

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA AT MALINDI
CIVIL APPEAL NO.....2022

THE HON. ATTORNEY GENERAL.....1ST APPELLANT
THE DIRECTOR OF PUBLIC PROSECUTION.....2ND APPELLANT
THE INSPECTOR GENERAL OF POLICE.....3RD APPELLANT
THE SENIOR PRINCIPAL MAGISTRATE KILIFI.....4TH APPELLANT

VERSUS

PAK.....1ST RESPONDENT
SALIM MOHAMMED.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Malindi (Mr. Justice Reuben Nyakundi) given on 25th March 2022 in Malindi High Court Constitutional Petition No. E009 of 2020)

IN
REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT MALINDI
CONSTITUTION PETITION NO. E009 OF 2020

PAK.....1ST PETITIPONER
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THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT
THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT
THE SENIOR PRINCIPAL MAGISTRATE KILIFI.....4TH RESPONDENT

RECORD OF APPEAL

DATED at Malindi this 19th day of September 2022


JACOB PUNGA MKALA
SENIOR LITIGATION COUNSEL
FOR THE HON. ATTORNEY GENERAL

DRAWN & FILED BY
THE HON ATTORNEY GENERAL
ATTORNEY GENERAL CHAMBERS
MALINDI COMPLEX, ROOM 18
P.O BOX 111-80200
MALINDI

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DATED AT MALINDI THIS 19th of September 2022


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CERTIFICATE OF CORRECTNESS

I Jacob Punga Mkala and advocate of the High Court of Kenya do hereby certify that the Record of Appeal is correct and prepared to accord the copies of proceedings, decree/exhibits and other documents supplied to counsel by Court of first instance.

DATED at MALINDI this 19th of September 2022


JACOB PUNGA MKALA
SENIOR LITIGATION COUNSEL
FOR THE HON. ATTORNEY GENERAL

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(Being an application for a stay of the orders of the High Court pending the lodging, hearing and determination of an intended Appeal from the Judgment and Decree of the High Court of Kenya at Malindi (Mr. Justice Reuben Nyakundi) given on 25th March 2022 in Malindi High Court Constitutional Petition No. E009 of 2020)

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THE SENIOR PRINCIPAL MAGISTRATE KILIFI.....4TH RESPONDENT

STATEMENT OF ADDRESS OF SERVICE

TAKE NOTICE THAT THE ADDRESS FOR SERVICE FOR THE APPELLANTS SHALL BE CARE OF:-

The Hon Attorney General
Attorney General Chambers
Malindi Complex, Room 18
P.O Box 111-80200
Malindi. (AG/Mld/520/2020)
Email:agmalindi@gmail.com
P105/16070/2019
Tel. No. 0782760052

30

TAKE NOTICE THAT THE LAST KNOWN ADDRESS FOR SERVICE OF THE RESPONDENTS IS:-

Martin Onyango
% Centre for Reproductive Rights
4th Floor, Pinetree off Kindaruma Road/ Off Ngong Road
P.O. Box 52834-00100
Nairobi

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MEMORANDUM OF APPEAL

The Appellant, being dissatisfied with the Judgement delivered by the Honourable Mr. Justice Reuben Nyakundi electronically on the 24th day of March, 2022 hereby appeals to the Court of Appeal against part of the said Judgement on the following grounds: _____

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1. The Learned Judge erred in law by holding that the right to abortion is a fundamental right but it cannot be said to be absolute in light of Article 26(4) of the Constitution.
2. The Learned Judge erred in law and in fact in his finding that the language in the impugned sections looked at from the legal lens of the Constitution exposes a lacuna on information regarding the termination of pregnancy.
3. The learned judge erred in law and fact in holding that the 1st respondent was subjected to forced medical examination thereby violating her rights prescribed under Article 25 on freedom from torture, ~~to~~ cruel, inhuman and degrading treatment, right to life within the bounds of Article 26(4), Article 28 on human dignity, Article 29 freedom from security of person and Article 21 on right to privacy all of the constitution.
4. The Learned Judge erred in his judgment by failing to consider the arguments and dispositions contained in the list of authorities on decided cases and jurisprudence set on the matter before him that were cited by the Grounds of Opposition and Replying Affidavit.
5. The learned judge erred in law and fact in failing to find, hold and follow precedent and doctrine of **stare decisis** in the judgment delivered by five judge bench in **Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR** that abortion is illegal in Kenya. ~~to~~ 20
6. The Learned Judge misdirected himself when he found contrary to Law by giving a declaration reviewing the decision-making process in a wider context by the respondents to initiate an investigation, arrest and

commencement of criminal proceedings in Criminal Case No. 395, 396 OF 2019 and Children's Case No. 72 OF 2018 at Kilifi Law Courts against the petitioners in terms of Sections 158, 159 & 160 of the Penal Code. That the proceedings having been marked with irregularities from the outset a writ of certiorari clearly merit based do issue against the text of the charges involved in prosecuting the petitioners under the authority of Article 157 (6) & (7) of the Constitution.

- 7. **THAT** the Learned Judge erred in Law and in fact by finding the Respondent's case meritorious and allowing the same.
- 8. **THAT** in all the circumstances of the case, the Learned Judge failed to do justice before him.

The Appellant prays for the following reliefs form this Honourable Court:

- (a) The Appeal be allowed.
- (b) That orders B, D, E and J contained in the judgment made on 25th March, 2022 be set aside.
- (c) A declaration be and is hereby issued that the right to abortion is not fundamental human right under Article 26(4) of the Constitution.
- (d) A declaration be and is hereby issued that the language in sections 158, 159 and 160 of the Penal Code looked at from the legal lens of the Constitution, there is no lacuna on information regarding the termination of pregnancies as strongly provided for in these provisions and the same are clear.
- (e) An order that the investigation arraignment and charge of the Respondents herein was not marred with irregularities and illegalities

and in the circumstance the same was proper, legal and constitutional.

(f) That costs be awarded to the Appellants.

DATED at Malindi this 19th day of September 2022.


Mr. Jacob Funga Mbala
Senior State Counsel
For: THE ATTORNEY GENERAL

To:

The Court of Appeal of Kenya at Malindi.

DRAWN & FILED BY

The Hon Attorney General
Attorney General Chambers
Malindi Complex, Room 18
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Malindi. (AG/Mid/520/2020)

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TO BE SERVED UPON

Martin Onyango
% Centre for Reproductive Rights
4th Floor, Pinetree off Kindaruma Road/ Off Ngong Road
P.O. Box 52834-00100
Nairobi

LODGED in the registry at Malindi this _____ day of _____ 2022.

DEPUTY REGISTRAR
COURT OF APPEAL

1

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CONSTITUTIONAL PETITION NO. E009
HIGH COURT OF KENYA
RECEIVED
2 DEC 2020
OF 2020
MALINDI

BETWEEN

PAK 1st APPLICANT

SALIM MOHAMMED 2nd APPLICANT

AND

THE ATTORNEY GENERAL 1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2nd RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3rd RESPONDENT

10

THE SENIOR PRINCIPAL MAGISTRATE KILIFI 4th RESPONDENT

CERTIFICATE OF URGENCY

I, **MARTIN ONYANGO**, an Advocate of the High Court of Kenya, having conduct of this matter on behalf of the Applicants, do hereby certify that the Application filed herein is urgent and should be heard *ex parte* at the first instance for the following reasons:

1. The 2nd Applicant is a trained and licensed Clinical Officer while the 1st Applicant is a female adolescent who sought emergency care at a licenced health facility in Ganze where the 2nd Applicant works following complications in her pregnancy.

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2. Without a complaint or cause, the Applicants were arrested at the Clinic by Police and charged with the offence of Procuring an abortion, despite the clinical notes and explanation by the 1st Applicant on how she ended up at the clinic.

3. The Applicants raised the violation of their rights and the unlawfulness of their arrest and prosecution before the Senior Principal Magistrates Court in Kilifi. The Court has declined to address their challenge and instead ordered that they be subjected to full trial, at which juncture they can

only raise the illegality and unconstitutionality of the Charges in their Defence.

- 4. The Director of Public Prosecutions has charged the Applicants under sections 158,159 and 160 of the Penal code without regard to the facts of the case and the law that would ordinarily apply even if this was a case of procuring an abortion. In so doing, the Director of Public Prosecutions has shifted the burden of proof to the Applicants to prove that they fall within the Constitutional and statutory protections. This contravenes the presumption of innocence and the duty to charge only for offences known to law in Kenya. 10
- 5. The Senior Principal Magistrate Court at Kilifi condemned the Applicants to a trial on **3rd of December 2020**. This trial if allowed before consideration of the Applicants application herein will further violate the rights of the Applicants, women, and girls of reproductive age, and healthcare providers who offer reproductive health services.
- 6. The Applicants seek to suspend their trial before the 4th Respondent scheduled for 3rd December 2020, to allow the High Court to review the appropriateness of the proceedings before the Magistrates Court pending the hearing and determination of the Application and Petition.
- 7. Both the Application and Petition will be rendered nugatory if this 20 Application is not certified urgent and duly brought before the duty judge.

Dated at Nairobi this 30th day of November 2020



MARTIN ONYANGO

ADVOCATE FOR THE APPLICANTS

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The Inspector-General of Police
Jogoo House 'A' Taifa Road
P.O. Box 44249 - 00100
NAIROBI.

20

The Senior Principal Magistrate Kilifi
P. O. Box 287 - 80108
KILIFI.



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CONSTITUTIONAL PETITION NO. OF 2020 MALINDI

BETWEEN

PAK 1st APPLICANT
SALIM MOHAMMED 2nd APPLICANT

AND

THE ATTORNEY GENERAL 1st RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 2nd RESPONDENT
THE INSPECTOR GENERAL OF POLICE 3rd RESPONDENT — 10
THE SENIOR PRINCIPAL MAGISTRATE KILIFI 4th RESPONDENT

NOTICE OF MOTION

(Under Articles 165 (6) and (7), 22, 23, 26, 43, 47, 50, 53 (1) (c), 53 (2) and 258, of the Constitution of Kenya, Rule 19 of the Protection of Rights and Fundamental Freedoms Practice and Procedure Rules.)

TAKE NOTICE that this Honourable Court shall be moved on the.....day of 2020 at 9:00 o'clock in the forenoon or soon thereafter as the Applicants may be heard on an application **FOR ORDERS THAT:**

- a. This Application be certified urgent and heard *ex parte* in the first instance.
- b. The identity of the 1st Applicant who was a minor when the events herein — 20 occurred be protected and only reflected as **PAK** in the entire record and proceedings.
- c. Pending the hearing and determination of this Application *inter partes*, a conservatory order be issued staying all proceedings before the 4th Respondent in Criminal Case numbers 395 and 396 of 2019 and Children's Case number 72 of 2019.

- d. Pending the hearing and determination of the petition herein, a conservatory order be issued staying the trial of the Applicants before the 4th Respondent in Criminal Case numbers 395 and 396 of 2019.
- e. The court be pleased to call for and examine the record of the proceedings in Criminal Case numbers 395 and 396 of 2019 and Children's Case number 72 of 2019.
- f. That each party to bear their costs of the Application.

WHICH APPLICATION is based on the following grounds:

1. The 1st Applicant is a female adolescent now aged 18 years, who suffered a spontaneous abortion and sought emergency post-abortion care at Chamalo Medical Clinic a licenced facility in Ganze where the 2nd Applicant attended to her. 10
2. The 2nd Applicant is a qualified and licensed clinical officer practicing as such at Chamalo Medical Clinic in Ganze, Kilifi County.
3. PAK was arrested on the 21st September 2019 from her hospital bed at Chamalo Medical Clinic in Ganze sub-county where she had sought emergency treatment following complications in her pregnancy. She was detained at Ganze Police Patrol Base for two nights, forced to undergo a medical examination and later charged before the Senior Principal Magistrates Court in Kilifi for procuring an abortion. 20
4. On the 23rd September, 2019 PAK was charged in Kilifi CR 395 of 2019 with the offence of **'Procuring abortion contrary to section 159 of the Penal code'** with the particulars of the offence being that **'On the 19th September 2019 at around 1900 Hours at Ganze location in Ganze sub-county within Kilifi County with intent to procure a miscarriage administered to herself drugs which led to her miscarriage.'**
5. On the same date, 23rd September 2019, Salim Mohamed was charged in Kilifi CR 396 of 2019 with **'Procuring abortion contrary to section 158 of the Penal code'** with particulars that **'Jointly with another not before the court; on the 19th September 2019 at around 1900HRS at Ganze sub-location, Ganze location in Ganze sub-county within Kilifi County unlawfully** 30

administered unknown drugs into the body of PAK (accused in CR395) that led to her miscarriage.'

- 6. The Applicants were without any complaint, arrested by Police, forced to undergo medical examination, and charged for seeking and providing abortion services without regard to the Constitution, statutes, and unequivocal judicial decisions on the law on abortion in Kenya.
- 7. There were no investigations conducted prior to the arrest of the Applicants to establish the medical condition of the 1st Applicant, the qualifications of the 2nd Applicant, and the licencing of the facility at which the 1st Applicant had sought treatment.
- 8. It is only after arresting and charging the Applicants that the Directorate of Criminal Investigations asked the employer of the 2nd Applicant for information on the 2nd Applicant's professional license and academic qualifications, and the licensing of the clinic and other employees. 10
- 9. On the 23rd October 2019, the Applicants raised the violation of their fundamental rights and freedoms, and the unlawfulness of their arrest and prosecution before the Senior Principal Magistrates Court in Kilifi. They challenged the lawfulness of the charges in criminal case numbers 395 and 396 of 2019. This challenge was based on Article 26(4) and 43 of the Constitution, section 35(3) of the *Sexual Offences Act, 2006* and the judgment of the High Court in Nairobi High Court Petition No. 266 of 2015. 20
- 10. On the 17th February 2020, the Magistrate declined the Application and ordered the Applicants to raise their challenge in their defence during their trial. The Court ordered that they stand trial and can only raise the unconstitutionality and illegality of the Charges in their Defence.
- 11. In charging the Applicants with abortion related charges, the Director of Public Prosecutions has shifted the burden of proof to the Applicants to prove that they fell within the Constitutional and statutory protections for the provision of

abortion services in Kenya. This contravenes the presumption of innocence and the duty of the DPP to charge only for offences known to law in Kenya.

- 12. The 4th Respondent has condemned the Applicants to a trial scheduled for 3rd December 2020. This trial is unlawful, and will violate numerous rights of the Applicants, women and girls of a reproductive age, and healthcare providers who offer reproductive health services and may be arrested and prosecuted just like the Applicants.
- 13. The Applicants seek a suspension of their trial before the 4th Respondent pending the hearing and determination of the Application and Petition herein.
- 14. Both the Application and Petition will be rendered nugatory if the trial of the Applicants before the Senior Principal Magistrates Court is not suspended pending the hearing and determination of the Application and Petition. —10
- 15. The denial of post-abortion care, which is an emergency medical treatment, contravenes the right to freedom from cruel, inhuman, or degrading treatment, a right from which no derogation is permitted under the Constitution of Kenya.
- 16. The orders stopping all proceedings before the Senior Principal Magistrates Court in criminal case No. 395 and No. 396 of 2019 are necessary to avoid the great injustice that would arise if the rights sought to be vindicated in the Petition and Application continue to be violated.

AND WHICH application is supported by the affidavits of **PAK** and **Salim Mohamed** —20 and by such other grounds, reasons and arguments as may be advanced at the hearing of the application.

Dated at Nairobi this 30th day of November 2020



MARTIN ONYANGO

ADVOCATE FOR THE APPLICANTS

DRAWN & FILED BY:

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The Inspector-General of Police

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NAIROBI.

The Senior Principal Magistrate Kilifi

P.O. Box 287 - 80108

KILIFI

9



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CONSTITUTIONAL PETITION NO. _____ OF 2020

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 43, 46, 48, 49, 50, 53 (1), 53 (2), 73, 75, 157(11), 159, 165 (3,6&7), 232, 258, 259, AND SIXTH SCHEDULE- SECTION 7 OF THE CONSTITUTION OF KENYA

AND _____ **10**

IN THE MATTER OF SECTIONS 158, 159 AND 160 OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CHILDREN'S ACT OF 2001 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 35 (3) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE HEALTH ACT OF 2017 AND THE CLINICAL OFFICERS (Training, Registration and Licensing) Act, 2017 _____ **20**

AND

IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KILIFI CRIMINAL CASE NUMBERS 395, 396 OF 2019 AND CHILDRENS CASE NO 72 OF 2019

BETWEEN

PAK 1st PETITIONER

SALIM MOHAMMED 2nd PETITIONER

AND

THE ATTORNEY GENERAL..... 1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS..... 2nd RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3rd RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE KILIFI 4th RESPONDENT

PETITION

TO

THE HIGH COURT OF KENYA, _____ 10

AT MALINDI.

The humble Petition of **PAK** and **SALIM MOHAMMED** of KILIFI County within the Republic of Kenya is as follows: -

THE PARTIES.

1. The 1st Petitioner is a female adolescent student, learning and residing within Kilifi County in the Republic of Kenya.
2. The 2nd Petitioner is a male adult, working for gain as a registered Clinical Officer at Chamalo Medical Clinic, a licensed health facility in Ganze Sub County of Kilifi County.
3. The Petitioners bring this Petition alleging violations of, and the threat of violations of, their fundamental rights and freedoms in their own interest and in the public interest under Articles 22(1) and 22(2)(b)&(c) and Articles 258(1) and 258(2)(b)&(c) of the Constitution of Kenya. — 20
4. The 1st Respondent is the Attorney General of Kenya and is enjoined to this petition according to the provisions of Article 156 of the Constitution as the principal legal adviser to the Government.
5. The 2nd Respondent is the Director of Public Prosecution of Kenya and is enjoined to this Petition under the provisions of Article 157 of the

Constitution as the repository of public prosecution power and power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct.

- 6. The 3rd Respondent is the Inspector General of Police who exercises independent command over the National Police Service and is enjoined in this Petition pursuant to the provisions of Article 245 of the Constitution.
- 7. The 4th Respondent is a Subordinate Court established under Article 169 of the Constitution and is currently handling criminal case No. 395 and No. 396 of 2019 and having the conduct of Children's Case No. 72 of 2019.

FACTUAL BACKGROUND OF THE PETITION

- 8. PAK is a 18year-old adolescent from a low-income family in Ganze location in Kilifi County. She is the 7th child in a family of 12 children. At the material time, PAK was a form two student at Patanguo Mixed Day Secondary School in Ganze Sub-County, Kilifi County.
- 9. Owing to a lack of information on contraception, PAK became pregnant after sexual intercourse with a fellow student.
- 10. PAK on her own initiative, upon experiencing complications with her pregnancy including severe pain and bleeding, went to Chamalo Medical Clinic in Ganze location for treatment on 19th September 2019.
- 11. On the same day at around 5:00pm Salim Mohammed, the 2nd Petitioner, received PAK at Chamalo Medical Clinic. PAK complained of severe lower abdominal pain, vaginal bleeding, and dizziness. She reported that she woke up with intense abdominal cramps that were followed by mild vaginal bleeding which increased over time.
- 12. At the Clinic PAK received emergency care from the 2nd Petitioner who upon examining her concluded that she had suffered a spontaneous abortion.
- 13. The 2nd Petitioner is a registered Clinical Officer with the Clinical Officers' Council with a current practice license. He holds a Diploma in Clinical Medicine and Surgery from the Kenya Medical Training College and is currently employed at Chamalo Medical Clinic in Ganze sub-County.

- 14. The 2nd Petitioner performed a successful manual vacuum evacuation, after which PAK was in fair general condition. With mild lower abdominal pain, PAK was then allowed to return to the female ward to recuperate.
- 15. PAK remained in the Clinic on the 19th and 20th of September 2019 as she recuperated awaiting discharge.
- 16. At around 7 pm on 21st September 2019, plain-clothed Police officers stormed Chamalo Medical Clinic without notice or permission. They demanded to be given PAK's treatment records and subsequently confiscated the same from the 2nd Petitioner.
- 17. The 2nd Petitioner was then handcuffed and taken to the procedure room where PAK was recuperating. The 1st and 2nd Petitioners together with two female employees at Chamalo Medical Center both working as cleaners, were arrested, and taken to Ganze Police Patrol Base. — 10
- 18. Upon arrival at the Police station, PAK was neither informed about the reason for her arrest nor her right to remain silent. She was not allowed legal representation and was interrogated alone.
- 19. The Police officer at Ganze Police Patrol Base made PAK sign a statement written by the inquiring Police officer. The statement was contrary to PAK's express narration of what had happened at Chamalo Medical Clinic. The Police insisted that she admits that she had procured an abortion against her explanation of what had happened. — 20
- 20. On the 22nd September 2019 PAK was forced to undergo a medical examination at Kilifi County Hospital where a medical examination form was filled out.
- 21. The Police officers who arrested the Petitioners did not inquire whether the 2nd Petitioner was a qualified healthcare provider or whether the facility in which he worked was licenced to provide reproductive healthcare services.
- 22. Despite PAK being a minor, she was dragged from her hospital bed and held in Police custody for two days without receiving any treatment. — 30
- 23. The 2nd Petitioner was arrested from his workstation without any Court Orders and without regard to his responsibilities as a healthcare provider. PAK's treatment documents were forcefully taken from him by

the Police, and he was held in Police custody without the option of a Police bond or bail.

24. Upon being charged, PAK was remanded at Malindi juvenile remand home for one month, from the 23rd September 2019 to the 24th October 2019 when a women's rights organisation which had heard of her plight from a network of healthcare workers secured her release on a cash bail of Kshs. 50,000 paid into the Court.

CRIMINAL CHARGES BY THE 2ND RESPONDENT

25. On 23rd September 2019, PAK was charged in Kilifi criminal case No. 395 of 2019 with the offence of ***'Procuring abortion contrary to section 159 of the Penal code'*** with the particulars of the offence being that ***'On the 19th September 2019 at around 1900 Hours at Ganze location in Ganze sub-county within Kilifi county with intent to procure her miscarriage administered to herself drugs which led to her miscarriage.'*** — 10
26. On the same day the 2nd Petitioner was charged in Kilifi criminal case number 396 of 2019 with ***'Procuring abortion contrary to section 158 of the Penal code'*** with particulars that ***'Jointly with another not before the court, on the 19th September 2019 at around 1900HRS at Ganze sub-location, Ganze location in Ganze sub-county within Kilifi County unlawfully administered unknown drugs into the body of PAK (accused in CR395) that led to her miscarriage.'*** — 20
27. The 2nd Petitioner was in the alternative charged with ***'Supplying drugs to procure abortion contrary to section 160 of the penal code'*** with particulars that ***'Jointly with another not before the court: on the 19th September 2019 at around 1900 HRS at Ganze sub-location, Ganze location in Ganze sub-county within Kilifi County unlawfully supplied drugs to one PAK aged 17 years knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.'***
28. Despite PAK having gone to the Clinic with an emergency medical need arising from her pregnancy which was duly assessed, and care — 30

given by the Salim Mohammed, the DPP decided to charge both with abortion related offences under the Penal Code.

- 29. Even if the PAK had indeed received abortion care from Salim Mohamed, the charges against them are based solely on the 1963 Penal Code and not in accordance with the Constitution, the Health Act and prevailing judicial opinion.
- 30. The charges against the Petitioner are based on a false belief on the part of the Police and the Office of the Director of Public Prosecution that the Petitioners had procured and provided abortion services and that abortion was absolutely unlawful in Kenya. No reference or regard has been given to the Constitution, statutory and policy provisions on abortion services in Kenya. —10
- 31. The charges against PAK were proffered without consideration of her age as a minor, medical condition (being a patient in her hospital bed and still in need of medical care and attention), right to access healthcare services (including reproductive healthcare from qualified providers), and right to access emergency medical care in any health facility (including post-abortion care).
- 32. The arrest and charges against the 2nd Petitioner were made without any prior investigations into the alleged offence. No inquiry was made into whether he was qualified and licensed to offer the services or whether the facility in which he worked was duly licensed to provide reproductive health services. —20
- 33. After arresting and charging the Petitioners, the Directorate of Criminal Investigations issued a demand for information from the proprietor of Chamalo Medical Clinic regarding the licensing of the hospital and its employees and on the 2nd Petitioner's professional licences and academic qualifications. This confirms that these documents were neither sought nor reviewed before instituting the Charges. —30
- 34. On the 23rd of October 2019, the 2nd Petitioner and PAK made an application to the Senior Principal Magistrate Kilifi challenging the lawfulness of the charges in both CR 395 and 396. This challenge to the legality of the charges as they appeared in the charge sheet was based

on Article 26(4) of the Constitution, section 35(3) of the *Sexual Offences Act, 2006* and the judgment of the High Court in Nairobi High Court Petition No. 266 of 2015.

35. On the 17th February 2020, the Senior Principal Magistrate declined the application by the Petitioners to declare the charges unlawful, and instead directed the Applicants to raise their challenge during their Defence.
36. Having declined to redress the Petitioners' challenge on the lawfulness of the charges against them, the Magistrate condemned the Petitioners to a trial based on the wrong assumption that the 1st Petitioner had sought abortion from the 2nd Petitioner and in violation of the rights of the Petitioners, women and girls of a reproductive age and healthcare providers who offer reproductive health services.
37. In declining the Petitioners application the Senior Principal Magistrate's Court in Kilifi held that ***'once an accused is charged under the impugned sections of the penal code it is she/he [who has] to prove in his defence that he benefits from the exceptions [under Article 26(4) of the Constitution and section 35(3) of the Sexual Offences Act] as these are facts within his knowledge. He cannot prefer such a defence until the hearing of the matter has commenced.'*** This approach to the prosecution erodes the presumption of innocence and protection from being charged for an act which is not a crime in Kenya and shifts the burden of proof to the accused instead of the prosecution.

