



BK.....	3RD PETITIONER
SR .....	4TH PETITIONER
VC.....	5TH PETITIONER
FK.....	6TH PETITIONER
KATIBA INSTITUTE .....	7TH PETITIONER

VERSUS

THE ASSISTANT CHIEF MOGOR VILLAGE TRANS MARA EAST SUB-COUNTY, NAROK COUNTY .....	1ST RESPONDENT
KENYA POLICE EMURUA DIKIRR .....	2ND RESPONDENT
EMURUA DIKIRR SUB-COUNTY HOSPITAL.....	3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS .....	4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....	5TH RESPONDENT
THE ANTI-FEMALE GENITAL MUTILATION BOARD .....	6TH RESPONDENT
THE CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE, GENDER & AFFIRMATIVE ACTION .....	7TH RESPONDENT
THE CABINET SECRETARY, MINISTRY OF HEALTH.....	8TH RESPONDENT
THE CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION .....	9TH RESPONDENT
THE INSPECTOR GENERAL OF POLICE .....	10TH RESPONDENT
THE CHIEF MAGISTRATE’S COURT, KILGORIS .....	11TH RESPONDENT

**PETITION**

**1 Introduction**

1. Female Genital Mutilation (FGM) is defined as any procedure involving partial or total removal of the external female genitalia, injury to the female genitals or other harmful procedures to the female genitalia for non-medical purposes.<sup>1</sup>

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<sup>1</sup> WHO, UNAIDS, UNDP, UNECA, UNESCO, UNHCHR, UNHCR, UNICEF & UNIFEM (2008) ‘Eliminating Female Genital Mutilation: An Interagency Statement’ 1. The typology of FGM includes type II,

2. The practice of FGM is inextricably linked and deeply embedded in culture; and is perpetuated as a social convention in many communities in Kenya.<sup>2</sup> Despite its cultural significance in the communities where FGM is practiced, FGM is considered a form of gender-based violence and a violation of women's and girls' sexual and reproductive health rights linked to deeply engrained societal values aimed at controlling women's sexuality.<sup>3</sup>
3. This Petition concerns a State practice and policy backed by law that revictimizes victims of female genital mutilation. In this practice, Kenya is the only country in the world to undertake its 'Zero Tolerance Approach to Female Genital Mutilation' that results in victims being arrested, prosecuted, and convicted of offences under Section 24 read with Section 29 of the Prohibition of Female Genital Mutilation Act.
4. The process of revictimization starts from the point of arresting victims, which is often followed by forcing them to undergo genital examinations under the instructions of police officers.

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clitoridectomy, defined as partial or total removal of the clitoris and/or the prepuce; type II, excision, includes partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora; type III, infibulation, involves narrowing of the vaginal orifice (introitus) with creation of a covering seal by cutting and appositioning or sewing of the labia minora and/or the labia majora, with or without excision of the clitoris; and other forms of injury to the female genitalia are categorized as type IV, to include pricking, piercing, incising, scraping, or cauterizing the skin near the clitoris for non-medical reasons.

<sup>2</sup> L Mwanri & GJ Gatwiri 'Injured bodies, damaged lives: experiences and narratives of Kenyan women with obstetric fistula and Female Genital Mutilation/Cutting' (2017) *Reproductive Health* 14,38

<sup>3</sup> United Nations Office of the High Commissioner 'Women's Rights are Human Rights' (2014)

5. This Petition is therefore filed before this Court to seek to protect victims who have undergone FGM or suspected to have undergone FGM, who are criminalized because of vague provisions of the law, including Section 24 of the Prohibition of Female Genital Mutilation Act which was declared so by the High Court in *KL v Republic [2016] eKLR*, over eight (8) years from the filing of this Petition.
6. This Petition seeks to address whether the State's goal of deterrence of FGM through criminalizing victims, meets the threshold under Article 24 of the Constitution of Kenya on the limitation of rights and fundamental freedoms.

