IN THE COURT OF APPEAL
AT MALINDI
(CORAM: GATEMBU, LAIBUTA & NGENYE, JJA.)
CIVIL APPEAL NO. E029 OF 2022

BETWEEN

KENYA CHRISTIAN PROFESSIONALS' FORUM.....1ST APPELLANT
ANN KIOKO ..... 2ND APPELLANT
CATHERINE NYAMBURA KEGENI OGANGA ..... 3RD APPELLANT

AND

PAK .....1st RESPONDENT
SALIM MOHAMED..... 2ND RESPONDENT
THE ATTORNEY GENERAL ..... 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS .... 4TH RESPONDENT
THE INSPECTOR GENERAL OF POLICE ..... 5TH RESPONDENT
SENIOR PRINCIPAL MAGISTRATE KILIFI ..... 6TH RESPONDENT

Consolidated with
CIVIL APPEAL NO. E030 OF 2022

BETWEEN

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

AND

PAK .....1st RESPONDENT
SALIM MOHAMED..... 2ND RESPONDENT

AND

KELIN KENYA..... 1ST AMICUS CURIAE
WOMEN'S LINK WORLDWIDE.....2ND AMICUS CURIAE
FIDA – KENYA ..... 3RD AMICUS CURIAE
THE LAW SOCIETY OF KENYA..... 4TH AMICUS CURIAE
INTERNATIONAL FEDERATION OF GYNAECOLOGY
AND OBSTERTRICS ..... 5TH AMICUS CURIAE

(Being appeals from the Judgment and Decree of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 24th March 2022

in

Petition No. E009 of 2020)

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JUDGMENT OF THE COURT

1. The two consolidated appeals arose from the judgment and decree of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated and delivered on 24th March 2022 in Petition No. E009 of 2020. As a matter of convenience, we take the liberty to refer to the parties to the two appeals thus: the Kenya Christian Professionals Forum ... 1st appellant; Anne Kioko ... 2nd appellant; Catherine Nyambura Kegeni Oganga ... 3rd Appellant; the Attorney General ... 4th Appellant; the Director of Public Prosecutions ... 5th Appellant; the Inspector General of Police ... 6th Appellant; and the Senior Principal Magistrate, Kilifi ... 7th Appellant; PAK (a minor) ... 1st respondent; and Salim Mohamed

… 2nd Respondent. However, the 5 *amici Curiae* remain in the order in which they were cited in the two appeals.

2. The impugned judgment and decree were delivered in determination of a constitutional petition dated 30th November 2020 filed by the respondents against the 4th to the 7th appellants (both inclusive) seeking the following reliefs, namely:

"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) and 50 of the Constitution.

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, equality, non-discrimination, privacy, education and freedom from cruel, inhuman and degrading treatment and not in the best interest 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 article 26(4) of the Constitution, the Health Act, 2017 and the Sexual Offences Act, 2006 is unlawful and a violation of the Constitution.

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 Principle 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 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 providing abortion care as stipulated under article 26(4) of the Constitution, the Health Act,2017 and the 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 judgment, 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 judgment, 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 judgment, 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."

3. The respondents' petition sought to challenge their arrest, charges and proceedings in Kilifi Criminal Case No. 395 and No. 396 of 2019. In criminal Case No. 395 of 2019, the 1st respondent was charged in the Senior Principal Magistrate's Court at Kilifi with the offence of procuring abortion contrary to section 159 of the Penal Code. The particulars of the offence were that, on 19th September 2019 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.

4. On the other hand, the 2nd respondent had been separately charged in the same court in Criminal Case No. 396 of 2019 with the offence of procuring abortion contrary to section 158 of the Penal Code. The particulars of the charge were that, on 19th September 2019 at Ganze Location in Ganze Sub-County within Kilifi County, jointly with another not before the court, unlawfully administered unknown drugs into the body of PAK (the 1st respondent), which led to her miscarriage.

5. In addition to the main charge, the 2nd respondent was charged with an alternative charge of supplying drugs to procure abortion contrary to section 160 of the Penal Code. The particulars of the charge were that, jointly with another not before the court, on 19th September 2019 at Ganze Location in Ganze Sub-County within Kilifi County, unlawfully supplied drugs to one PAK aged 17 years knowing that it was intended to be unlawfully used to procure the miscarriage of a woman.

6. In an attempt to resist the charges aforesaid, the respondents made an application dated 23rd October 2019 to the trial court

challenging the legality of the charges preferred against them. In its ruling dated 17th February 2020, the trial court (J. M. Kituku, SPM) dismissed the respondents' application and advised them to raise their challenge at the hearing of their defence.