APPLICATION BY THE CHILDREN'S OFFICER

38. A children's' officer is an officer appointed by the Director of Children's Services under section 38 of the *Children Act, 2001*. Their role is to safeguard the welfare of children and promote, co-ordinate and supervise services and facilities designed to advance the wellbeing of children and their families and promote the best interests of children.
39. Concurrent with the criminal charges against PAK, the Children's Officer in charge of Ganze Sub-County made an application in Children's

case No. 72 of 2019 seeking to send PAK to a children's home from 23rd September to the 17th October 2019. This application was made even though PAK was a student who should have been taken back home for her care and protection and then back to school to complete her education.

- 40. On the 18th February 2020, the children's officer for Ganze sub-county, one Mr. Mbogo, wrote a letter to the headteacher of PAK's school seeking to confirm her attendance at the school and further stigmatized her entire encounter with the criminal justice system by labelling her as one charged with procuring an abortion and subject to criminal proceedings. — 10
- 41. On the 19th February 2020, without just cause, the children's officer in charge of Ganze sub-county summoned PAK from school, together with her mother, to his office in furtherance of the harassment meted against PAK since she was charged in Court.
- 42. On the 1st March 2020, PAK's father received summons from the Senior Principal Magistrates Court applied for by the children's officer in charge of Ganze sub-county, requiring him to bring PAK from school to Court on the 12th March 2020, again in furtherance of the stigma and harassment against PAK.

LEGAL FOUNDATION AND CONSTITUTIONAL BACKGROUND — 20

- 43. The Preamble to the Constitution of Kenya, 2010 conveys the aspiration of Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law.
- 44. Under Article 2, the Constitution of Kenya is the supreme law of the land and it binds all persons and all State organs at both levels of government. No person may claim or exercise State authority except as authorised under the Constitution.
- 45. Article 2(5) of the Constitution expressly imports the general rules of international law and makes them part of the law of Kenya. — 30
- 46. Article 3 of the Constitution behoves the Respondents like all Kenyans and State organs to respect, uphold and defend the Constitution.
- 47. The national values and principles of governance in Article 10 and Article 232 of the Constitution bind all state organs, state officers, public

officers and all persons whenever any of them applies or interprets the Constitution or enacts, applies or interprets any law. The national values and principles of good governance pertinent to this petition include “*human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.*”

48. Article 20(3)(a) and (b) of the Constitution require the Court to not only *develop the law* to the extent that it does not give effect to a right or fundamental freedom, but also to adopt the interpretation that *most favours* the enforcement of rights and fundamental freedoms.
49. Under Article 21(1) it is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights. — 10
50. Article 24(1) of the Constitution of Kenya outlines the grounds for a justifiable limitation of rights and provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on values including human dignity, and equality.
51. Article 26(1) of the Constitution of Kenya guarantees every person the right to life. Furthermore, Article 26(4) provides that abortion is permitted 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. — 20
52. Schedule 6 of the Constitution of Kenya at section 7 requires *all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.*
53. Section 6(1) of the *Health Act, 2017* provides that every person has a right to reproductive healthcare. This includes (c) access to treatment by a trained health professional for conditions occurring during pregnancy, including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable — 30

conditions.

- 54. The *Health Act, 2017* at section 6(2) provides that for subsection (1)(c), "a trained health professional" shall refer to a health professional with formal medical training at the proficiency level of a medical officer, 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, and who has a valid license from the recognized regulatory authorities to carry out that procedure.
- 55. The Penal Code cap 63 at section 158 provides that any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years. — 10
- 56. Section 159 of the Penal Code provides 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. — 20
- 57. Finally, section 160 of the Penal code provides 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.
- 58. Article 27 of the Constitution of Kenya guarantees freedom from discrimination including discrimination based on age, sex, or health status.
- 59. Article 28 of the Constitution of Kenya guarantees the right to dignity of every person, while Article 29 provides for the right to freedom and security of the person, which includes the right not to be treated in a cruel, inhuman or degrading manner. — 30
- 60. Under Article 43(1)(a) of the Constitution, every person has the right to the highest attainable standard of health, including the right to health

care services and reproductive health care. Additionally, Article 43(2) provides that a person shall not be denied emergency medical treatment.

61. Article 46(1) of the Constitution of Kenya guarantees that consumers have the right (a) to goods and services of reasonable quality; (b) to the information necessary for them to gain full benefit from goods and services; and (c) to the protection of their health, safety, and economic interests.

62. Article 29(a) guarantees every person the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

63. Article 49(1) of the Constitution provides that an arrested person has the right to (b) remain silent, and (d) not be compelled to make any confession or admission that could be used in evidence against the person.

64. Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair

65. Article 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

66. Article 50(2) guarantees every accused person the right to a fair trial, which includes the right

(a) to be presumed innocent until the contrary is proved.

(b) to be informed of the charge, with sufficient detail to answer it.

...

(i) to remain silent, and not to testify during the proceedings.

...

(l) to refuse to give self-incriminating evidence; and

...

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not (i) an offence in Kenya or (ii) a crime under international law.

67. Article 50(4) states that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.
68. Article 53(1) guarantees every child the right (b) to free and compulsory basic education; (c) to basic nutrition, shelter and health care; (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; and (f) not to be detained, except as a measure of last resort, and when detained, to be held (i) for the shortest appropriate period. Article 53(2) provides that a child's best interests are of paramount importance in every matter concerning the child. — 10
69. In Article 73(1) of the Constitution, authority assigned to a State officer (a) is a public trust to be exercised in a manner that (i) is consistent with the purposes and objects of this Constitution, (ii) demonstrates respect for the people, (iii) brings honour to the nation and dignity to the office, and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.
70. In Article 75(1) a state officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids (a) any conflict between personal interests and public or official duties; (b) compromising any public or official interest in favour of personal interest; or (c) demeaning the office the officer holds. — 20
71. Article 157(1) establishes the office of Director of Public Prosecutions. In exercising the powers conferred, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
72. Article 159(1) provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. Article 159(2) states that, in exercising judicial authority, the courts and tribunals shall be guided by — 30

the following principles: (a) justice shall be done to all, irrespective of status; and (b) justice shall not be delayed.

- 73.** Article 165(3) provides that the High Court shall have (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution, (ii) the question whether anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of, this Constitution. — 10
- 74.** Article 165(6) states that the High Court has supervisory jurisdiction over the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Article 165(7) states that, for the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
- 75.** In Article 258(1), every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. — 20
- 76.** Under Article 258(2), in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members.
- 77.** Article 259(1) of the Constitution provides that it shall be interpreted in a manner that (a) promotes its purposes, values and principles; (b) — 30 advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance

78. The Constitution guarantees the right to health including reproductive healthcare to every person in the republic of Kenya and prohibits discrimination based on age, health, and gender, among other grounds.
79. By the Ministry of Health's regulations contained in the National Post Abortion Care Reference Manual (2013) and the directive issued by the Director of Medical Services on June 2013, post-abortion care (PAC) is an integral part of maternity services and should be treated as such. It is part of the emergency services to which all patients are entitled, under Article 26(4) and Article 43(2) of the Constitution.
80. The right to health, including reproductive healthcare, places the responsibility for service provision on qualified and licenced healthcare providers to, within the law, provide services to all women and girls. This obligation in the current case is being limited by the conduct of the Police and the Director of Public Prosecution in prosecuting the 2nd Petitioner for complying with the Constitution and delivering in his mandate. —10

OTHER LEGAL FOUNDATIONS OF THE PETITION

81. Sections 5,6, 7, 8 and 10 of the Health Act No.21 of 2017
82. The Clinical Officers Act (Training, Registration & Licencing) No. 20 of 2017
83. The Children Act, 2001 Sections 4, 5, 6, 7, 13, 16, 19 and the fifth schedule —20
84. The Prevention of Torture Act No.12 of 2017
85. Sections 4 and 5 of the Fair Administrative Action Act No. 4 of 2015
86. Articles 3 (2), 4, 5, 8, 9 (1), 16 (1) & (2) and 18 (3) of The African Charter on Human and Peoples' Rights
87. Articles 2 (1), 4 (1), 14 (1) (a), (b), (g) & (2) (a) of The Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa (Maputo Protocol)
88. Articles, 3, 4, 5, 10, 11, 14, 16 & 19 of the African Charter on the Rights and Welfare of the Child —30
89. Articles 2 (2), and 12 (1) of The International Covenant on Economic, Social and Cultural Rights (ICESCR)

90. Articles 2 (1), 6 (1), 7, 19 (2) and 24 (1) of The International Covenant on Civil and Political Rights (ICCPR)
91. Articles 1, 2 (b), 3, 10 (h), 12 (1) and 16 (e) of The Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW)
92. Article 2(1) & (2), 3(1), 13 & 24 (1) of The Convention on The Rights of the Child (CRC)
93. Article 16 of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
94. The Statute of the WHO and the WHO guideline on Health worker roles in providing safe abortion care and post-abortion contraception — 10
95. Section 25 of the Interpretations and general Provisions Act Cap 2 of the laws of Kenya.

VIOLATION OF AND THREATENED VIOLATION OF THE RIGHTS OF PAK, ADOLESCENT GIRLS & WOMEN OF REPRODUCTIVE AGE

96. The arbitrary detention, interrogation and charging of PAK, and the denial of access to counsel, violates PAK's rights to liberty and protection from self-incrimination, and the rights accorded to arrested persons.
97. The forced medical extermination to which the Police subjected PAK violates her rights to privacy, dignity, and fair hearing.
98. The denial of health care to PAK while in detention and at the juvenile remand violates her rights to health, dignity, and freedom from cruel, inhuman, and degrading treatment. — 20
99. The denial of access to education while in detention and the interruptions after release violates PAK's right to education.
100. The targeting of PAK for arrest, and her mistreatment for seeking health care, violate her rights to privacy, dignity, and protection from discrimination.
101. The confiscation of PAK's medical documents without her consent, a court order, or any other legal grounds, violates her rights to privacy and health. — 30
102. The subsequent harassment of PAK and her family by the children's officer, including revealing private medical information and calling

unnecessary meetings, violates her rights to equal protection under the law, privacy, and dignity.

- 103.** Arresting PAK from the health facility, and thereby preventing her from accessing health care, violates her rights to access emergency treatment, health, life, equality, non-discrimination, privacy, and dignity.
- 104.** Denying PAK full treatment at Chamalo Medical Clinic and arresting the 2nd Petitioner for providing healthcare, subsequently detaining and charging PAK for the alleged offences constitutes a violation of PAK's rights to the highest standard of health, dignity, and privacy.
- 105.** The Police's storming of Chamalo Medical Clinic, forceful confiscation of PAK's treatment records, storming of the female ward, arrest of PAK, and the Police's subsequent reliance on the information obtained in this manner, is a violation of PAK's rights to confidentiality of information relating to her health status, treatment or stay in a health facility. — 10
- 106.** Charging the Petitioners under sections 158, 159 and 160 of the Penal Code as they existed before the enactment of the Constitution of Kenya 2010, the *Health Act, 2017* and the *Sexual Offences Act, 2006*, which have the effect of modifying or amending the said provisions, subjects the Petitioners to an unlawful charge in violation of their rights to a fair trial and equal protection under the law. — 20
- 107.** The action by the Police of forcing PAK to endorse the Police statement stipulating that she had procured an abortion with the help of the 2nd Petitioner is a violation of her protection from self-incrimination and her right to a fair trial.
- 108.** Forcefully arresting PAK from the hospital and sending her to a children's remand home for over 30 days violates her right to parental care, right to education and dignity and undermines her best interests as a child.
- 109.** The Ganze sub-county children's officer's application to send PAK to a children's home for four weeks, successive summons issued for PAK and her parents to attend his office, the letter to the headteacher of PAK's — 30

school alleging that she had been charged with abortion and subsequent summons for PAK to be presented to Court, violate PAK's right to education, privacy, protection from discrimination, equal protection under the law and dignity.

110. It is not in the best interests of a child to stigmatize PAK for seeking treatment as this violates her rights to health, including reproductive healthcare.

111. Disrupting PAK, a minor, from school on so many occasions violated her right to education and is not in her best interests.

VIOLATION OF AND THREATENED VIOLATION OF THE RIGHTS OF THE 2ND PETITIONER AND OTHER HEALTHCARE PROVIDERS — 10

112. Arresting the 2nd Petitioner for providing post abortion care which is emergency medical care violates his obligations as a healthcare provider protected under the right to health.

113. Arresting the 2nd Petitioner and prosecuting him for providing lawful services violates his right not to be discriminated against on any of the grounds set out in Article 27(4) of the Constitution. It also contravenes his duty to provide health care, conscientiously and within his scope of practice and ability, to every person entrusted to his care and seeking his support, and to provide emergency medical treatment. — 20

114. Charging the 2nd Petitioner under sections 158, 159 and 160 of the Penal Code as they existed before the enactment of the Constitution of Kenya 2010, the *Health Act, 2017* and the *Sexual Offences Act, 2006*, which have the effect of modifying or amending the said provisions, subjects him to an unlawful charge in violation of his rights to a fair trial and equal protection under the law.

RELIEFS SOUGHT

- a) A declaration that forcing PAK and women and girls of reproductive age to undergo medical examination with the intention of charging them for procuring abortion violates the rights to health, privacy, dignity, and fair hearing.
- b) A declaration that the arrest, detention and prosecution of patients seeking - post-abortion care services is cruel, inhuman, and degrading treatment and a violation of Articles 25 (a) and 28 of the Constitution.
- c) A declaration that the arrest, detention, and charges against the Petitioners are illegal, arbitrary and a violation of Articles 26 (4), 43 (1) (a), 43 (2), 50 of the Constitution. — 10
- d) A declaration that arresting and detaining PAK from her hospital bed, charging her for seeking medical care, detaining her in a children's remand home, denying her treatment and a chance to be in school violates her constitutional rights to health including reproductive healthcare , access to emergency healthcare ,dignity, life, equality, non-discrimination, privacy, education and freedom from cruel, inhuman, and degrading treatment and not in her best interests as a child.
- e) A declaration that arresting and prosecuting women seeking abortion care services from a trained health professional and arresting and prosecuting a trained health professional providing abortion care, as stipulated in the Constitution, the *Health Act, 2017* and the Sexual Offences Act is unlawful and a violation of the Constitution. — 20
- f) A declaration that the conduct of the Police officers and the Children's officer is contrary to Articles 10 and 232 of the Constitution on the principles of good governance and public service.
- g) An order of certiorari calling into court and quashing the charge sheets in Kilifi Senior Principal Magistrates Court Criminal case numbers 395 of 2019 and 396 of 2019, and the application in Kilifi children's case number 72 of 2019.
- h) An order of permanent injunction barring the Director of Public Prosecutions from prosecuting any patient seeking abortion care from a trained health — 30

- professional or a trained health professional providing abortion care, as stipulated under Article 26(4) of the Constitution and the *Health Act, 2017*.
- i) An order of permanent injunction against the Inspector General of Police and the Director of Criminal Investigations from arresting any patient seeking abortion care from a trained health professional or a trained health professional providing abortion care, as stipulated under Article 26 (4) of the Constitution and the *Health Act, 2017 and Sexual Offences Act 2006*.
 - j) An order for damages to the Petitioners for the violations suffered.
 - k) An order of mandamus compelling the Attorney General to within 90 days from judgement, forward a Bill to the National Assembly for amendment of the Penal Code in line with Article 26(4) of the Constitution the *Health Act 2017 and the Sexual Offences Act 2006*.
 - l) An order of mandamus compelling the Inspector General of Police to, within 90 days of the judgement , issue a circular to all Police officers directing them on the illegality of arresting and harassing trained health professionals providing abortion services within the law throughout the country.
 - m) An order of mandamus compelling the Director of Public Prosecutions to, within 90 days of judgement , issue a circular to all prosecutors directing them on the illegality of prosecuting patients receiving and trained health professionals providing abortion services within the law throughout the country.

Dated at Nairobi this 30th day of November

2020

MARTIN ONYANGO

ADVOCATE FOR THE PETITIONERS

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The Inspector-General of Police
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P.O. Box 44249 - 00100

20

NAIROBI.

The Senior Principal Magistrate Kilifi
P. O Box 287 - 80108

KILIFI



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CONSTITUTIONAL PETITION NO. _____ OF 2020
IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 43, 46, 48, 49, 50, 53, 73, 75, 157(11) 159, 165 (3, 6 & 7), 232, 258, 259, AND SIXTH SCHEDULE- SECTION 7 OF THE CONSTITUTION OF KENYA

AND _____ 10

IN THE MATTER OF SECTIONS 158, 159 AND 160 OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CHILDREN'S ACT OF 2001 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 35 (3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE HEALTH ACT OF 2017 AND THE CLINICAL OFFICERS (Training, Registration and Licensing) ACT, 2017 _____ 20

AND

IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KILIFI CRIMINAL CASE NUMBERS 395, 396 OF 2019 AND CHILDRENS CASE NO 72 OF 2019

BETWEEN

PAK 1st PETITIONER
SALIM MOHAMMED 2nd PETITIONER

AND

THE ATTORNEY GENERAL 1st RESPONDENT _____ 30
THE DIRECTOR OF PUBLIC PROSECUTIONS 2nd RESPONDENT
THE INSPECTOR GENERAL OF POLICE 3rd RESPONDENT
THE SENIOR PRINCIPAL MAGISTRATE KILIFI 4th RESPONDENT

ATTORNEY GENERAL
Malindi Regional Office

P.O. Box 111-80200, MALINDI
Email: agmalindi@...

SUPPORTING AFFIDAVIT

I **PAK** an adolescent girl residing in Kilifi County in the Republic of Kenya swear this affidavit and state as follows.

1. THAT I am the 7th child in a family of 12 children, we are a low-income family from Ganze location Kilifi County, and I was 17 years old when the incidents herein happened.
2. THAT due to the stigma and discrimination against adolescents who have sought post abortion care services or are perceived to have procured an abortion I request the court to protect my identity in the proceedings in this case and allow me to use the initials **PAK** as my names having seen copies of documents which give my full particulars. — 10
3. THAT in September 2019, I was a Form Two student at Patanguo Mixed Day Secondary School in Ganze sub-County, Kilifi County.
4. THAT owing to a lack of information and services on contraception, I got pregnant after sexual intercourse with another student.
5. THAT my pregnancy progressed well until on the 19th September 2019 when I began experiencing severe pain and complications and went to Chamalo Medical Clinic in Ganze location for treatment at around 5:00 pm. **Annexed and Marked PAK-1 is a copy of my treatment card from the clinic.** — 20
6. THAT I was attended to by a Clinical Officer working at Chamalo Medical Clinic and I later learnt that his name is Salim Mohammed.
7. THAT at the time of admission into the Clinic, I had severe lower abdominal pain, vaginal bleeding, and dizziness. I had woken up that morning with abdominal cramps that were intensely followed by mild vaginal bleeding which increased over time. All this I reported to the clinical officer.
8. THAT at the Clinic I was informed by the Clinical Officer that I had lost the pregnancy then proceeded to treat me, I felt much better that evening, and remained in hospital for observation. — 30

9. THAT I remained in the Clinic on the 19th and 20th of September 2019 as I waited for my discharge.
10. THAT I was arrested on 21st September 2019 by a group of police officers from my hospital bed where I was recovering. The police officers were accompanied by my elder brother who is a policeman and by my parents.
11. THAT upon arrest I was neither informed of any reason for my arrest; my right to remain silent; my right to legal representation nor was I allowed legal representation.
12. THAT upon arrest I was taken to Ganze Police Patrol Base where I was interrogated alone by the police officers. — 10
13. THAT the Police Officers at Ganze Police Patrol Base wrote a statement in my name which they insisted that I sign as my statement. I later learnt that it was written by the investigating police officer and was contrary and contradicted my express narration of what had happened to me from the time I left home and while at Chamalo Medical Clinic. **Annexed and Marked PAK-2 is a copy of the statement written by the police officer which I was ordered to sign.**
14. THAT the police officer who took my statement insisted that I should admit to having procured an abortion at Chamalo Medical Clinic against my explanation that I had gone to the clinic with pregnancy complications. — 20
15. THAT I was detained at Ganze Police Patrol Base for two nights without receiving any medical treatment despite my complaint that I was not feeling well.
16. THAT on 23rd September 2019 I was taken to Kilifi Law Courts where I charged in Kilifi Criminal Case number 395 of 2019 with the offence of **'Procuring abortion contrary to section 159 of the Penal Code'** with the particulars of the offence being that **'On the 19th September 2019 at around 1900 Hours at Ganze location in Ganze sub-county within Kilifi county with intent to procure her miscarriage administered to herself drugs which led to** — 30

her miscarriage' . Annexed and Marked PAK-3 is a copy of the Charge Sheet.

- 17. THAT the charges against me were preferred without a consideration of my age as a minor, my medical condition, being a patient taken from my hospital bed and still in need of medical care and attention, my right to access healthcare services including, reproductive healthcare from qualified providers or my right to access emergency medical care including post-abortion care.
- 18. THAT long after taking a plea my advocates were supplied with the witness statements. ***Annexed and marked PAK-4 are copies of witness statements by Police Officers Oscar Pturi, Abraham Kipchumba and Bernard Kazume.*** — 10
- 19. THAT the Police also took statements from my mother and brother. ***Annexed and Marked PAK-5 are copies of the witness statements of Jumwa Kahindi Katana and Swaleh Kahindi Fondo.***
- 20. THAT the Police further obtained statements from the staff of Chamalo Medical Clinic. ***Annexed and marked PAK-6 are witness statements of Stephen Omondi, Albert Charo Nguya.***
- 21. THAT on 22nd September 2019, I was subjected to a forced medical examination by the Police. The examination was done at the Kilifi County Hospital against my will. ***Annexed and marked PAK-7 is a copy of the Medical Examination Report.*** — 20
- 22. THAT upon being charged before the Senior Principal Magistrates Court in Kilifi for allegedly procuring an abortion I was remanded at Malindi juvenile remand home from 23rd September 2019. ***Annexed and Marked PAK -8 is a copy of the Warrant of Commitment on Remand.***
- 23. THAT during my stay in remand, I did not receive any medical attention including psychosocial support from the institution and it took the intervention of a private reproductive healthcare provider who visited me at the facility and provided me with medication. — 30

Annexed and marked PAK-9 is a copy of the treatment notes from Vinoma Medical RHS Clinic.

24. THAT I was in remand from 23rd September 2019 to 24th October 2019 when the Center for Reproductive Rights (CRR) which had heard of my plight from a network of healthcare workers secured my release on a cash bail of Kshs 50,000. ***Annexed and marked PAK-10 are copies of the cash bail receipt and release order.***
25. THAT I have been informed by my Advocates that on 31st October 2019 they made an application to the Senior Magistrate not to admit the Charges against me and to find them unlawful. The application was declined in a ruling delivered on 13th February 2020. ***Annexed and Marked PAK-11 is a copy of the Ruling.*** 10
26. THAT concurrent to the charges against me by the Director of Public Prosecutions, the Children's Officer Ganze Sub-County filed a Children's Application No. 72 of 2019 dated the 23rd September 2019 for my Care and Protection, seeking to send me to Kikambala Rescue Center for 4 weeks until 17th October 2019, the justification therein was that " *being a victim of defilement has been exposed to a practice prejudicial to her life (abortion) and which circumstances are likely to interfere with her physical health, mental, psychological and social development, she... needs counselling to deal with the traumatic experience* ". ***Annexed and Marked PAK -12 is a copy of the Application.*** 20
27. THAT despite the application by the Children's Officer, I was charged and sent to Malindi Juvenile Remand Home until I secured my release on cash bail on 24th of October 2019.
28. THAT despite the application for Care and Protection, I did not receive any medical attention nor counselling from the Children's Department from the day of my arrest till release on bail.
29. THAT on 18th February 2020, the Children's Officer for Ganze sub-county, one Mr Mbogo, wrote a letter to the headteacher of my school seeking to confirm if I was attending the school, the letter further stigmatized my entire encounter with the criminal justice 30

system by labelling me as one charged with procuring an abortion and subject to criminal proceedings. **Annexed and Marked PAK-13 is a copy of the letter to the school.**

30. THAT on 1st March 2020, my father received summons dated 25th February 2020 from the Senior Principal Magistrates Court that had been applied for by the Children's Officer Ganze -sub-county, requiring him to take me from school to Court on 12th of March 2020, again in furtherance of the stigma and harassment against me. **Annexed and Marked PAK-14 is a copy of the Court Summons.**

10

31. THAT I am reliably informed by my advocate that the Constitution guarantees the right to health including reproductive healthcare to every person in the Republic of Kenya and prohibits discrimination based on age, health, and gender, among other grounds.

32. THAT because of my arrest from the hospital, detention at the police station, charge and then detention at the juvenile remand, I feel, stigmatised rejected, discriminated, and unwanted by the entire society.

33. THAT the arrest and detention denied me a chance to attend school and the constant removal from school has further affected my performance in school and subjected me to ridicule and isolation by other students.

20

34. THAT despite the application by my lawyer that the charges and against me were unmerited, the Magistrates Court has insisted that we proceed with the case and the hearing was set for the 21st May 2020 and moved to the 3rd of December 2020.

35. THAT if the Court does not intervene, I will be subjected to a continuation of multiple violations of my rights.

36. THAT I know of my own knowledge that many other young girls have found themselves in a situation like mine and have failed to get any help.

30

37. THAT I swear this affidavit in support of the Petition and Application filed herein.

38. THAT what is deponed herein is true to the best of my knowledge and belief, save what is deponed to on information and sources which have been stated.