## **2. The Parties**

### **2.1 The Petitioners**

7. The 1st Petitioner is an Advocate of the High Court of Kenya. She has represented victims of female genital mutilation and undertaken legal research on the trends in criminal prosecutions against victims of female genital mutilation. She brings this Petition on her own behalf and on behalf of the class of women and girls' victims or suspected victims of female genital mutilation who have been arrested, prosecuted, and convicted under the Prohibition of Female Genital Mutilation Act.
8. The 2nd- 6th Petitioners are accused persons in criminal cases No. MCCR/E077/23, MCCR/E078/23, MCCR/E079/23, and MCCR/E080/23 at the Murkan Mobile Court within the jurisdiction of the Kilgoris Law Courts.

9. The 7th Petitioner is Katiba Institute. Katiba Institute is a Kenyan non-governmental, not-for-profit organisation established as a company limited by guarantee. Katiba Institute's mandate is to instil a culture of constitutionalism in Kenya and the East African region. Katiba Institute has pursued public interest litigation and participated as a friend of the court in litigation regarding all parts of the Constitution, including the right to a fair trial and the constitutionality of vague laws.
10. The Petitioners have filed this suit on their own behalf and in pursuit of the public interest on behalf of victims of female genital mutilation in accordance with Article 22(1) and (2)(c) of the Constitution.

## **2.1 The Respondents**

11. The 1st Respondent is appointed pursuant to Cap 128 of the Laws of Kenya "Chiefs" who has a duty to maintain order in the area in respect of which he/she is appointed, and for such purposes he shall have, and exercise jurisdiction and powers conferred upon him/her over persons residing or being within such area.
12. The 2nd Respondent is in charge of law enforcement in the Emurua Dikirr area.
13. The 3rd Respondent is the medical institution whose staff members conducted the genital examinations on the 2nd- 6th Petitioners.
14. The 4th Respondent is the Office of the Director of Public Prosecutions, established under Article 157 of the Constitution of Kenya, 2010, to undertake public prosecutions. The ODPP is guided by its Standard Operating Procedures Manual and Rapid Reference Guide on Prosecution of Female Genital Mutilation Cases (2021)

15. The 5th Respondent is the Honourable Attorney General of the Republic of Kenya and is sued in his capacity as the principal legal adviser to the Government pursuant to the provisions of Article 156 of the Constitution.
16. The 6th Respondent is the Anti-Female Genital Mutilation Board established under Section 5 of the Prohibition of Female Genital Mutilation Act. The Board convenes and leads County Anti-FGM Steering Committees as part of Objective 2 of the National Policy on the Eradication of FGM (Sessional Paper No.3 of 2019). The steering committees include the County Commissioner, local chiefs, assistant chiefs, the local prosecutors and other stakeholders.
17. The 7th Respondent is the Cabinet Secretary in matters of public service, gender, and affirmative action. The Anti-FGM Board is under its docket.
18. The 8th Respondent is the Cabinet Secretary in matters of health and is responsible for outlining and implementing health policies and regulations, including the regulation of healthcare services and healthcare providers.
19. The 9th Respondent is Cabinet Secretary The Ministry of Interior and National Administration is a state organ of the Government of the Republic of Kenya responsible for maintaining internal security, overseeing National registration services, managing immigration policies and coordinating National Government functions. The Ministry also manages the Kenya prisons and probation services.

20. The 10th Respondent is the Inspector General and the independent command of the National Police Service and Administration Police Service.
21. The 11th Respondent is the Chief Magistrates Court that has jurisdiction over criminal matters wherein the 2nd-5th Respondents are charged with FGM/C related offences.

