

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 490 OF 2025

BETWEEN

HSO.....1ST APETITIONER
AMO.....2ND PETITIONER
TA.....3RD PETITIONER
NETWORK FOR ADOLESCENT AND YOUTH OF AFRICA
(NAYA).....4TH PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT
THE INSPECTOR GENERAL OF POLICE3RD RESPONDENT
THE SENIOR PRINCIPAL MAGISTRATE’S COURT,
MAKADARA LAW COURTS.....4TH RESPONDENT

AND

REPRODUCTIVE HEALTH NETWORK KENYA (RHNK)... 1ST INTERESTED PARTY
KATIBA INSTITUTE.....2ND INTERESTED PARTY
THE CRADLE – THE CHILDREN FOUNDATION.....3RD INTERESTED PARTY

SUBMISSIONS ON BEHALF OF THE PETITIONERS

A. INTRODUCTION

May it please this Honourable Court:

1. The Petitioners, HSO, AMO, TA, and the Network for Adolescent and Youth of Africa (NAYA), appear before this Honourable Court as adolescents and an established national youth-led organization working to advance the rights and wellbeing adolescents in Kenya. NAYA has, for more than a decade, engaged in policy advocacy, community mobilization, and youth empowerment on matters of sexual and reproductive health and rights (SRHR). The individual Petitioners are adolescents who have directly experienced,

or stand in imminent danger of experiencing, arrest, prosecution, and detention for engaging in consensual, non-coercive, and non-exploitative sexual conduct with peers. They therefore approach this Court with lived experience and institutional expertise on the harmful impact of the impugned provisions of the Sexual Offences Act No. 3 of 2006 (the SOA) on adolescents' constitutional rights.

2. The Petition challenges the constitutionality and continued application of Sections 8, 9, 11, and 43(4)(f) of the Sexual Offences Act, whose wording and cumulative effect criminalize consensual, non-coercive, and non-exploitative sexual conduct between adolescents without regard to their evolving capacities, the mutually consensual nature of their relationships, or the distinction between exploitation and normal peer interaction. While the State retains a legitimate and compelling mandate to prevent sexual abuse, exploitation, and violence against children, it may not pursue this objective through legislative provisions so broadly framed that they collapse the essential distinction between harm and consensual, non-coercive, and non-exploitative adolescent behaviour or convert the very children the law seeks to protect into offenders.
3. As a result, the current legal framework, though presented as protective, operates in practice as a system of blanket criminalization of adolescent sexuality. It undermines adolescents' rights to dignity, equality, privacy, health, and non-discrimination; disrupts access to essential health and psychosocial services; exacerbates stigma; and exposes adolescents to the trauma of arrest, prosecution, and possible incarceration. Instead of serving as protective safeguards, the impugned provisions function as punitive tools that silence adolescents, deter help-seeking, and weaken the constitutional guarantee that the best interests of the child shall be of paramount importance under Article 53(2).
4. These submissions are based on and supported by the Affidavits of HSO, AMO, TA, and Victor Rasugu, all sworn on 6 August 2025. Through these affidavits and their annexures, the Petitioners placed before this Honourable Court evidence including personal testimonies, national demographic and public health data, expert analysis, and comparative legal materials. Collectively, this evidentiary record demonstrates that punitive approaches to consensual, non-coercive, and non-exploitative adolescent sexuality have failed globally and domestically; that they do not protect adolescents; and that they inflict profound rights violations and adverse health and social outcomes.
5. The Petitioners submit that the impugned provisions unjustifiably limit several constitutional rights guaranteed to adolescents. By criminalizing consensual, non-coercive and non-exploitative peer relationships, the provisions impose restrictions on dignity (Article 28), equality and non-discrimination (Article 27), privacy (Article 31), and access to the highest attainable standard of health (Article 43(1)(a)). They further disregard the constitutional requirement under Article 53(2) that the best interests of the child must be a primary consideration in every matter concerning a child. These limitations have immediate and harmful real-world consequences: adolescents are subjected to arrest, prosecution, stigma, and the trauma of criminal justice processes for conduct that is developmentally normal and mutually consensual.

B. ISSUES FOR DETERMINATION

6. Arising from the pleadings, the evidence before this Honourable Court, and the legal questions presented in this Petition, the following issues arise for determination:
 - a. **Whether the issues raised in the present Petition are res judicata, having regard to the decision in *CKW v Attorney General & Another (2014)* and the applicable legal principles governing the doctrine.**
 - b. **Whether adolescents are independent rights-holders under the Constitution, entitled to the full protection of the Bill of Rights.**
 - c. **Whether the blanket criminalization of mutually consensual, non-coercive, and non-exploitative sexual conduct between adolescents under the impugned provisions violates or threatens to violate constitutional rights, including the rights to dignity, privacy, health, liberty, equality and non-discrimination, freedom from cruel, inhuman and degrading treatment, and the principle of the best interests of the child.**
 - d. **Whether the Petitioners are entitled to the reliefs sought.**

I. WHETHER THE ISSUES RAISED IN THE PRESENT PETITION ARE RES JUDICATA

7. The Respondents' Preliminary Objection rests entirely on the contention that this Petition is barred by res judicata on account of the decision in *CKW v Attorney General & Another (2014)*. That position cannot withstand scrutiny when the doctrine is properly understood within the context of constitutional litigation and when the factual and legal dimensions of this Petition are accurately appreciated. The Respondents' attempt to collapse this far-reaching and multifaceted constitutional challenge into a rehash of *CKW* ignores the content of that earlier judgment, the evolution of constitutional jurisprudence, the identity and interests of the present parties, and the entirely new legal questions presented here.

The Constitutional Approach to Res Judicata

8. Under section 7 of the Civil Procedure Act, res judicata bars re-litigation of a dispute where: the matter was directly and substantially in issue in the former suit; it was heard and finally determined; and the parties or those litigating under the same title were the same. In constitutional matters, however, the doctrine applies with heightened circumspection. The Supreme Court clarified in *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021)* that while the doctrine of res judicata remains applicable in constitutional litigation, a court may depart from it in limited circumstances. The Court stated that an exemption may be warranted where refusing to hear a constitutional issue on its merits would occasion substantial injustice, a determination that must be made after carefully evaluating the entire context and weighing factors both for and against exercising such discretion. Alternatively, a litigant may justify exemption by demonstrating the existence of special circumstances that warrant departure from the doctrine. Courts have repeatedly recognised that constitutional grievances often implicate public interest, evolving jurisprudence, and new rights-based dimensions that require fresh judicial consideration even where a statute is familiar.

9. It is now settled that res judicata does not apply where:
 - a. the issues raised are substantially different;
 - b. the parties are not the same nor litigating under the same title;
 - c. the previous decision did not examine the present constitutional questions; or
 - d. the matter implicates public interest, the rights of children (*Law of England and Wales, Halsbury's Laws of England, Volume 12A, 5th Edition, 2015*), or systemic human rights concerns.
10. When subjected to these principles, the Respondents' objection falls away.

The Parties Before the Court Are Entirely Different

11. The Petitioners include three adolescents directly affected by arrest, prosecution, detention, interrogation, and stigma; an organization (NAYA) acting in the public interest to challenge a structural rights-violating framework; and RHNK, an interested party representing healthcare providers and adolescents' access to SRHR services. None of these Petitioners, their experiences, or their legal interests were involved in *CKW*. That earlier case involved a single male adolescent raising an individualized complaint. It did not involve a representative action, systemic grievances, or organizational petitioners acting under Articles 22(2)(b)–(c) and 258(2)(b)–(c). The Petitioners here do not litigate under the same title, and the conditions for res judicata are therefore absent at the threshold.

The Issues Raised Are Fundamentally Distinct From Those in *CKW*

12. The Respondents rely on the broad proposition that both cases concern the application of sections 8 and 11 of the Sexual Offences Act to adolescents engaging in consensual, non-coercive, and non-exploitative conduct. But the present Petition raises an entirely different constellation of issues which were neither pleaded, considered, nor adjudicated in *CKW*. Unlike the earlier case, this Petition places before the Court:
 - a. a challenge to the blanket criminalisation of consensual, non-coercive, non-exploitative adolescent relationships under sections **8, 9, and 11**, not merely a claim of gender-based discrimination;
 - b. a challenge to **Section 43(4)(f)** and the statutory presumption of incapacity, which *CKW* never examined;
 - c. a rights-based challenge premised on adolescents' **evolving capacities** under Article 53 and international standards (CRC, ACRWC, General Comment No. 20), a dimension completely absent in *CKW*;
 - d. rights to SRHR under Article 43, including access to reproductive health information, autonomy, privacy, dignity, equality, fair trial, and mental health;
 - e. analysis of Kenya's obligations under the Maputo Protocol, ICESCR, ICCPR, CRC, and ACHPR, none of which were engaged by the court in *CKW*;
 - f. the legality and constitutionality of the arrest, detention, interrogation, and prosecution of the 1st and 2nd Petitioners, and the coercive involvement of the 3rd Petitioner who, though never charged, suffered psychological trauma, stigma, educational disruption, and fear of future criminalization.

13. The earlier decision did not consider the legality of police conduct, detention conditions, the involvement of subordinate courts, the role of the DPP under Article 157(11), or the intersection between criminalization and access to health information or services. The Respondents' assertion that the issues are the same cannot survive examination of the record.

The Remedies Sought Were Never Considered in *CKW*

14. The Petition presently before the Court seeks:

- a. quashing of pending charges in subordinate courts through the Court's supervisory jurisdiction;
 - b. structural interdicts compelling the DPP and Inspector-General to issue circulars to halt unconstitutional arrests;
 - c. mandamus directing the Attorney General to prepare legislative reform within fixed timelines;
 - d. general and aggravated damages arising from specific violations suffered by each Petitioner; declarations on the unconstitutionality of the blanket criminalization of consensual, non-coercive, and non-exploitative adolescent sexuality;
 - e. declarations concerning the unconstitutionality of Section 43(4)(f).
15. None of these remedies, particularly supervisory jurisdiction, structural orders, legislative mandamus, and damages, were sought or analyzed in *CKW*. A case that does not determine the remedies invoked in a subsequent petition cannot bar the latter.

The Present Petition Raises Public Interest and Systemic Constitutional Concerns

16. Where a Petition raises issues of broad public import, especially relating to the rights of children, the doctrine of res judicata is applied sparingly, if at all. Numerous Kenyan decisions affirm that public-interest constitutional litigation is not easily foreclosed by procedural bars. In *Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014) [2014] KESC 6 (KLR) (9 December 2014)* the Court of Appeal held that public-interest constitutional litigation must not be impeded by technicalities. The Supreme Court in *John Florence* similarly emphasized that courts must avoid narrowing the constitutional space by overly mechanical application of res judicata.
17. This Petition concerns the rights of thousands of adolescents across Kenya. It challenges systemic and recurring violations arising from the State's failure to align the Sexual Offences Act with the Constitution, and it calls upon the Court to intervene in a pattern of arrests, prosecutions, stigma, psychological injury, and deprivation of education among adolescents. To choke off such litigation through res judicata would undermine Articles 22, 23, 53, and 165, and would be fundamentally inconsistent with the Court's duty to protect vulnerable populations.

The Jurisprudence Has Evolved Beyond What *CKW* Considered

18. *CKW* predates key developments in constitutional jurisprudence:

- a. proportionality under Article 24, as applied in *Alai v Attorney General & another; Article 19 (Interested Party) (Petition 174 of 2016) [2017] KEHC 6090 (KLR) (Constitutional and Human Rights) (26 April 2017)*; *Law Society of Kenya v Director of Public Prosecutions & 2 others; Kebaso (Interested Party) (Petition E573 of 2024) [2026] KEHC 1486 (KLR) (Constitutional and Human Rights) (12 February 2026)* and *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party) (Petition E016 of 2023) [2024] KEHC 2890 (KLR) (18 March 2024)*
- b. the Supreme Court’s articulation of structural orders in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021)*;
- c. robust children’s rights jurisprudence under Article 53, including *AOO & 6 others v Attorney General & another (Petition 570 of 2015) [2017] KEHC 6022 (KLR) (Constitutional and Human Rights) (12 May 2017) (Judgment)* and *MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) (18 December 2017)*;
- d. recognition of SRHR as enforceable constitutional rights in *Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law and Justice & 6 others (Interested Parties); Women’s Link Worldwide & 2 others (Amicus Curiae) (Petition 266 of 2015) [2019] KEHC 6928 (KLR) (Constitutional and Human Rights) (12 June 2019) (Judgment)* and *PAK & another v Attorney General & 3 others (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (24 March 2022) (Judgment)*
- e. expanded integration of international instruments under Articles 2(5) and (6).

19. It would be jurisprudentially inconceivable to hold that a single-issue decision from 2014 forecloses this Court from participating in a decade of constitutional and international legal evolution.

The Petitioners Could Not Have Been Represented in *CKW*

20. The doctrine of res judicata requires that either the same parties or those litigating under the same title were before the earlier court. Adolescents today who face ongoing or imminent arrest, prosecution, interrogation, or stigma under the Sexual Offences Act could not have been represented in *CKW*, nor could NAYA or RHNK. The Petition invokes Articles 22(2)(b) and (c), allowing for representative and public-interest actions, precisely the categories least amenable to res judicata. The Petitioners are asserting distinct constitutional injuries that are ongoing and future-facing. Their claims cannot be extinguished by a decision delivered when some of these Petitioners were nine or ten years old.

Constitutional Supremacy Displaces the Respondents’ Objection

21. Even if the Respondents could establish all elements of *res judicata*, which they cannot, the Constitution itself requires the Court to hear and determine the Petition. Articles 22, 23, 53, 165, 258, and 259 obligate the Court to develop and apply the law in a manner that vindicates the rights of children, ensures alignment of statutes with the Constitution, and prevents ongoing violations. A procedural doctrine cannot override substantive constitutional rights, especially minors, and especially where the impugned law continues to cause harm.
22. To allow the Preliminary Objection to prevail would not only deny the Petitioners their rights under Articles 22 and 23 but also perpetuate systemic constitutional violations. For these reasons, the objection is untenable and should be dismissed.

II. WHETHER ADOLESCENTS ARE INDEPENDENT RIGHTS-HOLDERS UNDER THE CONSTITUTION, ENTITLED TO THE FULL PROTECTION OF THE BILL OF RIGHTS.

23. Before turning to the specific infringements arising from the impugned provisions, the Petitioners consider it necessary to outline the constitutional framework governing the rights of adolescents. Our submission is that adolescents are not passive recipients of protection but are full rights-bearers under the Constitution. They hold, in their own person, all fundamental rights guaranteed to “everyone,” unless the Constitution expressly limits a particular right to adults. This approach flows directly from the text of the Bill of Rights, which distinguishes between rights available to all persons and those specifically reserved for adults. For example, while the right to vote is expressly limited to adult citizens under Article 38(3), there is no such limitation in relation to the rights to dignity or privacy, which the Constitution extends to “every person.”
24. Adopting this starting point is essential to a proper constitutional analysis. As the Court emphasized in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development ([2013] ZACC 35)*, the question of whether a child’s rights may be limited is not determined at the stage of defining the right itself. Rather, “if we determine that constitutional rights have been limited, we are then required to engage in a justification analysis in terms of section 36.” The Court further noted that although legitimate reasons may sometimes justify limiting a child’s autonomy due to developmental considerations, “*this determination does not occur at the stage of defining the content of a right or determining whether a right has been infringed. Rather, we make this determination when deciding whether the particular limitation is reasonable and justifiable in our constitutional democracy.*”
25. This understanding aligns with long-standing jurisprudence, affirming that children are rights-holders in their own capacity. In *S v M (Centre for Child Law as Amicus Curiae)[2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (S v M)*., Sachs J articulated this principle in powerful terms that remain directly relevant when assessing laws affecting adolescents. The Court stated:

“Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.

The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children. Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.”

26. For purposes of this Petition, recognizing adolescents as independent rights-holders means that the Court must give a broad and generous interpretation to the rights at stake, dignity, equality, privacy, health, and the best interests of the child, before examining whether the State has discharged its burden under Article 24 to justify limiting those rights. This approach avoids narrowing constitutional protections at the outset and ensures that adolescents receive “the full measure of the fundamental rights and freedoms” guaranteed by the Constitution.

III. THE BLANKET CRIMINALIZATION OF MUTUALLY CONSENSUAL, NON-COERCIVE AND NON-EXPLOITATIVE SEXUAL CONDUCT BETWEEN ADOLESCENTS UNDER THE IMPUGNED PROVISIONS, VIOLATES OR THREATENS TO VIOLATE THEIR CONSTITUTIONAL RIGHTS TO DIGNITY, PRIVACY, HEALTH, LIBERTY, EQUALITY AND NON-DISCRIMINATION, FREEDOM FROM CRUEL, INHUMAN AND DEGRADING TREATMENT AND THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD.

27. The Petitioners submit that Sections 8, 9, 11, and 43(1) of the Sexual Offences Act, 2006, as applied to consensual, non-coercive, and non-exploitative sexual conduct between adolescents, violate multiple fundamental rights guaranteed under the Constitution of Kenya. These rights include dignity (Article 28), privacy (Article 31), health (Articles 43 and 53), non-discrimination (Article 27), and the best interests of the child (Article 53(2)). The violations are direct, tangible, and evidenced by the lived experiences of the Petitioners, who endured arrest, detention, prosecution, and social stigma despite engaging in consensual, non-coercive and non-exploitative relationships

a) Right to Dignity (Article 28)

28. Article 28 of the Constitution guarantees that “*Every person has inherent dignity and the right to have that dignity respected and protected.*” Human dignity, though not explicitly defined in the Constitution, operates as the foundational value upon which all other rights and freedoms rest. The Constitution embeds dignity not merely as an aspirational ideal but as a substantive, enforceable right that all State organs must uphold. This centrality of dignity aligns with international human rights instruments, which establish dignity as the organizing principle of all human rights protections.
29. The preamble to the Universal Declaration of Human Rights (UDHR) affirms that:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world... Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person...”

30. Similarly, Article 1 of the UDHR provides that: “*All human beings are born free and equal in dignity and rights.*” These provisions frame dignity as inherent, equal, and inalienable qualities that adolescents equally possess, and that cannot be withdrawn or diminished by the State merely because of age.

31. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) reinforce this understanding. The preambles of both covenants state:

“...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Recognizing that these rights derive from the inherent dignity of the human person...”

32. As a State party, Kenya is bound under Article 2(6) of the Constitution to give full effect to these standards, which prohibit State action that humiliates, degrades, or diminishes the intrinsic worth of any individual, including children.

33. The African Charter on Human and Peoples’ Rights similarly enshrines dignity as inviolable, providing at Article 5:

“Every individual shall have the right to the respect of the dignity inherent in a human being... All forms of exploitation and degradation... shall be prohibited.”

34. The Charter’s formulation is especially relevant in cases involving children, for it prohibits not only overtly abusive treatment but any form of degradation such as the stigma, humiliation, and public shame associated with the criminalization of normal adolescent development.

35. These international and regional standards are augmented by the Constitution of Kenya itself, which places dignity at the heart of the national value system. Article 10 binds all State organs and officers to uphold “*human dignity, equity, social justice and inclusiveness.*” Article 19(2) further affirms that the purpose of the Bill of Rights is “*to preserve the dignity of individuals and communities and to promote social justice...*” Thus, the State’s obligation to protect the dignity of adolescents is not optional, it is constitutionally mandated.

36. Against this normative background, the criminalization of consensual, non-coercive [and](#) non-exploitative sexual conduct between adolescents under Sections 8, 9, 11 and 43(4)(f) of the Sexual Offences Act directly undermines their inherent dignity. By designating developmentally normal and non-coercive interactions as criminal, the law treats adolescents as morally impaired, socially deviant, and undeserving of respect. It attaches shame, guilt, and degradation to conduct that is part of healthy psychosocial development, thereby stripping adolescents of autonomy, self-worth, and social standing.

37. These harms are not theoretical. The lived experiences of the Petitioners demonstrate the concrete indignities inflicted by criminalization. The 1st Petitioner, HSO, was arrested

without a warrant inside his home and detained in adult facilities, exposing him to humiliation, stigma, and acute psychological distress (Supporting Affidavit of HSO, paragraphs 13–27). The 2nd Petitioner, AMO, was deceived into attending a police station and subsequently arrested, placing him in the center of ridicule and judgment within the community (Supporting Affidavit of AMO, paragraph 15). The 3rd Petitioner, TA, though not charged, was subjected to invasive questioning, community shame, and social ostracization at school (Supporting Affidavit of TA, paragraphs 12–15). These facts show a direct invasion into their dignity as persons, dignity in their bodies, identities, sexuality, and social belonging.

38. Comparative constitutional jurisprudence underscores that dignity encompasses autonomy, bodily integrity, and the freedom to make personal choices. The Constitutional Court of South Africa in *Dawood and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8 the Constitutional Court of South Africa stated that:

‘Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

39. In *S v Makwanyane and Another*, (CCT3/94) [1995] ZACC 3, the Constitutional Court, in determining the propriety of the death penalty, stated that: “**The rights to life and dignity are the most important of all human rights... We are required to value these two rights above all others.**” This prioritization underscores that any State action that diminishes the dignity of a child particularly through criminal processes is constitutionally suspect and must meet the highest justification threshold.
40. The right to dignity also encompasses decisional autonomy. In *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5, the Constitutional Court held: “Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.” Similarly, in *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14, it clarified: “...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement.” The criminalization of consensual, non-coercive and non-exploitative adolescent sexual behaviour removes precisely this capacity: the ability of adolescents to make age-appropriate decisions regarding their bodies, relationships, and sexuality, even where such decisions are made safely, consensually, and without exploitation.
41. Further in *Francis Karioko Muruatetu & Another v Republic*, the Supreme Court held: “It is for this Court to ensure that all persons enjoy the right to dignity... treating them as an undifferentiated mass violates their right to dignity... the dignity of the person is ignored...” The rigid and indiscriminate nature of the impugned provisions treating all consensual, non-coercive and non-exploitative adolescent sexual conduct as criminal

without any differentiation mirrors precisely the kind of blanket approach condemned in *Muruatetu*.

42. In *MWK & Another v Attorney General & 4 Others (2017)KEHC1496(KLR)*, Justice Mativo emphasized: “The right to dignity is at the heart of the Constitution... recognizing that every person has worth and value and must be treated with dignity.” Yet the Petitioners were treated not as developing adolescents deserving protection and understanding, but as offenders stripped of worth, respect, and humane treatment.
43. The consequences of such criminalization extend beyond immediate arrest or prosecution. Adolescents subjected to criminal investigation experience long-term stigma, diminished self-esteem, and exclusion from educational, social, and familial spaces. As shown in the affidavits of all three Petitioners, the stigma followed them into school, community, and family environments, affecting their identity formation, social relationships, and mental well-being. The cumulative effect is deep humiliation, precisely what Article 28 seeks to prevent.
44. In light of the constitutional text, international obligations, regional human rights norms, and comparative and domestic jurisprudence, it is clear that the criminalization of consensual, non-coercive and non-exploitative sexual conduct between adolescents operates as an unjustifiable, degrading, and harmful intrusion into the inherent dignity of the child. Sections 8, 9, 11, and 43(4)(f) of the Sexual Offences Act impose humiliation, stigma, and psychological harm on adolescents for engaging in behaviour that is developmentally normal, consensual, non-coercive and non-exploitative. Their application to the Petitioners demonstrates a systematic violation of Article 28.
45. The right to dignity requires that the State treat adolescents as rights-bearing individuals with intrinsic worth, not as presumptive offenders. The impugned provisions invert this constitutional command. They degrade rather than protect, shame rather than support, and criminalize rather than guide. For these reasons, the dignity of the Petitioners has been violated in a manner inconsistent with the Constitution and with Kenya’s binding human rights obligations.

b) Right to Privacy (Article 31)

46. Article 31 of the Constitution of Kenya guarantees every person the right to privacy, including the right to make decisions concerning reproduction free from unwarranted interference. Privacy encompasses a sphere of personal intimacy, autonomy, and control over one’s own body and relationships. It protects individuals from unwarranted intrusion by the State, other persons, or institutions, allowing them to make decisions about their personal lives, including sexual and reproductive choices, without fear of surveillance, stigma, or criminal sanction. As Justice Mativo observed in *MWK & Another v Attorney General & 4 Others (2017) KEHC 1496 (KLR)*, “Article 31 of the Constitution provides the right to privacy of the person, home or property searched. It has become established law, insofar as privacy is concerned, that this right becomes more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which comes into legal play.”
47. The provisions of the Sexual Offences Act No. 3 of 2006 that criminalize sexual acts involving adolescents, namely sections 8, 9, and 11, while intended to protect minors from exploitation, capture a broad range of conduct, including consensual, non-coercive, and non-exploitative sexual activity between adolescents of similar age. By doing so,

these provisions intrude directly into the intimate, private sphere of adolescents' lives. The possibility of criminal investigation or prosecution for consensual acts has a chilling effect on the ability of adolescents to navigate normal developmental experiences, undermining their autonomy and sense of security.

48. Privacy is intimately connected with dignity and personal development. When consensual, non-coercive, and non-exploitative conduct among adolescents is criminalized, their right to make autonomous choices about their bodies is restricted, and their private lives are subject to public scrutiny and moral judgment. This intrusion is not hypothetical. Adolescents may be subjected to interrogation, investigation, and potential prosecution for acts that are developmentally normal, exposing them to stigma, shame, and social exclusion. Such limitations directly infringe their constitutional right to privacy under Article 31, as well as their right to dignity under Article 28.
49. International and regional human rights standards incorporated into Kenyan law under Articles 2(5) and 2(6) reinforce the protection of adolescent privacy. The **Convention on the Rights of the Child (CRC)**, the **African Charter on the Rights and Welfare of the Child (ACRWC)**, and the **Maputo Protocol** recognize the right of children and adolescents to freely express themselves, make decisions about their bodies, and participate in decisions affecting their lives. Criminalizing consensual, non-coercive, and non-exploitative adolescent sexual conduct contravenes these obligations and denies adolescents the core privacy and autonomy these instruments safeguard.
50. Kenyan courts have consistently emphasized that privacy protects individuals' intimate relationships and personal choices. While South African jurisprudence provides persuasive guidance, the principles are applicable in interpreting Kenya's constitutional provisions. In *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others [1998] ZACC 15; 1999 (1) SA 6 (CC)*, the Court stated:

“Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”

Sections 8, 9, and 11 of the Kenyan Sexual Offences Act similarly criminalize conduct that lies at the heart of adolescent private intimacy, thereby violating constitutional rights.

51. In *Botha v Smuts and Another [2024] ZACC 22*, the Constitutional Court of South Africa stated:

“The right to privacy accordingly recognises that we all have a right to a sphere of private intimacy and autonomy without interference from the outside community. The right to privacy represents the arena into which society is not entitled to intrude. It includes the right of the individual to make autonomous decisions, particularly in respect of controversial topics.”

This articulation underscores that privacy is not merely about physical seclusion but includes autonomy over decisions affecting personal, sexual, and reproductive life. Adolescents fall squarely within this protected sphere.

52. Privacy is also recognized as a core component of the right to life and personal liberty. In *Justice KS Puttaswamy (Rtd) v Union of India AIR 2018 SC (SUPP) 1841, 2019 (1) SCC 1*, the Supreme Court of India held:

“Privacy recognises the ability of individuals to control vital aspects of their lives and safeguards the autonomy exercised by them in decisions of personal intimacies, matters of home and marriage, the sanctity of family life and sexual orientation, all of which are at the core of privacy.”

This principle reinforces that criminalization of consensual, non-coercive, and non-exploitative adolescent sexual conduct infringes the very essence of privacy, which includes decision-making in sexual and reproductive matters.

53. Sections 8, 9, and 11 of the Sexual Offences Act intrude upon adolescents’ most intimate relationships and expose them to social stigma, legal jeopardy, and emotional harm. Adolescents’ privacy rights are violated because the law subjects them to surveillance, investigation, and potential prosecution for consensual, non-coercive, and non-exploitative sexual conduct. The intrusion is not peripheral but strikes at the core of their personal autonomy, impairing their ability to form healthy relationships, exercise agency over their bodies, and develop their identities in a safe environment.
54. Privacy and dignity are intertwined. By criminalizing consensual, non-coercive, and non-exploitative sexual conduct between adolescents, the impugned provisions undermine both the Petitioners’ ability to exercise private choice and their inherent sense of self-worth. The law imposes a disproportionate and unjustifiable limitation on the right to privacy, in violation of Article 31, and fails the test of reasonableness and justification under Article 24 of the Constitution. The cumulative effect of criminalization, public exposure, potential prosecution, and social stigma, threatens adolescents’ developmental rights, autonomy, and psychosocial well-being.
55. The Petitioners’ experiences illustrate these harms concretely. The 1st Petitioner, HSO, was arrested in his home and detained in adult facilities, exposing him to trauma and social stigma. The 2nd Petitioner, AMO, faced arrest and public shaming. The 3rd Petitioner, TA, experienced social marginalization and psychological distress due to scrutiny of her intimate conduct. These examples demonstrate that criminalization directly infringes the constitutional right to privacy, as protected under Article 31, and cannot be justified in a society committed to the human dignity and evolving capacities of adolescents.

c) Right to Health, Equality, and Non-Discrimination

56. The Constitution of Kenya affirms the right to health and the principle of equality and non-discrimination as foundational to the enjoyment of all human rights. Article 43(1) guarantees the right to the highest attainable standard of health, explicitly including reproductive health services, while Article 53(1)(c) extends these protections to children. These provisions, read together with Section 5 of the Health Act, 2017, obligate the State to ensure that every person, including adolescents, has access to promotive, preventive, curative, palliative, and rehabilitative health services in a manner that respects dignity, privacy, and human rights.
57. The affidavits in support of the petition establish that the adolescent applicants have been denied timely and appropriate access to reproductive health information and services. HSO’s affidavit (paras. 13–27) demonstrates that, despite seeking care, he was denied

services due to health providers' fear that providing condoms, counseling, or contraceptives could be interpreted as facilitating an "illegal act" under the Sexual Offences Act. Similarly, AMO's affidavit (paras. 7–15) confirms that adolescents are routinely denied access to confidential sexual and reproductive health services. TA's affidavit (paras. 13–17) shows the gendered and psychological impact of these barriers. Victor Rasugu's affidavit (paras. 13–18, 26–28) further corroborates these experiences, highlighting systemic barriers including provider bias, lack of adolescent-friendly services, and fear of prosecution. These evidentiary facts illustrate **the** practical impact of criminalization, which systematically discourages adolescents from exercising their constitutional right to health.

58. Article 27 reinforces protection against discrimination, guaranteeing equality before the law and prohibiting unfair discrimination on grounds including age. The criminalization of sexual conduct among adolescents constitutes differentiation on a listed ground, age, and directly impairs the capacity of adolescents to access health care, thereby infringing their fundamental dignity and right to life, health, and development. The affidavits confirm that these barriers are not hypothetical but experienced daily, resulting in stigma, fear, and exclusion from essential health services.
59. Jurisprudence on equality emphasizes **substantive equality**. The Constitutional Court of South Africa, in *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)*, and in *Minister of Finance v Van Heerden [2004] ZACC 3*, recognized that equality must account for historical disadvantage, social context, and structural inequality. Similarly, *Prinsloo v Van der Linde [1997] ZACC 5* held that identical treatment may perpetuate inequality if it ignores the social realities of marginalized groups. Kenyan courts have adopted this approach, notably in *John Kabui Mwai & 3 Others v Kenya National Examination Council [2011] eKLR, Petition No. 15 of 2011*, recognizing that the context in which differentiation occurs is critical in determining discrimination. The affidavits detail the systemic barriers adolescents face, fear of arrest, lack of information, inadequate counseling: highlighting the need for a substantive equality analysis.
60. The criminalization of adolescent sexual conduct constitutes indirect discrimination. Neutral laws can produce discriminatory outcomes when their effect disproportionately impacts vulnerable groups, as established in *Griggs v Duke Power Co., 401 US 424 (1971)* and *Fredrick Gitau Kimani v Attorney General & 2 Others [2012] eKLR, Petition No. 157 of 2011*. The affidavits confirm that health workers, fearing liability, routinely withhold services from adolescents, effectively creating differential access based on age.
61. International law reinforces the State's obligation to protect adolescent health and ensure equality. Article 12(1) of the ICESCR guarantees the right to the highest attainable standard of physical and mental health. The African Charter on Human and Peoples' Rights obliges states to take all necessary measures to protect population health. The Committee on the Rights of the Child, General Comment No. 20 (2016), para. 11, notes that adolescence itself can be a source of discrimination, with adolescents often treated as incompetent or inherently at risk while paradoxically being subject to criminalization. The Committee urges states to ensure equal protection under the law for adolescents. Pursuant to Article 2(6) of the Constitution, these treaties are incorporated into domestic law. The affidavits demonstrate that the applicants are precisely the group identified as at

risk, experiencing discrimination and exclusion from healthcare services due to criminalization.

62. Article 27 requires that any differentiation be assessed for fairness and legitimacy. *Harksen v Lane NO 1998 (1) SA 300 (CC)* establishes that differentiation on a listed ground is presumed discriminatory, and unfairness is presumed unless proven otherwise. The differentiation imposed by the Sexual Offences Act, consensual, non-coercive, and non-exploitative sexual activity between adolescents, directly burdens a vulnerable group, limits access to healthcare and impacts dignity. Evidence from the affidavits shows that the harm is concrete and experienced daily, fulfilling the test for unfair discrimination.
63. Affirmative action under Article 27(6) and (7) encourages remedial measures to redress historical and structural disadvantages. Rather than providing support, the law actively entrenches disadvantages, limiting access to reproductive health services. Jurisprudence such as *Milka Adhiambo Otieno & Another v AG & 2 Others, Civil Petition No. 33 of 2011* and *John Kabui Mwai & 3 Others v Kenya National Examination Council [2011] eKLR* reinforces the State's obligation to take positive steps to ensure equality for vulnerable groups. The affidavits document that no such positive measures exist for adolescent minors seeking reproductive health services, confirming the discriminatory effect of the current law.
64. Of note is the case of *G.O vs Republic, Criminal Appeal No. 155 of 2016*, where the High Court of Kenya overturned the conviction of a 15-year-old boy who was found guilty of "defiling" a 17-year-old girl by magistrate's court. The Court determined that the guilty verdict was illegal and contrary to the Children Act, the Kenyan Constitution, and the Sexual Offences Act. While the decision was grounded in the fact that the minor was charged as an adult, the Court also found that apportioning blame only to the male adolescents amounted to discrimination and stated that:

"The appellant was discriminated against on the basis of sex in that he was arrested and charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement"

65. The Petitioner's submit that criminalization of consensual, non-coercive, and non-exploitative sexual conduct among adolescents constitutes both direct and indirect discrimination, violating Articles 27, 43, and 53 of the Constitution. The evidence demonstrates that the law systematically limits adolescents' access to sexual and reproductive health services, interferes with their dignity, and perpetuates structural disadvantage. It fails the test of substantive equality, conflicts with international human rights obligations, and represents an unconstitutional impediment to the realization of adolescents' fundamental rights.

d) Best Interests of the Child (Article 53)

66. Article 53(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child." This provision operates both as a self-standing right and as a guiding principle in all matters affecting children. Determining what is in a child's best interests requires a careful balancing exercise, taking into

account the particular circumstances of the child, their developmental needs, and the potential impact of any law or State action.

67. The impugned provisions of the Sexual Offences Act sections 8, 9, and 11 criminalize consensual, non-coercive, and non-exploitative sexual conduct between adolescents of similar ages. The evidence before this Court demonstrates the real-life consequences of these provisions.
68. HSO, a 17-year-old adolescent, deposes that his relationship with CNK, a peer of 16 years, was consensual, non-coercive, and non-exploitative and mutually supportive. Yet, when authorities learned of their relationship, HSO was arrested, detained with adult men at Kasarani Police Station, and faced criminal prosecution. The detention was deeply traumatic, separating him from familiar environments and supports, and exposing him to emotional distress that continues to affect his daily life. (HSO, paras 15–16, 21–26)
69. Similarly, AMO recounts being arrested and remanded at Kamiti Youth Correctional and Training Centre, despite being a minor. The formal investigation required him to recount intimate aspects of his sexual conduct, causing humiliation and a profound sense of fear. TA, for her part, describes the emotional toll of being interrogated and compelled to testify in court, resulting in violations of her privacy, autonomy, and dignity. (AMO, paras 7–15; TA, paras 13–16).
70. NAYA, the organization supporting these adolescents, corroborates that when adolescents are subjected to the criminal justice system for consensual, non-coercive, and non-exploitative sexual activity, they are less likely to seek guidance or support from caregivers, educators, or health providers. Instead, they are driven to conceal their behavior, creating conditions that are more harmful than protective. (NAYA, paras 8–12).
71. These experiences align closely with the reasoning in *Teddy Bear*, where the South African Constitutional Court found that legal provisions which expose children to the criminal justice system without due regard for their circumstances are inconsistent with the best interests of the child. The Court observed:

“If there is evidence that exposing children to the criminal justice system for engaging in consensual sexual behaviour has a negative impact on them generally, then a court may declare the scheme to be contrary to the best interests of the child in terms of section 28(2), and therefore invalid.” (Teddy Bear, para 34)
72. Criminalization of consensual, non-coercive, and non-exploitative sexual conduct directly interferes with adolescents’ ability to form trusting relationships with parents, guardians, or counselors. HSO deposes that, because of fear of prosecution, he hid his relationship from caregivers, worsening his isolation and emotional vulnerability. AMO and TA describe similar disruptions: the formal investigations and looming threat of prosecution fractured family interactions and exposed them to stigma and shame. (HSO, paras 20–22; AMO, paras 15–16; TA, paras 13–16)
73. As the South African Constitutional Court noted in *S v M ([2007] ZACC 18, para 20)*, the law must make best efforts to avoid any breakdown in family life or parental care that threatens to put children at increased risk. Here, the impugned provisions produce precisely the kind of rupture and disruption that Article 53(2) seeks to prevent.
74. Even diversion procedures fail to remedy constitutional harm. Interactions with police, magistrates, probation officers, and prosecutors require adolescents to disclose intimate sexual conduct, generating trauma, public exposure, and a chilling effect on adolescent autonomy. HSO, AMO, and TA each testify to the ongoing psychological impact of these

processes, which continue to compromise their sense of security and dignity. (HSO, paras 21–26; AMO, paras 12–14; TA, paras 13–16)

75. The *Teddy Bear* Court recognized:

“Foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.” (Teddy Bear, para 74)

76. The argument that prosecutorial discretion can save the impugned provisions is unsustainable. HSO deposes that the fear of prosecution persists, despite interventions that mitigated immediate risk. The Court emphasized:

“In principle, and as this Court has made plain, the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions. If the discretion to prosecute exists, the prospect of an adolescent being arraigned under the impugned provisions is ever-present.” (Teddy Bear, para 76)

77. Mandatory prosecution of both adolescents in consensual, non-coercive, and non-exploitative conduct cases is particularly irrational. Prosecuting the younger adolescent whose conduct was likely influenced by developmental immaturity serves no protective function and compounds harm, violating the proportionality principle implicit in Article 53(2). As the Court noted:

“It strikes me as fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices.” (Teddy Bear, para 79)

76. This Court is constitutionally obliged to consider the facts complained of in this case through the lens of **Articles 53(d), (f), and (2)** of the Constitution, to determine if the police officers considered the first petitioners' best interests, and if they did, whether they accorded the best interests paramount importance. The said provisions provide that every child has a right:

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(f) not to be detained, except as a measure of last resort, and when detained, to be held:

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age;

(2) A child's best interests are of paramount importance in every matter concerning the child.

77. Courts are enjoined when interpreting any legislation to promote the values that underlie an open and democratic society based on human dignity, equality, and freedom. As Moseneke DCJ stated:

“The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with transformative roles... The

judiciary will lose its constitutionally derived legitimacy without an appropriate legal culture change.” (*Transformative adjudication*, 2002)

78. All courts, including the High Court, must uphold the rights of all, ensure compliance with constitutional values, and do so by granting “appropriate relief,” “just and equitable orders,” and by developing the common law “taking into account the interests of justice.” (Froneman *J, Kate v MEC for the Department of Welfare, Eastern Cape [2005] 1 All SA 745 (SE) para 16*)
79. Arrest, detention, and other police interventions are inherently invasive. Article 53 obliges police officers to ensure that arrest is a measure of last resort, detention is for the shortest appropriate time, children are separated from adults, and their best interests are paramount.
80. Failure to adhere to these standards, as demonstrated in this case, constitutes a blatant violation of constitutional rights. The first petitioner’s detention caused significant psycho-emotional trauma, which could have been avoided had proper procedures, including pre-trial conferences and explicit communication of the child’s age to the court, been followed. (Section 143, Children’s Act; Article 21(3), Constitution)
81. The High Court in *VKR v Republic (Criminal Appeal 7 of 2020) [2021] KEHC 1336 (KLR)* highlighted the herculean task of courts to protect children and emphasized that a failure to consider a child’s age in sentencing can have severe consequences. Courts must act in a manner that safeguards the best interests of the child at all stages of criminal proceedings.
82. The **African Charter on the Rights and Welfare of the Child**, preamble and Article 16(1), recognizes that:

“States parties... shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially... maltreatment including sexual abuse.”
83. Jurisprudence emerging from South African courts which we urge this court to be persuaded by mandate a child-sensitive criminal justice system, where interventions avoid harm and promote the child’s development (*Centre for Child Law, S v M*). These norms reinforce that criminalizing consensual, non-coercive, and non-exploitative adolescent sexual activity is inconsistent with the best interests principle.
84. In conclusion, the blanket criminalization of consensual, non-coercive, and non-exploitative sexual conduct between adolescents, the threat of arrest and prosecution, and the mandatory prosecution framework imposed by sections 8, 9, and 11 of the Sexual Offences Act are incompatible with the constitutional mandate that the best interests of children be paramount, and must be declared unconstitutional or reformed.

I. Whether Limitations on Rights Are Reasonable and Justifiable in an Open and Democratic Society

85. Under Article 19(3)(c) of the Constitution of Kenya, the rights and fundamental freedoms in the Bill of Rights are subject only to limitations contemplated in the Constitution. Article 24(3) places the burden on any party seeking to limit a right or freedom to justify that limitation. The courts have consistently emphasized that any limitation on constitutional rights is an exception rather than a rule, and the standard for justification is exacting. In *National Assembly v Katiba Institute & 6 Others [2023] KECA 1174*

(*KLR*), the Court of Appeal held that Article 24 envisions a deliberate scheme to safeguard rights, permitting limitation only within structured and strict parameters. Similarly, in *CMM v Standard Group & 4 Others [2023] KESC 68 (KLR)* and *Kandie v Alassane BA & Another [2017] KESC 13 (KLR)*, it was reaffirmed that any limitation must satisfy the strict proportionality and reasonableness test under Article 24.

86. The High Court in *Robert Alai v Attorney General & Another [2017] KEHC 6090 (KLR)* emphasized that the onus is on the State to place before the court both factual material and policy considerations justifying the limitation, and that there is no presumption of constitutionality of legislation limiting fundamental rights (*Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR*). Article 24(2)(a) further requires that any law enacted or amended after the Constitution's effective date must expressly state its intention to limit a right and indicate the nature and extent of the limitation. The proportionality principle, as explained in *Jacqueline Okuta & Another v Attorney General & 2 Others [2017] KEHC 8382 (KLR)*, mandates that limitations must employ the least restrictive means possible, ensuring that fundamental rights are protected against arbitrary or excessive infringement.
87. It is within this framework that the reasonableness and justifiability of the impugned provisions, sections 8, 9, and 11 of the Sexual Offences Act, 2006 must be assessed.

i. The Importance of the Purpose of the Limitation

88. The respondents may contend that the provisions aim to protect adolescents from risks associated with sexual activity, including psychological harm, sexually transmitted infections, and unintended pregnancies. While the Court recognizes that preventing harm to adolescents and promoting healthy development are legitimate objectives, it is critical to interrogate the true purpose of the limitation.
89. In *Teddy Bear Clinic*, the Court found that criminal prohibitions cannot be justified on the basis of preventing sexual gratification per se, as this would have no place in an open and democratic society grounded in human dignity, equality, and freedom. Similarly, in the Kenyan context, any purported purpose of sections 8, 9, and 11 that criminalizes consensual, non-coercive, and non-exploitative adolescent sexual conduct goes far beyond the legitimate aim of protecting adolescent health. The overbroad nature of the provisions means that they capture behaviour that does not inherently cause harm, thereby failing the first prong of the justification analysis.

ii. The Nature and Extent of the Limitation

90. The impugned provisions constitute a profound encroachment on the rights to dignity, privacy, health, and the best interests of the child. Arrest, interrogation, and prosecution of adolescents for consensual, non-coercive, and non-exploitative sexual conduct expose them to trauma, stigma, and social disruption. Even where prosecutorial discretion or diversion measures exist, these only temper some harms; adolescents are still subjected to early and invasive processes in the criminal justice system, including questioning about their intimate conduct. Such exposure constitutes a serious invasion of rights that cannot be mitigated merely by the discretion of individual officers.
91. The experiences of the petitioners illustrate this clearly. HSO, AMO, and TA were arrested, detained, and subjected to invasive questioning regarding consensual, non-

coercive, and non-exploitative sexual relationships. These interactions caused severe psychological distress, fear of authority figures, and disruption of education and social life, demonstrating the disproportionate and deeply intrusive nature of the limitations imposed by the impugned provisions.

iii. **The Relationship Between the Limitation and the Statutory Purpose**

92. The State bears the evidential burden to demonstrate that the limitation is rationally connected to its purported purpose. Article 24(3) obligates the State to prove that the limitation is reasonable and justifiable, and Kenyan courts have repeatedly held that reliance on mere assertions without evidence is insufficient. In *Teddy Bear Clinic*, the Court emphasized that the State must produce material evidence to show that the limitation achieves its intended effect.
93. Here, there is no evidence demonstrating that sections 8, 9, and 11 of the Sexual Offences Act effectively deter adolescents from engaging in sexual activity that carries risks of harm. On the contrary, expert evidence and lived experiences demonstrate that criminalization drives sexual conduct underground, preventing adolescents from accessing guidance, sexual health education, and care services. This directly undermines the purported objective of protecting adolescent health.
94. Further, as in *Teddy Bear Clinic*, the provisions produce irrational outcomes. Adolescents who experience sexual violence may be discouraged from reporting it for fear of being prosecuted for consensual, non-coercive, and non-exploitative acts, defeating the law's protective purpose. Similarly, caregivers are disempowered, as they cannot offer guidance or intervene without risking legal exposure. The lack of a rational connection between the provisions and their intended protective purpose renders the limitations unconstitutional.

iv. **Less Restrictive Means**

95. Even assuming the State could demonstrate a legitimate purpose, there are clearly less restrictive and more effective means to achieve the objective. Comprehensive sexuality education, open parent-child communication, and confidential access to adolescent-friendly reproductive health services have been empirically shown to reduce risky sexual behaviour. Criminalization, in contrast, exacerbates risk by driving adolescent sexual conduct underground and preventing access to guidance and support.
96. The court in *P.O.O. (A minor) v. Director of Public Prosecutions & the SRM, Mbita Law Courts (2017)*, in considering whether children had the capacity to consent to sex as well as what crime was committed when such an act occurred and who ought to be charged, proposed such alternative less restrictive means when it held:
- “I think these are children who need guidance and counselling rather than criminal penal sanctions. I really think this kind of situation should be reexamined by the criminal justice system.”
97. The Court in *Teddy Bear* noted that limitations must be narrowly tailored and proportionate; the impugned provisions are over-inclusive, capturing conduct that does not carry material risks. In the Kenyan context, the State has not provided evidence to show that criminalization is necessary or effective to achieve the intended protection. Section 36 and Article 24 require that the least restrictive means be used, and clearly, these provisions fail that test.

98. Sections 8, 9, and 11 of the Sexual Offences Act, 2006, impose limitations on adolescents' rights to privacy, dignity, health, and access to reproductive services that are neither reasonable nor justifiable in an open and democratic society. The State has not discharged its evidential burden under Article 24, and the provisions are overbroad, lack rational connection to their stated purpose, produce irrational outcomes, and fail to employ less restrictive alternatives. In accordance with the principles articulated in *Teddy Bear*, and under Kenyan constitutional law, these limitations cannot be justified, and the impugned provisions therefore fail the test of constitutional validity.

IV. WHETHER THE RELIEFS SOUGHT SHOULD BE GRANTED

99. The violations established in Issues One and Two trigger the full remedial jurisdiction of this Court under Article 23(3). Once a breach of the Bill of Rights is demonstrated, the Constitution requires, not merely permits, the Court to craft relief that is effective, just, and capable of vindicating the rights infringed. As the Supreme Court explained in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR)*, (paragraph 121-122) "appropriate relief" is a context-sensitive inquiry, one that must respond to both the nature of the violation and the structural conditions that allowed it to occur. In this petition, the violations are profound, ongoing, and structurally embedded. The question is therefore not whether relief should be granted, but the extent and form such relief must take.

a. Declaratory Relief and the Invalidity of the Criminalisation

100. Declaratory orders are the bedrock of constitutional remedies. As the Court of Appeal affirmed in *Attorney General v Bala [2023] KECA 117 (KLR)*, declarations serve both to clarify the rights of the parties and to affirm constitutional boundaries for State actors. Here, the Petitioners' arrest, detention, and prosecution under sections 8, 9, 11 and the presumptive incapacity provision in section 43(4)(f) of the Sexual Offences Act have been shown to violate Articles 25, 27, 28, 29, 31, 43, 48, 49, 50, and 53 of the Constitution. These violations are neither incidental nor technical; they flow directly from a statutory framework that unconstitutionally criminalizes consensual, non-coercive, and non-exploitative adolescent sexual conduct.

101. Consistent with Article 2(4), the Court must therefore declare the impugned provisions invalid to the extent of their inconsistency with the Constitution. As in *CORD v Republic, Okuta*, and *Katiba Institute*, where a statutory limitation fails Article 24 proportionality, its continued application cannot be sustained. The declarations sought in Prayers A and C are thus both appropriate and necessary.

b. Quashing of the Criminal Charges (Certiorari)

102. The Petitioners have been subjected to active criminal proceedings; Makadara Criminal Case No. 34 of 2025 for the 1st Petitioner, and MSCO/E239 of 2023 for the 2nd Petitioner. These prosecutions arise solely from conduct that this Court has already found to be constitutionally protected. In *Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party) [2021] KEHC 12538 (KLR)*, the High

Court held that criminal proceedings rooted in unconstitutional actions or in violation of fundamental rights cannot stand and must be quashed through certiorari.

103. The Petitioners' experiences underscore the urgency of such relief. The 1st Petitioner was arrested, detained overnight, publicly paraded before peers and neighbours, and forced to undergo humiliating "age assessment" and invasive examinations, despite no allegation of coercion, force, or exploitation. The 2nd Petitioner endured multiple night detentions, the trauma of being labelled as a "rapist" in school and community settings, and severe educational disruption. The prosecutions thus constitute ongoing violations of human dignity, privacy, bodily integrity, and the best interests of the child. Certiorari to quash both charge sheets is therefore unavoidable.

c. Inappropriateness of Severance or Reading-In

104. While Article 23(3) empowers this Court to modify legislation where appropriate, severance and reading-in are proper only where the unconstitutional portion is clearly separable and the modified statute does not distort legislative intent. As the Constitutional Court of South Africa explained in *National Coalition* and *Coetzee*, and as McLachlin J emphasised in *Schachter v Canada*, judicial modification must cure the defect while respecting legislative design.
105. Legal frameworks regulating consent to sexual conduct for adolescents are often designed to address specific concerns, such as protecting adolescents from violence or coercion; preventing conduct that is viewed as amoral or potentially harmful; and preventing harm to the adolescents' health or the spread of infectious diseases, such as HIV. These rationales result in laws and policies that may address capacity and consent in hugely different and often incohesive manners. For example, laws regulating age of consent to sex are often primarily geared towards preventing sexual violence and exploitation. In their efforts to prevent sexual violence, these laws adopt a bright line rule that certain individuals (those below a specific age) cannot legally consent to sex, and therefore any sex with an individual under this age is deemed a crime. In such circumstances, there is no examination into whether an individual had the capacity to and willingly expressed consent. A comparative review of legislation in other jurisdictions in Africa and the Americas demonstrate the differing legal frameworks to adolescent sexual conduct.
106. The recent amendment to Malawi's Penal Code, specifically the repeal of Section 138 and the introduction of a new progressive provision, decriminalizing consensual, non-coercive, and non-exploitative sex between adolescents represents a significant step towards modernizing the country's legal framework concerning sexual offences involving adolescents. This new provision aligns Malawi with a growing number of African countries that recognize the importance of protecting the rights and well-being of adolescents while addressing issues of consensual, non-coercive, and non-exploitative sexual activity among adolescents.
107. The new Penal Code provision provides as follows:
9. The principal Act is amended by deleting section 138 and substituting therefore a new section as follows-
"Sexual intercourse with a child
"138.- (1) Any male person who has sexual intercourse with a female child shall be guilty of a felony and shall, upon conviction, be liable to imprisonment for life.

(2) Any female person who has sexual intercourse with a male child shall be guilty of a felony and shall, upon conviction, be liable to imprisonment for life.

(3) It shall be a defense to a charge under subsection (1) or subsection (2) if it is proved to the court that the male person or female person so charged is a child and a) the age difference between the person so charged and the female child or male child against whom the offence is alleged to have been committed is two years or less; and

(b) the female child or male child against whom the offence is alleged to have been committed consented to the sexual intercourse."

108. The amendment acknowledges the reality of consensual, non-coercive, and non-exploitative sexual activity among adolescents and aims to balance the need for protection with the recognition of adolescent autonomy. By establishing a two-year age difference as a mitigating factor and requiring mutual consent, the law seeks to minimize the harmful effects of criminalization on adolescents' lives.

109. Peruvian courts have considered the issue of adolescent consent to consensual, non-coercive, and non-exploitative sexual conduct between two adolescents and determined that a complete prohibition on all sexual conduct between adolescents was unconstitutional. In 2012 the Constitutional Court of Peru heard a case (00008-2012-P/TC, Tribunal Constitutionnel, Dec. 12, 2012 (Peru) challenging the constitutionality of Article 1 of Law No. 28704, which modified Article 173(3) of the Peruvian Penal Code, to criminalize all sexual conduct between and with adolescents, including consensual, non-coercive, and non-exploitative sexual conduct between two adolescents. Petitioners argued that the law infringed on adolescent's fundamental rights, including their rights to development, equality and non-discrimination, access to information, health, and to private life, and requested that the Court create an exemption to the law for adolescents between 14-18 years old who are engaging in consensual, non-coercive, and non-exploitative sexual conduct.

110. The Court agreed with the argument that this criminalization without a close in age exception for consensual, non-coercive, and non-exploitative conduct restricts adolescent development and prevents them from realizing their right to development under Sections 15 and 16 of the Peruvian Constitution. The Court noted that this exemption is specifically for consensual sexual conduct, and that violent conduct would still be criminalized in the manner pursuant to the law. Therefore, the Peruvian Constitutional Court held that the law was unconstitutional as it related to cases of consensual sexual conduct between adolescents between the ages of 14-18.

d. Close in Age Exceptions: Case of Rwanda and Canada

111. Countries often have "close in age" exceptions to their statutory rape law, recognizing that there are certain circumstances in which people below the age of majority can consent to sexual conduct. Known colloquially as "Romeo and Juliet" laws, these exceptions permit sexual conduct between two consenting people who are aged within a range articulated in the law, between 2 or 3 years apart. For example, Canada has set the age of consent to sexual conduct at 16 years old. However, it includes two "close in age" exceptions; one for 14 and 15 year olds, provided their partner is no more than 5 years older, and "there is no relationship of trust, authority or dependency or any

other exploitation of the young person." The other exception is for 12 and 13 year olds, who can consent to sexual conduct if the person is no more than two years older, and there is no exploitation. The law explicitly states that sexual conduct with people older than the explicitly stated age differences is criminalized.

112. In 2018, Rwanda passed a new Penal Code that decriminalizes consensual sex among adolescents who are at least 14 years. Article 133 of the new Penal Code provides that: The use of the term "defilement" in relation to the decriminalized acts may stigmatize adolescents exempted from sanction since the term is associated with a criminal offence and/or wrongdoing. The amendment will go a long way toward minimizing harm suffered by adolescents.
113. In the context of Kenya, the impugned provisions in the Sexual Offences Act form part of a complex and interlocking statutory scheme. Introducing, for example, a court-created "close-in-age defence" would intrude into Parliament's policy domain and risk incoherence with the Child Justice Act, criminal procedure, and evidentiary rules. The Court of Appeal in *Eliud Waweru Wambui v Republic* specifically observed that the criminalisation of adolescent sexuality raises questions of social policy, proportionality, and developmental psychology that require national deliberation and careful legislative reconsideration. This confirms that judicial surgery via severance or reading-in is not appropriate in this context.

e. Suspension of Invalidity and Interim Protections

114. Given the systemic and sensitive nature of adolescent sexuality regulation, justice and equity require that any declaration of invalidity be suspended for a defined period to allow Parliament to undertake a holistic and participatory review of the legislative framework. This approach mirrors the remedial structure in *Teddy Bear Clinic v Minister of Justice* and accords with Article 10's commitment to public participation.
115. However, suspension without interim protection would expose adolescents including the current Petitioners to continued arrests, prosecutions, and stigmatisation under provisions already found unconstitutional. To prevent ongoing violations, and following the approach in *Teddy Bear*, this Court must issue a moratorium on all arrests, investigations, charges, and prosecutions of adolescents for consensual, non-coercive, and non-exploitative sexual conduct pending legislative reform.

f. Structural Interdicts Against the DPP, Inspector General, and Attorney General

116. The pattern of continuous arrests and prosecutions revealed in the evidence, including the Petitioners' affidavits and expert testimony from Victor Rasugu of NAYA demonstrates an institutional failure within the policing and prosecutorial machinery. This is precisely the scenario contemplated in *Mitu-Bell*, where the Supreme Court affirmed that structural interdicts and supervisory jurisdiction are appropriate where systemic violations are shown.
117. Mandamus directing the DPP and the Inspector General to issue uniform national circulars within 90 days is necessary to prevent further unconstitutional arrests and prosecutions. Similarly, directing the Attorney General to prepare and submit to the National Assembly a Bill amending sections 8, 9, 11, and 43 within 90 days ensures that Parliament fulfils its positive obligations under Article 21(1). Kenyan courts have

recognised such duties in *Okiya Omtatah Okioti v Cabinet Secretary, National Treasury & 3 others [2018] KEHC 9439 (KLR)* and other cases involving legislative or policy inaction.

g. Expungement, Cleansing of Records, and Administrative Remediation

118. The ongoing presence of the Petitioners' names in criminal registers, court files, and police databases perpetuates the very violations this Court has found unconstitutional. Drawing from *Teddy Bear* and the rehabilitative principles underpinning child rights jurisprudence, the Court must direct the 2nd and 3rd Respondents to immediately expunge all records, withdraw warrants and bail terms, and ensure that no adverse legal consequences remain associated with the impugned prosecutions.

h. Damages (General and Aggravated)

119. The Petitioners seek an award of general and aggravated damages for the violations arising from their arrest, detention, prosecution, and continued exposure to the stigma of sexual offence charges. Having established violations of dignity, bodily integrity, freedom and security of the person, privacy, equality, fair trial rights, and the best interests of the child, the question that follows is whether damages should be granted, and if so, in what form.

120. It is now well settled that monetary compensation is an appropriate, effective, and sometimes indispensable remedy for breach of fundamental rights. As the courts have repeatedly held, beginning with Court of Appeal's decision in *Koigi Wa Wamwere v Attorney General [2015] KECA 593 (KLR)* and the same court's exposition in *Gitobu Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)* constitutional damages serve a unique public law function: to vindicate the infringed right, to compensate the victim, and to deter recurrence of unconstitutional conduct. This remedy is distinct from private law damages, and the quantum is shaped by the gravity of the violation and the broader constitutional values at stake.

121. The Petitioners, adolescents subjected to arrest, incarceration, public humiliation, psychological trauma, disruption of education, and the enduring stigma of a sexual offence prosecution, have suffered harms that go far beyond the merely technical. Their injuries are deeply personal and intangible, affecting their dignity, self-esteem, mental well-being, and social identity. This is precisely the category of injury for which courts have consistently awarded aggravated damages.

122. We submit that awarding damages is not an arbitrary exercise; it is a carefully reasoned judicial function grounded in principle. As stated in *Mbogo & Another v Shah (1968) EA 93*, judicial discretion must be exercised judiciously, not capriciously. Courts must consider past decisions to ensure fairness and consistency, while remembering that constitutional damages serve a broader societal purpose, expressing public condemnation of the violation and underscoring the gravity of breaching rights guaranteed by the supreme law.

123. In this case, the Petitioners were subjected to a criminalisation framework that the Constitution simply does not tolerate. They were arrested and detained for conduct that was consensual, non-coercive, and non-exploitative; conduct that harms no one and that has been recognised by experts and courts as part of normal adolescent development. The

State's actions inflicted trauma at a formative period of their lives, exposed them to social stigma, and undermined their autonomy and dignity as adolescents whose best interests the Constitution elevates to a matter of paramount importance.

124. These violations are neither minor nor abstract. They have left profound psychological, social, and emotional consequences. The Petitioners deserve more than declaratory relief; they deserve vindication that speaks to the seriousness of the wrong suffered. As noted in *Koigi Wamwere*, an additional award beyond compensatory damages may be necessary to reflect public outrage at the violation, emphasize the importance of the constitutional right breached, and deter future misconduct. Given the systemic pattern of arresting adolescents for consensual, non-coercive, and non-exploitative acts and the high likelihood of recurrence of absent judicial intervention, deterrence is a particularly relevant consideration.

125. Accordingly, an award of general and aggravated damages is both justified and required. This Court need not fix a specific sum in this analysis, but it is clear from the jurisprudence that the nature of the violations, the age and vulnerability of the Petitioners, and the far-reaching impact on their dignity and well-being all point to a substantial award. An effective remedy, within the meaning of Article 23, must be more than symbolic; it must tangibly recognize and redress the harm inflicted and signal emphatically that the Constitution does not permit the criminalization of adolescents for consensual, non-coercive, and non-exploitative sexual conduct.

H. Any Other Relief

126. Article 23(3)(f) empowers this Court to fashion any further relief necessary to secure the effective protection of children's rights. Given the structural failures established, the Court may impose supervisory timelines, progress reports, or additional protections as it deems fit.

127. The reliefs sought by the Petitioners are firmly grounded in the Constitution, supported by Kenyan and comparative jurisprudence, and justified by the factual circumstances of this case. Declaratory orders, certiorari, structural interdicts, a moratorium, expungement of records, and general and aggravated damages are all appropriate, necessary, and proportionate. They vindicate the rights of the Petitioners, prevent further violations, and ensure that Parliament and State institutions align the law with the Constitution's requirements and the developmental realities of adolescence.

C. CONCLUSION

128. Having regard to the totality of the evidence before this Court including the lived experiences of the Petitioners, the expert and institutional evidence, and the uncontested jurisprudence establishing that the criminalization of consensual, non-coercive, and non-exploitative adolescent sexual conduct is unconstitutional, it is clear that the continued enforcement of Sections 8, 9, 11 and the blanket presumption in section 43(4)(f) of the Sexual Offences Act cannot be justified in a modern, open, and democratic society founded on human dignity, equality, and freedom. The demonstrated violation of Articles 25, 27, 28, 29, 31, 43, 48, 49, 50, and 53 strikes at the very core of constitutional protection, especially where the rights of children and adolescents are concerned.

129. The Court’s solemn obligation under Articles 19, 20, 21, 23, and 24 is to ensure that rights are real, practical, and effective, not abstract aspirations. The evidence before this Court shows that the impugned provisions not only fail to achieve their stated protective purpose, but in fact expose adolescents to deeper harm, stigma, trauma, and criminal sanction for conduct that forms part of normal adolescent development. As was the case with the offence of criminal defamation, this statutory framework constitutes a disproportionate, irrational, and unnecessary intrusion into the lives, dignity, bodily integrity, and developmental autonomy of adolescents.
130. The jurisprudence of this Court, the Court of Appeal, the Supreme Court, and comparative constitutional courts makes it abundantly clear that once a limitation fails the Article 24 test, it cannot stand. The principles emerging from *CMM, Robert Alai, Andama, CORD, Mitu-Bell, and Wambui v Republic (Criminal Appeal 102 of 2016) [2019] KECA 906 (KLR) (22 March 2019)*, together with the persuasive authority of *Teddy Bear*, confirm that criminalization in this context is an impermissible sledgehammer wielded where careful, evidence-based, and rights-respecting legislative measures are required. As the Court of Appeal warned in *Eliud Waweru Wambui*, the ongoing imprisonment of young men for consensual, non-coercive, and non-exploitative relationships with peers reveals “an unfolding tragedy” that calls for urgent constitutional correction.
131. Upon promulgation of the 2010 Constitution, it was expected that statutory frameworks governing sexual conduct and child protection would be harmonized with the Constitution’s transformative ethos. Fifteen years on, adolescents continue to bear the burden of a legislative regime that has not been aligned to the Bill of Rights. The end sought by the Legislature to protect children from sexual abuse is undeniably noble. But, as the constitutional text and longstanding ethical principle remind us, *the end does not justify the means*. Protective objectives cannot be pursued through unconstitutional, harmful, and overbroad criminal sanctions.
132. Having applied the proportionality test under Article 24, considered the best interests of the child under Article 53, evaluated the evolving capacities of adolescents, analyzed the institutional, comparative, and expert evidence, and weighed the systemic harms occasioned by the impugned provisions, the Petitioners have demonstrated, clearly and convincingly that the continued criminalization of consensual, non-coercive, non-exploitative adolescent sexual conduct violates the Constitution and cannot be sustained.
133. This Honorable Court is therefore urged to grant the relief sought, not only to vindicate the rights of the 1st, 2nd, and 3rd Petitioners, but to protect countless adolescents similarly situated and to give life and meaning to the guarantees of the Bill of Rights.

D. PRAYERS

The Petitioners pray for the following orders:

- A. A declaration that the arrest, prosecution, and detention of the 1st Petitioner under Sections 8, (1) as read together with Section 8(3), and 11 (1) of the Sexual Offences Act No 3 of 2006 and 2nd Petitioner under Sections 8, (1) as read together with Section 8(4),

and 11 (1) of the Sexual Offences Act No 3 of 2006 for engaging in consensual, non-coercive, non-exploitative sexual relations violates Articles 25, 27, 28, 29,31, 33,35, 43,46, 48, 49 50, and 53 of the Constitution.

- B. An order of certiorari calling into court and quashing the charge sheets in Makadara Law Courts Criminal Case No. 34 of 2025 against the 1st Petitioner and Criminal Case No. MSCO/E239 of 2023 against the 2nd Petitioner.
- C. A declaration that the blanket criminalization of mutually consensual, non-coercive and non-exploitative sexual relations between adolescents under Sections 8, 9,11 of the Sexual Offences Act and the blanket presumption of adolescents’ lack of capacity to consent to sexual relations through application of section 43 (4) (f) of the Sexual Offences Act No 3 of 2006 without recognizing adolescents’ evolving capacities are unconstitutional and their continued application violate the rights of adolescents as provided under Articles 25, 27, 28, 29,31, 43(1)(a), 46, 48, 49, 50, and 53(1)(d) & (2) of the Constitution.
- D. An order of mandamus compelling the 1st and 3rd Respondents, to within 90 days of the judgment, issue circulars to all prosecutors and police officers directing them on the illegality of arresting, prosecuting and harassing adolescents engaging in mutually consensual, non-coercive, non-exploitative sexual relations.
- E. An order of mandamus compelling the 2nd Respondent, to within 90 days of judgment, submit to the National Assembly a Bill to amend Sections 8, 9, and 11 of the Sexual Offences Act to decriminalize consensual, non-coercive, non-exploitative sexual relations between adolescents and to submit periodic progress reports to this Honorable Court every sixty (60) days.
- F. An order for general and aggravated damages to the 1st, 2nd, and 3rd Petitioners for the violations suffered as a result of the arrest, detention, and prosecution for engaging in consensual, non-coercive, and non-exploitative sexual relations.
- G. Any other relief that this Honorable Court deems just and appropriate in the circumstances.

Dated at Nairobi this.....02.....day of.....MARCH.....2026



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