SWORN at KILIFI by the said

PAK

This 30th day of November 2020



DEPONENT

Before me



COMMISSIONER FOR OATHS

DRAWN & FILED BY:

Martin Onyango

% Centre for Reproductive Rights

4th Floor, Pinetree off Kindaruma Road /Off Ngong Road

P.O. Box 52834-00100

Nairobi.

Tel: +254202518361/63

monyango@reprorights.org

P.105/7757/09 LSK/2020/05836

TO BE SERVED UPON: -The Attorney General's Chambers,
Sheria House,

P.O Box 40112-00100

NAIROBI.

The Director of Public Prosecutions

ODPP House, Ragati Road

Po Box 30701-00100

NAIROBI.

The Inspector-General of Police

Jogoo House 'A' Taifa Road

P.O. Box 44249 - 00100

NAIROBI.

The Senior Principal Magistrate Kilifi

P. O Box 287 - 80108

KILIFI

Annexed and Marked
PAK-1

Copy of PAK's treatment
card from Chamalo
Medical Clinic.

2273/19 ⁽³⁸⁾

Date 19/9/2019.

NAME: AMINAH KAHINDI

AGE: 19 YRS

RES: GANZE

Investigations

HB 10g/dl

PTD - Positive

Cl - LAPs

- PV bleeding

- Pains Cramp like in nature

- Not increasing in intensity or frequency

LMP - 17/2/19

Dx: Incomplete abortion

Plan

- MVA Procedure - 10

- I.V Cef 2g stat

- I.V Nilgroms →

- Monitor vitals

ole fbc
($P^{\circ}O^{\circ}cy^{\circ}reH_2O^{\circ}E^{\circ}$)

- I.V Tramadol 100mg stat

Annexure PAK-2

***Copy of statement
written by the Police
Officers for PAK to sign.***

PATIENCE AMINA KAHINDI

PETANGUO SECONDARY

FORM TWO

0707-179192

22/9/2019

22/9/2019

AT

1100 HRS

24

HOME PARTICULARS

District COUNTY - KICIFA

Division SUB-COUNTY - GANZE

LOCATION LOCATION - GANZE

SUB-LOCATION - GANZE

VILLAGE - KIBWAGO

STATE AS FOLLOWS

I am the above named giriyama female juvenile aged 17 years and a form two at Petanguo secondary school. I am under the care of my two parents namely Richard Kahindi Katana and Jamwa Kahindi Katana and I wish to state as follows.

It was in the year 2017 when I met one Mustafa Elijah who became my boyfriend and in the same year we started engaging in sex at his home in Bale.

Repeating this year 2019 we again met with Mustafa as usual and had sex in the month of May without any protection and in the same month I missed my monthly periods.

2019/19
1160 HRY
24

informed ^{me} ^{that} I suspected that I was pregnant but he never gave me a good answer. Nwstaga is a former student at Bale secondary school and since that time we never met again.

BRAND
POLICE
STATION

During all this time my parents never knew that I was pregnant though my mother had heard some rumours about it but she never asked me

reaching on Thursday 19th September 2019 at around 0700 hrs while at home since I had been sent home for school fees I started feeling stomachache, headache and my body was hot, during that time I had one tablet of Tumbocid which I took and felt some changes and even the stomachache stopped completely. 20

Now it was at around 1200 hrs of the same day when again I started feeling the stomachache, I decided to visit Charalo clinic in Danga to seek medical attention since I had some cash amounting to 5000 which I had got during August holidays when the school were close by doing small works and by the time schools open I had 30 and the other 1000k was

Q.O.C

On this day I reached the clinic
 and found one nurse namely Satim,
 I explained how I feel to him
 and he said that was a small
 problem and he took four (4)
 white tablets unknown to me of
 which he asked me to chew two
 and the other two he inserted in
 my vagina

Later the nurse asked me to sleep
 in one of the beds in hospital where
 I slept and it was late at
 night when another female nurse
 came and gave me one white tab.
 she asked me to chew it and
 I did, during this time my
 stomach was really paining.

Now I slept until morning of Friday
 20/9/2019 at around 07:00 hrs when I
 started bleeding, reporting around 20
 11:00 hrs Satim injected me hospital
 water two bottles and still I
 remained there, on this Friday I
 paid the 3000 which I was
 told it was part of the deposit, I
 paid this cash over the counter wh
 patients normally pay.

On this Friday I again spent
 the night there, during all this
 time I was being served ⁻³⁰ for
 all other sick people

concerned. Reaching on Saturday at 10/19

22/10/19

I woke up early in the morning

at around 0600 hrs and had

11.00 hrs

bath and this was after sat-

had pleased me up.

After there I went back to sleep

until when time for lunch had

arrived reached, during that time I was

having very little bleeding just like

a normal period, I took my meal

and remained there, it was at

around 1400 hrs when again I went

to the pay point and paid two

thousand shillings 2000/- since I had

been told earlier that the treatment

could cost 5000/-, for me I did

not know that terminating the

pregnancy was part of the treatment

since I was not for that.

Now it was at around 20.00 hrs.

when we were already having our

supper at the hospital and then

came in three men of which

one of them was my brother name

Swalhe Fonda and the other two

were police officers, there were other

people who were outside.

The police officers asked me when I

arrived there and I told them and

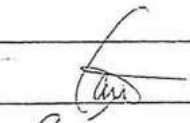
they asked whether I had informed

my parents that I was there

R.O.C

~~R.O.C~~

asked to move outside where I
 22/9/19 found the police car and I
 AT boarded the car under the account
 1100 #22 of police officers and my parents
 AT were also there, I was taken
 to Gamba police station where the
 Police Nurse Satim was also brought. On
 the same night we were escorted
 to Gamba police station where today
 on 22/9/2019 I recorded my statement
 and that is all I can
 state.


 R. O. E.

signed


Annexure PAK-3

***Copy of Charge Sheet in
Criminal Case No 395 of
2019.***

POLICE 5

THE KENYA POLICE
CHARGE SHEET

POLICE CASE NO.318/116/19

DATE TO COURT: 23/9/19

COURT FILE: 395/19

46

OB 04/22/09/19

Christian names in full or PATIENCE AMINA	Surname or Father's Name. KAHINDI	Identity certificate No. NIL	Sex FEMALE	Nationality or Tribe GIRIAMA	Apparent Age JUVENILE	ADDRESS (include District and Location where applicable) C/O KILIFI COUNTY
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CHARGE **PROCURING ABORTION CONTRARY TO SECTION 159 OF THE PENAL CODE.** — 10

PARTICULARS OF OFFENCE
Second Schedule of P.P.C
PATIENCE AMINA KAHINDI: On the 19TH September 2019 at around 1900HRS at Ganze sub location, Ganze location in Ganze sub county within Kilifi county with intent to procure her own miscarriage administered to herself drugs which led to her miscarriage.

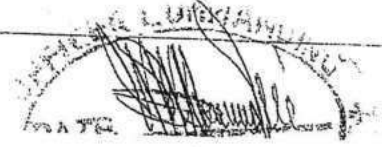
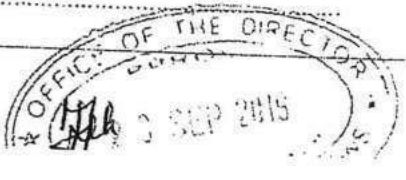
If accused Arrested YES	Date of Arrest 22/9/19	Without With warrant. w/o	Date Apprehension Report to Court 23/9/19	Bond or Bail and Amount IN CUSTODY	Is Application made for Summons to Issue ////////////////////
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Remanded
Adjourned — 20

Complainant and witnesses
REP THROUGH NATIONAL POLICE SERVICE BAMBA

Witnesses
1. JUMWA KAHINDI
2. IP OSCAR PTURU
3. PC DORRIS NYAGA
4. DOCTOR
5. PC MAUREEN ATIENO
6. S/SGT WANJALA — 30

Sentence, Court and date...
..... PM'S COURT KILIFI ON 23/9/19 If fine paid.....



Annexure PAK-4

***Witness statements
by Police Officers;
Oscar Pturi, Abraham
Kipchumba and
Bernard Kalume.***

WITNESS STATEMENT OF:

IP OSCAR PTURI

NO 237181

GANZE
POLICE
PATROL
BASE

No: 237181 IP OSCAR PIURU
PO BOX 1 GANZE
TEL: 0727651557

12/09/2019
1900 Hrs

STATES AS FOLLOWS:

I am the above named police officer currently performing general duties at Ganze Police Patrol Base. I do remember very well that on Thursday 19/09/2019 at about 1600hrs (got information from an informant⁻¹⁰ that there was a school secondary girl who had escaped from school to procure abortion. The girl could be from Petangoo secondary school. And on Saturday 21/09/2019 at about 1900 Hrs I received a mobile call from 0707179192 (Mum Tumwa) who informed me that her daughter had gone to Chamalo Medical Clinic to⁻²⁰ procure abortion. I acted immediately and went straight to the Hospital (Chamalo Medical Clinic). I was in the company of PC Hipchumba and the mother of the girl (Patience Aminga) and her father.

I went straight to the reception and asked if they had a patient by the name Patience Aminga. The reply I got was No. At that time the doctor⁻³⁰ came to the reception. I asked him

Patience Amina? He replied saying "Hapana". I told the doctor to accompany me to the female ward PC Kalumbi PC Kipchumba, the parent her brother and one Mr Salim Mohammed and I proceeded to the female ward. On arrival her brother identified her saying "Ofisa ndio nyu". I asked the doctor one Mr Salim Mohammed why he had used to be a patient when I asked if they had a patient by the name Patience Amina. One Mr Salim Mohammed kept silent.

I asked the doctor one Mr Salim Mohammed to give me any medical notes concerning her. There were no notes concerning her. And she was also not in the register of the Hospital book. I checked in the register to find the name of one Miss Patience Amina but it was not there. I once again asked the doctor one Mr Salim Mohammed why was the patient there then. He kept quiet and never talked. I then interrogated one Miss Patience Amina why she was there. She said "Amina una ugonjwa gani? She replied saying "Homa". I told her

(III)

"Ongea ukweli wako". She started narrating. "Niliidua hapa, tukasikisana nikafanyiwa hivyo". I asked her "Tulisikisana nini?" "Tulisikisana kutoa elfu kumi nitanyiwe hivyo". "Nikatoa elfu tana salio Badaaye". They agreed 10,000/- Kenyan Shilling which they she raised 5000/- for the abortion.

I asked her "Ulifanyiwa nini?" She replied saying "Mimba nitolewa na huyu Sakitari. Pointing her finger at one Mr Salim Mohammed." ¹⁰

I arrested Both - the Clinical Officer one Mr Salim Mohammed and one Miss Patience Aming and escorted them to Bambu Police Station for further investigation. That is all I can state.

WITNESS STATEMENT OF:

**PC. ABRAHAM KIPCHUMBA
NO.119584**

NO. 117304 of ~~MWAKHAM~~ KIKUYU
of GANZE POLICE PATROL

P.O BOX 23,
KILIFI

22/9/19
at
030 hrs
DCI
GANZE
office

STATES AS FOLLOWS:-

I am the above named police officer currently based at GANZE Police Patrol Base where I do investigation duties.

I wish to state that on ¹⁰ Saturday 21st of September 2019 at about 1845 hours I was with IP OSCAR PIUS

with other officers at the patrol base when we received a report where the clinical officer was procuring at

AT CHAMATO MEDICAL CLINIC within GANZE shopping. It was alleged that the ²⁰ was done to a form two student at Potang'wa Secondary School - PATIENCE AMINA KAHINDI.

We all proceeded to the said hospital together with the complainant where we traced the said student PATIENCE AMINA KAHINDI where upon ³⁰ interrogation by IP OSCAR PIUS in our presence where she confirmed that she had done at a certain amount

Doc
Wany
SIGNED
Kah

paid 5000 F and she has
been held from 14th September
2019 until she completes
~~of~~ payment.

At that point inspector
Asad Iqbal asked the clinic
officer SALIM ~~Mohammed~~ the
treatment notes for the girl
but he said he could not
have them. He was a ¹⁰ witness
and charged with the
offence of procuring abortion
that is all I wish to
state.

ROC ~~[Signature]~~ SALIM - ~~[Signature]~~

WITNESS STATEMENT OF:

PC BERNARD KAZUME

presence, she confirmed that abortion was conducted on her at agreed amount of Kshs. 10,000. She said she raised Kshs. 5000 but she had been detained until complete payment.

When WACCAR requested medical notes of the ~~same~~ student PATIENT AGUNA KATTINA the doctor said she could not have them, so they were ~~both arrested and charged with the offence.~~

That is all I wish to state.

ROC - ~~[Signature]~~ SIGNED - J

Annex PAK-5

***Witness statements
of Jumwa Kahindi
Katana and Swaleh
Kahindi Fondo.***

WITNESS STATEMENT OF:

***Jumwa Kahindi
Katana***

JUMA KATHINDI KATHINDI
PO GANZE EAST VILLAGE
P. O BOX
KILIFI

at
1400 hrs

DCI
charge
office

STATES AS FOLLOWS:

I am the above named Giovanni female adult aged 45 years currently working at GANZE⁻¹⁰ secondary school at the construction site.

DOE
~~W/S~~

I'm a mother of PATIENCE AMINA KATHINDI who is my 7th of twelve children. PATIENCE AMINA is a form two (2) student at Detangus Secondary School and she is 17 years.

SUNED
x

I wish to state that on Friday 20th September 2019 at about 1900 hours when I came back from work, I passed via my girls house to find out how they have been doing but I noticed that PATIENCE AMINA KATHINDI was not around. I asked my daughter HADY KATHINDI about her whereabouts and she informed me that PATIENCE AMINA⁻³⁰ left yesterday around 1700 hrs and have not reported back yesterday about
lx

I received information that PATIENCE AMINA is admitted at CHAMALO MEDICAL CLINIC where she has been since 19th September 2019. This brought me worries of her sickness the can cause her admission in the hospital without informing me.

However, after learning that PATIENCE AMINA KAHINDI had gone to procure abortion, I was forced to report the matter at Orange Police Patrol Base for further action.

RUC

~~W/S~~

I was joined by police officers to the said Chamalo Medical Clinic where upon arrival I met my son SWALEH KAHINDI FOND outside the clinic. We went together to the Women Ward where I met my daughter PATIENCE AMINA had already procured abortion.

SUNED
x



Police officer asked if abortion was done? She confirmed it was done at Kshs. 10,000 of which she managed to pay Kshs. 5,000. When police officer requested for medical notes from the clinician who procured abortion he did not produce. So the police arrested the clinician together with my daughter.

WITNESS STATEMENT OF:

Swaleh Kahindi Fondo

22/9/19
at
1355 hrs

SWAEEH KAHINDI FONDO
P. O. Box
KILIFI

STATE STATES AS FOLLOWS:-

DCI
office

I am the above named
Giriama male adult aged 20
years currently a form (3)
student at Petanguo Secondary
School 10

20c
MP
[Signature]

I wish to state that I do
reside in a rented house with
other students at Petanguo Mark
as we continue with our studies
And on Thursday 19th September
2019 at about 0800 hours
I was among other students
that were sent home for school
fees. Upon arrival at home 20
at around 1130 hours I met
with my sister PATIENCE AMINA
KAHINDI who is a form two @
student that was sent home
the previous day of Wednesday
18th September 2019.

SIGNED
X
[Signature]

I wish to state that I have
saw my sister PATIENCE AMINA KAH
at home in the evening of 19th
September 2019 upto 21st Sept
at around 1845 hours. 30
I gotten tip off information that
she is committed at CHAMBE

gone to procure abortion.
I immediately rushed at the clinic I have joined my parents I was with the police to the female ward I have PATIENCE AMINA was recovering.

Police officer asked her to confirm if abortion was done? she confirmed that it was done at KShs. 10,000/- but she managed to pay KShs 5,000/-. When the police officer requested for the medical notes on the same but the clinical officer who procured abortion did not produce. So he was arrested together with my sister PATIENCE AMINA for further investigations.
That is all I wish to state

ROC ~~Chiny~~

WITNESSED - ~~Har~~

Annex PAK-6

***Witness statements
of Stephen Omondi
and Albert Charo
Nguya .***

WITNESS STATEMENT OF:

Stephen Omondi

H/10/19
at
Kooles

Garage
SCCO
Office

20c

~~Handwritten mark~~

SWINE

x
~~Handwritten mark~~

1/10 1200

69

STEPHEN OMANDI
PO P.O. Box 9
KILIFI

STATES AS FOLLOWS:-

I am the above Kenyan
over 18 years and owner
working at the facility of
OTTAMARO MEDICAL CLINIC.

I wish to state that on
Thursday 10th of September 2019
I was ~~owner~~ working at
the facility throughout the day.
I do remember that both the
clinical officers namely ALBERT
CHARO (owner of the facility)
and SAHIM MOHAMMED were
also at the facility. And as
I was reporting off at
around 1845 hours I left
both of them at the day
shade talking.

I wish to state that
on Friday 20th September 2019
both clinical officers were
present in the morning until
0900 hours is when ALBERT
CHARO left and reported
back on Saturday 21st Sept
2019 at 1730 hours.

On 21st September 2019
at about 1945 hours as

and I saw Police Vehicle
 and some people had been
 arrested from the facility. I
 tried to find out later the
 following day is when I
 learned that the girl came in
 while having a problem and
 is when she has assisted
 by the clinical officer, SAEM.
 That is all which to -10
 state

ROC ~~APR 2017~~

STUNED - ~~APR 2017~~

WITNESS STATEMENT OF:

Albert Charo Nguya

ALBERT CHARD NGUYA
P.O. Box 459
KILIFI

70

22/9/19
at
1500hrs
Ganze
CID
Office

STATE AS FOLLOWS:-

I am the above named ~~Chama~~ Kauma male adult 55 years a clinical officer by profession currently operating my own Medical clinic ~~located~~ ^{Chamalo} ~~based~~ ¹⁰ at Ganze Shopping Centre.

ROC
~~Signature~~

I know SARIM MOHAMMED who came at my clinic in early September 2019 and informed me that he is a clinical officer graduate from Cheuka KIMTC and is looking for employment.

SUNED
X

I requested for his all education documents and certificate & such he told me he & his wife are going to get them. And he left.

On Wednesday 18th September 2019 I left station to other duties out of Ganze. I came back on Saturday 21st September 2019 at about 1900 hours

30

Sahim Motilal

house at Gange I was called by ~~a teacher~~ ~~of a~~ ~~to~~ ~~come~~ at the facility ~~at~~ ~~there~~ on issue.

Roc

How

I was surprised to see SAHIM MOTILAL is back and was with police officer from Gange Patrol Base. I inquired to know the ~~18~~ ~~is~~ that is the time a police officer told me that SAHIM MOTILAL had attended a patient by the name PATIENCE AMINA KATTINDI. She has no documents showing her treatment. They have arrested him and were taking him to Gange Patrol Base.

WENT X

I asked my workers who said that they have written a patient by the name. I further went through the records but I never gotten the name of the patient PATIENCE AMINA KATTINDI.

Today I visited him at Bamaga Police station and inquired from him if he ~~30~~ ~~is~~ a written agreement for the patient and he ~~is~~ ~~not~~

asked him as to why
did you ~~do abortion~~
procure abortion ~~without~~
written agreement ~~but~~
he claimed that the girl ~~pat~~
nt came on Saturday ~~the~~
September 2019 in the mor
bleeding.

At this juncture I learned
that he never involved ~~any~~¹⁰
other staff in the ~~issue of~~
dealing with the ~~said~~
patient.

That is all I wish to
state as he reported ~~at~~
my place of work ~~without~~
informing me, and due to
what had happened, I he
not even asked him ~~about~~
his medical documents. That's a

ROC ~~by~~ ~~signed~~ - by

73

Annex PAK-7

Medical Examination Report.

74

MEDICAL EXAMINATION REPORT

PART I - (To be completed by Police Officer requesting examination)

From OCS BAMBATA
POLICE STATION

Ref 4

To the NTHA HICIP COUNTY Hospital/Dispensary

Date 22/9/2019

I have to request the favour of your examination of:-

Name PATIENCE BANDA KAHINDI

Age 17 YRS (if kno)

Address c/o PETANG'UO
SECONDARY

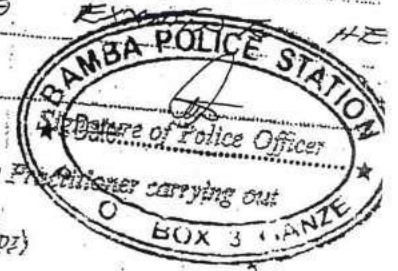
Date and time of alleged offence B.T.W.
20¹⁰ 19th SEPT

Sent to you/hospital on the 23rd SEPT 2019 under escort of POLICE OFFICER

and of your furnishing me with a report of the nature and extent of bodily injury sustained by him/her.

Date and time reported to police 22/9/2019 AT 0022 hrs

Brief details of alleged offence SHE WAS SEXUALLY ABUSED AND IMPREG. BY SOMEONE KNOWN TO HER, SHE LATER ABORTED THE PREGNANCY. Please



PART II - MEDICAL DETAILS (To be completed by Medical Officer or Practitioner carrying out examination)
(Please type four copies from the original manuscript)
SECTION "A" - THIS SECTION MUST BE COMPLETED IN ALL EXAMINATIONS - 20

Medical Officer's Ref. No. 10863/19

1. State of clothing including presence of tears, stains (wet or dry) blood, etc.
Not present

2. General medical history (including details relevant to offence). A 17 years old girl with no defilement & complete Abortion. Says she had a boyfriend for quite sometime hence she conceived and later fetus to a private clinic & induced an abortion.

3. General physical examination (including general appearance, use of drugs or alcohol, and other).
Gc good, P° 5" Cu° Delta° - 30

SECTION "B"—TO BE COMPLETED IN ALL CASES OF ASSAULT, INCLUDING SEXUAL ASSAULTS, AFTER COMPLETION OF SECTION "A"

1. Details of site, situation, shape and depth of injuries sustained:—

(a) Head and neck

NAD

(b) Thorax and abdomen

NAD

(c) Upper limbs

NAD

(d) Lower limbs

NAD

10

2. Approximate age of injuries (hours, days, weeks)

Days

3. Probable type of weapon(s) causing injury

Blunt

4. Treatment, if any, received prior to examination

5. What were the immediate clinical results of the injury sustained and the assessed degree, i.e. "minor", or "serious harm".*

*DEFINITIONS—

"Harm" means any bodily hurt, disease or disorder whether permanent or temporary. 20

"Maim" means the destruction or permanent disabling of any external or internal organ, member or sense.

"Grievous Harm" means any harm which amounts to maim, or endangers life, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ.



Date 11/10/18

576

SECTION "C" - TO BE COMPLETED IN ALLEGED SEXUAL OFFENCES AFTER THE COMPLETION OF "A" AND "B"

- 1. Nature of offence Defilement Estimated age of person examined 174
- 2. FEMALE COMPLAINANT

(a) Describe in detail the physical state of and any injuries to genitalia with especial reference to the clitoris, labia majora, labia minora, vagina and cervix and conclusion.

Hymen - broken (old scar)
 cervix - normal
 vagina - normal
 labia - normal

10

(b) Note presence of discharge, blood or venereal infection, from genitalia or on body

None

3. MALE COMPLAINANT

(a) Describe in detail the physical state of and any injuries to genitalia

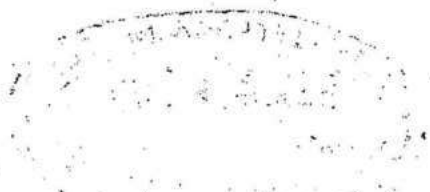
N/A

(b) Describe in detail injuries to anus

N/A

(c) Note presence of discharge around anus, on thighs, etc; whether recent or of long standing

N/A



1. MALE ACCUSED OF ANY SEXUAL OFFENCE

77

(a) Describe in detail the physical state of and any injuries to genitalia especially penis

N/A

(b) Describe in detail any injuries around anus and whether recent or of long standing

N/A

5. Details of specimens or smears collected in examinations 2, 3, or 4 of Section "C" including pubic hairs and vaginal hairs

AT - Positive

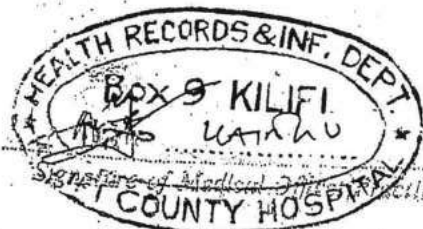
VDRL - Negative

Unanalysis - NAD

PTCC - NR

6. Any additional remarks by the doctor

10



Date 11/10/19

76

Annex PAK-8

***Warrant of
Commitment on
Remand .***



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT KILIFI

CRIMINAL CASE 395 OF 20 19

To: JUVENILE REMAND HOME MALINDI

WHEREAS PATIENCE AMINA KAHINDI has this day been charged before me with PROCURING ABORTION CONTRARY TO SECTION 159 OF THE PENAL CODE

and has been remanded till the 7th 10 19 day of 20 19

This is to authorize and command you to receive him into your custody and to produce him in the Court at 8.00 a.m./p.m on the day named

Dated this 23rd day of SEPTEMBER 20 19

Further remanded until Hg: 21/11/19 Mn. 7/10/19

(signature)

Signature of Sitati, Resident Magistrate, Malindi

Further remanded until Mn 31/10/19

(signature)

20

Magistrate

Further remanded until

(signature)

Magistrate

Further remanded until

(signature)

Magistrate

Further remanded until

(signature)

60

Annex PAK-9

***Treatment notes
from Vinoma Medical
RHS Clinic .***

Patient: Amina Kahirndi
Age: 17 YEARS

Residence: Ganze

18/10/2019.

