state that has failed to ensure their access to health services that they require, are targeted and treated as criminals.

Second, the stigma associated with procuring abortion is at a critical point. Instead of families seeking medical services, even in instances where women have sought unsafe abortions and are in dire need of emergency treatment, they resort to reporting the matter to the police, who in turn solicit bribes or charge the women falsely and take them to court. This only fuels further discrimination.

## C. CONSTITUTIONAL CASES ON ARTICLE 26(4)

### Standards and Guidelines Case

The only case that has explicitly discussed Article 26(4) of the constitution is *FIDA Kenya & 3 Others v. Attorney General & 2 Others*<sup>67</sup> (Nairobi High Court Petition No. 266 of 2015). The decision in this case was handed down by a five-judge bench on June 12, 2019.

In the judgment, the court sets out the case of “JMM,” the second petitioner, whose defilement, pregnancy, unsafe abortion, failure to receive quality health care, and ultimate death are representative of the plight of many women and girls in Kenya. The petitioners blamed JMM’s predicament on the MoH for withdrawing the Standards and Guidelines for Reducing Morbidity & Mortality from Unsafe Abortion in Kenya and the National Training Curriculum in 2012.

In reviewing the evidence, the court conducted in-depth analysis of the social context of unsafe abortions in Kenya, citing reports by the MoH that acknowledged the need for standards, guidelines, and training (paragraph 314). The court also recognized that it was called upon to decide on the meaning and implication of Article 26(4) of the constitution (paragraph 297). In establishing the intention of the drafters, the judges relied on the final report of the Committee of Experts on Constitutional Review (paragraph 298).

The court noted that the right to life and health are at the core of the petition and reiterated the protection of the right to health under Article 43(1) of the constitution (paragraph 335). The judges adopted the WHO’s definition of health, which is similar to that contained in the Maputo Protocol (paragraph 336). The court further recognized the interlinkage and interdependence of rights and in this regard observed that the right to health is an underlying determinant of the enjoyment of other rights (paragraph 337).

The court noted that because the state has an obligation under Article 21(1) to “observe, respect, protect, promote and fulfil” the rights guaranteed under the Bill of Rights, and to take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43; any action that limits or diminishes this right is a violation of the constitution (paragraph 334).

The court noted that the government recognized the challenge posed by unsafe abortions resulting from lack of a clear framework for ensuring that women have access to safe reproductive health care and post-abortion services and that it had issued guidelines in the past but appeared to be intimidated by the objection from other sectors, particularly from the faith-based sectors (paragraph 355).

The court concluded that the constitution permits abortion in situations where a pregnancy, in the “opinion of a trained health professional,” endangers the life or the mental, psychological, or physical health of the mother (paragraph 262).

The court also implied a repeal of the penal code by the Sexual Offences Act to the extent of its inconsistency with the later statute. The judges observed that it is correct that the penal code prohibits abortion. However, it is an Act of Parliament that predates the Sexual Offences Act, 2006, and the constitution. Because the constitution provided a right to abortion under specific circumstances, the apparent blanket prohibition of abortion under the penal code cannot stand. This is because, in accordance with sections 6 and 7 of the 6th Schedule to the Constitution, the provisions of the penal code must be read with the necessary alterations, adaptations, qualifications, and exceptions to bring it into conformity with the constitution. While the said section is still valid insofar as unlawful abortions are concerned, the same must be read taking into consideration the provisions of the constitution as well as the Sexual Offences

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Act. (paragraph 369). The provisions of the Sexual Offences Act, which was created after the penal code, take precedence (paragraph 367). The judges unanimously agreed that under the constitution and the Sexual Offences Act, while the general rule is that abortion is prohibited, it is permissible in the circumstances prescribed under Article 26(4), and further as provided under section 35(3) of the Sexual Offences Act. The 2009 Guidelines issued by the Minister in accordance with the Sexual Offences Act — providing that victims of sexual violence who became pregnant as a result should be informed that termination of pregnancy may be allowed after rape, and should they opt for termination, should be treated with compassion, and referred appropriately — are also valid. (paragraph 371).