7. Dissatisfied with the trial Magistrate's decision, the respondents filed the subject constitutional petition seeking the orders aforesaid pursuant to: Sections 5,6,7,8 and 10 of the Health Act No. 12 of 2017; the Clinical Officers (Training, Registration & Licensing) Act, No. 20 of 2017; Sections 4,5,6,7,13,16,19 and the Fifth Schedule to the Children Act, 2001; the Prevention of Torture Act No. 12 of 2017; Sections 4 and 5 of the Fair Administrative Action Act, No. 4 of 2015; Articles 3(2),4,5,8,9 (1),16(1) & (2) and 18(3) of the African Charter on Human and Peoples' Rights; 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); Articles 3,4,5,10,11,14,16 & 19 of the African Charter on the Rights and Welfare of the Child; Articles 2(2) and 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Articles 2(1), 6(1), 7, 19(2) and 24 of the International Covenant on Civil and

Political Rights (ICCPR); 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); Articles 2(1) & (2), 3(1) & 24(1) of the Convention on the Rights of the Child (CRC); Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Statute of the WHO and the WHO guidelines on Health worker roles in providing safe abortion care and post-abortion contraception; and section 25 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya.

8. The respondents' petition was supported by the 1st respondent's affidavit sworn on 30th November 2020 in which she averred that she became pregnant after sexual intercourse with a fellow student; that her pregnancy progressed well until 19th September 2019 when she began experiencing severe pain, vaginal bleeding and dizziness; that she visited Chamalo medical clinic for treatment where she was attended to by the 2nd respondent, who informed her that she had lost the pregnancy; that she was treated and admitted for observation; that she was arrested on 21st September 2019 from her hospital bed and taken to Ganze Police Patrol Base; that the officers at the station

wrote a statement in her name and insisted that she signs it, admitting that she had procured an abortion; that she was detained for two nights at the police base and presented to court on 23rd September 2013 when she was charged with the offence aforesaid.

9. According to the 1st respondent, she was subjected to a forced medical examination by the police at Kilifi County Hospital; after being charged, she was remanded at Malindi Juvenile Remand Home from 23rd November 2019 to 24th October 2019; and that concurrent to the charges against her by the Director of Public Prosecutions, the Children's Officer, Ganze Sub-County filed a Children's Application No. 72 of 2019 for her care and protection, seeking to send her to Kikambala Rescue Centre but that, despite the application, she was remanded at Malindi Juvenile Remand Home.

10. The 1st respondent further deposed that, because of her arrest from the hospital, detention at the police station, charge and detention at the juvenile remand, she felt stigmatised, rejected, discriminated, and unwanted by the entire society; that the arrest and detention denied her an opportunity to attend school, affected her

performance and subjected her to ridicule and isolation by other students; that despite her application for a declaration that her charges against her were unmerited, the Magistrate's court insisted that the criminal case proceeds to hearing on 3rd December 2020; and that, if the court did not intervene, she would be subjected to continued and multiple violations of her rights.

11. On his part, the 2nd respondent swore an affidavit on 30th November 2019 deposing that, on 19th September 2019, the 1st respondent visited the clinic where he worked complaining of severe lower abdominal pains, vaginal bleeding and dizziness; that, on examining her, he concluded that she had suffered an incomplete abortion; that he performed complete post-abortion care management on her until she stabilised; that, on 21st September 2019, police officers stormed the clinic, confiscated the 1st respondent's treatment notes, and arrested him together with the 1st respondent and took them to Ganze Police Patrol Base after which they were charged with the offences aforesaid; and that he was remanded in custody at Kilifi GK Remand Prison from 23rd to 27th September 2019.

12. According to the 2nd respondent, his arrest, detention and charge made it difficult for him to provide comprehensive reproductive health care services to women who visit the clinic. He contended that post-abortion care is emergency care protected in law, and that no woman or girl should be denied such care.

13. Joseph Karisa Ngozi, a nurse at Bamba Medical Clinic, also swore an affidavit on 15th January 2021 in further support of the respondents' petition deposing that he was likewise arrested, charged, but subsequently acquitted, all on account of charges relating to the alleged abortion of yet another patient contrary to section 158 of the Penal Code.

14. Likewise, Jonah Morori, a registered nurse at Prestige Health Points Medical Centre in Nairobi County, swore an affidavit on 15th January 2021 in support of the respondents' petition and deposed that he was also arrested soon after performing complete post-abortion care management on a different patient.

15. Karisa and Morori's supporting affidavits were intended to demonstrate how medical personnel were often harassed for undertaking post-abortion care management on patients who had suffered miscarriage.

16. Last, Professor Joseph Gathuru Karanja, a specialist in obstetrics and gynaecology, also swore an affidavit on 3rd February 2021 in support of the respondents' petition. Professor Karanja deposed that post-abortion care was designed to minimise morbidity and mortality associated with abortions whether spontaneous or induced; that the harassment, arrest and prosecution of healthcare workers by the police for providing lawful services stands in the way of reducing maternal deaths in Kenya; that he had reviewed the 1st respondent's medical records and found it consistent with a case of post-abortion care; and that the blanket criminalisation of abortion under the Penal Code has been used to threaten healthcare providers and reproductive health advocates so as not to provide services or information on safe services.

17. In reply, the investigating officer, Sgt. Martin Wanjala, swore a replying affidavit on 15th February 2021 on behalf of the 4th and 5th appellants deposing, *inter alia*: that the issues raised in the petition were premature as they should be dealt with at the defence stage in the trial court; that, by entertaining the petition, the High Court would be interfering with the investigations, and with the entire justice system; that none of the respondents' rights had been infringed on; that, in view of the foregoing, there was no Post Abortion Care provided, but that an abortion was actually procured, which is against the Constitution, the Penal Code, the Health Act and Guidelines; and that the petition was intended to compound the 4th and 5th appellants with a barrage of suits purposed to confuse the issues and tantamount to an abuse of the court process. He urged the court to dismiss the petition.

18. Opposing the petition, the 5th appellant, the Director of Public Prosecutions, filed "Grounds of Opposition" dated 16th February 2021 contending that:

"1. The Petitioners have not demonstrated in any manner how the Respondents have violated their constitutional rights or intend to violate

their constitutional rights as appertains to their acts which led to them being arraigned in court.

2. The Petitioners are attempting to hoodwink this court into believing them so as to sanitize themselves yet their affidavits and the statements they recorded at the Police Station are contradictory and the truth can only be unearthed after the trial court looks into the evidence that was gathered.

3. The 1st Petitioner secretly went to seek medical attention without any parental consent and the 2nd Petitioner breached the medical code of conduct by attending to her without such consent.

4. The 2nd Petitioner does not meet the minimum threshold that is required to be termed as a "Trained Health Professional" as per the Health Act's definition.

5. That a complaint was lodged by the 1st Petitioner's parents and it was investigated by officers from the National Police Service.

6. That the 2nd, 3rd and 4th Respondents have not been shown to have acted either ultra vires or in excess of their powers or contrary to their mandate as enshrined in the Constitution of Kenya.

7. The current laws governing Abortion were breached by the Petitioners and as such the law should be left to take its course in this matter as such issues can be raised in their defence during the trial.

8. The Applicant is engaging in Forum shopping which should not be encouraged by this Honourable Court.

9. The Application is a misuse of the judicial process and judicial time and that the Stay Orders granted by this court should be set aside and the matter handled by the SPM Kilifi to its logical conclusion.

10. The Application is hapless, presumptive and an abuse of the court process and should be dismissed."

19. On their part, the Attorney General, the Inspector General of Police and the Senior Principal Magistrate, Kilifi, the 4th, 6th and 7th appellants, likewise opposed the petition and filed joint "Grounds of Opposition" dated 23rd February 2021 contending:

"1. that the matters/issues of laws and facts raised herein were substantially and conclusively dealt with by a five-judge bench in **Federation of Women Lawyers (Fida - Kenya) & 3 others v Attorney General & 2 others: East Africa Centre for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)** [2019] eKLR hence res-judicata;
2. that the issues raised herein were judicially determined by a court of competent jurisdiction in **Federation of Women Lawyers (Fida - Kenya) & 3 others v Attorney General & 2 others: East Africa Centre for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)** [2019] eKLR hence the same falls short under the doctrine of issue estoppel;
3. that human rights and freedoms as envisioned under the Bill of rights are not absolute and the same are subject to limitations;

4. that sections 158 and 159 of the Penal Code do not offend Article 26(4) of the Constitution and, hence, constitutional; and
5. that the ODPP, Inspector General of Police and the Senior Principal Magistrate are independent offices which the Petitioners should not direct on how to conduct their constitutional duties."

20. In response to Sgt. Martin Wanjala's replying affidavit; the 5th appellant's grounds of opposition; and to the 4th, 6th and 7th appellants' joint grounds of opposition aforesaid, the 1st respondent swore an affidavit on 3rd March 2021 stating that the arrest, investigation and subsequent prosecution of the respondents raised fundamental constitutional questions within the jurisdiction of the High Court; that the High Court has supervisory jurisdiction over the 7th appellant; that the court proceedings instituted by the respondents cannot be construed as directing the appellants on how to discharge their mandate; and that the appellants had not shown any credible evidence to prove that the 1st respondent had procured an abortion.

21. In its judgment dated 24th March 2022, the High Court (R. Nyakundi, J.) allowed the respondents' petition in part. In his view, the learned Judge observed:

"a. That sections 158, 159 & 160 of the Penal Code are not inconsistent with Articles 1, 2, 4, 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.

b. 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. That the language in the impugned sections looked at from the legal lens of the Constitution there is a lacuna on information regarding the termination of pregnancies as strongly provided for in these provisions.

c. That a declaration be and is hereby made and founded on the right to life for Parliament to enact an abortion law and public policy framework in terms of Article 26(4) of the Constitution to provide for the exceptions as stipulated in the Supreme Law.

d. That the declaration be and is hereby made by reviewing of 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.

e. That the forced medical examination in which the 1st petitioner was subjected to by the police violated her rights prescribed under Article 25 on freedom from torture and cruel, inhuman and degrading treatment, right to life within the bounds of Article 26(4), Article 28 on human dignity, Article 29 freedom and security of the person, Article 31 on rights to privacy all of the Constitution.

f. That the right to private communication between a patient and his or her personal doctor is guaranteed and protected under Article 31 of the constitution and other enabling statutes save for the disclosure is consented to by the patient or is in the public interest or the limitations provided for in the Constitution. To that extent the police and the Director of Public Prosecutions are prohibited from criminalizing such communication unless compelled by the due process of the court.

g. That the medical doctor/trained health professional licensed to practice medicine in Kenya by the relevant authorities exercising his/her skill, expertise with due care and attention, good faith inferred from the diagnostic carried out on examination of a patient shall not be guilty of an offence in the expansive provisions of the Penal Code on procuring abortion.

h. That a declaration be and is hereby issued that a prerogative writ of mandamus prayed for by the petitioners against the 1st, 2nd and 3rd respondents to fulfil the public duty on a wide range of duties stated in the petition lacks merit and is therefore denied.

i. That a declaration be and is hereby made to the effect there is no primary justification for a grant of perpetual injunction against the respondents.

j. That a declaration be and is hereby made that section 158, 159 and 160 of the Penal Code on purely procedural and substantive defects fails to capture the letter and spirit to the exceptions in Article 26(4) of the Constitution.

k. That the truism on assessment and award of damages against the State is hereby denied.

l. What constitutes cost be borne by each party."

22. Aggrieved by the learned Judge's decision, the 1st, 2nd and 3rd appellants moved to this Court on appeal in Civil Appeal No. E029 of 2022 on 11 grounds. On their part, the 4th, 5th, 6th and 7th appellants lodged Civil Appeal No. E030 of 2022 on 8 grounds. The 19 grounds on which the two consolidated appeals were preferred are:

"1. The learned Judge erred in law by failing to recognise that the abortion exceptions in Article 26(4) of the Constitution of Kenya amount to limitations to the underlying right to life of the unborn, that should be interpreted narrowly and strictly in accordance with the widest possible enjoyment of the right to life by the unborn.

2. The learned Judge erred in law and in fact by holding that the right to abortion is a fundamental right, treating it as a core right and thereafter interpreted it in a manner that seeks to recognise, protect and

uphold it, without recognizing that abortion is treated by the constitution as a limitation of Article 26(1)'s core right of another person's right to life.

3. The learned Judge erred in law by holding that access to abortion services can be justified by the right to privacy, contrary to the law which holds that abortion is illegal.

4. The learned Judge erred in law in failing to hold that the Petition therein was barred by the doctrine of Issue Estoppel and thus failing to dismiss it.

5. The learned Judge erred in law and fact by wrongly applying international law that is inconsistent with the Constitution thus void to the extent of the inconsistency in interpreting Kenyan law.

6. The learned Judge erred in law and in fact by holding that access to abortion services effectuates vital constitutional values including dignity, autonomy, equality and bodily integrity without consideration of the right of the unborn child.

7. The learned Judge erred in law and in fact by interpreting that the right of a woman to control her reproductive process and rights includes the right to consent to abortion and that the right to terminate a pregnancy is a fundamental right and the decision as to whether to terminate a pregnancy is fundamental to a woman's personal liberty.

8. The learned Judge erred in law and in fact by relying on the U.S Supreme Court decision of ***Roe v Wade 410 US 113 [1973]*** *which is inapplicable to Kenya and has since been overturned.*

9. The learned Judge erred in law and in fact by finding that the decision-making process by the Police and Office of the Director of Public Prosecution to investigate, arrest, charge and prosecute the petitioners therein was flawed and thus the petitioners' rights were violated despite overwhelming evidence to the contrary.

10. The learned Judge erred in law by recognizing an unlimited right to Parliament to legislate away the right to life of the unborn, without consideration of the Constitutional underpinning of the right to life.

11. The learned Judge erred in law and fact by allowing the Petition and granting various declarations and writs related thereto."

12. 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.

13. The learned Judge erred in law and 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.

14. 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, cruel, inhuman and degrading treatment, right to life within the bounds of Article26(4), Article 28 on human dignity, Article 29 freedom from security of person and Article 31 on right to privacy all of the Constitution.

15. The learned Judge erred in his judgment by failing to consider the arguments and dispositions contained in the list of authorities and decided cases and jurisprudence set on the matter before him that were cited by the Grounds of Opposition and Replying Affidavit.

16. 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 the 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.*

17. 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.

18. The learned Judge erred in law and in fact by finding the Respondents' case meritorious and allowing the same.

19. That in all circumstances of the case, the learned Judge failed to do justice before him."

23. In support of the appeal in Civil Appeal No. E029 of 2022, learned counsel for the 1st, 2nd and 3rd appellants herein, M/s. Muma & Kanjama, filed written submissions dated 27th February 2025 together with a list/digest of 20 judicial authorities, which we have duly considered.

24. Likewise, the Principal State Counsel, Ms. Ruth C. Lutta, filed written submissions dated 24th June 2024 followed by a list of 9 judicial authorities dated 2nd September 2025 in support of the appeal in Civil Appeal No. E030 of 2022 on behalf of the Attorney General for the 4th to 7th appellants herein, and which we have taken to mind.

25. In Opposition to the appeal in Civil Appeal No. E029 of 2022, learned counsel for the respondents, Mr. Martin Onyango, filed written submissions dated 5th May 2025, which were also filed in Civil

Appeal No. E030 of 2022 together with a list of 11 authorities dated 16th September 2025, and which we have duly considered.

26. In addition to the submissions aforesaid, learned counsel Ms. Nyokabi Njogu and Ms. Marion Ogeto filed a joint brief with a list of 17 judicial authorities and case digest dated 29th April 2025 on behalf of KELIN Kenya (the 1st *Amicus Curiae*), Women's Link Worldwide (the 2nd *Amicus Curiae*) and FIDA-Kenya (the 3rd *Amicus Curiae*).

27. On their part, learned counsel Ms. Nerima Were and Ms. Phanice A. Kwega represented the Law Society of Kenya (the (4th *Amicus Curiae*) and filed their brief dated 2nd July 2024 citing 2 judicial authorities, which we have taken to mind. Finally, the 5th *Amicus Curiae*, the International Federation of Gynaecology and Obstetrics was represented by Mr. Ochieng (Advocate), who stated that he had filed a brief dated 17th April 2025, but which is not on record.

28. Having considered the record of appeal, the battalion of grounds on which it is anchored, the rival submissions, the respective briefs

by counsel for the *amici curiae*, we form the view that the instant appeal raises the following six issues, namely:

(i) whether abortion is permissible under the laws of Kenya and, if so, under what circumstances;

(ii) whether procuring an abortion is tantamount to depriving the unborn child the right to life as defined under the Constitution of Kenya, 2010;

(iii) whether abortion is a fundamental right under the Constitution free from any limitations;

(iv) whether access to abortion services is justifiable in exercise of a person's right to privacy, human dignity, the right to liberty, and the right to equality and non-discrimination guaranteed under the Constitution;

(v) whether the learned Judge was at fault in holding that the arrest, charge and prosecution of the respondents was unlawful and in breach of any of their fundamental rights; and

(vi) what orders and directions ought we to give in determination of the instant appeal?

29. On the 1st, 2nd and 3rd closely related issues as to whether abortion is permissible under the laws of Kenya and, if so, under what circumstances; whether procuring an abortion is tantamount to depriving the unborn child the right to life; and whether abortion is a fundamental right under the Constitution free from any limitations, the learned Judge formed the view that "… abortion is a fundamental right but … cannot be said to be absolute in light of Article 26(4) of the Constitution." According to the learned Judge, "… the language of the impugned sections [*to wit* sections 158, 159 and 160 of the Penal Code] looked at from the legal lenses of the Constitution there is a lacuna on information regarding the termination of pregnancies as strongly provided for in these provisions."

30. Taking issue with the learned Judge's decision, counsel for the 1st to 3rd appellants submitted that "… abortion is outlawed under the Kenyan laws starting with Article 26 of the Constitution …"; that sections 158 to 160 of the Penal Code criminalises abortion and abortion related activities; and that the import of those provisions is that abortion is not permitted in Kenya save for the limited exceptional circumstances set out in Article 26(4) of the Constitution.

31. According to counsel, "… when dealing with the life of the unborn and abortion, the Court has to start from the foundation that Article 26 denotes the right to life from the moment of conception, and that abortion is a limitation to the right to life. Thus, a holistic reading of Article 26, read together with Article 20(2) on expansive interpretation of rights and Article 24 on restrictive interpretation of limitation of rights, should lead to a restrictive approach of the abortion exception to the right to life of the unborn."

32. To bolster their submissions, counsel cited the Supreme Court's decision in ***Judges and Magistrates Vetting Board & Others v Centre for Human Rights and Democracy & Others*** [2014] eKLR where the then Chief Justice Dr. Willy Mutunga observed that:

"The Constitution has to be interpreted holistically, within its context, and in its spirit."

33. On their part, learned counsel for the 4th to 7th appellants submitted that "fundamental rights are the protections and liberties guaranteed to the people of Kenya by the Constitution. These rights

are expressly and unequivocally outlined in the Bill of Rights." According to counsel, Article 26 unequivocally guarantees the right to life thereby affirming that every person is entitled to life from the moment of conception, and that the language of that Article exclusively prohibits intentional deprivation of life except under the specific circumstances set out in sub-article (4).

34. In rebuttal, learned counsel for the respondents submitted that the trial court interpreted Article 26(4) of the Constitution not in isolation, but in harmony with other constitutional rights, including the right to dignity, health, privacy, non-discrimination and freedom from cruel and degrading treatment. According to counsel, this approach accords with the spirit and letter of the Constitution and is in keeping with the established principles that the Constitution must be interpreted holistically. Counsel cited the Supreme Court decision in ***Communication Authority of Kenya & Others v Royal Media Services Ltd & Others*** [2014] eKLR where the Court emphasised the need for a purposeful and value-oriented reading of the Constitution.

35. In apparent support of the learned Judge's view on the first three issues aforesaid, counsel for the 1st to 3rd *amici curiae* submitted that, "while Kenya's Constitution under Article 26(4) provides for limited circumstances under which safe and legal abortion is permitted, the absence of a clear regulatory framework has resulted in significant barriers to accessing safe abortion services." Counsel cited the decision of the United Nations Human Rights Committee in ***K.L v Peru*** [2005] Human Rights Committee to elaborate on how lack of clear regulations limits enabling legal framework.

36. In a different approach to the three issues, learned counsel for the 4th *amicus curiae* contended that "the fundamental right to an abortion does not stem from Article 26(4), but … from Article 43(1)(a)"; and that "the content of the right to reproductive healthcare necessitates an unbundling of rights that allow people to make decisions on their reproduction free from discrimination, coercion and violence" (see: ***FIDA Kenya & 3 Others v the Attorney General & 2 Others*** [2015] eKLR). According to counsel, Article 26(4) should not be read in a vacuum, but in relation to the entire Bill of Rights and the Constitution as a whole.

37. We must underscore right at the outset the fact that this Court is only obligated to pronounce itself on the propriety of the impugned judgment and decree of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 24th March 2022 in HC Petition No. E009 of 2020 in which the learned Judge quashed the proceedings in Kilifi Senior Principal Magistrate's Court Criminal Case Nos. 395 and 396 of 2019 in which the 1st and 2nd respondents were respectively charged, and which were pending hearing and determination.

38. It is instructive that the right to life is guaranteed by Article 26 of the Constitution, which we take the liberty to replicate hereunder:

Right to life.

26. (1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

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

39. To our mind, the self-explanatory provisions of Article 26(1) and (2) are incontestable at law. Indeed, none of the respondents raised any issue touching on the provisions of the two sub-articles in the two criminal cases. Neither did any of them take issue with those self-executing provisions in Petition No. E009 of 2020 or otherwise seek to challenge the two provisions in so far as they guarantee the fundamental right to life from the very moment of conception.

40. With regard to sub-articles (3) and (4) (both of which set out the circumstances under which abortion may be permitted, the respondents first made an application dated 23rd October 2019 to the trial court in a concerted effort to bring an end to the charges preferred against them. In its ruling dated 17th February 2020, the trial court (J. M. Kituku, SPM) dismissed their application and advised them to raise their challenge at the hearing of their defences.

41. By the ensuing constitutional petition that culminated in the impugned judgment and decree, the respondents renewed their challenge on their arrest and charge in Kilifi Senior Principal Magistrates Court Criminal case numbers 395 of 2019 and 396 of

2019 for allegedly attempting to procure a miscarriage or abortion contrary to sections 158, 159 and 160 of the Penal Code.

42. In view of the foregoing, we hasten to conclude that, even though Article 26(1) and (2) of the Constitution guarantees the fundamental right to life right from conception; and that, in effect, procuring an abortion is tantamount to depriving the unborn child the right to life, abortion is nonetheless permissible in the restrictive circumstances contemplated in sub-articles (3) and (4) of the Constitution, namely: that, in the opinion of a trained health professional, there is need for emergency treatment; that the life or health of the mother is in danger; or if permitted by any other written law. Hence the punitive sanctions imposed by sections 158, 159 and 160 of the Penal Code. In effect, abortion is not a fundamental right guaranteed under the Constitution. On the contrary, the Constitution expressly prohibits it but provides exceptions in limited circumstances when it may be permissible. It is noteworthy that to establish offences under sections 158, 159 and 160 of the Penal Code, the prosecution would have to establish the element of 'unlawfulness' in accordance with the demands of those provisions. And that settles the 1st, 2nd and 3rd

issues before us, and in respect of which we need not say more lest we pre-empt or embarrass the trial court.

43. The most we can say in conclusion is that, in our considered view, the criminal proceedings aforesaid provide the requisite judicial platform on which the veracity of the charges preferred against the respondents stand to be tested in the context of sections 158, 159 and 160 of the Penal Code read together with Article 26(3) and (4) of the Constitution. However, the learned Judge's decision effectively reversed the trial Magistrate's decision to proceed with the two cases and hear and determine the objections raised. He quashed the proceedings and barred further investigations, thereby raising the pertinent question as to the propriety of the impugned judgment and decree.

44. Turning to the 4th and 5th intertwined issues, we hasten to observe that, while the High Court has exclusive jurisdiction under Article 165(3) (b), (6) and (7) of the Constitution to determine constitutional petitions and issue orders, declarations or remedies to enforce fundamental rights and freedoms, including the power to

supervise and control subordinate courts (such as magistrates' courts) to ensure that they act within the law and the Constitution, Magistrates courts have power to determine incidental constitutional questions raised in proceedings before them and grant constitutional remedies pursuant to Article 23(3).

45. In effect, courts, including magistrates Courts, have power to pronounce themselves on constitutional issues raised in any proceedings before them. Put differently, he jurisdiction is therefore concurrent in a qualified sense in that magistrates apply the Constitution on a day to day basis, but they cannot be the primary forum for the enforcement or vindication of fundamental rights through a constitutional petition. The High Court retains that exclusive supervisory and enforcement role.

46. Suffice it for the moment to observe that, having regard to the relevant Constitutional guarantees and the respective remits of subordinate and superior courts, the issue as to whether access to abortion services is justifiable in exercise of a person's right to privacy, human dignity, the right to liberty, and the right to equality and non-discrimination stands to be determined at the trial at which the

relevant constitutional questions are raised, including in proceedings before Magistrates Courts.

47. We form this view conscious of our remit to clarify the constitutional and other statutory provisions on abortion as well as the related reproductive health rights without more so as to avoid the possible risk of encroaching on the merits of the prosecution or defence cases. We do so taking to mind the fact that our remit is more particularly restricted to an inquiry as to whether, having regard to the six issues before us, the learned Judge was at fault in issuing orders to quash the criminal proceedings aforesaid and bar further investigations on the alleged offences. Accordingly, we steer away and abstain from pronouncing ourselves on the 4th issue before us.

48. Turning to the 5th and decisive issue as to whether the learned Judge was at fault in holding that the arrest, charge and prosecution of the respondents was unlawful and in breach of any of their fundamental rights, we take to mind the limited circumstances in which the constitutional court may exercise its powers to quash criminal charges and terminate proceedings against an accused.

Examples of such circumstances are: where the proceedings are instituted or conducted in violation of the accused's constitutional rights (such as the right to fair trial, or where the proceedings are conducted in abuse of court process or in violation of due process); where the prosecution is discriminatory, malicious or otherwise designed to achieve an ulterior motive (such as purely civil debt collection or to settle personal scores); where the accused's rights to a fair trial as guaranteed by Article 50 of the Constitution are irreparably violated; and where the subordinate court lacks jurisdiction or otherwise acts *ultra vires* (beyond its legal authority), all of which must be demonstrated on the required standard, and to the satisfaction of the court. In every case, the court's decision either way must be suitably designed to enforce compliance with the Constitution with regard to the process of investigation, charge and prosecution.

49. As to what constitutes abuse of court process, this Court in ***Meme v. Republic & Another*** [2004] eKLR had this to say:

"An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of

vexation and oppression, or for ulterior purposes, that is to say, court process is being misused."

50. With regard to the more pertinent principle of the rule of law and the need to safeguard fundamental rights and freedoms of the individual *vis a vis* the critical role of the criminal justice system, Mumbi Ngugi, J. (as she then was) correctly stated in ***Kipoki Oreu Tasur v Inspector General of Police & 5 Others*** (2014) eKLR thus:

"The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated ...."

51. With regard to investigation, this Court in ***Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others*** [2013] eKLR held that the High Court can stop a process that may lead to abuse of power and held that:

"Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process."

52. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. This Court in ***Diamond Hasham Lalji & another v Attorney General & 4 others*** [2018] eKLR stated as follows:

"The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is

accorded a fair hearing and that court processes are used fairly by state and citizens."

53. Pronouncing itself on the limitations in the High Court's power to quash criminal proceedings in subordinate courts, this Court in ***Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others*** [2018] eKLR referred to the Supreme Court of India in ***State of Maharashtra & Others v. Arun Gulab & Others***, Criminal Appeal No. 590 of 2007, where the Court stated:

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled-for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings."

54. Having carefully considered the records of the two consolidated appeals, the grounds on which they are anchored, the rival submissions and briefs filed by the *amici curiae* and the law, we reach the respectful conclusion that the judgment and decree of Nyakundi, J. were in error and that, all said and done, the restraint on further investigations and prosecution of the respondents in the two criminal cases aforesaid were unfounded in law. The very fact that the respondents lodged a constitutional reference alleging breach of various constitutional rights could not, of itself, stand in the way of proper investigation, charge and prosecution of the alleged offences in issue.

55. In addition to the foregoing, we took to mind the words of Section 193 A of the Criminal Procedure Code, which reads:

193A. Notwithstanding the provisions of any other written law, the fact that any other matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay,prohibition or delay of the criminal proceedings.

56. What section 193A means is that the respondents were at liberty to petition the High Court pursuant to Article 23(3) of the Constitution (which empowers the High Court to grant appropriate relief, including orders to stop or nullify unconstitutional actions) on account of any breach of their fundamental rights without needless interference with the criminal proceedings aforesaid in the absence of proof that those proceedings and the preceding investigations offended any of the cardinal principles on account of which they would be liable to orders of *certiorari*. In any event, the 1st respondent is at all times at liberty to assert her constitutional right to health care services, including reproductive health care, pursuant to Article 43(1) (a) of the Constitution regardless of the criminal proceedings in issue.

57. In our respectful view, the respondents' petition did not by any means meet the constitutional and other statutory threshold to warrant the impugned judgment and decree in their favour. Our inescapable conclusion is informed by our finding, *inter alia*: that there is no evidence to demonstrate that the Prosecutor acted in disregard of the public interest or against the interests of the administration of justice; that there is nothing to suggest that the two

criminal cases amounted to abuse of the legal process; that, in the circumstances, termination of the criminal cases in issue would invariably frustrate rather than advance the rule of law; that, in any event, the respondents retain constitutional safeguards in respect of their rights notwithstanding the obligation to submit to the trial; that the respondents will at all times be accorded an opportunity to challenge the veracity of the prosecution evidence, including whether the evidence was properly obtained; and that they (the respondents) will be accorded the opportunity to present their respective defences and submit on the relevant judicial authorities and statute law on which their defences would be anchored.

58. Having scrutinised the records in the two consolidated appeals, the written and oral submissions by respective counsel for the parties, the respective briefs by learned counsel for *amici curiae*, the cited judicial authorities and the law, we find that the two consolidated appeals succeed and are hereby allowed. Consequently:

(a) the judgment and decree of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 24th March 2022 be and are hereby set aside;

(b) the proceedings in the Senior Principal Magistrate's Court at Kilifi in Criminal Case No. 395 and No. 396 of 2019 be and are hereby reinstated for hearing and determination on their merits; and

(c) in view of the nature of the public interest in the two consolidated appeals, we hereby direct that each party bears their own costs. Orders accordingly.

Dated and **delivered at Malindi this 24th day April of 2026.**

S. GATEMBU KAIRU, FCIArb, C.Arb

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

Signed
DEPUTY REGISTRAR