Pres OK
Patient has visited
on the date..

① Pres Caps Amoxicillin 500
TDS x 5/7.

② Pres Bifen 400mg TDS
x 5/7.

TCA 25/10/2019

No further complaints
She is followed by
physician.

VENOMA MEDICAL & RHS CLINIC
P. O. Box 1231-80200, MALINDI
Tel: 0722 500 820

10

N/B following has case of
SLE. If this necessary
to put the girl on
the following Rx

Date.....

82

Annex PAK-10

***Cash Bail receipt &
Release Order .***

43

Cash bail deposit receipt

84

Mr 31/10/19
1/19 21/11/19

CT

REPUBLIC OF KENYA

ORIGINAL - Payee

0723699345

DEPOSIT RECEIPT

0175029

Spru's - KWS

COURT

RECEIVED from Martin Ouma Oyangon Date 25/10/19

the sum of Shillings Fifty thousand only and cents

being payment into Court in Criminal Case No. 395/19

Civil

Parties Rep

10

Patience Amina Kahindi

Sh. 5000/-

Signature of Receiving Officer

85

Release Order

80

Release order where cash
CRIMINAL
bail has been paid



REPUBLIC OF KENYA

IN THE Spm COURT AT KILIFI

CRIMINAL CASE NO. 395 OF 2019

REPUBLIC.....STATE.....PROSECUTOR

-VERSUS-

Patience Amina Kahindi.....ACCUSED

TO: THE OFFICER IN CHARGE,
REMAND HOME, OC Malindi **10**
Juv. Centre Remand Home

IN ACCORDANCE with the order endorsed on the above file and the Remand Warrant which is in your possession, a cash bail of Sh. 50,000/- has been paid by accused/has been paid on behalf of the accused by Martin Ouma Oyang'or into this Court, you are hereby directed to release him and inform him to attend this Court on 31st day of Oct 2019.....at 8:00.....a.m/p.m.

GIVEN under my hand and Seal of the Court at Kilifi.....this 25th day of Oct.....2019..... **20**



[Signature]
SP Magistrate

NOTE: Please return the remand warrant together with the bond to this Court

67

Annex PAK-11

***Ruling by the Senior
Principal Magistrate.***

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REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT KILIFI

CRIMINAL CASE NUMBER 396 OF 2019

REPUBLIC.....PROSECUTOR

- VERSUS -

SALIM MOHAMMED.....ACCUSED

R U L I N G

Though the two accuseds are charged separately, I will consolidate the two cases for purposes of this ruling as it deals with one common issue, ~~10~~ whether *the Court should decline to admit the charges for being unlawful and unconstitutional in light of Article 26 (4) of the Constitution of Kenya, Section 35 (3) of the Sexual Offences Act Section 6 of the Health Act and against the interpretation of these provisions in the HIGH COURT OF KENYA FIDA & 30 OTHERS - VERSUS AG AND OTHERS (PETITION NO. 266 OF 2015).*

In *Case No. 396 of 2019*, the accused is charged with two counts.

69

Particulars are that on the 19th September, 2019 at around 1900 hours at Ganze Sub-location with intent procure her own miscarriage administered to herself drugs which led to her miscarriage.

Both denied the charges at the time of plea and are out on bond.

On 24/10/2019 the advocate for the two, Martin Onyango wrote a letter to the Court seeking the matter be mentioned inter alia *for directions on the legality of the charges above.*

Mention was set for 31st October, 2019.

On that day, Court directed the issue be canvassed on 21st November, 2019. _____ 10

On 21st November, 2019, it was agreed parties were to file and exchange submissions and a ruling date was scheduled for today. Only the defence has to date filed submissions.

I have carefully gone through the submissions and the case law cited.

I have read the cited case by the defence and I don't agree with the interpretation they give have to the *ratio decidendi*.

At paragraph 304 of the Judgment the learned judges held;

".....we therefore do not accept an interpretation that tends to hold that Article 26 (4) of the Constitution means that Abortion is legal in this Country. To or mind, abortion is not lawful in this Country. It is prohibited under Section 158, 159 and 160 of the Penal Code".

Pausing at this stage, it is clear the Court did not declare Sections 158, 159 and 160 of the Penal Code unconstitutional. They said they are ~~lawful~~ **10**. *How can charges preferred under those Sections then be said to be unlawful?*

What the Court held is *that Article 26 (4) of the Constitution makes an exception to the above general rule, as it exempts situations to which a trained health professional forms the opinion that 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, to procure an abortion.*

91

Dated at Kilifi this 13th February, 2020.



HON. J. M. KITUKU

SENIOR PRINCIPAL MAGISTRATE

13/2/2020

92

Annex PAK-12

***Application for Care
& Protection by
Children's Officer .***

93

Form P&C1



REPUBLIC OF KENYA

IN THE CHILDREN'S COURT AT KILIFI
PROTECTION AND CARE NO. 72/2019
APPLICATION FOR AN ORDER UNDER SECTION 119(1)(h)(v) OF THE CHILDREN ACT

C.O/S.NO. 23/09/2019(1)
Police Case No. 05 20/21/9/2019
Date to Court 23/09/2019
Protection and Care No. 72/2019

Child's Particulars 10
Name of Child PATIENCE AMINA KATHINDI
Apparent Age 17 YEARS Gender FEMALE Nationality KENYA
County KILIFI Language(s) KISWAHILI Religion CHRISTIAN Disability -
Special needs (list any needs that the child may have) TRIAMA
NONE

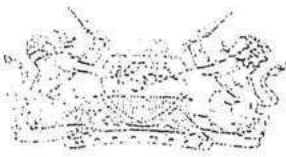
Parent(s)/Guardian(s) Particulars
Name 1. RICHARD KATHINDI KATANA
2. JUMWA KATHINDI KATANA 20
Telephone/mobile 0700-263872 (SOLOMON KATHINDI - BROTHER)
Physical / Home Address Ganze Trading Centre
Postal Address 1225-KILIFI
Relationship with the child PARENTS

CATEGORIES OF CHILDREN IN NEED OF CARE AND PROTECTION

(tick as appropriate) A child who/whose,

- has no parent/guardian
- has been abandoned by his parent or guardian,
- is destitute
- found begging or receiving alms 30

94



REPUBLIC OF KENYA
MINISTRY OF LABOUR AND SOCIAL PROTECTION
DEPARTMENT OF CHILDREN'S SERVICES

Telephone: 020-2717010
Email: info@moa.go.ke
When making a telephone
quote

Sub-county Children's Office
P. O BOX 801
GANZE

child 72/19

Ref. No: CS/CS/19/00000

Date: 23/09/2019

RE: PRELIMINARY SOCIAL ENQUIRY REPORT OF PATIENCE AMINA KAHINDI,
AGED APPROXIMATELY 17 YEARS

The above named subject is aged approximately 17 years and hails from Ganze East-10 Village in location Ganze Sub-county. She is a Form 4 student at Petanguo Secondary School in Ganze sub-county.

The subject is a victim of defilement which led to pregnancy.

After becoming pregnant, she decided to seek advice to procure abortion. She went to the Ganze Health Centre where she procured the abortion assisted by the doctor in-charge of the facility (Popularly known as CHAMALO). Possibly the doctor, the informant and the subject and the doctor were arrested on 21-09-2019.

The subject was arrested at Ganze Police Post vide OS 20/21/09/2019. The matter is under investigation. 20

RECOMMENDATIONS ON THE BEST INTERESTS OF THE CHILD

The experience of victim of defilement has also been exposed to a practice prejudicial to her life, health and which circumstances is likely to interfere with her physical health, mental, psychological and social development. She therefore needs counseling to deal with the traumatic experiences.

It is recommended that she be placed at Kikambala Rescue Centre for 4 weeks until 17th October 2019 for further Social Enquiry Report.

DANIEL KIMBUGO
SUB-COUNTY CHILDREN'S OFFICER
GANZE

THE SUB-COUNTY CHILDREN'S OFFICE
GANZE
23 SEP 2019
Email: ccoganz@go.ke

30

95

Annex PAK-13

***Letter from Ganze
Sub County
Children's Officer to
Principal Patanguo
Secondary School.***



MINISTRY OF LABOUR AND SOCIAL PROTECTION
STATE DEPARTMENT OF SOCIAL PROTECTION
DEPARTMENT OF CHILDREN'S SERVICES

Telephone: 0732-917010
Email: dcoganze@gmail.com
When replying quote

Sub-county Children's Office
P. O BOX 801
GANZE

Ref. No. Children Case 72/2019

Date: 18/02/2020

The Principal
Petungu Secondary School
Ganze

10

RE! Patience Annia Kahundi

The above named girl I refer. She has a case pending in court where she's an accused in procuring abortion contrary to section 228 of the Penal Code.

I have opened a Care and Protection file in the same court to advise on her welfare as she still a child.

Kindly confirm to me if the subject is attending school in your institution as per this term.

20

Thanks

DANIEL KIMBOGO
SUB-COUNTY CHILDREN'S OFFICER
GANZE

97

Annex PAK-14

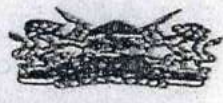
***Court Summons
dated 25th February
2020.***

70

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SUMMONS REQUIRING

Criminal 91B



REPUBLIC OF KENYA
IN THE SENIOR MAGISTRATE'S COURT

AT KILIFI

CH. CASE NO. 72 OF 2019

TO: RICHARD KALINDI
WATANA

WHEREAS your attendance is necessary to answer a charge of awful these minor
PATIENCE AMINA before court. You 10
are hereby commanded to appear in this Court at 8:00 a.m. / 12:00 on the
12th day of March 2020 and not to depart without leave of the Court or until
the case is finished.

Delete where
not
applicable

This date is fixed for plea only and witnesses need not attend.
This date is fixed for the hearing of the case. you should bring any witnesses
on whom you rely for your defence. If you wish to call witnesses who will not
appear willingly, you should apply to the Court in sufficient time to allow
summons to be issued for their attendance.
Your personal attendance will not be necessary if you plead "Guilty" in writing
or appear by an advocate duly instructed to plead "Guilty." 20

Given under my hand and the Seal of the Court this 25th day
of Feb 2020

This summons has been
served to the application of



SENIOR PRINCIPAL MAGISTRATE

KILIFI

SP Magistrate

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CONSTITUTIONAL PETITION NO. 9 OF 2020
IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 43, 46, 48, 49, 50, 73, 75, 157(11) 159, 165 (3,6&7), 232, 258, 259, AND SIXTH SCHEDULE- SECTION 7 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 158, 159 AND 160 OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CHILDREN'S ACT OF 2001 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 35 (3) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE HEALTH ACT OF 2017 AND THE CLINICAL OFFICERS (Training, Registration and Licensing) Act, 2017

AND

IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KILIFI CRIMINAL CASE NUMBERS 395, 396 OF 2019 AND CHILDRENS CASE NO 72 OF 2019

BETWEEN

PAK 1st PETITIONER

SALIM MOHAMMED 2nd PETITIONER

AND

THE ATTORNEY GENERAL 1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2nd RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3rd RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE KILIFI 4th RESPONDENT

Office of the Attorney General
Malindi Region
P.O. Box 111 - 80200, MALINDI
Email: agmalindi@magfi.gov.ke

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20

30

SUPPORTING AFFIDAVIT

I, **SALIM MOHAMMED**, a resident of Kilifi within the Republic of Kenya and P.O. Box 5054 Malindi do hereby make oath and solemnly swear as follows-

1. **THAT** I am an adult male of sound mind and disposition hence competent to make this oath.
2. **THAT** I hold a Diploma in Clinical Medicine and Surgery from the Kenya Medical Training College. ***Annexed and Marked SM-1 is a copy of my diploma certificate awarded on 6th of December 2018 and bearing my names as Mohammed Ismail Salim.***
3. **THAT** upon qualification I was duly registered as a Clinical Officer by the Clinical Officers Council as No. 21641 on 13th day of September 2018. ***Annexed and marked SM-2 & SM-3 are copies of my registration as a clinical officer under the Clinical Officers (Training Registration and Licensing) Act No.20 of 2017, and a copy of my professional identification card valid through to 30th September 2021.*** — 10
4. **THAT** as of 19th September 2019, I was employed at CHAMALO MEDICAL CLINIC as a Clinical officer. ***Annexed and marked SM-4 is a copy of the licence No G0553/19 issued to Chamalo Medical Clinic owned by one Albert Charo Guya by the Clinical Officers Council on the 19th day of July 2019, and SM-5 is a copy of the Licence to Chamalo Medical Clinic to operate as a private medical institution-nursing home, level 3B from the Medical Practitioners and Dentists Board dated 10th day of January 2019.*** — 20
5. **THAT** as of 19th September 2019 Chamalo Medical Clinic had a team of 5 qualified and licenced health professionals practicing within our authorised mandates. ***Annexed and Marked SM-6 is a copy of the staff duty roster from 9th to 30th September 2019 and SM-7 are copies of practice licences for Albert Charo Guya, Selina Kache Charo, Grace Furaha Mbogo and Maureen Chepchirchir.*** — 30
6. **THAT** on 19th September 2019 at around 5:00 pm I received a female adolescent patient at Chamalo Medical Clinic, who was later identified

as PAK. She complained of severe lower abdominal pain, vaginal bleeding, and dizziness. She reported that she woke up with abdominal cramps that were intensely followed by mild vaginal bleeding which increased over time.

- 7. **THAT** at the clinic PAK received emergency supportive management and upon examining her, I concluded that she had suffered an incomplete abortion.
- 8. **THAT** I performed a complete -post-abortion care management on PAK till she stabilised. **Annexed and marked SM-8 is a copy of the redacted medical treatment record from the clinic.** 10
- 9. **THAT** PAK remained in the Clinic on the 19th and 20th September 2019 as she awaited her discharge.
- 10. **THAT** on 21st September 2019 at around 7:00 pm police officers not in uniform and without any warrants stormed Chamalo Medical Clinic demanding to know where PAK was and asking for her treatment records. They forcefully confiscated the records from me before handcuffing me and dragging me to the room where PAK was recuperating.
- 11. **THAT** PAK, myself and two female employees at Chamalo medical clinic both working as cleaners were arrested and taken to Ganze Police Patrol Base. The two cleaners were later released without being charged. 20
- 12. **THAT** the Police officers who arrested me did not inform me of the reason for my arrest, nor did they inform me of my right to legal representation.
- 13. **THAT** during the arrest the police did not inquire into whether I was a qualified healthcare provider or whether the facility I worked in was licenced to provide reproductive healthcare services.
- 14. **THAT** despite PAK being a minor, she was dragged from her hospital bed and held in police custody for two days without due regard to her health or welfare. 30
- 15. **THAT** to my knowledge, on September 23rd 2019 PAK was charged in Kilifi Criminal Case number 395 of 2019 with the offence of

'Procuring abortion contrary to section 159 of the Penal code' with the particulars of the offence being that **'On the 19th September 2019 at around 1900 Hours at Ganze location in Ganze sub-county within Kilifi county with intent to procure her miscarriage administered to herself drugs which led to her miscarriage.'** Annexed and marked SM-9 is a copy of the charge sheet.

16. **THAT** on the same day I was charged in Kilifi criminal case number 396 of 2019 with **'Procuring abortion contrary to section 158 of the Penal code'** with particulars that **'Jointly with another not before the court, on the 19th September 2019 at around 1900HRS at Ganze sub-location, Ganze location in Ganze sub-county within Kilifi County unlawfully administered unknown drugs into the body of PAK (accused in CR 395) that led to her miscarriage.'** 10

17. **THAT** an alternative charge against me of **'Supplying drugs to procure abortion contrary to section 160 of the penal code'** with particulars that **'Jointly with another not before the court: on the 19th September 2019 at around 1900 HRS at Ganze sub-location, Ganze location in Ganze sub-county within Kilifi County unlawfully supplied drugs to one PAK aged 17 years knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.'** Annexed and marked SM-10 is a copy of the Charge Sheet. 20

18. **THAT** the charges against are not only ill conceived, but they are also based on the false assumption that **PAK** received an unlawful service from Chamalo Medical clinic.

19. **THAT** on 23rd of October 2019, through our advocate we made an application to the Senior Principal Magistrate Kilifi not to admit the charges in both criminal case numbers 395 and 396 of 2019 as they were unlawful. 30

20. **THAT** on 17th February 2020, the Senior Principal Magistrate declined our application to declare the charges unlawful but instead directed that we raise our challenge during our defence. Having

declined to address our challenge on the lawfulness of the charges, the Magistrate condemned us to a trial. **Annexed and marked as SM-11 is a copy of the ruling.**

21. **THAT** in declining our application, the Senior Principal Magistrate's Court in Kilifi held that "**once an accused is charged under the impugned sections of the penal code it is she/he [is the one] to prove in his defence that he benefits from the exceptions [under Article 26(4) of the Constitution and Section 35(3) of the Sexual Offences Act] as these are facts within his knowledge. He cannot prefer such a defence until the hearing of the matter has commenced.**" 10
22. THAT the holding of the Magistrates Court condemns all health professionals rightfully or wrongfully suspected of providing abortion services as permitted by the Constitution of Kenya to arrests by the police and prosecution without exception until they prove that indeed the services were within the law, a process which in Kenya can take very many years.
23. **THAT** I denied the charges against me and was remanded at the Kilifi GK Remand Prison where I stayed from the 23rd to the 27th of September 2019 when I was released on a Bond of Kshs 300,000. **Annexed and marked SM-12 are copies of the release order, bond and bail bond, a letter from the chief Malindi town location, a letter from the assistant chief Ganze/Tsangalweni sub-location supporting the bond by Albert Charo Guya and vehicle inspection report for Albert Charo Guya to post bond for me.** 20
24. **THAT** upon taking plea I obtained orders to be supplied with copies of the Charge Sheet and all evidence to be adduced by the prosecution during trial. **Annexed and marked SM-13 is a copy of the Order.**
25. **THAT** despite the order from the Court, the Investigating Officer **declined to comply giving an excuse that the police were still carrying out further investigations in the cases.** 30

- 26. **THAT** after several follow-ups the investigating officer handed over to me copies of witness statements and a P3 form filled after compelling PAK to undergo medical examination. **Annexed and marked SM-14 is a bundle of the witness statements and the P3 form.**
- 27. **THAT** several days after being arrested and charged, the Directorate of Criminal Investigations issued a fresh demand for information from the proprietor of Chamalo Medical Clinic on the licensing of the clinic, his professional licences and academic qualifications and licences of his employees. **Annexed and marked as SM-14 is the undated Requisition for Documents from the National Police Service.** — 10
- 28. **THAT** the Magistrates Court set out my trial to commence on May 21st 2020 but the same did not happen due to the COVID -19 disease breakout, and should the High Court fail to intervene, I will be condemned to a trial on the 3rd of December 2020 for doing that which the law expects me to do for every patient who seeks treatment.
- 29. **THAT** because of my arrest detention and charge, I am very afraid to offer comprehensive reproductive healthcare services to all women who come to the clinic for fear of being arrested and persecuted again. — 20
- 30. **THAT** owing to the arrest and the many Court appearances I have had to make, I have lost valuable time which could have gone into taking care of the many patients who come to our clinic for treatment.
- 31. **THAT** I know of my own knowledge that the Ministry of Health has several policy guidelines and standards on the provision of post-abortion care which I adhere to in my work.
- 32. **THAT** it is wrong for the Police to target health workers, frame them for providing abortion, arrest and prosecute them out of stigma against abortion whenever they offer healthcare services to women and girls. — 30
- 33. **THAT** I know of my own knowledge that post abortion care is emergency care protected in law and that no woman and girl in need should be denied.

- 34. **THAT** I know of my own knowledge that the law in Kenya allows for the provision of abortion services under limited circumstances including in emergency situations or when the health or the life of a woman is in danger or if allowed by any written law.
- 35. **THAT** I know of my own Knowledge that despite the changes brought about by the Constitution of Kenya and the Health Act 2017 on when trained health professionals can offer abortion within the law, the Police continue to use sections 158 to 160 of the Penal Code to threaten health workers with arrest and long imprisonment as a measure to extort money from health workers. 10
- 36. **THAT** I know of my own knowledge that there exists a high level of stigma associated with abortion care and many people including the Police impute ill motive against women who either suffer spontaneous abortions or receive abortion care within the law due to their own ignorance of the facts and circumstances of the patient.
- 37. **THAT** the constant harassment and malicious prosecution of healthcare workers under the penal code for providing abortion will not end unless the penal code is aligned with the constitution and other laws that regulate the provision healthcare and in particular reproductive health services including abortion. 20
- 38. **THAT** what is deponed herein is true to the best of my knowledge, information, and belief.

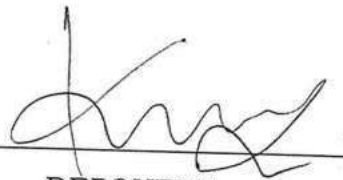
SWORN at **KILIFI** by the said

SALIM MOHAMED

This 20th day of November 2020



COMMISSIONER FOR OATH



 DEPONENT

DRAWN & FILED BY:

Martin Onyango
% Centre for Reproductive Rights
4th Floor Pinetree off Kindaruma Road /Off Ngong Road
P.O. Box 52834-00100
Nairobi.

Tel: +254202518361/63

monyango@reprorights.org

P.105/7757/09

LSK/2020/05836

10

TO BE SERVED UPON: -

The Attorney General's Chambers,
Sheria House,
P.O Box 40112-00100

NAIROBI.

The Director of Public Prosecutions
ODPP House, Ragati Road
Po Box 30701-00100

NAIROBI.

The Inspector-General of Police
Jogoo House 'A' Taifa Road
P.O. Box 44249 - 00100

20

NAIROBI.

The Senior Principal Magistrate Kilifi
P. O Box 287 - 80108

KILIFI

Annex SM-1

***Diploma Certificate
from Kenya Medical
Training College .***

108

Serial Number

113177



KENYA MEDICAL TRAINING COLLEGE

This is to certify that

Mohamed Ismail Salim

having satisfied all the prescribed requirements
for the award of the

Diploma

in Clinical Medicine & Surgery

was awarded this Certificate at a Graduation Ceremony — 10
held at the Kenya Medical Training College, Nairobi

on the **6th** Day of **December**
in the Year **2018**

Mohamed Ismail Salim



[Signature]
Director

Annex SM-2

***Certificate of
registration as a
clinical officer under
the Clinical Officers
(Training
Registration and
Licensing) Act No.20
of 2017 .***

COC.3
007693

110

Rule (4)
21641

REGISTRATION NO



THE CLINICAL OFFICERS (TRAINING REGISTRATION AND LICENSING) ACT. NO. 20 of 2017

Certificate of Registration as a Clinical Officer

ISMAIL MOHAMED SALIM

1. Mr/Mrs./Miss _____

ID No. 31482107 (Full names-BLOCK LETTERS)

2. Qualifications(Basic) DIPLOMA - CLINICAL MEDICINE & SURGERY — 10

3. Training Institution NYERI MEDICAL COLLEGE

4. Permanent Address P O BOX 5054-80200 MALINDI

has been registered by the Clinical Officers Council as a Clinical Officer in accordance with the provisions of Section 7 of the Act

Dated this 13th Day of September 19 20

111

Annex SM-3

***professional
identification card
valid through to 30th
September 2021.***


112

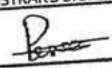
CLINICAL OFFICERS COUNCIL
PROFESSIONAL PRACTICE LICENCE

Name: **ISMAIL MOHAMED SALIM**

ID/Passport No: **31482107** Licence No: **R01488/19**

Speciality: **None**



REGISTRAR'S SIGNATURE:  C.O.C Reg. No.: **21641** VALID UNTIL: **Sep 30th, 2021**

10

Annex SM-4

Licence No G0553/19

issued to Chamalo

Medical Clinic

LICENSE NO. G0553/19

SR No.009242/19

411



REPUBLIC OF KENYA



CLINICAL OFFICERS COUNCIL CLINICAL OFFICERS (Training, Registration and Licensing Act 2017) LICENSE FOR PRIVATE MEDICAL PRACTICE

Name Institution: CHAMALO MEDICAL CLINIC
is licensed by the Clinical Officers Council as a Medical Clinic/ Centre.

Address: P.O.BOX 459, KILIFI
Telephone No. 0721891811

Owner: ALBERT CHARO GUYA
ID No. 8527047
Registration No. 2282

Qualification: DIPLOMA - CLINICAL MEDICINE & SURGERY
The License entitles the Practitioner to Practice for GENERAL PRACTICE

Authorized premises to be used for this purpose

Plot no.	MFL code No	Market/Town	Sub-County	County
ISOLATED	11845	GANZE	GANZE	KILIFI

This license shall expire on the last day of December 2019

Dated this 19th Day of July 2019

Signature of Holder *[Signature]*
REGISTRAR

Annex SM-5

***Licence to Chamalo
Medical Clinic to
operate as a private
medical institution-
nursing home***

Issue Date : 10-Jan-2019

FORM XIII

No.37298



THE MEDICAL PRACTITIONERS AND DENTISTS ACT

(Cap. 253)

LICENCE TO OPERATE AS A PRIVATE MEDICAL INSTITUTION

CHAMALO MEDICAL CLINIC

Institution Name

015147

RegNo.

P.O.Box 459 - 80108 KILIFI

full address

Is Hereby Licensed To Operate a Private Medical Institution In Accordance With the Provisions of Rule(5) of the Medical Practitioners and Dentists (Medical Institutions) Rules. 10

This Licence Entitles the Medical Institution To Operate As a:

NURSING HOME

in Medical Institutions:

LEVEL 3B

Authorised County for the Institution

KILIFI

Authorised Premises for the Institution

PLOT No. 4 GANZE MARKET JARIBUNI ROAD

Maximum number of In-patients 7. 20

This Licence Shall Expire on the Last Day of **December, 2019**

No Change of Premises is Permitted Without the Authority of the Board.