The court concluded that it is clear that the 2012 Standards and Guidelines and the Training Curriculum were public policy documents, which were the product of a public participatory process as required under the constitution. Their withdrawal, however, did not follow the same process and was thus arbitrary. The court indicated that a decision to withdraw a public policy document must similarly be subjected to the constitutional dictates. The power to withdraw cannot therefore be arbitrarily exercised even where it exists as this is a ground to grant a judicial review relief, which is one of the reliefs under Article 23(3) of the constitution (paragraph 382).

## Marie Stopes International Kenya Case

Another case that is expected to have an import on Article 26(4) of the constitution is Petition 428 of 2018 (*Network for Adolescents and Youth of Africa and Another v. the Attorney General and 4 others*). This is a case challenging the bans by the Kenya Film Classification Board (KFCB), the Kenya Medical Practitioners and Dentists Board (KMPDB), and the DMS on Marie Stopes International's provision of abortion services and information in Kenya. The case, filed November 30, 2018, was a result of a series of events.

First, the KFCB canceled advertisements that Marie Stopes was running as part of a communication campaign; The KFCB argued that the advertisements were promoting abortion. A few months later, an anti-abortion organization petitioned the KMPDB to deregister Marie Stopes for providing abortions. Eventually, the KMPDB, after hearing both sides, ordered Marie Stopes to stop providing any kind of abortion services.

This case challenges the limitation of reproductive health information and services, including abortion, in Kenya that is perpetuated by public institutions through the actions of individual officers at the helm of those institutions. The case also 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.

The argument the petitioners are making is that the ban is contrary to Kenyan citizens' right to access information, because it deprives Kenyan women of information that they need to be able to exercise and/or protect their right to health enshrined in the constitution. It further prevents women from accessing essential information about how they can seek reproductive services and PAC as part of their right to health.

Furthermore, the Abortion Services Ban is in direct violation of Article 26(4) of the constitution as it imposes a blanket ban on all abortion services; it does not allow for the legal abortions outlined in Article 26(4). In addition to being in direct violation of domestic law, the abortion services ban is a violation of Kenya's international obligations to uphold its people's human rights. Another effect of the ban: Pregnant women and girls, who are lawfully entitled to medical treatment in the form of a legal abortion, as specifically enshrined in the constitution, are being denied this right and are unable to access safe and legal abortion services.

## Some Constitutional Cases on Article 26(4)

**FIDA Kenya & 3 Others v. Attorney General & 2 Others.**  
(Nairobi High Court  
Petition No. 266 of 2015)

**Network for Adolescents and Youth of Africa and Another v. the Attorney General and 4 others.**  
(Petition 428 of 2018)

The Court concluded that it is clear that the 2012 Standards and Guidelines and the Training Curriculum were public policy documents, which were the product of a public participatory process as required under the constitution. Their withdrawal, however, did not follow the same process and was thus arbitrary.



## 5. Conclusion

The explicit provision in the 2010 constitution permitting abortion in cases of danger to the woman's life or health was an important step in clarifying the legal and policy framework. However, the expected reduction in unsafe abortions has not materialized, partly, as the findings show, due to the continued application of section 240 of the penal code. The inadequate implementation of the constitutional provisions has also maintained the stigma and misperceptions that existed prior to the 2010 reform, impacting women's access to safe abortion. The effects of both have manifested in the health sector where health care providers may fail to provide adequate services out of fear of criminal prosecution, as well as in the legal sector, where charges are still based on the provisions of the penal code as they existed prior to the enactment of the 2010 constitution. As a result, courts have failed to assert the constitutional protection for women and girls who seek services from health professionals to obtain lawfully permitted abortions. Without penal code reform, clear implementing policies and regulations, and widespread education on the constitution's provisions, the challenges associated with a lack of clarity surrounding Kenya's abortion laws and policies will remain.

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## ENDNOTES

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- 8 Rex v. Bourne, Central Criminal Court 3 All E. R. 615 (1938), available at <https://msu.edu/user/schwenkl/abtrbng/rvbourne.htm>.
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- 42 Id. at vii.
- 43 This estimate does not include a handful of case files that could not be traced in the court registries, including a few ongoing cases.
- 44 R v. Beatrice Achieng Makokha, Criminal Case No. 1255/2016, Kibera Law Courts.
- 45 Which states that "any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and is liable to imprisonment for seven years."
- 46 Which states that "any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years."
- 47 Section 240 of the Penal code (KE) falls under Chapter XXII that lists "offences endangering life and health." It states that "a person is not criminally responsible for performing in good faith

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and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life."

- 48 R v. Silvia Naiserian Rorua, Criminal Case Number 112/2016, Limuru High Court; and R v. Naentie Linnet Nangai, Criminal Case No. 5064/2011, Makadara Law Courts, Nairobi.
- 49 R v. Randon Amunga Maina, Criminal Case Number 113/2016, Limuru High Court; and R v. Joseph Ndung'u, Criminal Case Number 5085/2011, Makadara Law Courts, Nairobi.
- 50 R v. John Onsongo Nyangweso and Jane Njambi, Criminal Case No. 3225/2014, Kibera Law Courts.
- 51 R v. Joan Mukiuhi Njuguna, Criminal Case No. 135/17, Limuru Law Courts.
- 52 R v. Carester Nyaboke, Criminal Case No. 511/2018, Nakuru Law Courts.
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- 54 These cases involve charges of attempts to procure abortion, supplying drugs or instruments to procure unlawful abortion, killing unborn child and concealing birth.
- 55 R v. Anne Mbethi Kilonzo and R v. Naentie Linnet Nangai, Criminal Case No. 5064/2011, Makadara Law Courts, Nairobi.
- 56 R v. Nancy Wanjiku Muigai, Criminal Case Number 541/2012, Limuru Law Courts.
- 57 R v. Grace Wambui Wanjiku, Criminal Case Number 1531/2012, Nakuru Law Courts.
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- 59 R v. John Onsongo Nyangweso & Jane Njambi, Criminal Case Number 3225/2014, Kibera Law Courts.
- 60 R v. Hannah Njeri Gathaku, Criminal Case Number 308/2018, Limuru Law Courts.
- 61 R v. Ruth Ngendo Wangari, Criminal Case Number 2049/2013, Nakuru Law Courts.
- 62 In seven cases, the courts ordered

probation sentences for a period ranging from one to three years, and in one case, the court ordered community service for three young girls who were charged with concealing birth.

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- 65 John Muchangi, Nairobi abortion providers protest police harassment, November 6, 2017. [https://www.the-star.co.ke/news/2017/11/06/nairobi-abortion-providers-protest-police-harassment\\_c1664830](https://www.the-star.co.ke/news/2017/11/06/nairobi-abortion-providers-protest-police-harassment_c1664830).
- 66 The Constitution of Kenya, 2010, Article 43(1).
- 67 Constitutional Court of Kenya, Petition 266 of 2015 FIDA Kenya & 3 Others v. Attorney General & 2 Others <http://kenyalaw.org/caselaw/cases/view/175490/>.

### PHOTO CREDIT

Front Cover: Medical clinic in Kenya, dealing with Maternal, Neonatal and Child health.

Photo credit: Katari Sporrang.

Right: Young woman going through a family planning session at Mariakani hospital in a rural coastal region in Kenya.

Photo credit: Jonathan Torgovnik/Getty Images.

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**Center for Reproductive Rights**

Fourth Floor, Pinetree off Ngong  
Road Kamburu Drive Kindaruma  
Road Junction, P.O. Box 48136-  
00100, Nairobi, Kenya.

Tel: +254 20 251 8361 / 63.

[publications@reprorights.org](mailto:publications@reprorights.org)

[www.reproductiverights.org](http://www.reproductiverights.org)

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