### **3. Statement of Standing and Jurisdiction**

22. The Petitioners have standing to bring this petition under Articles 22(1) & (2) and 258(1) & (2) of the Constitution. Article 22(1) states, 'Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened'. Articles 22(2)(a)-(c) authorise Sofia Rajab to file this petition on behalf of another person who cannot act in their own name, in the interest of a group or class of people, and in the public interest.
23. Similarly, Articles 258(1) & (2)(a)-(c) give the Petitioners authority to bring this petition on its own behalf and on behalf of another person who cannot act in their own name, in the interest of a group or class of people, and in the public interest.
24. Article 23 vests the High Court with jurisdiction 'to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights'. Similarly, Article 165(3) vests this Court with

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

#### **4. Facts supporting the Petition**

25. On 3rd November, 2016 the High Court in *KL v Republic [2016] eKLR* delivered a judgment in which the Honourable Judge determined that Section 24 of the Prohibition of Female Genital Mutilation Act is vague, difficult to apply to real varied situations and amounts to unacceptable encroachment of civil freedom.. The Court directed that the 5th Respondent, the Attorney General, to have Section 24 relooked to ensure justice to those charged under it, or have it deleted altogether.

26. On 4th December 2023, the 2nd, 3rd, 4th and 5th Petitioners were reported by the 1st Respondent to the 2nd Respondent for allegedly undergoing FGM. The 2nd Respondent was thereafter arrested for committing offences under Sections 24 and 29 of the Prohibition of Female Genital Mutilation Act.

27. The 2nd Respondent then took the 2nd, 3rd, 4th and 5th Petitioners to the 3rd Respondent, who was instructed to conduct genital examinations recorded in a P3 Form. This was done without the consent of the Petitioners.

28. Thereafter these P3 forms formed part of the Investigation and Prosecution Files that are being used to charge and prosecute the 2nd-5th Petitioners for allegedly failing to report to law enforcement that they underwent FGM.
29. There are several other women and girls who are suspected to be victims of FGM or who are victims of FGM are arrested across Kenya under Section 24 read with section 29 of the Prohibition of FGM Act.

## **5. Legal Foundation of the Petition**

### **5.1 Constitution of Kenya, 2010**

30. The Preamble to the Constitution of Kenya, 2010 speaks of the aspiration of Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law.
31. Under Article 2, the Constitution is the supreme law of the land, and it binds all persons and all State organs at both levels of government. In addition, Article 10 stipulates that rule of law as a value and principle of governance. In many ways, rule of law is the overarching principle that undergirds Kenya's constitutional order.
32. Article 2(5) of the Constitution also expressly imports the general rules of international law and makes them part of the law of Kenya.
33. Article 2(6) of the Constitution also expressly imports the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. [Maputo Protocol] including its general comments/recommendations.

34. Article 3 of the Constitution behoves the Respondents like all Kenyans and State organs to respect, uphold and defend the Constitution.
35. The national values and principles of governance in Article 10 bind all State organs, State officers, public officers, and all persons whenever any of them applies or interprets the Constitution or enacts, applies, or interprets any law. The National values and principles of government pertinent to this petition include “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised”.
36. Under Article 21(1) it is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.
37. Article 21 (3) provides that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, *including women*, older members of society, persons with disabilities, children, youth, members of *minority or marginalised communities*, and members of particular ethnic, religious or cultural communities.
38. Article 27 guarantees the right to equality and freedom from non-discrimination.
39. Article 28 recognises every person’s inherent dignity and the right to have that dignity respected and protected.
40. Article 29 Every person has the right to freedom and security of the person, which includes the right not to be-

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

41. Article 31 (a) enshrines everyone's right to privacy which includes the right not to have their person searched and Article 31 (c) that provides that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.

42. Article 43(1) (a) provides that every person has the right to the highest attainable standard of health.

43. Access to justice is guaranteed under Article 48 which provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

44. Article 49(1)(d) provides that an arrested person has the right to not to be compelled to make any confession or admission that could be used in evidence against the persons. Additionally,

45. Article 50(2)(l) under the right to a fair trial, an accused person has the right to refuse to give self-incriminating evidence.

## 5.2 Acts of Parliament

### 5.2.1 Prohibition of Female Genital Mutilation Act

46. The Prohibition of Female Genital Mutilation Act is an Act of Parliament to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation and for connected purposes. The Prohibition of Female Genital Mutilation Act provides a clear definition of FGM<sup>4</sup> including all relevant types as outlined in the WHO definition (save for Type IV FGM). The Act criminalizes the performance of FGM<sup>5</sup>, aiding and abetting FGM<sup>6</sup>, performing or procuring FGM in another country<sup>7</sup>, the use of premises and provision of tools for use in FGM<sup>8</sup>, use of derogatory language against women who have not undergone FGM<sup>9</sup> and the failure to report FGM.<sup>10</sup>

47. A fundamental feature of anti-FGM legislation is an express provision that obligates the Government to provide health and support for victims of FGM.<sup>11</sup> Section 27 of the Prohibition of Female Genital Mutilation Act mandates the Government to take necessary steps within its available resources to

- (a) protect women and girls from FGM;
- (b) provide support services to victims of FGM; and

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<sup>4</sup> Section 2 Prohibition of Female Genital Mutilation Act No.32 of 2011

<sup>5</sup> Section 19(1) Prohibition of Female Genital Mutilation Act No.32 of 2011

<sup>6</sup> Section 20 Prohibition of Female Genital Mutilation Act No.32 of 2011

<sup>7</sup> Section 21 Prohibition of Female Genital Mutilation Act No.32 of 2011

<sup>8</sup> Section 22 & Section 23 Prohibition of Female Genital Mutilation Act No.32 of 2011

<sup>9</sup> Section 25 Prohibition of Female Genital Mutilation Act No.32 of 2011

<sup>10</sup> Section 24 Prohibition of Female Genital Mutilation Act No.32 of 2011

<sup>11</sup> Thomson Reuters Foundation & 28 Too Many 65

(c) undertake public education and sensitise the people of Kenya on the dangers and adverse effects of FGM.

48. The Prohibition of Female Genital Mutilation Act defines ‘support services’ to include the provision of shelter, medical services, legal education, training of service providers and advocates against FGM, and the provision of psycho-social support.<sup>12</sup>

### **5.2.2 Victim Protection Act No. 17 of 2014**

49. The Victim Protection Act is an Act of Parliament to give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes.

50. Section 2 defines a “victim” as any natural person who suffers injury, loss, or damage as a consequence of an offence; and “victimization” as any act or omission that renders a person or community a victim within the meaning of this Act.

51. Section 4 (l) binds a court, administrative body or a person performing any function under the Act to respect and uphold the values and principles in the Constitution, and in particular, be guided by the provisions of Articles 10, 27(4),47,48 and 49 of the Constitution.

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<sup>12</sup> Section 2 Prohibition of Female Genital Mutilation Act No.32 of 2011

52. Section 8(1)(b) reaffirms a victim's right to privacy, including from unreasonable intrusion from health professionals.

## **6 Other Legal Foundations- Regional and International Law**

53. The Republic of Kenya is a member state of the UN<sup>13</sup> and has ratified key international human rights treaties that set the standard for the protection and promotion of human rights applicable in the context of female genital mutilation.

### **6.1 Universal Declaration on Human Rights (UDHR)**

54. Article 5 of UDHR provides that no one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment.

55. Article 12 of UDHR states that no one shall be subjected to arbitrary interference with his (or her) privacy. Everyone has the right to the protection of the law against such interference.

### **6.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>14</sup>**

56. Article 2 imposes an obligation on State parties to condemn discrimination against women in all its forms, agree to pursue by all

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<sup>13</sup> Kenya became a member of the United Nations on 16<sup>th</sup> December 1963

<sup>14</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1)

appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.

(g) To repeal all national penal provisions which constitute discrimination against women.

### **6.3 Convention on the Rights of the Child (CRC)<sup>15</sup>**

57. Article 2 mandates State Parties to take all appropriate measures to ensure that the child is protected from all forms of discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth of other status.

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<sup>15</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

58. Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

59. Article 16 states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

60. Article 40 provides that

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

#### **6.4 International Covenant on Civil and Political Rights<sup>16</sup>**

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<sup>16</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

61. Article 7 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
62. Article 17 states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
63. Additionally, Article 26 reaffirms that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### **6.5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>17</sup>**

64. Article 1 defines the term "torture" as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him(or her) or a third person information or a confession, punishing him(or her) for an act

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<sup>17</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)

he (or she) or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

65. Article 2 obligates each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

66. Additionally, Article 11 mandates each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

67. Article 14 provides that each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

#### **6.6 UN General Comments and Recommendations**

68. The Joint General Recommendation no.31 of the Committee on the Elimination of Discrimination against Women/General Comment no.18 on the Committee on the Rights of the Child on harmful

practices<sup>18</sup> recommends several measures to be implemented by State parties to the convention to prevent FGM<sup>19</sup> as well as protective measures and responsive services to be offered to victims of FGM.<sup>20</sup>

69. The UN General Assembly Resolution 67/146<sup>21</sup> and the Human Rights Council Resolution 38/6<sup>22</sup> reaffirmed the obligations and commitments of States to respect, protect and promote the human rights and fundamental freedoms of women and girls and to prevent and eliminate the practice of FGM. Among the measures to be implemented by States include the adoption and ‘strict application’ of national legislation FGM, in line with international human rights law.<sup>23</sup>

70. It further calls upon States to provide assistance to women and girls who are victims of FGM, including through appropriate support services for treatment of the physical, physiological and psychological consequences.<sup>24</sup> The former is in line with similar recommendations from political consensus declarations such as the Beijing Declaration and Platform for Action that called on governments to take action and to ‘enact and enforce legislation against the perpetrators of practices and acts of violence against women, such as FGM<sup>25</sup>, the ICPD Programme of Action that urged governments to ‘prohibit FGM

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<sup>18</sup> UN Doc CEDAW/C/GC/31-CRC/GC/18

<sup>19</sup> UN Doc CEDAW/C/GC/31-CRC/GC/18, p 15, 19

<sup>20</sup> UN Doc CEDAW/C/GC/31-CRC/GC/18, p 20, 21

<sup>21</sup> UN General Assembly Resolution 67/146 on ‘Intensifying global efforts for the elimination of female genital mutilation’ UN Doc A/RES/67/146

<sup>22</sup> Human Rights Council Resolution 38/6 on the ‘Elimination of female genital mutilation’ UN Doc A/HRC/RES/38/6

<sup>23</sup> Para 9 (e)

<sup>24</sup> Para 10

<sup>25</sup> United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995)

wherever it exists<sup>26</sup> and a General Assembly Resolution 53/117 among others, that called upon States to

develop and implement national legislation and policies prohibiting traditional or customary practices affecting the health of women and girls, including female genital mutilation, inter alia, through appropriate measures against those responsible, and to establish, if they have not done so, a concrete national mechanism for the implementation and monitoring of legislation, law enforcement and national policies.<sup>27</sup>

### **6.7 African Charter on Human and Peoples' Rights (Banjul Charter)**

71. Articles 3(1) & (2) state that every person is equal before the law and has the right to equal protection of the law.

72. Article 4 states that 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

73. The right to dignity and freedom from torture, cruel, inhuman, or degrading punishment and treatment are guaranteed under Article 5.

74. Article 6 states that 'Every individual shall have the right to liberty and to the security of [their] person. No one may be deprived of [their] freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

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<sup>26</sup> UN Doc A/CONF.171/13/Rev.1

<sup>27</sup> UN Doc A/RES/53/177 1 February 1999

## **6.8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)**

75. Article 2 on 'Elimination of Discrimination Against Women' provides that States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

- a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
- b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
- c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
- d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
- e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

76. Article 3 guarantees the Right to Dignity and provides that Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.

77. Article 5 on Elimination of Harmful Practices provides that States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

78. Article 8 on Access to Justice and Equal Protection before the law provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

### **6.9 African Charter on the Rights and Welfare of the Child (Children's Charter)**

79. Article 4 on the Best Interests of the Child mandates that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

80. Article 10 guarantees Protection of Privacy and provides that No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right

to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

81. Article 16 guarantees Protection Against Child Abuse and Torture and provides that State Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

82. Article 21(1) on Protection against Harmful Social and Cultural Practices indicates that State Parties to the Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status

#### **6.10 African Human Rights System General Comments/Recommendations**

83. African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child published a Joint General Comment on Female Genital Mutilation (June 2023) to provide specific and contextualised guidance, and to clarify and elaborate the measures necessary to fulfil State responsibility for the elimination of female genital mutilation. It indicates that State parties to the African Charter on Human and Peoples' Rights, the Maputo Protocol and The African Charter on the Rights and Welfare of the Child

‘Must also ensure that the framing of the law does not expose victims of FGM to prosecution, or otherwise characterize them as having participated in committing the crime. Legislation that targets victims risks unfairly criminalising people who are already victims.’ (Paragraph 37)

## **7 Violations of the Constitution and the law**

### **7.1 The Assistant Chief, Mogor Village, Trans Mara East Sub-County, Narok County**

84. The Assistant Chief has violated its duty to care for victims or suspected victims of FGM/C under Articles 21(1), 21 (3), 27(1), 27(2) and 28 of the Constitution by failing to observe, respect, protect, promote the rights of victims of FGM/C guaranteed under the Bill of Rights.

85. The Assistant Chief indicated in her police statement that she received information from one of her informers that some ladies had allegedly undergone FGM/C, which information she passed to the Kenya Police at Emurua Dikirr. As opposed to offering them services envisioned under Section 27 of the Prohibition of Female Genital Mutilation Act, the Assistant Chief, along with the police, arrested the women the next day.

### **7.2 Kenya Police Emurua Dikirr**

86. The Kenya Police Emurua Dikirr violated its duty to care for victims or suspected victims of FGM/C under Articles 21(1), 21 (3), 27(1), 27(2) and 28 of the Constitution by failing to observe, respect, protect,

promote the rights of victims of FGM/C guaranteed under the Bill of Rights.

87. The Investigating Police officer indicated in their statement that they received information from the Assistant Chief that some ladies had allegedly undergone FGM/C, who later led the contingent of police officers from Emurua Dikirr to the individual suspects' homes in order to effect arrests.
88. As opposed to offering them services envisioned under Section 27 of the Prohibition of Female Genital Mutilation Act, the contingent of police officers arrested the women and then took the women to the Emurua Dikirr Sub County Hospital for forced genital examinations to "ascertain whether the said activity (FGM/C) had taken place".
89. That the results of the genital examinations were captured in P3 forms and admitted as evidence in criminal proceedings against the 2nd-6th Petitioners in violation of the right to fair trial, specifically the right not to be compelled to make any confession or admission that could be used in evidence against the person under Article 49(1)(d) as well as 50(2)(l) the right to refuse to give self-incriminating evidence.

### **7.3 Emurua Dikirr Sub County Hospital**

90. The Emurua Dikirr Sub-county through its medical officers violated the Constitution by conducting illegal and unconstitutional searches by way of genital examinations on the persons of M.CN, B.K, V.C, S.R, and F.K in violation of Article 28 on the right to dignity and Article 31(a) specifically the right not to have their person searched under the Constitution generally.

91. The results of the genital examinations were captured in P3 forms and admitted as evidence in criminal proceedings against the 2nd-6th Proceedings in violation of the right to fair trial, specifically the right not to be compelled to make any confession or admission that could be used in evidence against the person under Article 49(1)(d) as well as 50(2)(l) the right to refuse to give self-incriminating evidence.
92. The 2nd-6th Petitioners did not consent to the genital examinations.

#### **7.4 The Office of the Director of Public Prosecutions**

93. The Office of the Director of Public Prosecutions (ODPP) has violated its duty to protect victims of FGM under Articles 2(1)-(4), (5), & (6), 3(1), 20(1), 21(1), and 21(3) or the Constitution by failing to uphold and respect the Constitution and observe, respect, protect, promote the rights of victims of FGM guaranteed under the Bill of Rights.
94. The ODPP has the State Due Diligence obligation to prosecute those who commit Violence Against Women, such as FGM/C, and this includes the duty to respect suspected victims of FGM and not prosecute them as accused persons.
95. The ODPP has violated the rights of the 2nd to 6th Petitioners by failing in its duty and unlawfully prosecuting victims of FGM under the 2nd to 6th Petitioners who are alleged victims of FGM/C.
96. The ODPP has violated its duties under Sections 4(1) and (2)(b), (f), (i), and (l) of the Victim Witness Protection Act by charging and trying

suspected victims of FGM/C and the 2nd-6th Petitioners under the Prohibition of Female Genital Mutilation Act.

97. The ODPP has violated Articles 28, 29, 31 for procuring and relying on illegally obtained evidence to charge and prosecute the stated offences. The illegal evidence arises from an illegal and unconsensual genital examinations conducted by the 3rd Respondent upon instructions from the 2nd Respondent contrary to Article 31(a) and (b) of the Constitution.

### **7.5 The Attorney-General**

98. The Attorney General has violated Article 21 of the Constitution in failing to take measures outlined in the Court order in *KL v Republic [2016] eKLR* which required Section 24 of the Prohibition of Female Genital Mutilation Act be relooked to ensure justice to those charged under it, or have it deleted all together.
99. The Attorney-General's omission and dereliction of a constitutional duty to prevent the violation of the 2nd -6th Petitioners and other victims of FGM and the duty to protect them and have enabled a continued violation of the rights and fundamental freedoms of victims charged under Section 24 of from 3<sup>rd</sup> November 2016 to date.

### **7.6 The Anti-FGM Board**

100. The Anti-FGM Board has violated its duty under Article 21 read with Section 5 of the Prohibition of Female Genital Mutilation Act to advise the Government on matters relating to female genital mutilation and the implementation of the Act, having full knowledge

of the pattern of revictimizing victims of FGM through indiscriminate prosecutions.

101. The Anti-FGM Board has failed to implement measures to provide support services to victims of FGM who have been arrested as required under Section 27 of the Prohibition of Female Genital Mutilation Act.

102. As the lead Government agency in charge of coordinating the National Policy for the Eradication of Female Genital Mutilation (Sessional Paper No.3 of 2019), the Anti-FGM Board has failed in providing overall policy guidance and direction to key stakeholders within National and County Governments to ensure that victims or suspected victims of FGM/C are not revictimised particularly through FGM raids by local law enforcement and police, subjected to forced genital examinations in government hospitals and prosecution through the ODPP.

**7.7 The Cabinet Secretary, Ministry of Public Service, Gender and Affirmative Action**

103. The Ministry has failed in implementation of its Gender Function by failing to identify the trends of prosecuting victims of FGM while undertaking its monitoring function of the prevalence of FGM and SGBV.

104. The Ministry has failed to provide coordinate programmes for support services for victims of FGM facing prosecutions as required under Section 27 of the Prohibition of Female Genital Mutilation Act.

105. The Ministry has failed to effectively provide oversight of the Anti-FGM Board for the implementation of the National Policy for the Eradication of Female Genital Mutilation (Sessional Paper No.3 of 2019)

### **7.8 The Cabinet Secretary, Ministry of Health**

106. The Ministry has failed to institute policy guidance and measures to ensure genital examinations conducted on suspected victims of FGM/C are done consensually and in accordance to the Bill of Rights.

### **7.9 The Cabinet Secretary, Ministry of Interior and National Administration**

107. The Ministry has failed in establishing protocol to correctly identify suspected victims of FGM/C and referral pathway for them to access services under Section 27 of the Prohibition of Female Genital Mutilation Act.

### **7.10 The Inspector General of Police**

108. The Inspector General of Police has failed in establishing protocol to correctly identify suspected victims of FGM/C and referral pathway for them to access services under Section 27 of the Prohibition of Female Genital Mutilation Act.

109. The police have failed in their mandate to observe, respect, protect, promote and fulfil the rights and fundamental freedoms of victims/suspected victims of FGM/C as provided for under Article 21 of the Constitution. Police officers across various jurisdictions in Kenya have routinely effected unconstitutional and arbitrary arrests of victims or suspected victims of female genital mutilation/cutting.

## **8 Relief Requested**

110. The Petitioners pray for the following relief:

### **8.1 Declaratory Orders**

- a. A declaration that the 2nd and 3rd Respondents conduct in subjecting the 2nd -6th Petitioners by non-consensual genital examinations amounted to a violation of their rights under Articles 25, 27, 28 and 29 of the Constitution and the State's violation of its obligations under Article 21 of the Constitution.
- b. A declaration that the use of evidence obtained through genital examinations of the 2nd-6th Petitioners in criminal proceedings against them violates their rights under Articles 49(1)(d) and 50(2)(a) and (l) of the Constitution.
- c. That upon granting prayer (a) above, a declaration that the proceedings in the criminal case were unfounded, malicious, oppressive, and as against the 2nd-6th Petitioners' rights and otherwise unconstitutional; and the criminal proceedings in the lower court be terminated.
- d. A declaration that forced genital examinations amounts to degrading treatment as it violated human dignity and the violation therein has a severe impact on the right to health and wellbeing of victims or suspected victims of female genital mutilation/cutting.
- e. A declaration that the Attorney-General has violated its duty under Article 156(6) and Section 5(e) of the Office of the Attorney-General Act by failing to draft legislative proposals to the National Assembly advising on the inconsistency and ambiguity of Section 24 of the Prohibition of Female Genital Mutilation Act and attendant violations to the right to a fair trial.

## **8.2 Injunctive Orders**

- f. Criminal cases MCCR E077/2023, MCCR E078/2023, MCCR E079/2023, MCCR E080/2023, before the Murkan Mobile Courts within Kilgoris Law Chief Magistrates Court be terminated against 2nd-6th Petitioners.
- g. An order prohibiting the Office of the Director of Public Prosecutions from charging and the Judiciary from accepting charges against victims of female genital mutilation under the Prohibition of Female Genital Mutilation Act.
- h. An order prohibiting the compulsory or otherwise forced or coerced genital examinations of victims of female genital mutilation.
- i. In any event and in addition to Prayer (h) above an order excluding all evidence against all victims of female genital mutilation obtained through female genital examinations from any criminal proceedings against them.

### **8.3 Other Relief**

- j. An order expunging any and all criminal records of victims of female genital mutilation who were convicted based on forced genital examinations to aide in their own prosecution.
- k. The Office of the Director of Public Prosecutions, the Inspector General of Police and the Anti FGM-Board shall file a report to this Court within 90 days on the status of expunging the criminal records of wrongfully convicted women and girl

victims of female genital mutilation since the Prohibition of Female Genital Mutilation Act was came into effect.

- l. An order directing the Kenya Prisons Service to immediately release from custody and the Probation Department to immediately release from probation, all victims of female genital mutilation who were convicted based on forced genital examinations to aide in their own prosecution.
  
- m. An order directing the Ministry of Health to immediately establish regulations/guidelines for the conduct of genital examinations in support of prosecuting principal perpetrators under the Prohibition of Female Genital Mutilation Act.
  
- n. Any other orders that this Court deems appropriate to protect the rights and dignity of victims of FGM, the Constitution and interests of justice.

Dated at Nairobi this 16 day of June 2025



Sofia Rajab  
Advocate for the 1st to 6th Petitioners

And



Emily Kinama  
Advocate for the 7th Petitioners

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