Dated This 10th day of January 2019

Dr. Jackson K Kioko, OGW

Registrar

Medical Practitioners and Dentist Board

CONDITIONS OF LICENSE:

1. This Licence is Issued on Condition That Minimum Requirements Set By the Board for Operation of the Private Medical Institution Are Adhered To At All Times

376

30

Annex SM-6

***copy of the staff duty
roster from 9th to 30th
September 2019***

CHAMALO MEDICAL CLINIC
STAFF DUTY ROSTER

MONTH: SEPTEMBER

FROM: 9TH SEPT TO: 30TH SEPT

	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F
GRACE F.	M	M	M	M	M	M	N	N	N	N	N	N	N	N	N	N	N	N	N
MAURINE	M	E	M	E	M	E	D	S	N	D	E	D	D	S	S	E	M	S	S
SELINDA K	E	M	E	E	M	E	D	S	S	M	M	E	D	S	S	D	E		

KEY: M (morning off)
½ (morning duty)
N (night duty)

D.O (day off)
N.O (night off)
E (evening off)
C (covering)

Annex SM-7

***practice licences for
Albert Charo Guya,
Selina Kache Charo,
Grace Furaha Mbogo
and Maureen
Chepchirchir***



**CLINICAL OFFICERS
COUNCIL**



PROFESSIONAL PRACTICE LICENCE

120

Name: **ALBERT CHARO GUYA**

ID/Passport No:
8527047

Licence No:
R600250/17



Speciality
None

REGISTRAR'S SIGNATURE:

C.O.C Reg. No.:

2282

VALID UNTIL
Nov 30th, 2019

10

121

NURSING COUNCIL OF KENYA
PRACTICE LICENCE

Name: **SELINA KACHE CHARO**
ID/Passport No: **27058128** Licence No: **148752**
Address:

VALID UNTIL: **31 Oct, 2019** REGISTRAR'S SIGNATURE:  **KECHIN(25372)**



10



NURSING COUNCIL OF KENYA



PRACTICE LICENCE

122

Name: GRACE FURAHA MBOGO
 ID/Passport No: 32533773
 Licence No: 148560
 Address:



VALID UNTIL: 31 Oct 2019

REGISTRAR'S SIGNATURE:


KECHN(25333)

10

123

		NURSING COUNCIL OF KENYA		
PRACTICE LICENCE				
Name:				
ID/Passport No:		Licence No:		
32445536		148459		
Address:				
BOX 45, KIPKAREN RIVER				
VALID UNTIL:	REGISTRAR'S SIGNATURE:			
31 Oct 2019			KNCN(45008)	

10

124

Annex SM-8

***medical treatment
record for PAK***

2273/19

Date 19/9/2019
NAME: AMINAH WAHIDI
AGE: 19 YRS
RES: GANZE

Investigations
HB 10g/dl
PTD - Positive

Cl - LAPs
- PV bleeding
- Pains Cramp like in nature
- Not increasing in intensity or frequency

Dx: Incomplete abortion

LMP - 17/2019

Plan
- MVA Procedure
- I.V Cef 2g stat
- I.V Nil Grams → 10
- Monitor vitals

ole fac
(P^ocy de H₂O F^o)

- I.V tramadol 100mg stat

Annex SM-9

***Charge Sheet in CR 395
of 2019***

POLICE 5

THE KENYA POLICE
CHARGE SHEET

127

POLICE CASE NO.318/116/19

DATE TO COURT: 23/9/19

COURT FILE: 393/19

OB 04/22/09/19

Christian names in full or PATIENCE AMINA	Surname or Father's Name. KAHINDI	Identity certificate No. NIL	Sex FEMALE	Nationality or Tribe GIRIAMA	Apparent Age JUVENILE	ADDRESS (include District and Location where applicable) C/O KILIFI COUNTY
--	---	--	----------------------	--	---------------------------------	---

CHARGE **PROCURING ABORTION CONTRARY TO SECTION 159 OF THE PENAL CODE.** 10

PARTICULARS OF OFFENCE **PATIENCE AMINA KAHINDI:** On the 19TH September 2019 at around 1900HRS at Ganze sub location, Ganze location in Ganze sub county within Kilifi county with intent to procure her own miscarriage administered to herself drugs which led to her miscarriage.

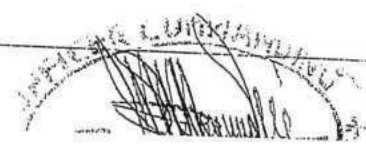
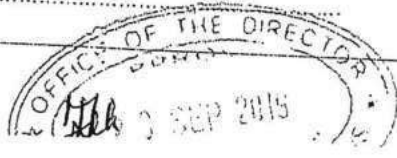
If accused Arrested YES	Date of Arrest 22/9/19	Without Warrant With warrant w/o	Date Apprehension Report to Court 23/9/19	Bond or Bail and Amount IN CUSTODY	Is Application made for Summons to Issue //////////
-----------------------------------	----------------------------------	---	---	--	---

Remanded or Adjoined to 20

Complainant and ss **REP THROUGH NATIONAL POLICE SERVICE BAMBA**

- Witnesses**
1. JUMWA KAHINDI
 2. IP OSCAR PTURU
 3. PC DORRIS NYAGA
 4. DOCTOR
 5. PC MAUREEN ATIENO
 6. S/SGT WANJALA
- 30

Sentence, Court and date...
..... PM'S COURT KILIFI ON 23/9/19 If fine paid.....



Annex SM-10

***Charge Sheet in CR 396
of 2019***

129

OB 04/22/09/19

CHARGE SHEET

(C)

DATE TO COURT: 23/9/19

COURT FILE: 392/19

Christian names in full or SALIM	Surname or Father's Name. MOHAMMED	Identity certificate No. NIL	Sex MALE	Nationality or Tribe GIRIAMA	Apparent Age ADULT	ADDRESS (include District and Location where applicable) C/O KILIFI COUNTY.
-------------------------------------	---------------------------------------	---------------------------------	-------------	---------------------------------	-----------------------	---

CHARGE PROCURING ABORTION CONTRARY TO SECTION 158 OF THE PENAL CODE.

PARTICULARS OF OFFENCE
Second Schedule of C.P.C.
SALIM MOHAMMED Jointly with another not before court: On the 19TH September 2019 at around 1900HRS at Ganze sub location, Ganze location in Ganze sub county within Kilifi county unlawfully administered unknown drugs into the body of PATIENCE AMINA KAHINDI that led to her miscarriage.

FOR ALTERNATIVE CHARGE SEE OVERLEAF

If accused Arrested YES	Date of Arrest 22/9/19	Without Warrant w/o	Date Apprehension Report to Court 23/9/19	Bond or Bail and Amount IN CUSTODY	Is Application made for Summons to Issue //////////
----------------------------	---------------------------	------------------------	--	---------------------------------------	--

Remanded or Adjournd

Complainant and
REP THROUGH NATIONAL POLICE SERVICE BAMBA

Witnesses
1. PATIENCE AMINA
2. DOCTOR
3. S/SGT WANJALA
4. OTHERS TO BE STATED

Sentence, Court and date...
PM'S COURT KILIFI ON 23/9/19
paid..... If fine

621



Officer in Charge

ALTERNATIVE CHARGE

130

(2)

SUPPLYING DRUGS TO PROCURE ABORTION CONTRARY TO SECTION 160 OF THE PENAL CODE

PARTICULARS

SALIM MOHAMMED Jointly with another not before court: On the 19TH September 2019 at around 1900HRS at Ganze sub location, Ganze location in Ganze sub county within Kilifi county, unlawfully supplied drugs to one PATIENCE AMINA KAHINDI aged 17 years knowing that it is intended to be unlawfully used to procure the miscarriage of a woman.



Annex SM-11

***Ruling by the Senior
Principal Magistrate***

REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT KILIFI

CRIMINAL CASE NUMBER 396 OF 2019

REPUBLIC.....PROSECUTOR

- VERSUS -

SALIM MOHAMMED.....ACCUSED

R U L I N G

Though the two accuseds are charged separately, I will consolidate the two cases for purposes of this ruling as it deals with one common issue, ~~10~~ whether *the Court should decline to admit the charges for being unlawful and unconstitutional in light of Article 26 (4) of the Constitution of Kenya, Section 35 (3) of the Sexual Offences Act Section 6 of the Health Act and against the interpretation of these provisions in the HIGH COURT OF KENYA FIDA & 30 OTHERS - VERSUS AG AND OTHERS (PETITION NO. 266 OF 2015).*

In *Case No. 396 of 2019*, the accused is charged with two counts.

Particulars are that on the 19th September, 2019 at around 1900 hours at Ganze Sub-location with intent procure her own miscarriage administered to herself drugs which led to her miscarriage.

Both denied the charges at the time of plea and are out on bond.

On 24/10/2019 the advocate for the two, Martin Onyango wrote a letter to the Court seeking the matter be mentioned inter alia *for directions on the legality of the charges above.*

☞ Mention was set for 31st October, 2019.

On that day, Court directed the issue be canvassed on 21st November, 2019. _____ 10

On 21st November, 2019, it was agreed parties were to file and exchange submissions and a ruling date was scheduled for today. Only the defence has to date filed submissions.

I have carefully gone through the submissions and the case law cited.

I have read the cited case by the defence and I don't agree with the interpretation they give have to the *ratio decidendi*.

At paragraph 304 of the Judgment the learned judges held;

".....we therefore do not accept an interpretation that tends to hold that Article 26 (4) of the Constitution means that Abortion is legal in this Country. To our mind, abortion is not lawful in this Country. It is prohibited under Section 158, 159 and 160 of the Penal Code".

Pausing at this stage, it is clear the Court did not declare Sections 158, 159 and 160 of the Penal Code unconstitutional. They said they are ~~lawful~~ **10**. *How can charges preferred under those Sections then be said to be unlawful?*

What the Court held is *that Article 26 (4) of the Constitution makes an exception to the above general rule, as it exempts situations to which a trained health professional forms the opinion that 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, to procure an abortion.*

135

Dated at Kilifi this 13th February, 2020.



HON. J. M. KITUKU

SENIOR PRINCIPAL MAGISTRATE

13/2/2020

Annex SM-12

***copies of the release
order, bond and bail
bond, letter supporting
bond application***

137

Release order where surety has signed bond

CRIMINAL137



REPUBLIC OF KENYA

IN THE SPM COURT AT KILIF

CRIMINAL CASE NO. 396 OF 20 19

REPUBLIC.....PROSECUTOR

-VERSUS-

SALIM MOHAMED.....ACCUSED

TO: THE OFFICER IN CHARGE,
REMAND HOME,

GR PRISON - KILIF

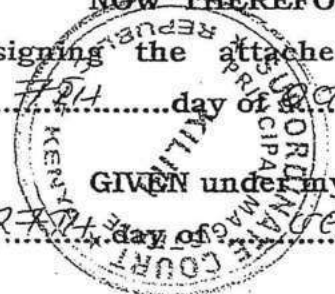
10

IN ACCORDANCE with the order endorsed on the above file and the Remand Warrant which is in your possession, the above-named accused SALIM MOHAMED may be released on signing the attached copies of the bond.

The surety has/sureties have signed the bond.

NOW THEREFORE YOU ARE REQUIRED to release the said accused on signing the attached bond and inform him to attend this Court on 7/2/19 day of SEPTEMBER 20 19 at 8:00 a.m/p.m.

GIVEN under my hand and Seal of the Court at KILIF this 27/2/19 day of SEPTEMBER 20 19.....20



[Signature]
P. Magistrate

NOTE: Please return the remand warrant together with the bond to this Court

Release order where surety has signed bond.

138

CRIMINAL 137



REPUBLIC OF KENYA

IN THE SPM C COURT AT KILIFI

CRIMINAL CASE NO. 396 OF 20 19

REPUBLIC Prosecutor

versus

SALIM MOHAMMED , Accused

TO: THE OFFICER IN CHARGE,

~~REMAND HOME,~~

OK PRISON

KILIFI

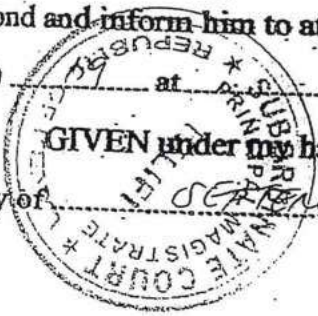
10

IN ACCORDANCE with the order endorsed on the above file and the remand warrant which is in your possession, the above-named accused SALIM MOHAMMED may be released on signing the attached copies of the bond.

The surety has/sureties have signed the bond.

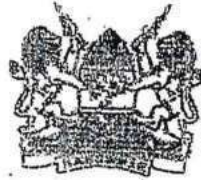
NOW THEREFORE YOU ARE REQUIRED to release the said accused on signing the attached bond and inform him to attend this Court on 7TH day of OCTOBER 2019 at 8:00 a.m/p.m.

GIVEN under my hand and the Seal of the Court at KILIFI this 27TH day of SEPTEMBER 2019



[Signature]
Magistrate
Hon. S. D. Sitati
Resident Magistrate

NOTE: Please return the remand warrant together with the bond to this Court



REPUBLIC OF KENYA

CR 396/19

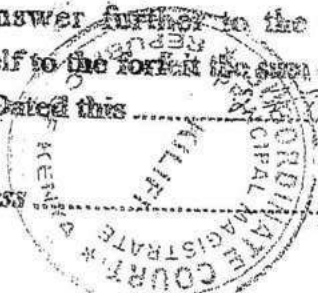
IN THE SPM COURT
AT KILIFI

I, SALIM MOHAMMED, of GANZE
being charged with the offense(s) of PROCURING ABORTION CHC
158 OF THE PENAL CODE

and after inquiry required to appear before the Judge/Magistrate at KILIFI
and after inquiry called upon to enter into my own recognizance to appear when required hereby by
myself to appear in the MAGISTRATE'S Court at KILIFI
o'clock in the fore/afternoon on the 7TH day of OCTOBER 20 19
or whenever required and so to continue to attend until otherwise directed by the Court
to answer further to the said charge, and in case of my making default herein, I bind
myself to the forfeit the sum of Shillings 300,000/-

Dated this 7TH day of SEPTEMBER 20 19

Witness



Signature

I, ALBERT CHARO GUYA, of GANZE
do hereby declare myself surety for the above-mentioned SALIM
MOHAMMED that he shall attend at MAGISTRATE'S
at KILIFI on the 7TH day of OCTOBER 20 19
(or on such day as he may hereafter be required to attend) further to answer to the charge pending
against him, and in case of his making default therein, I hereby bind myself
to forfeit the sum of Shillings 300,000/-

Dated this 7TH day of SEPTEMBER 20 19

Witness to Signature(s)



Signature

140

Send and Mail Base

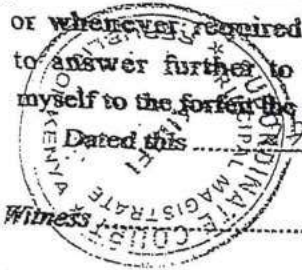


REPUBLIC OF KENYA

CR 396/19

IN THE SMIL COURT
AT KILIFI

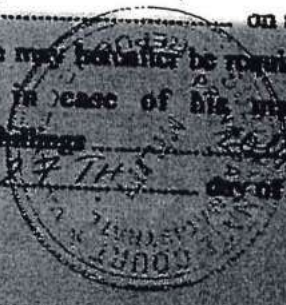
I, SALIM MOHAMMED, of GANZE
being charged with the offence(s) of PROCURING ABORITION CASE
158 OF THE PENAL CODE
and after inquiry required to appear before the Judge/Magistrate at KILIFI
and after inquiry called upon to enter into my own recognizance to appear when required hereby bind
myself to appear in the MAGISTRATE Court at KILIFI
o'clock in the fore/afternoon on the 7TH day of OCT 20 19
or whenever required and so to continue to attend until otherwise directed by the Court
to answer further to the said charge, and in case of my making default herein, I bind
myself to the forfeit the sum of Shillings 300,000/-
Dated this 27TH day of SEPTEMBER 20 19



Witness

Signature

I, ALBERT CHARO GUYA, of GANZE
do hereby declare myself surety for the above-mentioned SALIM
MOHAMMED that he shall attend at MAGISTRATE
at KILIFI on the 7TH day of OCT 20 19
(or on such day as he may hereafter be required to attend) further to answer to the charge pending
against him, and in case of his making default therein, I hereby bind myself
to forfeit the sum of Shillings 200,000/-
Dated this 27TH day of SEPTEMBER 20 19



Witness to Signature(s)

Signature

Release order where surety has signed bond.



REPUBLIC OF KENYA

IN THE COURT AT

CRIMINAL CASE NO. 396 OF 2017

REPUBLIC Prosecution

versus

SALIM MOHAMMED Accused

TO: THE OFFICER IN CHARGE,
REMAND HOME,
GK POUW
KILIFI

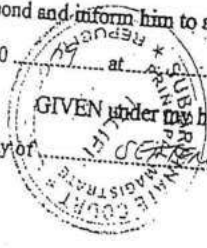
10

IN ACCORDANCE with the order endorsed on the above file and the remand warrant which is in your possession, the above-named accused SALIM MOHAMMED may be released on signing the attached copies of the bond.

The surety has/sureties have signed the bond.

NOW THEREFORE YOU ARE REQUIRED to release the said accused on signing the attached bond and inform him to attend this Court on 7th day of October 2017 at 8:00 a.m/p.m.

GIVEN under my hand and the Seal of the Court at KILIFI this 27th day of SEPTEMBER 2017



Signature of Magistrate
Magistrate

20

NOTE: Please return the remand warrant together with the bond to this Court

Bond and Bail Book



REPUBLIC OF KENYA

IN THE COURT
AT

I, SALIM ABUHAMID, of
being charged with the offence(s) of PROCURING ABUSIVE USE OF THE PENAL CODE

and after inquiry required to appear before the Judge/Magistrate at KILIFI
and after inquiry called upon to enter into my own recognizance to appear when required hereby
myself to appear in the MAGISTRATE Court at KILIFI
o'clock in the fore/afternoon on the 7TH day of OCTOBER 20 19
or whenever required and so to continue to attend until otherwise directed by the Court
to answer further to the said charge, and in case of my making default herein
myself to forfeit the sum of Shillings 300,000/-
Dated this 27TH day of SEPTEMBER 20 19

Witness

Signature

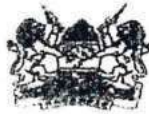
I, ALBERT CHARO GUYA, of GRANZI
do hereby declare myself surety for the above-mentioned SALIM
ABUHAMID that he shall attend at MAGISTRATE
at KILIFI on the 7TH day of OCTOBER 20 19
(or on such day as he may hereafter be required to attend) further to answer to the charge pending
against him, and in case of his making default therein, I hereby bind myself
to forfeit the sum of Shillings 200,000/-

Dated this 27TH day of SEPTEMBER 20 19

Witness to Signature(s)

Signature

Bond and Bail Bond



REPUBLIC OF KENYA

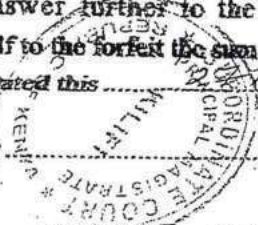
IN THE SMALL COURT
AT MILIFU

I SALIM MOHAMMED, of GANZE
being charged with the offence(s) of PROCURING ABUJINJA
USE OF THE PENAL CODE

and after inquiry required to appear before the Judge/Magistrate at MILIFU
and after inquiry called upon to enter into my own recognizance to appear when required hereby
myself to appear in the MAGISTRATE'S Court at MILIFU
o'clock in the fore/afternoon on the 7TH OCTOBER day of 20 19
or whenever required and so to continue to attend until otherwise directed by the Court
to answer further to the said charge, and in case of my making default herein, I bind
myself to the forfeit the sum of Shillings 300,000/2

Dated this 28TH day of SEPTEMBER 20 19

Witness



Signature

I ALBERT CHARO GUYA, of GANZE
do hereby declare myself surety for the above-mentioned SALIM
MOHAMMED that he shall attend at MAGISTRATE
at MILIFU on the 7TH day of OCTOBER 20 19
(or on such day as he may hereafter be required to attend) further to answer to the charge pending
against him, and in case of his making default therein, I hereby bind myself
to forfeit the sum of Shillings 300,000/2

Dated this 27TH day of SEPTEMBER 20 19

Witness to Signature(s)

Signature

144

Bond and Bail Book



REPUBLIC OF KENYA

CR 396/19

IN THE SPM/C COURT
AT KILIFI

I, SALIM MOHAMMED, of GANZE
being charged with the offence(s) of PROCURING ABORTION DEC
158 OF THE PENAL CODE

and after inquiry required to appear before the Judge/Magistrate at KILIFI
and after inquiry called upon to enter into my own recognizance to appear when required hereby bind
myself to appear in the MAGISTRATE Court at KILIFI
o'clock in the fore/afternoon on the 7TH OCT. day of 20 19

or whenever required and so to continue to attend until otherwise directed by the Court
to answer further to the said charge, and in case of my making default herein, I bind
myself to the forfeit the sum of Shillings 300,000/-

Dated this 7TH day of SEPTEMBER 20 19
Witness [Signature] Signature [Signature]

I, ALBERT CHARO GUYA, of GANZE
do hereby declare myself surety for the above-mentioned SALIM
MOHAMED

at KILIFI that he shall attend at MAGISTRATE 20
on the 7TH day of OCT 20 19
(or on such day as he may hereafter be required to attend) further to answer to the charge pending
against him, and in case of his making default therein, I hereby bind myself
to forfeit the sum of Shillings 200,000/-

Dated this 7TH day of SEPTEMBER 20 19

Witness to Signature(s)

[Signature]

[Signature]

145



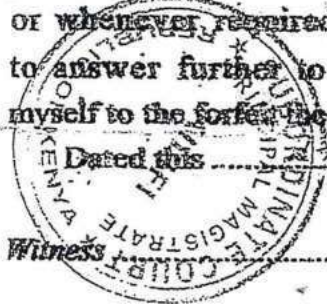
REPUBLIC OF KENYA

CP 396/19

IN THE SPMC COURT
AT KILIFI

I, SALIM MOHAMMED, of GANZE
being charged with the offence(s) of PROCURING ABORTION 158 OF THE PENAL CODE

and after inquiry required to appear before the Judge/Magistrate at KILIFI
and after inquiry called upon to enter into my own recognizance to appear when required hereby bind myself to appear in the MAGISTRATE Court at KILIFI
o'clock in the fore/afternoon on the 7TH day of OCT. day of 20 19
of whenever required and so to continue to attend until otherwise directed by the Court to answer further to the said charge, and in case of my making default herein, I bind myself to the forfeit the sum of Shillings 300,000/-



Dated this 7TH day of SEPTEMBER 20 19

Witness _____ Signature _____

I, ALBERT CHARO GUYA, of GANZE
do hereby declare myself surety for the above-mentioned SALIM MOHAMED that he shall attend at MAGISTRATE
at KILIFI on the 7TH day of OCT. 20 19
(or on such day as he may hereafter be required to attend) further to answer to the charge pending against him, and in case of his making default therein, I hereby bind myself to forfeit the sum of Shillings 300,000/-

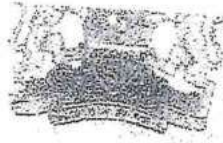


Dated this 7TH day of SEPTEMBER 20 19

Witness to Signature(s)

Signature

146



THE PRESIDENCY

MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT

Telegrams: ADISCOM MALINDI
TELEPHONE
FAX
when replying please quote

OFFICE OF THE CHIEF
MALINDI TOWN LOCATION
P.O BOX 1-80200
MALINDI

Your Ref:.....
Our Ref:

Date: 27/9/2019

To WHOM IT MAY CONCERN

RE: ISMAIL MOHAMED SALIM
ID. NO. 31482107

10

I confirm the above named is a resident within my area of jurisdiction and well known to me.

I further confirm his parents MOHAMED SALIM SHIMANZI and CHANA MOHAMED SALIM are also residents within my area of jurisdiction and also well known to me.

Kindly, ~~assist~~ ⁱⁿ accord the above the necessary assistance he deserves

20

W. A. Ntiro
CHIEF
MALINDI TOWN LOCATION
Box 1 - MALINDI

OFFICE OF THE PRESIDENT

ASSISTANT CHIEF'S OFFICE,
GANZE/TSANGALAWENI SUB-LOCATION
P.O. Box 801,
KILIFI.
25/9/2019.

ASSISTANT CHIEF
GANZE/TSANGALAWENI
SUB-LOCATION
GANZE LOCATION

TO WHOM IT MAY CONCERN:

REF: INTRODUCTORY LETTER

NAME. ALBERT CHARO GUYA.

ID. NO. 8527047 10

The above named person is a resident in my area of jurisdiction; Ganze/Tsangalaweni Sub-location; Ganze Location in Ganze Sub-county.

May I confirm to you that the above named subject is an obedient, responsible Kenyan citizen who owns a private hospital at the Trading Centre (Ganze Trading Centre) well known as Chamelo medical clinic.

May I confirm to you that this institution offers quality health services to the local residents and that he is a Kenyan citizen who has ~~no~~ any 20 criminal liability. Kindly therefore accord him the necessary assistance possible

Yours in Service

Emmanuel Kahindi Vuko
Emmanuel Kahindi Vuko.

ASSISTANT CHIEF
GANZE/TSANGALAWENI
SUB-LOCATION
GANZE LOCATION



148

MINISTRY OF TRANSPORT AND INFRASTRUCTURE
HOUSING & URBAN DEVELOPMENT STATE
DEPARTMENT OF INFRASTRUCTURE

Telephone: 0713272865
Fax: 041-7522054
Telegrams: "MINIWORKS"
When replying please quote:

County Mechanical Officer,
P.O. Box 27 - 80108,
KILIFI.

MR.NO.

26/09/2019

Our Ref: MOR/KFI/VALU/VOL.II/04

Name: ALBERT CHARO GUYA
Address:
P.O. Box : 459 - 80108 KILIFI

Engine No.: 2ZR-0731696
Chasis No.: ZRE144-9010481 ——— 10
Model: Fielder

VEHICLE VALUATION INSPECTION REPORT.

MAKE	TYPE	YEAR	ORIGINAL COST	REGISTRATION NO.
TOYOTA	MOTOR VEHICLE	2010	1,200,000/=	KCM 464V

Mileage: 107965

Considered genuine Yes/No No.: YES.....

Engine: Serviceable.

Steering etc. : Serviceable.

Suspension: Serviceable.

Transmission: Serviceable.

Brakes: Serviceable.

Chassis: N.V.D

Electrical Equipment: Head lamps Assy fade.

Body & Upholstery: OK

TYRES % WORN	O/S FRONT	N/S FRONT	O/S REAR	N/S REAR	SPARES
	S/V	S/V	S/V	S/V	

General Remarks: The Motor vehicle is in a good working condition.

Estimated Forced sale value for Government: Kshs.378,000.00 (Three Hundred and Seventy Eight Thousand Only)

Inspected by: ...David Mweri.....

Approved by:J.N. Ochieng.

GPK 1072 - 20m - 5/74

COUNTY MECH. OFFICER - KILIFI ——— 30

Annex SM-13

***copy of the Order to be
supplied with
documents***

150

REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT KILIFI

CRIMINAL CASE NUMBER 396 OF 2019

REPUBLIC-----PROSECUTOR

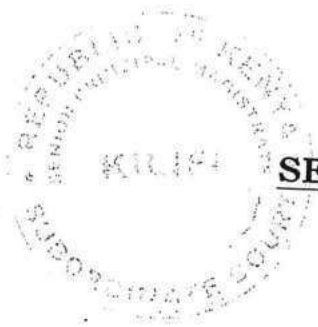
VERSUS

SAMUEL MOKHAMED-----ACCUSED

ORDER

THAT the accused to be supplied with charge sheet, witness statement and any other document. _____ 10

GIVEN under my **HAND** and the **SEAL** of this Honourable Court this 7th day of October, 2019.



HON. J. M. KITUKU,
SENIOR PRINCIPAL MAGISTRATE.
KILIFI LAW COURTS.

DATED at KILIFI this 7th Day of October 2019.

MAGISTRATE
KILIFI LAW COURTS.

Annex SM-14

Witness statements

WITNESS STATEMENT OF:

Albert Charo Nguya

ALBERT CHARO NGUYA
P.O. Box 459
KILIFI

22/9/19
at
Gauze
C/S
Office

STATEMENT AS FOLLOWS:-

I am the above named ~~Chama~~ Kauma male adult 35 years a clinical officer by profession currently operating my own Medical clinic ~~called~~ Chamalo-10 medical clinic based at Gauze Shopping Centre.

ROC
~~Signature~~

I know SALIM MOTTAMMED who came at my clinic in early September 2019 and informed me that he is a clinical officer graduate from Cheeka KIMTC and is looking for employment.

SUNNY
X

I requested for his all education documents and certificate. Such he told me he has gone to get them. And he left.

On Wednesday 18th September 2019 I left station to other duties for de Gauze. I came back on Saturday 21st September 2019 at about 1900 hours.

153

-20

-30

Sahim note

house at Ganze I was called by ~~teacher~~ ~~to~~ come at the facility that there is an issue

I was surprised to see SAHIM MOHAMMED is back and was with police officer from Ganze Patrol Base. I inquired to know the ~~pro~~ that is the time a police officer told me that SAHIM MOHAMMED had attended a patient by the name PATIENCE AMINA KATTINDI. She has no documents showing her treatment. They have arrested him and were taking him to Ganze Patrol Base.

Roc
X

I asked my workers who said that they were written a patient by the name. I further went through the records but I never gotten the name of the patient PATIENCE AMINA KATTINDI.

SAHIM X

Today I visited him at Bamsa Police station and inquired from him if he has a written agreement from the patient and he ~~ag~~

asked him as to why
did you ~~do abortion~~
procure abortion without a
written agreement but
he claimed that the girl (patie
nt) came on Saturday 21st
September 2019 in the morning
bleeding.

At this juncture I learned
that he never involved any ¹⁰
other staff in the ~~issue of~~
dealing with the said
patient.

That is all I wish to
state as he reported ~~at~~
my place of work without
informing me, and due to
what had happened, I have
not even asked him ~~about~~
his medical documents. That's all ²⁰

ROC ~~Henry~~ SIGNED - by

156

WITNESS STATEMENT OF:

*Jumwa Kahindi
Katana*

MD NO. 157

JUMWA KATHINDI KATHA
PO GANZE EAST VILLA
P. O BOX
KILIFI

at
4:00 hrs

DCI
Charge
Office

STATES AS FOLLOWS:

I am the above named Gwian female adult aged 45 years currently working at Gange secondary school at the ~~site~~ ¹⁰ site.

I'm a mother of PATIENCE AMINA KATHINDI who is my seventh born child in a family of twelve children. PATIENCE AMINA is a form two (2) student at Detangus secondary school where she is 17 years.

I wish to state that on Friday 20th September 2019 at about 1900 hours when I came back from work via my girls house to find out how they have been doing but I noticed that PATIENCE AMINA KATHINDI was not around. I asked my daughter HADY KATHINDI about her whereabouts and she informed me that PATIENCE AMINA left yesterday around 1700 hrs and have not reported back yesterday about

Roe

~~Handwritten signature~~

STUNTS

x



I received information that PATIENCE AMINA is admitted at CHAMALO MEDICAL CLINIC where she has been since 19th September 2019. This brought me worries of her sickness that can cause her admission in the hospital. Without informing me however, after learning that PATIENCE AMINA KAHINDI had gone to procure abortion, I was forced to report the matter at Ganga Police Patrol Base for further action.

RUC

~~W/S~~
~~W/S~~

I was joined by police officers to the said Chamalo Medical Clinic where upon AMINA I met my son SWALEH KAHINDI FOMI outside the clinic. We went together to the Women Ward where I met my daughter PATIENCE AMINA who had already procured abortion.

-20

SUNED
 x

Police officer asked if abortion was done? She confirmed it was done at KShs 10,000 of which she managed to pay KShs 5,000. When police officer requested for medical notes from the clinician who procured abortion he did not produce. So the police arrested the clinician together with my daughter PATIENCE AMINA KAHINDI for further

-30

WITNESS STATEMENT OF:

Swaleh Kahindi Fondo

gone to procure abortion. I immediately rushed at the clinic I have joined my partner who were with the police to the female ward I have PATIENCE AMINA was recovering.

Police Officer asked her to confirm if abortion was done? She confirmed that it was done at KShs 10,000 but she managed to pay KShs 5,000. When the police officer requested for the medical notes on the same but the clinical officer who procured abortion did not produce. So we was arrested together with my sister PATIENCE AMINA for further investigations. That is all. I wish to state

ROC ~~Cherry~~

QUINED - ~~Har~~

162

WITNESS STATEMENT OF:

**PC. ABRAHAM KIPCHUMBA
NO.119584**

22/9/19
at
030 hrs

DCI
Gange
office

163

of GANGE POLICE PATROL

P.O Box 23,
KILIFI

STATES AS FOLLOWS:-

I am the above named Police Officer currently based at Gange Police Patrol Base where I perform investigation duties.

I wish to state that on ¹⁰ Saturday 21st of September 2019 at about 1845 hours

with other officers at the patrol base when we received a report from the Clinical Officer who was working at CHANAA MEDICAL CLINIC

within Gange Shopping area was alleged that the ²⁰ was done to a form two student at Potangung Secondary

SCHOOL - PATIENCE AMINA KAHINDI

We all proceeded to the said hospital together

the complainant where we traced the said student PATIENCE AMINA KAHINDI

where upon interrogation by IP OSCAR PTI in our presence where the ³⁰ confirmed that she had

been at a shop at agreed amount

ROE

~~UP~~

SUNET

~~Red~~

paid 5000\$ and she has ¹⁶⁴ been held from 14th Sept 2019 until she completed ~~of~~ payment.
At that point inspector Oscar Brown asked the officer ~~SALIM~~ Mohammed the treatment notes but he said he could not have them. He ~~has~~ ^{is} ~~one~~ and charged with the offence of ~~proceeding~~ ^{proceeding} ~~about~~ ^{about} that is ~~all~~ ⁱⁿ ~~Sask~~ ^{Sask} to ~~state~~.

ROC ~~[Signature]~~ SALMED - ~~[Signature]~~

165

STATEMENT OF:

IP.OSCAR PTURU

(1)
GANZE
POLICE
PATROL
BASE

22/09/2019
1900 HRS

IP

166
No: 237181 IP OSCAR PIURU
PO BOX 1 GANZE
TEL: 0727651557

STATES AS FOLLOWS:

I am the above named police officer currently performing general duties at Ganze Police Patrol Base. I do remember very well that on Thursday 19/09/2019 at about 1600Hrs (got information from an informant¹⁰ that there was a school secondary girl who had escaped from school to procure abortion. The girl said is from Petangoo secondary school. And on Saturday 21/09/2019 at about 1900 Hrs I received a mobile call from 0707179192 (mum Jumwa) who informed me that her daughter has gone to Chamalo Medical Clinic to procure abortion. I acted immediately²⁰ and went straight to the Hospital (Chamalo Medical Clinic). I was in the company of PO Kipchumba and the mother of the girl (Patience Amina) and her father.

I went straight to the reception and asked if they had a patient by the name Patience Amina. The reply I got was No. At that time the doctor came to the reception. I asked him³⁰

(ii)

167

Patience Amina? He replied saying "Hapana". I told the doctor to accompany me to the female ward. PC Kulumbe PC Kipchumba, the Parer her brother and one Mr Salim Mohamed and I proceeded to the female ward. On arrival her mother idom ad ur saying "Ofisa ndio nyu". I asked the doctor one Mr Salim Mohammed why he had led to ¹⁰ the carrier when I asked if they had a patient by the name Patience Amina. One Mr Salim Mohammed kept silent.

I asked the doctor one Mr Salim Mohammed to give me any medical notes concerning her. There were no notes concerning her. She was also not in the register ¹⁰ the Hospital book. I checked in the register to find the name one Miss Patience Amina but it was not there. I once again asked the doctor one Mr Salim Mohammed why was the patient there then. He kept quite and never talked. I then interrogated one Miss Patience Amina why she was ³⁰ the "Amina una ugonjwa gani?" She replied saying "Homa". I told n

(ii)

166

Patience Amina? He replied saying "Hapana". I told the doctor to accompany me to the female ward. PC Kulumbe PC Kipchumba, the Parer her brother and one Mr Salim Mohammed and I proceeded to the female ward. On arrival her mother identified her saying "Ofisa ndio wuyu". I asked the doctor one Mr Salim Mohammed why he had used to be a patient when I asked if they had a patient by the name Patience Amina. One Mr Salim Mohammed kept silent.

I asked the doctor one Mr Salim Mohammed to give me any medical notes concerning her. There were no notes concerning her. She was also not in the register in the Hospital book. I checked in the register to find the name one Miss Patience Amina but it was not there. I once again asked the doctor one Mr Salim Mohammed why was the patient there then. He kept quite and never talked. I then interrogated one Miss Patience Amina why she was the "Amina una ugonjwa gani?" She replied saying "Homa". I told her

"Ongea ukweli wako". She started narrating. "Niliidua napa, tukasikisan nikafanyiwa hivyo". I asked her "Tulisikisana nini"? "Tulisikisana kutoka elfu kumi nitanyiwe hivyo". "Nika toa elfu tana salio Baadaye". They agreed 10,000/- Kenyan Shilling which ~~they~~ she raised 5000/- for the abortion.

I asked her "Uliifanyiwa nini". She replied saying "Mimba hitolewa na huyu Sakitari. Pointing her finger at one Mr Salim Mohammed." ¹⁰

I arrested both - the clinical officer one Mr Salim Mohammed and one Miss Patience Aming and escorted them to Bambas Police Station for further investigation. That is all I can state.

170

STATEMENT OF:
PC. BERNARD KAZUME

NO. 243315 V. BERNARD KALU
P.O. BOX 22
K. I. L. I. F. I

171

29/19
at
020 hrs
by
Gauge
office

STATES AS FOLLOWS:-

I am the above named Police Officer currently based at Gauge Police Patrol Base perform general duties.

I wish to state it was on Saturday 21st September 2019 at about 1845 hours while at Gauge Trading

loc

x
this

Centre I received information that one PATIENCE AMUNA KATHINDI of Rotanga Secondary School had been admitted at OTAMARO MEDICAL CLINIC

from 19th September 2019. She had gone for abortion.

I immediately called IP Peter P. Tuyen who confirmed that he had already received a report and was coming down to the said clinic with the complainant.

owned
x
to

When they arrived we went together with the complainant and other Police to Women's Centre. We traced PATIENCE AMUNA KATHINDI who upon being asked

30

presence, she confirmed the abortion. She conducted a her at agreed amount of Rs. 10,000. She said she raised Rs. 5000 but she had been detained until complete payment.

When IASCA requested medical notes of the student PATIENT ~~the~~ ¹⁰ ~~she~~ ^{she} ~~could~~ ^{she} ~~not~~ ^{not} ~~have~~ ^{have} ~~them~~ ^{them} ~~so~~ ^{so} ~~they~~ ^{they} ~~were~~ ^{were} ~~with~~ ^{with} ~~the~~ ^{the} ~~agency~~ ^{agency} ~~and~~ ^{and} ~~charges~~ ^{charges} that is still ~~ask~~ ^{ask} to state.

ROC - ~~[Signature]~~ SIGNED - ~~[Signature]~~

173

STATEMENT OF:

PAK

174

PATIENCE AMINA KAHINDI

DETANGIO SECONDARY

FORM TWO

22/9/2019

0707-179192

22/9/2019

AT
1100 HR

21 HOME PARTICULARS

District COUNTY - KICIFA

Police SUB-COUNTY - GANZE

Station LOCATION - GANZE 10

SUB-LOCATION - GANZE

VILLAGE - KIBONHO

STATE AS FOLLOWS

I am the above named girl named girigama female juvenile aged 17 years and a form two at Detangio secondary school. I am under the care of my two parents namely Richard Kahindi Kahana and Jamwa Kahindi Kahana and I wish to state as follows. 20

It was in the year 2017 when I met one Mustafa Elijah who became my boyfriend and in the same year we started engaging in sex at his home in Bale.

Re-engaging this year 2019 we again met with Mustafa as usual and had sex in the month of May without any protection and in the same month

~~which~~ I missed my monthly periods 30
until today.

concerned. Resting on Saturday 21/09/19


22/09/19 I woke up early in the morning
 at around 0600hrs and had
 11.00 AM back and this was a few sat.
 at had cleared me up.

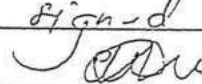
DANGER After there I went back to sleep
 Police until when three pm lunch had
 arrived reached, during that time I was
 having very little bleeding just like
 a normal period, it took ~~my~~¹⁰ meal
 and remained there, it was at
 around 1400hrs when again I went
 to the pay point and paid two
 thousand shillings 2000/- since I had
 been told earlier that the treatment
 could cost 5000/-, for me I did
 not know that terminating the
 pregnancy was part of the treatment
 since I was not for that.

Now it was at around ~~20.00h~~²⁰
 when we were already having our
 supper at the hospital and the
 came in three men of which
 one of them was my brother na
 Swatsha Fonda and the other two
 were police officers, there were other
 people who were outside.

The police officers asked me when I
 arrived there and I told them and
 they asked whether I had ~~injury~~³⁰
 ... because that I was there

asked to move outside where I
 22/9/19 found the police car and I
 AT boarded the car under the escort
 1100 Hrs of police officers and my parents
 AT were also there, I was taken
 to Gange Police station where the
 Police Nurse Satim was also brought. On
 the same night we were escorted
 to Bamba police station where today
 on 22/9/2019 I recorded my ¹⁰ state-
 ment and that is all I can
 state.


 R. O. E

signed


179

WITNESS STATEMENT OF:

Stephen Omondi

STEPHEN OMONDI 180

P.O. Box 9
KILIFI

4/10/19
at
400 hrs

STAGE
SACCO
OFFICE

STATES AS FOLLOWS:-

I am the above Kenyan
over 18 years and currently
working at the facility of
OTTAMARO MEDICAL CLINIC.

I wish to state that on
Thursday 10th of September 2019
I was ~~being~~ working at
the facility throughout the day.
I do remember that both the
clinical officers namely ABRAHAM
OTTAHO (owner of the facility)
and STEPHEN MOHAMMED were
also at the facility. And as
I was reporting off at
around 1845 hours I left
both of them at the day
shade talking.

200
~~4/10/19~~

STAGE
x
~~4/10/19~~

I wish to state that
on Friday 20th September 2019
both clinical officers were
present in the morning until
0900 hours is when ABRAHAM
OTTAHO left and reported
back on Saturday 12th Sept
2019 at 1730 hours. — 30

On 21st September 2019
at about 1945 hours

and I saw Police Vehicle
 and some people had been
 arrested from the facility. I
 tried to find out later the
 following day as when I
 learned that the girl came in
 while having a problem and
 is when she has assisted
 by the clinical officer. ~~SAEM.~~
 That is all which to ~~10~~
 state

ROC ~~UPY~~

SIGNED ~~AW~~

182

**MEDICAL
EXAMINATION REPORT
FOR PAK**

A3

183

KENYA POLICE

MEDICAL EXAMINATION REPORT

PART I - (To be completed by Police Officer requesting examination)

From OCS BAMBWA
POLICE STATION

Ref. 4

To the NDIHOYA HICIP COUNTY Hospital/Dispensary.

Date 22/9/2019

I have to request the favour of your examination of:-

Name PATIENCE ANNA KAHINDI

Age 17 YRS (if known)

Address C/O PETANAO
SECONDARY

Date and time of alleged offence B7WN
XNS 19th SEPT 10

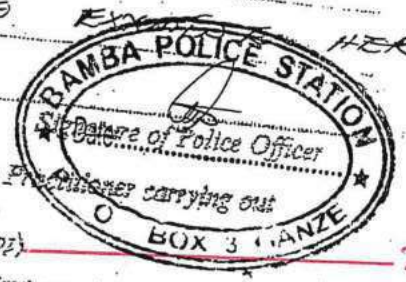
Sent to you/hospital on the 23rd SEPT
OFFICER

20/19 under escort of POLICE

and of your furnishing me with a report of the nature and extent of bodily injury sustained by him/her.

Date and time reported to police 22/9/2019 AT 0022 hrs

Brief details of alleged offence SHE WAS DEFILED AND IMPREGNATED
BY SOMEONE KNOWN TO HER, SHE LATER
ABORTED THE PREGNANCY PLEASE ENQUIRE HER



PART II - MEDICAL DETAILS (To be completed by Medical Officer or Practitioner carrying out examination)

(Please type four copies from the original manuscript)

SECTION "A" - THIS SECTION MUST BE COMPLETED IN ALL EXAMINATIONS

Medical Officer's Ref. No. 1237/19
A.P. 10863/19

1. State of clothing including presence of tears, stains (wet or dry) blood, etc.

Not present

2. General medical history (including details relevant to offence): A 17 years old girl with no defilement + complete Abortion. Says she had a boyfriend for quite sometime being sex she answered and later taken to a man at Clinic & Induced.

3. General...

SECTION "B"---TO BE COMPLETED IN ALL CASES OF ASSAULT, INCLUDING SEXUAL ASSAULTS, AFTER COMPLETION OF SECTION "A"

1. Details of site, situation, shape and depth of injuries sustained:—

(a) Head and neck.....
NAD

(b) Thorax and abdomen.....
NAD

(c) Upper limbs..... 10
NAD

(d) Lower limbs.....
NAD

2. Approximate age of injuries (hours, days, weeks).....
Days

3. Probable type of weapon(s) causing injury..... 20
Blunt

4. Treatment, if any, received prior to examination.....

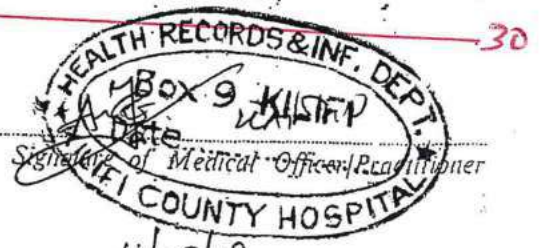
5. What were the immediate clinical results of the injury sustained and the assessed degree, i.e. "main", or "grievous harm".* (ha)

*DEFINITIONS—

"Harm" means any bodily hurt, disease or disorder whether permanent or temporary.

"Main" means the destruction or permanent disabling of any external or internal organ, member or sense.

"Grievous Harm" means any harm which amounts to main, or endangers life, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ.



11/10/8

SECTION "C" - TO BE COMPLETED IN ALLEGED SEXUAL OFFENCES AFTER THE COMPLETION OF SECTIONS "A" AND "B"

1805

- 1. Nature of offence Defilement Estimated age of person examined 17 years
- 2. FEMALE COMPLAINANT

(a) Describe in detail the physical state of and any injuries to genitalia with especial reference to majora, labia minora, vagina and cervix and conclusion.

Hymen - broken (old scar)
cervix - normal
vagina - normal
labias - normal

(b) Note presence of discharge, blood or venereal infection, from genitalia or on body external

None

3. MALE COMPLAINANT

(a) Describe in detail the physical state of and any injuries to genitalia

N/A

(b) Describe in detail injuries to anus

N/A

(c) Note presence of discharge around anus, on thighs, etc; whether recent or of long standing

N/A

10

20

1. MALE ACCUSED OF ANY SEXUAL OFFENCE

(a) Describe in detail the physical state of and any injuries to genitalia especially penis

N/A

(b) Describe in detail any injuries around anus and whether recent or of long standing

N/A

5. Details of specimens or smears collected in examinations 2, 3, or 4 of Section "C" including pubic hairs and vaginal hairs

AT - Positive

VDRL - negative

Urinalysis - NAD

PTCC - NR

10

6. Any additional remarks by the doctor



Annex SM-15

***Requisition for
Documents from the
National Police
Service.***

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NATIONAL POLICE SERVICE

Telegram: CRIMINAL GANZE
Email: ganze@cpd.go.ke
Ref: CIO/SEC/4/4/1/NOV/10/ (te)



SECRETARIAT
P.O. BOX 44
Nairobi
Kenya

DIRECTORATE OF CRIMINAL INVESTIGATIONS

ALBERT CHARO NGUYA,
P.O BOX 459 - 80180,
KILIFI

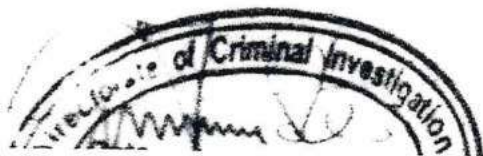
REF: REQUISITION OF DOCUMENTS: -

This office is investigating a case of procuring abortion which was done or performed on a form — 10
two student of Petanguo secondary school at Chamalo Medical Clinic which is believed to be
yours and is located at Ganze Shopping Centre in Ganze Sub County within Kilifi County.

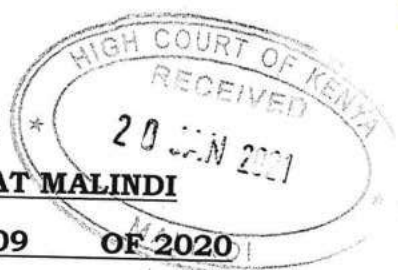
Kindly and urgently, facilitate with the following documents to enable us complete our
investigations into the alleged incident: -

- (i) The Hospital licence
- (ii) Your practicing licence
- (iii) Names of Nurses and clinical officers employed at your clinic
- (iv) Their academic or professional or practicing licence
- (v) The duty roaster of showing who were on duty between 15th of September 2019 and
21st September 2019 — 20

Thank you for continued corporation.



189



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CONSTITUTIONAL PETITION NO. E009 OF 2020

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 43, 46, 48, 49, 50, 73, 75, 157(11) 159, 165 (3, 6&7), 232, 258, 259, AND SIXTH SCHEDULE- SECTION 7 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 158, 159 AND 160 OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CHILDREN'S ACT OF 2001 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 35 (3) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE HEALTH ACT OF 2017 AND THE CLINICAL OFFICERS (Training, Registration and Licensing) Act, 2017

AND

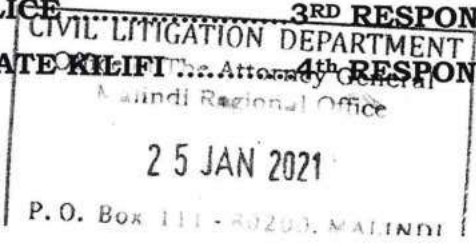
IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KILIFI CRIMINAL CASE NUMBERS 395, 396 OF 2019 AND CHILDRENS CASE NO 72 OF 2019

BETWEEN

PAK1st PETITIONER
SALIM MOHAMMED2nd PETITIONER

AND

THE ATTORNEY GENERAL.....1st RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....2nd RESPONDENT
THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT
THE SENIOR PRINCIPAL MAGISTRATE KILIFI.....4th RESPONDENT



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190

SUPPORTING AFFIDAVIT

I, **JONAH MORORI**, a resident of Nairobi within the Republic of Kenya and P.O. Box 43844 Nairobi do hereby make oath and solemnly swear as follows-

1. **THAT** I am an adult male of sound mind and disposition hence competent to make this oath.
2. **THAT** I hold a Diploma in Nursing from the Kenya Medical Training College. *Annexed and Marked JM-1 is a copy of my diploma certificate.*
3. **THAT** upon qualification I was duly registered as a Nurse by the Nursing Council of Kenya. 10
4. **THAT** in 2020 I held a practice licence from the Nursing Council of Kenya. *Annexed and marked JM-2 is a copy of my licence for the year 2020.*
5. **THAT** as of 14th October 2020, I was employed at Prestige Health Points Medical Center, a health facility within Nairobi County as a Nurse. *Annexed and marked JM-3&4 is a copy of the licence No.1314851 by Nairobi City County issued to Prestige Health Points, and JM-4 is a copy of the Licence to Prestige Health Points to operate as a private medical institution-a nursing home, level 3B from the Medical Practitioners and Dentists Board dated the 18th October 2019.*
6. **THAT** on Wednesday the 14th October 2020, I received a female adult patient. The patient-complained of vaginal uterine water and bleeding. 20
7. **THAT** at the clinic, the patient received urgent supportive management and upon examining her, I concluded that the pregnancy had suffered a miscarriage.
8. **THAT** I performed a complete -post-abortion care management on the patient till she stabilised.
9. **THAT** after receiving care, the patient was left to recuperate at the request of the father who was to come and pay for the costs.
10. **THAT** on the 15th October 2020, unknown persons visited the Clinic posing as patients. 30
11. **THAT** before being processed, a large group of about eight people stormed the facility.

- 12. **THAT** the persons claimed to be police officers but did not identify themselves, while others said they were from the media. They went past the reception and forcefully went into the various rooms of the clinic.
- 13. **THAT** I was arrested and before being escorted to Pangani Police Station, I was asked to part with Kshs 1million, so as not to be taken to the police station, which I declined.
- 14. **THAT** upon my arrest, the Police drove around the Ngara area in Nairobi while I remained, in the boot of a Toyota Probox vehicle KCV528J.
- 15. **THAT** I remained in the vehicle in a parking lot for over one hour while the police contacted the proprietor of the clinic to part with the Kshs. 10 1million.
- 16. **THAT** when the proprietor of the facility failed to show up with the money, I was taken to Pangani Police Station, but the vehicle never went into the station.
- 17. **THAT** after some time, a police officer came from within the station and directed me to the OCS's office within Pangani Police Station.
- 18. **THAT** after my arrest, the police then went back to the facility where they arrested the rest of patients including the female patient, cleaners and other persons found at the clinic.
- 19. **THAT** the police released the cleaners and one patient, except for me, 20 the female patient, the proprietor of the clinic and two other persons found at the clinic.
- 20. **THAT** during my arrest I was neither informed of the reason for my arrest, nor did they inform me of my right to legal representation.
- 21. **THAT** during the arrest the police did not inquire whether I was a qualified healthcare provider or whether the facility I worked in was licenced to provide reproductive healthcare services.
- 22. **THAT** I was released on police bond on the 15th October 2020 together with the other suspects. (***annexed and marked JM-5 is a copy of my police bond***). 30
- 23. **THAT** owing to the arrest, I have lost valuable professional time, which affected the discharge of my duties.

- 24. **THAT** since the encounter with the police officers on the 14th October 2020, I have been treated in a cruel, inhuman, and degrading manner, including being held in the boot of a saloon car without regard to my dignity as a human being.
- 25. **THAT** I am aware that Article 26 (4) of the Constitution of Kenya permits healthcare professionals to provide abortion services where the health or the life of the mother is at risk or as an emergency treatment.
- 26. **THAT** I know that the Ministry of Health has several policy guidelines and standards on the provision of post-abortion care which I adhered to in my work. _____ 10
- 27. **THAT** the police operate without due regard to the provisions of Article 26 (4) of the Constitution and the policy guidelines from the Ministry of Health.
- 28. **THAT** as a trained healthcare professional, I have a right to equality and freedom from non-discrimination, which the law enforcement agencies continue to violate.
- 29. **THAT** because of my arrest and detention, I am very afraid to offer comprehensive reproductive healthcare services to all women who come to the clinic for fear of being arrested and persecuted again.
- 30. **THAT** the harassment by law enforcement agencies of healthcare professionals jeopardizes the rights of millions of women and girls of reproductive age to access comprehensive reproductive health services. _____ 20
- 31. **THAT** what is deponed herein is true to the best of my knowledge, information, and belief.

SWORN AT NAIROBI this 15th day of January 2021

By JONAH MORORI

)
) Deponent
)
)
)
)

BENEDETA P. MUTISO
 COMMISSIONER FOR OATHS
 P.O. Box 52248-00100,
 NAIROBI

BEFORE **BENEDETA P. MUTISO**
 COMMISSIONER FOR OATHS
 P.O. Box 52248-00100,
 NAIROBI

COMMISSIONER FOR OATHS

DRAWN & FILED BY:

Martin Onyango
% Centre for Reproductive
4th Floor
Pinetree off Kindaruma Road /
Off Ngong Road
P.O. Box 52834-00100

NAIROBI.

Tel: +254202518361/63

monyango@reprorights.org

P.105/7757/09

LSK/2020/05836

10

TO BE SERVED UPON: -

The Attorney General's Chambers,
Sheria House,
P.O Box 40112-00100

NAIROBI.

The Director of Public Prosecutions
ODPP House, Ragati Road
Po Box 30701-00100

20

NAIROBI.

The Inspector-General of Police
Jogoo House 'A' Taifa Road
P.O. Box 44249 - 00100

NAIROBI.

The Senior Principal Magistrate Kilifi
P. O Box 287 - 80108

KILIFI.

Annex JM-1

***A copy of my diploma certificate from
Kenya Medical Training College***



195

KENYA MEDICAL TRAINING COLLEGE

This is to certify that

Morori J. Kipsiror

having satisfied all the prescribed requirements for the Award of the

Diploma in Community

Health Nursing

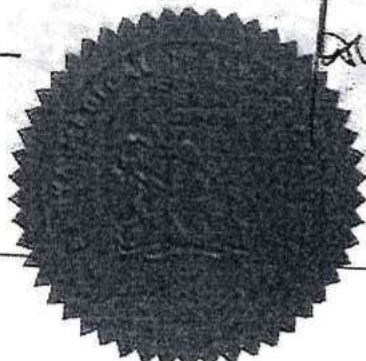
was presented
at a Graduation Ceremony held at
the Kenya Medical Training College, Nairobi on the

6th December 2001

Principal

Director

34151



10

Annex JM-2

***A copy of my licence for the year 2020
from the Nursing Council of Kenya***

197



NURSING COUNCIL OF KENYA
Practice Licence

Full Name **Morori Jonah Kipsiror**
ID/PP No. **12853478**
Licence No. **192875**
Valid Until **2020-11-30**
Cadres **KRCHN(2722)**



Nursing Council of Kenya Retention Card
Phone: +254 733 924669 / +254 721 920567 Email: info@nckkenya.org

Annex JM-3&4

A copy of the licence No.1314851 by Nairobi City County issued to Prestige Health Points, and JM-4 is a copy of the Licence to Prestige Health Points to operate as a private medical institution-a nursing home, level 3B from the Medical Practitioners and Dentists Board

199



NAIROBI CITY COUNTY

SINGLE BUSINESS PERMIT

Effective Date	16th July 2020
Expiry Date	15th July 2021
Duration	12 Months




Nairobi City County grant this Business Permit to

Applicant/Business/Commercial Name PRESTIGE HEALTH POINTS	Business ID
KRA Pin	1314851

To engage in the activity/business/profession or Occupation of Health clinic / doctor's surgery/ doctor / dentistry / physiotherapist / psychologist or other health professional office with no overnight accommodation available HEALTH FACILITY	Activity Code 10 740
--	---

Having Paid a Business Permit Fee of KES	15,000
Amount in words *** Fifteen Thousand shillings only ***	

Business under this permit shall be conducted at the address as indicated below		
P.O. Box	Plot No:	209/230
Road Street	MURANGA RD	
Building:	Floor:	Door/stall No:

Date of Issue	2020-07-16 15:19:00	By order of 20
		 

Notice: It is an offence to give false information. Granting this permit does not exempt the business identified above from complying and any other relevant laws and regulations as established by the Government of Kenya and Nairobi City County

National
Bank



THE MEDICAL PRACTITIONERS AND DENTISTS ACT

(Cap. 253)

LICENCE TO OPERATE AS A PRIVATE MEDICAL INSTITUTION

PRESTIGE HEALTH POINTS MEDICAL CENTRE

001247

Institution Name

RegNo

P.O.Box 74276 - 00200 NAIROBI

full address

Is Hereby Licensed To Operate a Private Medical Institution In Accordance With the Provisions of Rule(5) of the Kenya Medical Practitioners and Dentists (Medical Institutions) Rules. 10

This Licence Entitles the Medical Institution To Operate As a:

NURSING HOME

in Medical Institutions:

LEVEL 3B

Authorised County for the Institution

NAIROBI

Authorised Premises for the Institution

PLOT No. NGARA-NAIROBI

Maximum number of In-patients **12**

This Licence Shall Expire on the Last Day of **December,2019** 20

No Change of Premises is Permitted Without the Authority of the Council.

Dated This 18th day of October 2019

Daniel M. Yumbya, MBS

Chief Executive Officer/ Registrar

Kenya Medical Practitioners and Dentists Council



CONDITIONS OF LICENSE:

1. This Licence is Issued on Condition That Minimum Requirements Set By the Board for Operation of the Private Medical Institution Are Adhered To At All Times

Annex JM-5

A copy of the Police Bond

POLICE 18A DCI STARBUCK ORIGINAL

CASH BAIL RECEIPT
(Section 122, C.P.C.)

1478723

Case File No. 1211 / 2020 MUTHAISA Police Station

Received From JONAH MORORI
the sum of Shillings FIFTY THOUSAND SHILLINGS the aforesaid
person being accused on a charge of PROCURING ABORTION

C.F. No. _____ and being
required to appear before the JUDICIAL MAGISTRATE at OSUTRES

at 10 o'clock in the morning on the 19/10/2020 (date)

to answer to the said charge or in default to forfeit the sum deposited.
Signature MUTHAISA Police Station

Witness 12833078

Date 17/10/2020 Time 9.30hrs

2. Case File No. _____ Date _____
Received from _____ Police Station

the sum of Shillings _____
_____ Court Prosecutor.

Date _____ 20

3. RECEIVED from Court Prosecutor (Estreated)
_____ Court Clerk

4. Case File No. _____ Date _____
Received from _____
the sum of Shillings _____

Signature or thumb-print of Bailee.
Witnessed.

- Of what probative value is this Affidavit
- It is crystal clear that its purpose is to demonstrate that not related to this case & the same should be ignored



203

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. E009 OF 2020

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 43, 46, 48, 49, 50, 73, 75, 157(11) 159, 165 (3, 6 & 7), 232, 258, 259, AND SIXTH SCHEDULE- SECTION 7 OF THE CONSTITUTION OF KENYA

10

AND

IN THE MATTER OF SECTIONS 158, 159 AND 160 OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CHILDREN'S ACT OF 2001 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 35 (3) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006 OF THE LAWS OF KENYA

20

AND

IN THE MATTER OF THE HEALTH ACT OF 2017 AND THE CLINICAL OFFICERS (Training, Registration and Licensing) Act, 2017

AND

IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KILIFI CRIMINAL CASE NUMBERS 395, 396 OF 2019 AND CHILDRENS CASE NO 72 OF 2019

BETWEEN

30

PAK1st PETITIONER
SALIM MOHAMMED2nd PETITIONER

AND

THE ATTORNEY GENERAL.....1st RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....2nd RESPONDENT
THE INSPECTOR GENERAL OF POLICE3rd RESPONDENT
THE SENIOR PRINCIPAL MAGISTRATE KILIFI4th RESPONDENT



204



SUPPORTING AFFIDAVIT

I, **JOSEPH KARISA NGOZI**, a resident of Kilifi within the Republic of Kenya and P.O. Box 1024 Kilifi do hereby make oath and solemnly swear as follows-

- 1. **THAT** I am an adult male of sound mind and disposition hence competent to make this oath.
- 2. **THAT** I hold a Diploma in Nursing from the Kenya Medical Training College.
- 3. **THAT** upon qualification I was duly registered as a Nurse by the Nursing Council of Kenya with a current practice licence No.217782. **Annexed and marked JKN-1 is a copy of my practice licence valid until 31st August 2021.** — 10
- 4. **THAT** as of 12th January 2021, I am employed at Bamba Maternity Nursing Home as a Nurse. **Annexed and marked JKN2 is a copy of the Licence to Bamba Maternity Nursing Home to operate as a private medical institution-a nursing home, level 3B from the Medical Practitioners and Dentists Board dated the 1st Day of January 2021.**
- 5. **THAT** between 2012 to 2013, I was stationed at the same Bamba Maternity Nursing Home operating as Bamba Medical Clinic.
- 6. **THAT** at all material times, I was a qualified and licensed healthcare professional working in a licenced medical facility. — 20
- 7. **THAT** on 8th December 2013, I received a female patient at the Bamba Medical Clinic. The patient accompanied by her guardians, complained of severe lower abdominal pains.
- 8. **THAT** at the clinic, the patient received urgent supportive management and upon examining her, I concluded that the patient had attempted an abortion using local methods and failed.
- 9. **THAT** I administered misoprostol, a lifesaving drug and approved by the Ministry of Health for use in reproductive and maternal health and performed a complete -post-abortion care management on the patient to save her life. — 30

- 10. **THAT** police officers stormed the clinic and stated that they had received reports of illegal abortion services being conducted in the clinic.
- 11. **THAT** I was arrested and arraigned before the Kilifi Senior Principal Magistrate's Court in criminal case number 536 of 2013 on charges of abortion contrary to Section 158 of the Penal Code, Cap 63 Laws of Kenya.
- 12. **THAT** the prosecution of the case took more than five years and after hearing both the prosecution and the defence cases, on the 26th February 2019, the court proceeded to acquit me on all charges. ***Annexed and Marked JKN-3 is a copy of the Judgement.***
- 13. **THAT** in its judgment the court determined that the patient had been in dire need of medical attention and that I discharged my duties in line with the law. 10
- 14. **THAT** in its judgement, the court noted that as a medical practitioner, I have a duty to save lives.
- 15. **THAT** I was arrested and maliciously prosecuted for providing abortion services as a medical emergency to save the life of a pregnant woman despite the provisions of Article 26 (4) of the Constitution.
- 16. **THAT** for five years, the law enforcement agencies subjected me to psychological torture, cruel and degrading treatment through the arrest and unlawful charges. 20
- 17. **THAT** the law enforcement agencies including the Police continue to apply the blanket provisions of Section 158 to Section 160 of the Penal Code to harass and intimidate healthcare professionals from discharging their professional duties.
- 18. **THAT** since my arrest, prosecution, and subsequent acquittal, I am extremely afraid to offer comprehensive reproductive services to patients who visit the clinic.
- 19. **THAT** healthcare professionals continue to operate in an intimidating environment, with the constant harassment fuelling stigma around abortion despite the provisions of Article 26 (4) of the Constitution. 30
- 20. **THAT** healthcare professionals have a duty to save lives and protect the health of patients as is required under the Constitution.

- 21. **THAT** the continued interference in the discharge of duties under Article 26 (4) of the Constitution, violates the freedom and security of healthcare professionals and jeopardizes access to comprehensive reproductive services.
- 22. **THAT** the lack of clarity on the implementation of Article 26 (4) of the Constitution has created fear and confusion among healthcare professionals as to the status of abortion in Kenya.
- 23. **THAT** I know that the Ministry of Health has several policy guidelines and standards on the provision of post-abortion care such as the **2012 Standards and Guidelines on Reducing Morbidity and Mortality from Unsafe Abortions.**
- 24. **THAT** what is deponed herein is true to the best of my knowledge, information, and belief.

SWORN AT KILIFI this 15th day of January 2021

By JOSEPH KARISA NGOZI

)
) JKN
) Deponent

BENEDETA P. MUTISO
 BEFORE ME FOR OATHS
 P.O. Box 52248-00100
 NAIROBI

COMMISSIONER FOR OATHS

DRAWN & FILED BY:

Martin Onyango, % Centre for Reproductive, 4th Floor
Pinetree off Kindaruma Road /Off Ngong Road
P.O. Box 52834-00100

NAIROBI.

Tel: +254202518361/63
monyango@reprorights.org
P.105/7757/09
LSK/2020/05836

TO BE SERVED UPON:

The Attorney General's Chambers,
Sheria House,
P.O Box 40112-00100

10

NAIROBI.

The Director of Public Prosecutions
ODPP House, Ragati Road
Po Box 30701-00100

NAIROBI.

The Inspector-General of Police
Jogoo House 'A' Taifa-Road
P.O. Box 44249 - 00100

20

NAIROBI.

The Senior Principal Magistrate Kilifi
P. O Box 287 - 80108

KILIFI.

Annex JKN-1

**Practice Licence valid until 31st August
2021**

209



NURSING COUNCIL OF KENYA Practicing Licence

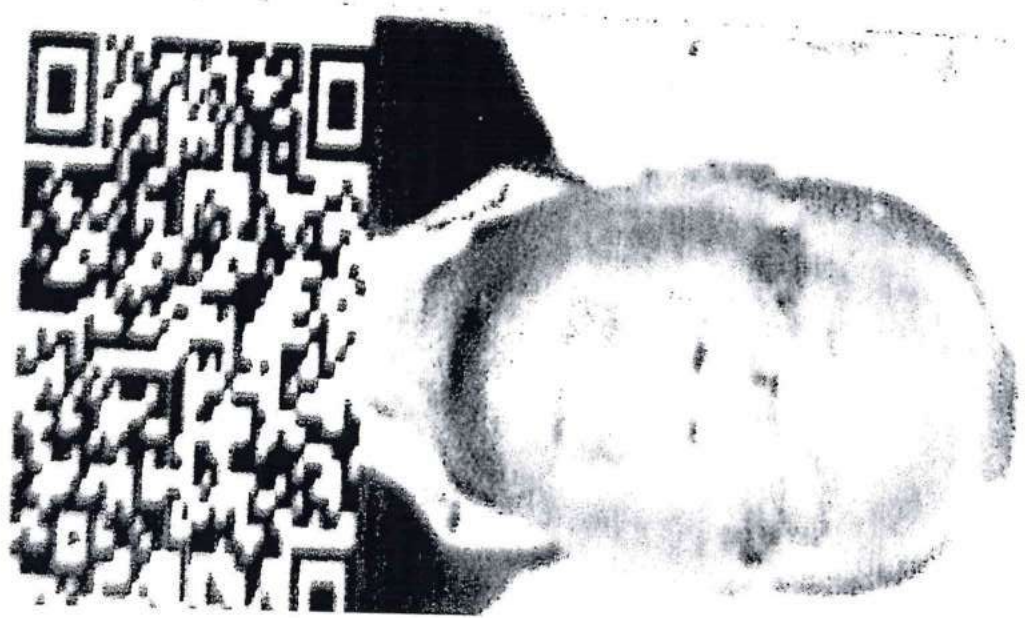
Full Name: Joseph Karisa Gonzi

ID/PP No: 3880768

Licence No: 217782

Valid Until: 2021-08-31

Cadres: KRCHN(232) KEPN(304) KEN(2833)



Nursing Council of Kenya Retention Card

Phone: +254 733 034400 / +254 733 034406 / Email: info@nck.or.ke

Annex JKN-2

Licence to Bamba Maternity Nursing Home to operate as a private medical institution-a nursing home, level 3B from the Medical Practitioners and Dentists Board dated the 1st Day of January 2021.



211

THE MEDICAL PRACTITIONERS AND DENTISTS ACT (Cap. 253)

LICENCE TO OPERATE AS A PRIVATE MEDICAL INSTITUTION

BAMBA MATERNITY NURSING HOME

Institution Name

002568

RegNo

P.O. BOX 7 80108 KILIFI

full address

Is hereby licensed to operate a Private Medical Institution In Accordance With the Provisions of Rule(5) of the Medical Practitioners and Dentists (Medical Institutions) Rules. This Licence Entitles the Medical Institution To Operate As a:

PRIVATE LEVEL 3B MATERNITY HOME

in Medical Institutions:

LEVEL 3B

Authorised County for the Institution

KILIFI

Maximum number of In-patients **6**

This Licence Shall Expire on the Last Day of **December 2021**

No Change of Premises is Permitted Without the Authority of the Council.

Dated This **1st day of January 2021**



[Signature]

Daniel M. Yumbya, MBS
Chief Executive Officer/Registrar
Medical Practitioners and Dentists Council

CONDITIONS OF LICENSE:

1. This Licence is issued on condition that minimum requirements set by the Council for operation of the Private Medical Institution are adhered to at all times

Annex JKN-3

***Copy of the Judgement in Kilifi SPM
criminal case number 536 of 2013***

REPUBLIC OF KENYA

JURISDICTION: IN THE SPM'S COURT AT KILIFI

FILE NUMBER: SEXUAL OFFENCE NO. 536/2013

BETWEEN: REPUBLIC V/S JOSEPH NGOZI

CORAM: R.K. ONDIEKI- SPM

HEARD: 9th OCTOBER, 2018

DELIVERED: 26th FEBRUARY, 2019.

J U D G E M E N T :

Perhaps, it befits this case to give the introduction, from the outset and the defence case and determination of the matter. — 10

Prosecution Case:

The complainant, her mother and Uncle took her to Bamba Medical Clinic and the uncle first had a word with the accused who is the proprietor of the facility

that, the victim S.K.Z. in the company of her uncle and mother was on the 8th December, 2013 taken to the accused's clinic and the accused first had a word with the Uncle to the victim and the mother and then he gave the victim some tablets to swallow and some to insert in the vagina.

In the process the police officers arrived and took the victim to Kilifi Hospital where she was admitted for three days and thereafter her brother took her to Ziwa La Ngombe in Mombasa where the pain persisted and had to be hospitalised at Ziwa La Ngombe, Mombasa where she gave birth to a child who died after ten minutes.

In support of her case, the victim marked the tablets wrapped in a paper as MFI 1, scan and reports of the scan as MFI 2, medical treatments from Ziwa La Ngombe as MFI 3, Photograph of the dead child as

MFI4 and P3 Form by Dr Bushra as MFI 5. Under cross examination, the witness reiterated her testimony in chief and further said that she was accompanied by the police to Bamba Police station and then to Kilifi District Hospital.

When the brother took her to Mombasa, she was unwell and taken to Ziwa La Ngombe Dispensary where she was given some pain killers and put on drip and subsequently fainted. She regained her consciousness and a baby who then died ten minutes — 10 later.

DR MOHAMED YUNIS told the court that the victim went to the hospital with blood stained clothing and she was bleeding from her vagina and that the cervical opening was closed and on further examination, there was a debris of pills and that the victim was 22 weeks pregnant but the foetus was in

the uterus but still alive. The body of the child was found at Bamba Medical Clinic and had decomposed beyond recognition and it was impossible to tell the sex of the body. The witness produced the P3 Form and the Post Mortem report as Exhibits 5 and 6, respectively.

Under cross examination, the witness said that the cervix was closed an indication that the victim had not procured an abortion and finally the witness said that it was not clear as to the cause of the death of the baby. — 10

RENYSON KARISA KENGA too told the court that he learned that the victim who is her sister was scheduled to procure abortion at Bamba Clinic but upon reaching there, he found that she had been taken to Kilifi District Hospital in an ambulance and from Kilifi District Hospital, he took her to Ziwa La

Ngombe in Mombasa because the doctors were on strike in the public Hospitals. upon being admitted the victim miscarried and the baby died subsequently.

Undercross examination, the witness said that the victim was admitted in the hospital for four days and so he cannot tell if the medication caused the abortion.

ALICE MWARABU produced some tablets which had been inserted into the vagina of the victim and were ~~white~~ ¹⁰ white in colour. the victim further told her that upon administration of the drugs, she started to feel cold and shaking and that the time, she was pregnant at 36 weeks.

GEORGE OKELLO a government chemist also told the court that he was asked to analyse the crushed tablets which were white and solid and whether they

can cause abortion and his findings were that the tablets can cure ulcers and procure abortion. The witness produced the tablet as Exhibit 1 and the report as Exhibit 8.

CORPORAL PAUL WALUMBWA is a police officer attached to Kisumu but he recalls on the 8th December, 2013 when he was tipped that there was abortion being carried out at Bamba Clinic and upon reaching there, he met the victim on the procurement bed and she disclosed that the accused had given her 10 tablets to procure abortion and some were inserted into her vagina. the witness in company of other officers took the victim to Bamba sub County Hospital where the tablets were retrieved from the private parts. When the x-ray was done at Kilifi District Hospital, it was found that the foetus had

died and so the accused was arrested and charged with this offence.

The witness then produced the tablet as exhibit1, Exhibit memo as Exhibit 9, Chemist report as Exhibit 8, Bamba Clinic Card as Exhibit 3, practising licence for the accused as Exhibit 11, discharge summary as Exhibit 10. Upon examination, the witness said that at the time they stormed the Bamba Clinic, they found the victim had aborted and dead foetus was recovered. Alice Mwarabu was also at the facility at the time and the victim was taken to Bamba Sub county Hospital for first aid and then to Kilifi District Hospital as the victim was still bleeding. The dead foetus was photographed but the photographs were marked for identification.

Having been satisfied with the evidence at hand, the witness charged the accused person with the offence

of attempt to procure^a abortion contrary to section 158 of the Penal Code.

" Particulars of the offence being that on the 8th day of December, 2013 at Bamba Medical Clinic at Bamba Trading Centre of Ganze District of Kilifi County with intent to procure miscarriage, of a woman, unlawfully administered misoprosol drugs to SALOME KACHE KAZUNGU."

JOSEPH KARISA NGOZI took the court through a detailed bio to demonstrate that he is a qualified — 10 nurse and that he has all it takes to practise medicine. Further the accused told the court that on the 8th December, 2013 the mother and uncle to the victim took her to the Clinic and alleged that the victim had stomach aches, headache and some cold and upon examining her, she gave her panadol as he went to attend another lady who was giving birth. At

this time police officers stormed the facility and alleged that the accused had procured abortion. However the mother to the victim had told him that the victim had taken *aloe vera* concoction and was in the process of aborting. After his arrest, the witness was informed that the victim was taken to Ziwa La Ngombe where she procured abortion.

PROF JOSEPH KARANJA is a medical Doctor by profession and his evidence related to a drug called misoprostol which when administered to procure—10 abortion cause cramping and bleeding within 1 to 4 hours and as such, the cervix will not open. Under cross examination, the witness said that misoprosol come in different brands. The witness produced an expert affidavit which he adopted in evidence.

RAJAB MENZA and HAMISI KAHINDI KENGA told the court that on 8th December, 2013 they had gone

to the accused's Clinic for treatment when the victim in the company of the mother and another arrived and the victim had extreme tummy pains and they heard the mother tell her to open up and tell the truth. The accused then gave her a bottle to secure urine specimen for analysis and it was while in the toilet that the police arrived and arrested the accused person.

Analysis and determination.

Be that as it may, Section 158 of the penal code ~~10~~ provides that:-

“Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other

means whatever is guilty of a felony and is liable to imprisonment for fourteen years."

The evidence by the complainant (PW1) as supported by that of her grandmother (PW2) indicated that misoprosol drugs was administered or inserted into the complainant's vagina or through her buttocks for purposes of procuring a miscarriage or abortion. Further in this case, there is no doubt that the victim was taken to the Bamba Clinic and at the time as disclosed by the victim, she had abdominal pains but she was not bleeding. She was in company of her mother and the uncle and upon reaching the hospital, her uncle went in first and explained to the doctor whatever they discussed and the mother told the victim to be free and explain everything to the Doctor.

This fact alone is clear that the victim was in need of

medical attention as the abdominal pain was severe and so what the accused was doing is to assess the situation by first taking the steps to save life. The fact that she was in pain at the time she went to the hospital, is evidence enough that the victim had presumably attempted abortion by local methods but failed and now sought to save her life by going to the clinic. The victim may have gone to this clinic because the government hospitals were paralysed by the Doctors' strike.

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So that what is key here is the *mens rea* and *actus reus* that must be established by the prosecution. Did the accused intent to procure abortion in the circumstances?

The use of misoprostol drugs in this situation would therefore be no surprise and as put forth by Prof. Joseph Gatheru Karanja in his expert opinion where he said that the drug is used as *a life saving drug for*

use in reproductive and maternal processes, intrauterine.... fetal death, among other uses.

It was part of the duty of a medical practitioner to save lives and it will be a travesty of this profession if interference is encouraged. It even took so long for the victim to be saved passing through two other government facilities without any assistance. The victim was released with a death fetus in her body from Kilifi District Hospital only to be assisted by Ziwa la Ngombe 10

In the circumstances I make I finding that the prosecution has not proved its case beyond reasonable doubts and I acquit the accused under section 215 of the CPC.

Written and dated this 26th February, 2019.

R.K. ONDIEKI,
SENIOR PRINCIPAL MAGISTRATE,

KILIFI LAW COURTS.

I CERTIFY THAT THIS IS
TRUE COPY OF THE ORIGINAL
MAGISTRATE
DATE 26/2/19.

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. E009 OF 2020

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23,
24,25,26,27,28,29,31,43,46,48,49,50, 73, 75,157(11) 159, 165 (3,6&7),232, 258, 259, AND
SIXTH SCHEDULE- SECTION 7 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 158,159 AND 160 OF THE PENAL CODE CAP 63 ~~10~~
OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CHILDREN'S ACT OF 2001 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE HEALTH ACT OF 2017 AND THE CLINICAL
OFFICERS (Training, Registration and Licensing) Act, 2017

AND

IN THE MATTER OF PROCEEDINGS IN THE SENIOR PRINCIPAL
MAGISTRATES COURT AT KILIFI CRIMINAL CASE NUMBERS 395,396 OF 2019 ~~20~~
AND CHILDRENS CASE NO 72 OF 2019

BETWEEN

PAK1st PETITIONER

SALIM MOHAMMED2nd PETITIONER

AND

THE ATTORNEY GENERAL.....1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2nd RESPONDENT

THE INSPECTOR GENERAL OF POLICE3RD RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE KILIFI4th RESPONDENT

CIVIL LITIGATION DEPARTMENT
Office of The Attorney General
Malindi Regional Office

08 FEB 2021

P. O. Box 111 Malindi, MALINDI
Email: agmalindi@gmail.com

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SUPPORTING AFFIDAVIT



I **PROF. JOSEPH GATHERU KARANJA**, a male adult of sound mind and a resident of Nairobi County within the Republic of Kenya do hereby make oath and state as follows:

1. **THAT** I trained as a Medical Doctor at the University of Nairobi Medical School and was awarded a Bachelor of Medicine and Bachelor of Surgery (MBChB) Degree in 1976.
2. **THAT** I embarked on my internship at the then Nakuru Provincial Hospital from 1976 to 1977 and was later posted as a medical officer at Garissa Provincial Hospital from 1977 to 1978.
3. **THAT** I started my specialist residency training in Obstetrics and Gynecology at the University of Nairobi and Kenyatta National Hospital from 1978 to 1982 and was awarded a Master of Medicine (M.MED) Degree in 1983. — 10
4. **THAT** from 1978 to 1982, I gave clinical tutorials to undergraduates at the University of Nairobi. Clinical tutorials involve demonstrating and teaching students on how to perform clinical examinations on patients and interpret medical results. I then became an honorary lecturer at the same university from 1983 to 1984, a lecturer in Obstetrics and Gynecology from 1985 to 1992, a Senior Lecturer from 1992 to 2004, and was also the Chairman of Department of Obstetrics and Gynaecology from 1994 to 2000. Further, that from 2004 to date, I have been an Associate Professor of Obstetrics and Gynaecology at the University of Nairobi.
5. **THAT** for the period from 1983 to 1985, I also lectured in other institutions like the Nairobi School of Nursing at the Medical Training College, which offers diploma courses to nurses and lectured at the Department of Nursing Sciences at the University of Nairobi from 1986 to 2000. — 20
6. **THAT** in 1984, I was an external examiner for the Machakos Kenya Medical Training College for their Clinical Officers examinations. I have on different occasions set and organized examinations for Bachelor of Medicine and Bachelor of Surgery students (MBCHB) and students of master's in medicine (MMED) in Obstetrics and Gynecologists from 1985 to date. I was an external examiner for Department of Reproductive Health at Moi University from 1995 to 1999 and in 2003, and an external examiner for Kenyatta University Department of Public Health from 2004 to date. I have also been an external — 30

examiner for Dar es Salaam and Makerere University Schools of Medicine from 2005 to date. I therefore have a thorough understanding of the medical curriculum both at the degree and at the diploma level in Kenya, Uganda and Tanzania.

- 7. **THAT** from 1986 to 1992, I attended various courses related to Reproductive Health in Egypt, Hungary, the United States of America, and Thailand, which further sharpened my skills in reproductive health. **(Attached hereto and marked JGK-1 is a copy of my curriculum vitae).**
- 8. **THAT** I have vast experience in research as an individual and with other academicians at the national, regional and international levels. I have contributed and edited newsletters, medical journals, and papers for different workshops and trainings related to reproductive health matters. — 10
- 9. **THAT** some of my published research experience that is related to issues pertinent to this Petition include:
 - a) Karanja J.G, Adolescent Reproductive Health, Editorial Journal. Obstet. Gynaec Eastern & Central Africa. (1999).
 - b) Karanja J.G, (as a member of a working group), Report of Inter-regional Consultation Meeting on Measuring and Estimating Maternal Mortality, World Health Organization, Geneva Switzerland (1999).
 - c) Karanja J.G, (Contributor), Taking Post abortion Care Services to Scale: Quality, Access, and Sustainability. Report of an International Workshop held in Mombasa, Kenya, May15-18, 2000, Engender Health, (2001). — 20
 - d) Koigi R.K., Liku J.K. & Karanja J.G., Knowledge, Attitude and Practice of Abortion among College Students in Kenya Final Research Report to the World Health Organization, Department of Obstetrics and Gynaecology, (2001).
 - e) Wamwana E.B., Ndavi P.M., Gichangi P.B., Muia E.G., Jaldesa G.W. & Karanja J.G., Socio-Demographic Characteristics of Patients Admitted with Gynaecological Emergency Conditions at the Provincial General Hospital, Kakamega, Kenya, East African Medical Journal Vol. 83 No. 12 (2006).
 - f) Karanja J.G., Mutungi A., Kihara A., Ndavi P., Kamau K., Ogutu O., Gachuno O., Odawa F., Introducing Pre-Service Training in Comprehensive Abortion Care (CAC) in a Situation of Restrictive Law, International Journal of Gynecology & Obstetrics 107S2 S93–S396, (2009). — 30

g) Karanja J.G., Confronting Maternal Mortality Due to Postpartum Hemorrhage and Unsafe Abortion: A Call for Commitment, African Journal of Reproductive Health, 17(2): 18 (2013).

10. **THAT** through trainings organized by non-governmental organizations and professional associations, such as the Kenya Obstetrical and Gyneacological Society (KOGS), I have trained mid-level providers on aspects of comprehensive abortion care to translate various research findings into practice. The trainings have included post-abortion care (PAC) for middle-level health workers to enhance access to PAC by women in under-served areas, prevention and management of obstetrical fistula, and comprehensive abortion care trainings. _____ 10

11. **THAT** I was actively involved in the Kenya Constitutional review process from 2004 until the promulgation of the Constitution in 2010, and I am a founding member of the National Reproductive Health Steering Committee for organizations that were interested in engaging with the Constitutional review process. This steering committee evolved to the Reproductive Health and Rights Alliance (RHRA), which is an alliance of health organizations and associations working on reducing maternal mortality due to unsafe abortion. Through the RHRA, I presented views to the Constitutional Review Committee regarding the drafting of the language around right to health and access to legal abortion, which greatly informed the current Article 26 of the Constitution.

12. **THAT** I am a member of the following professional associations: the Kenya Medical Association (KMA); KOGS, where I served as the Chairman of the Association from 2001 to 2005; the International Federation of Gyneacology and Obstetrics (FIGO) where I served as the regional coordinator of the FIGO initiative for the prevention of unsafe abortion from 2009 to 2012; and the Eastern, Central and Southern African Association of Obstetrical and Gyneacological Society (ECSAOGS), where I served as the President from 2009 to 2014. ECSAOGS draws its membership from country-level Obstetricians and Gyneacologists from the Eastern, Central and Southern African regions. Its mandate is to reduce maternal and perinatal mortality. _____ 20

13. **THAT** between 2011 and 2012, I was a member of the task force set up by the Ministry of Health to draft the Standard and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya (Standards and Guidelines). The need to develop the Standards and Guidelines arose from the fact that so many women were needlessly dying as a result of unsafe abortion and lack of post abortion care services even though Article 26 (4) of the Constitution provided that abortion is permitted if in the opinion of a trained health _____ 30

professional, there is need for emergency treatment, or the life or health of a pregnant woman is in danger or if it is permitted by any other written law. Further, that the said Standards and Guidelines were adopted by the Ministry of Health in 2012. (Annexed hereto and marked JGK-2 is a copy of the Standards and Guidelines adopted by Ministry of Health in 2012).

14. THAT the objective of the Standards and Guidelines was to have a government policy guideline on the prevention and management of unsafe abortion and provision of post abortion care within the circumstances allowed under Article 26 (4) of the Constitution as a key link for reducing maternal mortality and morbidity and to increase access to safe legal services in order to reduce unsafe abortions. 10

15. THAT in 2017 Parliament passed the Health Act 2017 that captures both the intention of the spirit and underpins the 2012 guidelines.

16. THAT as a member of the Kenya Obstetrical and Gynecological Society (KOGS), the East Central Southern Association of Gynecological Societies and Federation of International Gynaecology and Obstetrics (FIGO), as well as the Kenya Medical Association, I have trained health professionals of all cadres, including doctors, clinical officers, nurses and midwives on aspects of the assessment and management complications due to unsafe abortion and post abortion care.

17. THAT as a health practitioner I have offered post abortion care services to women and girls at health institutions and as a result of treating these patients, I am well versed with knowledge of the adverse health complications and consequences of not providing emergency post abortion care as well as the emergency treatment protocols required to address them. 20

18. THAT complications arising from interrupted pregnancy ought to be treated immediately for instance hemorrhage, wherein timely treatment of heavy blood loss is critical, as delays can be fatal; infections which are treated with antibiotics along with evacuation of any remaining pregnancy tissue from the uterus as soon as possible; and injury to the genital tract and/or internal organs which may require surgical interventions.

19. THAT even in cases wherein a patient is experiencing mild complications that do not amount to a medical emergency, in the context of post abortion care, a medical practitioner is still required to address the medical indications exhibited by the patient. 30

20. THAT in fact, failing to provide emergency medical treatment according to Section 7 (3) of the Health Act attracts a criminal penalty.

21. **THAT** owing to various reasons, including stigma or fear of legal repercussions, patients experiencing pregnancy complications often present to facilities only when they are in crisis and their conditions are too grave for further self-management. Therefore, any delay in the treatment of these medical emergencies will exacerbate their medical condition.

22. **THAT** a trained health professional has a professional, ethical and legal obligation to offer emergency care and assistance and stabilize any patient who presents herself to a medical facility exhibiting complications in pregnancy or is in need for post abortion care. This position is articulated in our Hippocratic Oath as well as the Kenya National Patients' Rights Charter. **(Annexed hereto and marked as JGK-3 copies of the Oath and Charter)**.

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23. **THAT** post-abortion care is designed to minimize morbidity and mortality associated with all abortions whether spontaneous or induced by addressing incomplete abortion and treating complications, and to prevent recurrence, linking women to other reproductive health services, and providing them with post-abortion contraception.

24. **THAT** the National Guidelines for Quality Obstetrics and Perinatal Care recognize abortion whether induced or spontaneous as a leading cause of maternal mortality in Kenya, and outline post abortion care amongst the six pillars of Maternal and Newborn Health in Kenya.

25. **THAT** the National Guidelines for Quality Obstetrics and Perinatal Care defines Post Abortion care as the care given to a woman who has had an unsafe, spontaneous or legally induced abortion and consists of:

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- a) Emergency treatment of complications from a spontaneous or unsafe induced abortion;
- b) Family planning counseling and services;
- c) Access to comprehensive reproductive health care, including screening and treatment for STI, RTIs and HIV/AIDS; and
- d) Community education to improve reproductive health and reduce the need for abortion.

26. **THAT** the Ministry of Health's own regulations contained in the National Post Abortion Care Manual (2020) and the directive issued by the Director of Medical Services on June 2013, indicate that post abortion care is an integral part of maternity service and should be treated as such. Post Abortion Care is part of emergency services to which all patients are entitled, under Article 26 (4) and Article 43 (2) of the Constitution. **(Annexed hereto and marked as JGK-4 are the National Post Abortion Care Manual (2020) and the directive issued by the Director of Medical Services on June 2013 marked as JGK-4).**

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- 27. **THAT** the roles and specific health management protocols for safe abortion and post abortion care are enumerated in a report by the World Health Organization's Health Worker Roles in Providing Safe Abortion and Post- Abortion Contraception (2015) and the Clinical Practice Handbook for Safe Abortion (2014) (**Annexed hereto and marked as JGK-5 are copies of the reports**).
- 28. **THAT** I know of my own knowledge that despite the promulgation of the 2010 Constitution, the enactment of the Health Act 2017, and the development of various standards and guidelines for reproductive healthcare provision in Kenya pursuant to Article 21 of the Constitution, there has been little change in attitude and actions from law enforcement agencies as they still rush to harass, arrest and even prosecute women and girls seeking services and healthcare workers under the old 1963 Penal Code. — 10
- 29. **THAT** the harassment, arrests and prosecution of healthcare workers by the Police for providing lawful services sends a contradictory message on the governments and Ministry of Health's stand on reducing maternal deaths in Kenya.
- 30. **THAT** I have reviewed the medical record of PAK annexed to her Affidavit dated the 30th November 2020 in particular her treatment card from Chamalo medical clinic at Annex 1 and the Medical Examination Report from Kilifi county Hospital provided as her Annex 7 and find both consistent with a case of post abortion care patient in any health facility.
- 31. **THAT** I know of my own knowledge that the continued stigmatization of abortion related services including post abortion care creates unavailability of services and leads to poor outcomes especially for poor and rural-based women who largely suffer denial of services and end up dying; whereas affluent women are able to access safe abortion and post abortion services within the law privately. — 20
- 32. **THAT** it is my opinion that a failure to train the police officers, prosecutors and judicial officers on the health laws, a failure to make all laws including the penal code to align with the Constitution, a failure to issue proper guidelines to law enforcement officers, and the resultant unlawful harassments, arrests and prosecutions of trained health professionals fosters confusion among health service providers, which results in their hesitation to take appropriate and timely decisions on whether or not to provide post abortion care or safe legal abortion services to their clients. — 30
- 33. **THAT** the government of Kenya has a responsibility to provide comprehensive post abortion care services to all patients in need even in instances where legal abortion is not available to a patient.

34. **THAT** besides the 2012 standards and guidelines, the Ministry of Health has put in place a National Post Abortion Care Reference Manual (2013) and the National Health Sector Standard Operating Procedures on management of Sexual violence in Kenya (2014).

35. **THAT** Annex 13 of the National Health Sector Standard Operating Procedures on management of Sexual violence in Kenya of 2014; the Community info pack lists the following among the rights of a survivor of sexual violence

“Access termination of pregnancy and post abortion care in the event of pregnancy from rape”

36. **THAT** the Kenya Maternal and Newborn Health model recognizes Post Abortion Care (PAC) services as one of its pillars and one of the strategies to improving maternal survival. To this effect, the Ministry of Health has developed three documents: — 10

- i. The National Post Abortion Care training curriculum for health service providers (MOH 2012),
- ii. The National Post abortion care reference manual (MOH 2013), and
- iii. The National Post Abortion Care Manual (2020).

These three documents were developed out of the need to equip reproductive health service providers with the necessary knowledge and skills to provide timely quality PAC services to reduce morbidity and mortality associated with complications of unsafe abortion. There have been skills transfer in Kenya whereby nurse midwives and clinical officers are trained to perform Post Abortion Care services. — 20

37. **THAT** in Kenya, women who seek abortion and post abortion care services encompass a certain range of age group, socioeconomic status, marital status, education level, religion and urban or rural residence. In the study conducted by APHRC and MOH in 2012 about half of all PAC clients were less than 25 years of age with 17% aged 10-19 years old. The majority (59%) were from rural areas while 64% were married (APHRC; MOH; IPAS; Guttmacher 2013). **Annexed hereto and marked JGK- 6 is a copy of the report.**

38. **THAT** the National Guidelines on the Management of Sexual Violence; Ministry of Health’s National Guidelines for quality obstetrics and perinatal care; and, the various professional codes of conduct for doctors, nurses and clinical officers, all recognize the fundamental duty that health care providers have in saving lives and preserving health. — 30

39. **THAT** arrests, detention and intimidation of reproductive health advocates and providers remain pervasive. This tactic aims to instill fear in advocates and health providers to refrain from providing sexual and reproductive health services and information. Preliminary findings from a research conducted by Center for Reproductive Rights (the Center) shows

that several health providers have been arrested, detained and extorted by police officers for being suspected to be providing abortion services while indeed their facilities provide a broad range of sexual and reproductive health services. **Annexed hereto and marked JGK-7 is a copy of the said report.**

- 40. **THAT** the blanket criminalization of abortion under the Penal Code has been used to threaten health providers and reproductive rights advocates to not provide the service or information on safe services.
- 41. **THAT** to improve the health outcomes for women and girls in Kenya, there must be a harmonization of all laws with the Constitution and proper policy directions should be given to all law enforcement agencies.
- 42. **THAT** what is deponed to herein is true to the best of my knowledge, information and belief.

10

SWORN at **NAIROBI** by the said

JOSEPH GATHERU KARANJA

This 5th day of February, 2021

Before me



} _____
 DEPONENT

COMMISSIONER FOR OATH

DRAWN & FILED BY:

Martin Onyango

% Centre for Reproductive Rights

4th Floor Pinetree off Kindaruma Road /Off Ngong Road

P.O. Box 52834-00100

Nairobi.

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monyango@reprorights.org

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LSK/2020/05836

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TO BE SERVED UPON: -

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Sheria House,
P.O Box 40112-00100

NAIROBI.

The Director of Public Prosecutions
ODPP House, Ragati Road
Po Box 30701-00100

NAIROBI.

The Inspector-General of Police
Jogoo House 'A' Taifa Road
P.O. Box 44249 - 00100

10

NAIROBI.

The Senior Principal Magistrate Kilifi
P. O Box 287 - 80108

KILIFI

Annexure JGK-1

A Copy of my Curriculum Vitae

PROFESSOR JOSEPH GATHERU KARANJA



PERSONAL DATA:

NAME:
DATE OF BIRTH:
PLACE OF BIRTH:
CITIZENSHIP:
MARITAL STATUS:
CURRENT POSITION:
ADDRESS:

CURRICULUM VITAE

JOSEPH GATHERU KARANJA
30 JUNE 1949
NYERI, KENYA
KENYAN
MARRIED WITH CHILDREN
ASSOCIATE PROFESSOR AND CONSULTANT
OBSTETRICIAN & GYNAECOLOGIST
DEPARTMENT OF OBSTETRICS AND GYNAECOLOGY
UNIVERSITY OF NAIROBI, KENYATTA NATIONAL
HOSPITAL CAMPUS
PRIVATE ADDRESS: PO BOX 56772 CSQ 00200 NAIROBI
Mobile: 0722 513881, 0737 484270

This is a true and correct copy of the original as sworn and declared by me

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EDUCATION:

- DEGREES:
1. 1978-82: University of Nairobi & KNH (Residency), Awarded M.Med. (Obs/Gyn) Degree. Later Board certified as obstetrician /gynaecologist
 2. 1971-76: University Of Nairobi, Faculty of Medicine, Awarded MB.Ch.B. Degree
 3. 1992: Mahidol University, Thailand: Research Methodologies In Reproductive Health And STDs/HIV/AIDS.
 4. 1989: University Of California At San Diego Medical Center And Wellstart, USA: Lactation Education Management Course.

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- 5. 1987 Nov/Dec: Debrecen University Medical School, Hungary: Postgraduate Course On Prenatal Diagnosis And Family Planning
- 6. 1987 May: Assiut University, Egypt: To Study Research Methodology For W.H.O. Study On Progesterone Only Contraceptives During Lactation.
- 7. 1986: Johns Hopkins University, USA: Course On Management Of STDs and Infertility.

Basic EDUCATION.

- 8. 1969-70: Nyeri High School, Passed 'A' Level With 3 Principles.
- 9. 1965-68: Nyeri High School, Passed 'O'level With Division I.
- 10. 1958-64: Githunguri Primary School, Nyeri, Passed KPE With 3 A's. _____ 10

PROFESSIONAL EXPERIENCE:

- 1. Honorary Consultant In Obs And Gyn At KNH from 1992 to date and Visiting/Attending Consultant Obstetrician/Gynaecologist In All Major Hospitals In The City Of Nairobi.
- 2. Worked as a Specialist In Obs and Gyn in KNH from 1983 to 1985 and Honorary Specialist in KNH 1985-92
- 3. Underwent Specialist Training from 1978 to 1982 - Residency In Obs and Gyn at The University Of Nairobi And Kenyatta National Hospital. Awarded M.Med (obs/gyn) In 1983.
- 4. Medical Officer: 1977-78: General Duty Doctor at Garissa Provincial Hospital.
- 5. Internship: 1976-77 Rotated In Surgery, Medicine, Paediatrics, and Obs/Gyn at Nakuru Provincial Hospital. _____ 20

ACADEMIC AND TEACHING EXPERIENCE:

- 1. Pedagogy training, University of Nairobi, 2014
- 2. Associate Professor Of Obstetrics And Gynaecology wef 1st April 2004
- 3. Master Trainer in Reproductive Health, (Advanced Trainer plus Curriculum Development), Johns Hopkins University Program for Training in Reproductive Health (Jhpiego).
- 4. Conducted Didactic and Clinical Training in Basic Laparoscopy, Minilap tubal ligation, No Scapel Vasectomy, Reproductive Health Updates, Reproductive Epidemiology, Reproductive Biology, M.Sc, MVA, Norplant Insertion/Removal, for Health Professionals from Kenya and the Region. _____ 30
- 5. Chairman of Department of OBs and Gyn from August 1st 1994 to 31st July 2000.
- 6. Senior Lecturer 1992 to March 2004
- 7. Lecturer in Obs/Gyn, UoN, 1985-92.
- 8. Honorary Lecturer 1983-84
- 9. Clinical bedside teaching for M.Med Students Since 1983
- 10. Clinical Bedside Teaching Of MB,Ch.B Students Since 1978

EXAMINATIONS: