

LEGAL REVIEW ON THE USE OF PUBLIC INTEREST LITIGATION TO ADVANCE THE RIGHTS OF SEX WORKERS IN KENYA

PREPARED FOR:

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Table of Contents

1	BACKGROUND.....	3
2	INTRODUCTION.....	4
2.1	<i>Public Interest Litigation and Advancement of Social Change in Kenya.....</i>	<i>4</i>
2.1.1	Right to Health.....	6
2.1.2	Right to Accessible and Adequate Housing and Protection against Forceful Eviction.....	11
2.2	<i>LESSONS LEARNT FROM PREVIOUS PIL SEEKING ENFORCMENT OF CONSTITUTIONAL RIGHTS</i>	<i>13</i>
3	OVERVIEW OF THE LEGAL ENVIRONMENTON SEX WORK IN KENYA	14
3.1	<i>LEGISLATIVE FRAMEWORK.....</i>	<i>16</i>
3.1.1	Supportive Framework.....	16
3.1.2	Punitive Framework.....	19
4	ANALYSIS OF KENYAN CASE LAW ON SEX WORK RELATED ISSUES.....	20
4.1	<i>LESSONS LEARNT FROM THE ABOVE KENYAN JURISPRUDENCE.....</i>	<i>27</i>
5	REVIEW OF CASES IN OTHER JURISDICTIONS INVOLVING SEX WORK	28
6	TRENDS, STRENGTHS, WEAKNESSES AND OPPORTUNITIES.....	38
7	THE WAY FORWARD IN ADVANCING THE FUNDAMENTAL RIGHTS AND FREEDOMS FOR SEX WORKERS	39
8	RECOMMENDATIONS	40
9	POSSIBLE CHALLENGES IN LITIGATION	41
10	CONCLUSION.....	43

1 BACKGROUND

Kenyan sex workers continue to suffer human rights violations, and the reported incidences and gravity of violence are increasing despite the expansive human rights protections under the bill of rights in the Constitution of Kenya 2010. Violence against sex workers is reported to pose a challenge to the efficiency of HIV prevention efforts and violates their fundamental human rights. The *Kenya AIDS Strategic Framework 2014/15 – 2018/19* identifies poor enforcement of anti-discrimination laws, weak social and legal protection of vulnerable populations among the factors driving new infections in Kenya.

A study carried out by the Kenya Sex Workers Alliance in Nairobi, Mombasa, Kisumu, Nakuru, and Busia; counties mapped out by The National AIDS and STI's Control Programme (NASCOP) as having a relatively higher population of sex workers, generated evidence on the impact of the legal environment on sex work related violence in Kenya with a focus on health, safety, and protection of sex workers.

The following summarizes the implications of punitive legislation on sex workers in Kenya:

- i. Influences negative public perceptions and biases that result in social marginalization of sex workers which exacerbates sex work-related violence.
- ii. Results in profiling of sex workers as criminals deterring equitable access to services
- iii. Contributes to impunity by law enforcement agents including rampant incidences of harassment, extortion, sexual exploitation, unlawful arrests and trumped up charges.
- iv. Discourages reporting of cases of violence against sex workers especially by sexually exploited adolescents who sell sex.
- v. Discredits sex workers which affects proper investigation and successful prosecution of perpetrators of violence.
- vi. Contributes to abuse of criminal procedures:
 - a. Restricts access to justice by encouraging prohibitive bail terms (and more favorable fines) that coerce sex workers to plead guilty to criminal charges that cannot be sustained in full trial
 - b. Cases against sex workers are rarely pursued to full hearing to have key issues determined.
- vii. Diversion is rarely considered even for petty offences by sex workers.
- viii. Prevents adolescents who sell sex from benefiting from legal protections in place to protect children who are sexually exploited – they are prosecuted as criminal offenders as opposed to children in need of care and protection.
- ix. Limits recognition of sex work as work presenting a challenge in protection of sex workers and provision of decent working conditions as recommended by ILO.

- x. Increases the vulnerability of sex workers to ill health including limited access to services for sexual violence, HIV prevention, Contraception and other reproductive rights such as mental health services.

The findings of the study resulted in two publications. The first report titled *"Silenced by Law,"* captures the findings on the impact of the legal environment on sex work-related violence in Kenya with a focus on health, safety, and protection of sex workers. The second report titled *"Underage and Legally under Protected"* documented the impact of the legal environment on sex work-related violence in Kenya with a focus on health, safety, and protection of sexually exploited adolescents who sell sex.

KESWA is confident that strategic legal action is a promising, potential tool for catalyzing change in the systems that perpetuate severe and multiple disadvantage in order to make sex workers lives healthier and work safer. This report will facilitate informed decision making by the community of sex workers in Kenya as they solidify a litigation strategy to use the court to achieve systematic change on key issues affecting their health, safety and well-being. PIL has the potential to advance the full enjoyment of the rights guaranteed under the Constitution of Kenya 2010 by sex workers in Kenya and their families.

2 INTRODUCTION

2.1 Public Interest Litigation and Advancement of Social Change in Kenya

Public Interest Litigation has the potential of reforming unfair laws, policies and practices through legal precedents that improve conditions for disadvantaged groups. Public interest litigation is wide in scope and can help address conditions that hinder these groups from participating fully and fairly in society.

The **Constitution of Kenya, 2010** under **Articles 22** and **258** recognize the wide scope of public interest and provides any person the right to institute court proceedings on where a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Such a right can be exercised by a person acting in their own interest, on behalf of another or in the interest of a group of persons.

The House of Lords In the case of *D vs. National Society for the Prevention of Cruelty to Children (1978) AC 171*¹, expounded the scope of public interest:

"the categories of public interest are not closed matters of public interest that would affect fundamental rights and freedoms would include for example, public health, national security, defence, international obligations, proper and due

¹ <https://www.casemine.com/judgement/uk/5a8ff8db60d03e7f57cce899#>

administration of criminal justice, independence of the judiciary, observance of the rule of law, the welfare of children, a clean environment among others.”

The Constitutional Court of Zimbabwe in the case of *Loveness Mudzuru & Another vs. Minister of Justice, Legal & Parliamentary Affairs and Others*², the court held that: -

“The courts in many jurisdictions have preferred to leave the definition of public interest open. They prefer to determine the question of public interest on the basis of the circumstances of each case. Concepts such as “public interest” are kept broad and flexible to develop in line with changing times and social conditions reflective of community attitudes. There are many areas of national and community activities which may be subject to the public interest.

LORD HAILSHAM’S in D v National Society for the Prevention of Cruelty to Children [1978] AC 171 at 230 said –

“Public interest is a term embracing matters, among others, of standards of human conduct tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The paramount test should be whether the alleged infringement of a fundamental right or freedom has the effect of prejudicially affecting or potentially affecting the community at large or a significant section or segment of the community. The test covers cases of marginalised or underprivileged persons in society who because of sufficient reasons such as poverty, disability, socially and economically disadvantaged positions, are unable to approach a court to vindicate their rights.

Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provide mechanisms for instituting public interest litigation actions. Any person may institute such a suit where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, and such a person affected or likely to be affected may make an application to the High Court on their own behalf or on behalf of any such other person or on behalf of a group or class of persons or in the public interest.

PIL actions undertaken by civil society groups and individuals in Kenya have exposed public service delivery gaps and supported the strategies of poor Kenyans to claim their rights.³ Public interest litigation actions in Kenya have provided marginalized individuals and groups with a platform to link their shared concerns on various issues. Using PIL, new

² Constitutional Application No. 79 of 2014

³ Kenyans for Peace with Truth and Justice (KPTJ), Africa Centre for Governance (AfriCOG) and Katiba Institute, “A Guide to Public Interest Litigation in Kenya” 2014

opportunities have arisen for Kenyans to leverage the law and courts to influence government policy, dialogue and practice.

In Kenya various PIL actions have been undertaken by various groups as tabulated herein below:

2.1.1 Right to Health

***Luco Njagi & 21 others vs Ministry of Health & 2 others*⁴**

The Petitioners filed the suit as a public interest cause and sought various orders including mandatory orders to compel the Ministry of Health to meet the cost of medical dialysis on their behalf at eight private medical facilities namely the Nairobi Hospital, the Nairobi Women's Hospital, The Aga Khan, MP Shah, Mater, Nairobi West and Karen hospitals, and at the Parklands Dialysis Centre, or to subsidize the cost of medical dialysis at the named private medical facilities at the rate at which the petitioners would have accessed treatment at Kenyatta National Hospital.

The petitioners, all suffering from renal failure, had been undergoing renal dialysis at the Kenyatta National Hospital which had 20 machines for this purpose but only 6 were available to serve all patients who require renal dialysis, and that the hospital gave preference to in-patients. It was their case that they could not afford healthcare from other service providers and their rights to health had been infringed.

While opposing the Petition, the Respondents' case was that over the years, the government had taken policy and legislative steps to achieve the realization of economic and social rights, within its resources. They contended that the government had built hospitals and health centres to provide health services to Kenyans who could not afford to go to private hospitals; took measures to combat cancer by enacting the Cancer Prevention and Control Act, 2012; and given free access to people living with HIV and AIDS free access to anti-retroviral drugs. The 1st respondent submitted that the government had bought dialysis machines and subsidized the fee for accessing the services, and the issues that it raised were issues that belonged to the decision-making authority of elected officials.

The 2nd respondent on its part contended that the cost of a single dialysis machine was about Kshs 1.6 million. The consumables per session for a patient cost about Kshs 4,500/= at the 2nd respondent, compared to Kshs 9,000/= in private hospitals, and the renal unit is therefore not considered a profit centre for Kenyatta National Hospital but instead as a significant cost centre considering the machines run non-stop. It was its case that as a

⁴ [2015] eKLR

result, the machines get really stretched most of the time; which inevitably led to occasional mechanical failure that required both time and enormous financial resources to repair. The National Hospital Insurance Fund on its part stated that it gave priority to ensuring the widest possible enjoyment of the right to health and healthcare services having regard to prevailing circumstances, including budgetary limitations, increasing cost of healthcare and scarce resources.

The question that the Court set for determination was whether, in the circumstances of the case, there had been a violation of the petitioners' right to health and whether the Court could grant the orders that the petitioners sought.

The petition was dismissed. While appreciating that the case raised issues of great public interest, the Court acknowledged the steps that had been taken by the Government of Kenya in ensuring access to medical services and health care by the citizens. The court acknowledged the efforts and various other factors including that dialysis is highly resource intensive, particularly on consumables, and that it requires enormous labour and specially trained human resources with specific expertise in the area to man the Renal Unit twenty-four hours every day. The court appreciated that the costs of dialysis in public hospitals was half compared to that in private hospitals and that the State contributed 30% of the healthcare budget while citizens remitted the rest through such payments to public hospitals. Ultimately the court was satisfied with the Government's efforts in ensuring access to health care moreover on dialysis. The Court observed as follows:

In the case now before me, the petitioners all suffer from chronic renal failure, and as they aver, need dialysis two or three times a week. They ask the court to intervene and ask that their treatment be subsidized by the state at private institutions. In making this demand, they ask the court to interfere with matters of policy which, as the Constitution enjoins at Article 20(5), should be left to the state, as the court is not suited, and does not have the requisite information, to enable it make a determination as to the best use of scarce resources in the health sector vis a vis other equally critical, sectors.

Analysis

From the above decision, it is evident that the court was reluctant to interfere with the policy decision and decline to grant any orders compelling the Government to take any action to relieve the petitioners. Although the petition did not succeed, the petitioners were able to articulate their issues through public interest litigation in advancing and highlighting the challenges in the health sector and the difficulties that some section of members of the public are having in accessing healthcare and health services.

In another similar case **Kenya Society of the Mentally Handicapped (KSMH) v Attorney General and Others (Petition No. 155A of 2011)** and **Okwanda v Minister of Health and Medical Services and 3 Others (Petition 94 of 2012)** both failed as a result of technical inadequacy that failed to provide proper evidence in support of their case before the court.

Daniel Ng'etich & 2 others vs Attorney General & 3 others

The Court was invited to consider the constitutionality or otherwise of various actions taken against the petitioners pursuant to **section 27** of the **Public Health Act** (hereafter “the Act”). The said provision had been used by public health authorities to have persons who have infectious diseases, notably tuberculosis (hereafter “TB”), and had defaulted in the treatment of the diseases, arrested, charged and confined to prison on the orders of a Magistrate’s Court. The petitioners argued that the use of the provisions of the Act to have them committed to prison for the purposes of treatment amounted to a violation of their constitutional rights including the right to dignity, the right to freedom from torture and other cruel and degrading treatment, and the right to freedom of movement.

The events giving rise to the petition occurred on or about 13th August, 2010, when the 1st and 2nd petitioners were arrested by the 3rd respondent, the Public Health Officer, Nandi Central District Tuberculosis Defaulter Tracing Coordinator. They were then charged in court on the allegation that they had failed to take the TB medication prescribed to them. In Misc App No 46 of 2010, the 3rd respondent applied before the Principal Magistrate Kapsabet for orders for the imprisonment of the 1st and 2nd petitioners pursuant to section 27 of the Public Health Act. The Court issued an order dated 13th August, 2010 for the confinement, in isolation, of the 1st and 2nd petitioners at the Kapsabet G.K Prison for the purposes of TB treatment. The confinement was to be for a period of 8 months or such period as would be satisfactory for their treatment. The two petitioners were as a result confined at the Kapsabet G.K Prison for a period of 46 days. Pursuant to an application made on behalf of the petitioners in Eldoret High Court Petition No 3 of 2010, the High Court (Mwilu J, as she then was) on 30th September 2010, ordered the release of the petitioners, to their respective homes from where they would continue their treatment under the supervision of the 3rd respondent.

In ordering the petitioners’ release, the court observed that their incarceration was unconstitutional and not even in compliance with the Public Health Act. She also observed that the G.K Prison was the worst of choices to confine the petitioners, and the period of eight months was unreasonably long given that it was not backed by any medical opinion. It is against this background that the petitioners filed a petition in the High Court.

⁵ Petition No. 329 of 2014, [2016] eKLR

In response to the Petition, the respondents contended that the 1st and 2nd petitioner were examined by a qualified medical practitioner who certified that they be put on medication for TB. They were informed of the treatment options and the dangerous nature of TB. At one time, the 3rd respondent tried in vain to locate the two so that they could take their drugs and calls to them went unanswered. Many visits to their homes were also unfruitful, which prompted their arrest and arraignment in court because of failure to adhere to the guidelines on TB treatment. The respondents further argued that Article 24 (1) (d) of the Constitution was clear that rights or fundamental freedoms in the Bill of Rights may be limited if there is need to ensure that the enjoyment of rights or freedoms by any individual does not prejudice the rights and freedoms of others. Their argument was that the failure by the two petitioners to adhere to treatment meant that they returned to active TB infectious state while continuing to interact, associate and mix with the general public, in which case they could easily transmit the infection thereby interfering with the right of other members of society to enjoy the highest attainable standards of health.

They also argued that sections 27 and 28 of the Public Health Act should be read together. While conceding that there were indeed less restrictive means to prevent the petitioners from spreading the disease, it was the respondent's further contention that such means did not work as the two petitioners failed to report to hospital every day for the purpose of taking their medication as instructed. They had also failed to be available at their homes when they were scheduled to take their medication. The respondents also contended that the 3rd respondent settled on the option of treating the two while in lawful confinement due to the fact that default in TB treatment is likely to lead to a multi-drug resistant TB and extra multi drug resistant TB which are very difficult and expensive to treat. The respondents argued that if that was allowed to happen, and the individuals were allowed to mix and interact freely with the public, it would create a danger to the general population.

The court upon considering the various parties' pleadings and submissions noted that the issues for determination was whether confinement of persons in prison for the purposes of treatment is a violation of their constitutional rights, and if so, what remedies were appropriate in the circumstances of the case. While allowing the petition, the court made the following observation;

Taking all the above matters into consideration, I am inclined to find that while there was a violation of the petitioners' right to liberty as guaranteed under Article 29 and of their freedom of movement guaranteed under Article 39, such limitation was justifiable under Article 24, and was in accordance with the Siracusa Principles. What was patently wrong and unjustifiable, and still is wrong and unjustifiable, is that such confinement should be in penal institutions. I say this for several reasons. It seems to me that the state, having failed to adequately address the needs of the health sector, and confronted with rising cases of TB, has taken the easy option:

arrest those who default and lock them away, and keep them away from the law abiding society. Unfortunately, given the state of prisons in Kenya, which are known to be overcrowded and lacking in basic facilities, that does not help in the treatment of the TB patients confined, or in stopping the spread of TB. Not only is such action not sanctioned by the Public Health Act, it is also patently counter-productive.

In the circumstances, the court issued the following declarations:

- a) That the confinement of the petitioners at the Kapsabet G.K Prison for the purposes of tuberculosis treatment for a period of eight months as ordered by the 2nd respondent was not authorized under section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya, and was therefore unlawful.*
- b) That the confinement of the 1st and 2nd petitioners at the Kapsabet G.K Prison for the purposes of tuberculosis treatment for a period of eight months, as ordered by the 2nd respondent violated the petitioners' rights under section 80 and 81 of the Constitution of Kenya, 1969 and Articles 29 and 39 (1) of the Constitution 2010.*
- c) That the confinement of patients suffering from infectious diseases in prison facilities for the purpose of treatment is a violation of their rights under Articles 29 and 39 (1) of the Constitution of Kenya, 2010.*
- d) That the confinement of patients suffering from infectious diseases in prison facilities for the purposes of treatment under section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya violates the Constitution and any use of this provision to order such detention in prison is at all times unconstitutional.*

Analysis

The use of a strategic case arising from procedural practice in implementation of punitive legal provisions, the litigants were able to bring out issues for determination on the basis of public interest. The effective use of international law and practices as stipulated in the World Health Organization Guidelines persuaded the court's application to the Kenyan context as measures aimed at addressing TB in line with human rights dictates. The court granted orders to compel State compliance with international human rights standards. The Court compelled the to issue a Circular to various health facilities to facilitate the rights of the petitioners and others in similar circumstances. The State was compelled to develop a policy to facilitate the prescribed compliance. The specificity of the timelines that accompanied the court decision was critical to post trial follow up and accountability by the state.

2.1.2 Right to Accessible and Adequate Housing and Protection against Forceful Eviction

In the case of **Satrose Ayuma & 11 others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others**⁶, the petition was filed by a group of petitioners, on their behalf and in the public interest of the entire residents, who had for several years occupied a parcel of land subject of the Petition, being L.R. No.209/6502 (*hereinafter to be referred to as "the suit premises"/or "Muthurwa Estate" interchangeably*), which land originally belonged to the East African Railways and Harbors Administration but was at the moment owned by the Kenya Railways Corporation (KRC). The suit premises comprised residential houses and other social amenities for use by the staff of KRC. Sometime in 2005, there was established a retirement scheme for the staff of KRC, the Scheme's purpose was mainly, the provision of pension and other benefits for employees of KRC. The Trustees also managed some of the properties of the KRC including the suit premises.

The 1st Petitioner contended that in the year 2010, the residents of Muthurwa Estate were informed that the rent account at Kenya Commercial Bank, which they previously used to pay rent into had been closed and that the bank was no longer accepting rent deposits on behalf of the Scheme. Shortly thereafter, provision of social amenities such as water and sanitation was stopped and the amenities were disconnected. The 1st Respondent, the Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme, then published notices dated 1st July 2010 which required all the residents of Muthurwa Estate to vacate the suit premises within 90 days and subsequently an advertisement was placed in the East African "*Standard*" newspaper. The advertisement invited offers for plots, as the land was to be used for development of a micro-metropolis with shopping malls, office blocks, petrol stations and "*high class apartments*". The advertisement was placed by or on behalf of the Trustees of the Kenya Railways Staff Retirement Benefits Scheme. Even before the expiry of the 90 days period, demolitions in the suit premises begun and the 1st Respondent also disconnected water supply, demolished toilets and bathrooms and removed the main fence of the property all in an attempt at deliberately forcing the Petitioners out of the suit premises and as a result the suit was filed challenging the said actions.

While opposing the Petition, the 1st Respondent claimed that it was not a public body as defined by the Interpretation and General Provisions Act (Cap 2) and that the reliefs sought by the Petitioners in the nature of judicial review were not appropriate as the issues involved in these circumstances revolved around private law and not public law. It argued that it was the registered proprietor of the suit premises, and allegedly a private property

⁶ Petition No 65 of 2010

wherein are erected houses for rent. The 1st Respondent contended that it had never entered into any formal tenancy agreement with any of the tenants occupying the Muthurwa Estate houses and that it applied to the City Council of Nairobi for change of user of the suit premises in order to enhance their market value so as to offer the suit property for sale which in return would enable it raise money to pay its Pensioners.

The 2nd Respondent's case was that it had no role to play in the circumstances leading to the suit and that it ought not to have been involved at all in the private landlord-tenant relationship between the Petitioners and the 1st Respondent. It stated that the suit premises was alleged to be among many of the properties that it transferred to the 1st Respondent in the year 2006 for its use and purposes of realizing its objectives as set out in the Trust Deed. That the 1st Respondent was an independent and autonomous body and had not been appointed by the 2nd Respondent to manage the suit premises on its behalf, and as such it had no right in law or fact to interfere in the manner in which the 1st Respondent chose to deal with its private properties.

The court upon considering the various submissions by the parties, stated that the issue for determination was around the issue of forced eviction and whether the 1st Respondent was indeed entitled to evict the Petitioners from the Estate and whether that eviction or intended eviction had violated any of the Petitioners' rights as alleged. While allowing the Petition, the Court rendered itself as follows:

In light of all the information available, especially on the nature of the housing crisis in this county, this case has clearly assumed an enormity of purposes beyond itself. In designing whatever remedies I shall grant the Petitioners I must take into account the fact that whereas I have found violations of rights articulated above, the following other issues are pertinent;

- a) It is hereby declared that the 1st Respondent violated the Petitioners' rights to accessible and adequate housing contrary to **Article 43** of the **Constitution** but limited to the manner in which the forced evictions from Muthurwa Estate was conducted on or about 12th July 2010.
- b) The 3rd Respondent is directed to consider amendments to the **Water Services Act of 2002** to bring it in line with the expectations of **Article 43(1)(d)** of the **Constitution 2010**.
- c) The 3rd Respondent shall within **90 days** of this Judgment file an Affidavit in this Court detailing out existing or planned State Policies and Legal Framework on Forced Evictions and Demolitions in Kenya generally and whether they are in line with acceptable International standards.

- d) The 3rd Respondent shall within **90 days** of this Judgment file an Affidavit in this Court detailing out the measures the Government has put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the expectation of **Article 43(1)(b)** of the **Constitution**.
- e) Within **21 days** of this Judgment, a meeting shall be convened by the Managing Trustee of the 1st Respondent together with the Petitioners, where a programme of eviction of the Petitioners shall be designed taking into account all the factors clearly outlined at paragraph 83 of this judgment;
 - i) that at the time of eviction, neutral observers should be allowed access to the suit premises to ensure compliance with international human rights principles.
 - ii) that there must be a mandatory presence of Governmental officials or representatives including Nairobi County officials and security officers.
 - iii) that there must be compliance with the right to human dignity, life and security of the evictees.
 - iv) That the evictions must not take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.
 - v) that no one is subjected to indiscriminate attacks. .

Analysis

In the above Case, the Court appreciated the role and applicability of international law and practices including the United Nations Resolutions and Guidelines. The court interpreted and applied the same within the Kenyan context and used the same as a basis for finding fault in the Government's actions. The strength in this case was the court granting orders to enable monitoring enforcement by requiring a specific Affidavit to Court detailing out existing or planned State Policies and Legal Framework on Forced Evictions and Demolitions in Kenya generally and whether they are in line with acceptable International standards.

2.2 LESSONS LEARNT FROM PREVIOUS PIL SEEKING ENFORCMENT OF CONSTITUTIONAL RIGHTS

PIL is broad. No one case can resolve all the issues affecting sex workers in Kenya. It is important therefore to prioritize key issues with actionable prospects with a higher impact.

Proper preparation will ensure a case is competently presented increasing the likelihood of success.

In light of the foregoing, the analysis herein shall examine the viability of public interest litigation as a tool of addressing issues affecting sex workers while highlighting the approach taken by the Kenyan Courts and International and regional Courts in addressing the issues surrounding the fundamental rights and freedoms of sex workers. We conclude by making various proposals on the possible remedies and recourse in addressing issues affecting sex workers in Kenya.

3 OVERVIEW OF THE LEGAL ENVIRONMENT ON SEX WORK IN KENYA

The international community has taken various steps in attempting to address issues pertaining to sex workers. The United Nations observes that historically, sex work has been criminalized in two major ways:

1. Through the criminalization of the selling of sexual services, with the imposition of penalties upon sex workers themselves.
2. Through the criminalization of various practices around sex work: these include, but are not limited to, keeping a brothel, recruiting for or arranging the services of others; living off the earnings of sex work; solicitation and facilitating sex work through the provision of information or assistance.⁷

Countries have promulgated various legislation through statutes and Constitutions to address such issues. At the international level, there have been attempts through international instruments such as the Universal Declaration of Human Rights; the United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others; and the United Nations Convention on the Elimination of All Forms of Discrimination against Women, among other instruments. Similarly, the International Labour Organization has made various recommendations on recognition of sex work as work.

In its Report of 1998, the International Labour Organization calls for the recognition of the sex industry citing the expanding reach of the industry and its unrecognized contribution

⁷ Anand Grover, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health', (2010) United Nations General Assembly. Pg 10

to the gross domestic product (GDP) of four countries in Southeast Asia. The ILO urges official recognition of what it terms ‘the sex sector’.⁸

Articles 3 and 5 of the *Universal Declaration of Human Rights* (1948) are to the effect that:

Everyone has the right to life, liberty and security of person.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The Universal Declaration seeks to protect every individual from all forms of such practices that are harmful and does not make any distinction of the person’s work, gender, race etc. This instrument prohibits any forms of discrimination on any grounds and advocates for equal treatment for all. Such international frameworks offer protection and recognition for all persons including sex workers.

On the other hand, instruments such as the *United Nations Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)⁹ stipulates that:

States are to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

The *United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*¹⁰, in its preamble it asserts thus:

Prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person.

States have relied on such instruments to criminalize ‘prostitution’ and all related activities in a bid to prevent exploitation and trafficking of women.

⁸ Janice G. Raymond, ‘Legitimizing Prostitution as Sex Work: UN Labour Organization (ILO) Calls for Recognition of the Sex Industry (Part One), (2003)

⁹ 1979

¹⁰ (1949) of 2nd December, 1949. It has been argued that the Protocol’s text has been interpreted in a way which ‘sexual exploitation’ is singled out as separate from what now is called ‘labour exploitation’ i.e forced labour, slavery, slavery-like practices and servitude in other industries. This is problematic for a number of reasons. Apart from the fact that this implies that sex work cannot be labour, the separation of sexual exploitation from forced labour falsely suggests that forced labour cannot exist in the sex industry, consequently depriving sex workers of protection against the practice. This is one of the reasons why sex workers perceive the trafficking framework unhelpful in the protection of their human rights. See *Marjan Wijers, Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol* Anti-Trafficking Review 4 (2015)

3.1 LEGISLATIVE FRAMEWORK

Within the Kenyan context, the law does not recognize the term sex work. The existing law recognizes the term ‘prostitution’ and other activities related to the same. The language used in the laws is ‘*prostitution*’ as opposed to ‘sex work’. It may be argued that the choice of wording by the Kenyan Legislature was aimed at not recognizing ‘sex work’ as a form of economic activity. The laws in Kenya therefore do not recognize ‘sex work’ as an economic activity however, the law creates penal consequences for engaging in acts related to ‘*prostitution*’.

3.1.1 Supportive Framework

The Constitution of Kenya 2010

The Constitution of Kenya, 2010 recognizes various fundamental rights and freedoms as stipulated in the Bill of Rights. The Constitution recognizes the protection of minorities and marginalized groups. The Constitution in that regard defines ‘marginalized group’ as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in **Article 27 (4)**.¹¹ **Article 56** of the Constitution obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalized groups participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; are provided special opportunities for access to employment; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure. **Article 36** of the **Constitution** grants every person the freedom of association. It stipulates that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

The Bill of Rights further recognize the right to equality before the law wherein every person is equal before the law and has the right to equal protection and equal benefit of the law. The said Article further protects against any forms of discrimination. The foregoing provisions and the entire Bill of Rights are to be read together with various international law instruments on the Bill of Rights and various international customary laws and practices in the enforcement and recognition of the same. Human rights are universal and so they are to be applied equally and universally.

The Health Act No.21 OF 2017

¹¹ Constitution of Kenya, 2010. Article 260. See Article 27 (4) which provides that: The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The law seeks to safeguard access to health care services for vulnerable groups. It obliges Kenya to address the health needs of vulnerable groups, and mandates the provision of emergency and specialized care. The Act is beneficial to sex workers because it provides better protection of the right to privacy. The law demands maintenance of confidentiality of one's health status and requires informed consent for the provision of a specified health service. Finally, the law guarantees reproductive health rights for all persons including right to safe, effective, affordable and acceptable family planning services.

HIV and AIDS Prevention and Control Act, 2006 (HAPCA)

This Act provides the legal framework to address HIV in Kenya. The law provides for protection and promotion of public health, the appropriate treatment, counselling, support and care of persons infected or at risk of HIV infection. This Law seeks to protect the rights of persons living with and those affected by HIV. Part IV of the Act addresses screening and access to health care services. It prohibits compulsory HIV testing for purpose of enjoyment of basic rights such as employment, marriage, education, movement and basic health services. The law makes it mandatory to obtain informed consent from a person before subjecting them to an HIV test. Part V upholds confidentiality of patients' HIV status and information.

The establishment of the HIV and AIDS Tribunal under the Act has ensured the protection of human rights in the context of HIV as provided under the Act. This is the first and only HIV-specific judicial body in the world. The procedure at the Tribunal has been simplified allowing individuals to submit their own cases, even without legal representation. This has made access to justice more accessible and affordable to PLHIV.

Section 24(1) of the Act requires a person aware of being HIV positive to "take all reasonable measures and precautions to prevent the transmission of HIV to others" and to "inform, in advance, any sexual contact or persons with whom needles are shared" of their HIV positive status. This section however was declared unconstitutional and parliament was ordered to reconsider the provision.

Protection Against Domestic Violence Act No.2 OF 2015

The purpose of the Act is for the protection and relief of victims of domestic violence. The Act defines domestic violence as violence against a person, or a threat of violence or imminent danger by someone who that person is in or has been in a domestic relationship with. It goes further to elaborate what a domestic relationship is and gives various examples such as marriages, relationships between divorced couples, people who live together, and people who were in marriages that have been dissolved or declared null and void. Family members and people engaged to be married, someone you have a child with and any person you have a close personal relationship with.

The Act recognizes a unique type of violence known as Economic violence. It is defined as an abuse that happens when one is deprived of money that she is entitled to or needs. Where empowered, sex workers can seek protection against violence experienced within domestic relationships. The Act further stipulates that it is the duty of police officers to inform a victim of violence of all the options they have to protect themselves against an abusive person such as access to shelter, medical assistance, and how to lodge a criminal complaint against the perpetrator.

Sexual Offences Act No.3 of 2006

The Act was enacted in response to an increase in sexual violence. It is meant to ensure complainants of sexual offences get justice that is substantive to the harm caused. It makes provisions for the sexual offences, their definition, prevention and protection of all persons from harm arising from unlawful sexual acts. It provides for minimum sentence and does not give judicial officers discretion when it comes to sentencing. It prohibits all manner of sexual offences including defilement, rape, gang rape, indecent acts, sexual exploitation and administering a substance with intent. This is the first legislation in Kenya's legal history, to recognize sexual harassment as a crime. It has also prohibited child trafficking, forced prostitution, sex tourism and sexual offences against persons with mental disability. The Act empowers the court to recognize and provide protection for vulnerable witnesses during the prosecution of sexual offences.

Children Act

The Act provides that a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscene materials.

The Penal Code CAP 63

The Penal Code prohibits all acts of violence. It incorporates provisions relating to assault addressing acts that cause actual bodily harm, fear of the same and threats to cause harm.

Counter-Trafficking in Person Act

The Act also makes provisions that may be used to safeguard the interests and rights of sex workers. Part IV establishes a counter trafficking in person's advisory committee, charged with submitting an annual report and such other functions necessary for the full implementation of the Act. Under Section 21 thereof, the Advisory Committee is to submit to the Minister and to the National Assembly an annual report of the policies, programmes and activities relating to the implementation of the Act.

3.1.2 Punitive Framework

The Penal Code CAP.63 OF 2009

The Penal Code contains provisions that outlaw activities relating to sex work. These provisions focus on third parties who benefit from sex work or promote sex work. The law touches on the following:

- i. Detention of females for immoral purposes - Section 151;
- ii. Male person living on the earnings of prostitution or soliciting - Section 153;
- iii. Woman living on earnings of prostitution or aiding, abetting or compelling an individual to engage in sex work - Section 154;
- iv. Procedure for entry and search of premises used for prostitution - Section 155; and
- v. Running a brothel - Section 156

In addition, the penal code criminalizes unnatural offences. This is defined under Section 162 as having carnal knowledge with another against the order of nature. Section 165 additionally penalizes indecent acts between males. This section has caused male sex workers to face harassment by law enforcement officers.

Sexual Offences Act No. 3 of 2006

The Sexual Offences Act (SOA) contains various provisions that penalize acts of third parties and generally outlaws the “exploitation of prostitution”. This means that it is illegal to encourage sex work or benefit from another person engaging in sex work. It also focuses on the exploitation of prostitution such as actions compelling anyone including a child or person with mental disabilities into sexual intercourse for gainful purposes.

Section 26 of the SOA criminalizes transmission of a life threatening sexually transmitted disease by doing or permitting the doing of anything which he or she knows is likely to transmit the disease. The section compels disclosure of HIV status. Additionally, it gives court the power to authorize compulsory testing of an accused person of this offense for the purpose of ascertaining that they are infected with the disease.

Public Health Act CAP 242

Provisions of the Act have been used to compel forced medical examination including the enforcement of forced HIV testing of sex workers. Section 43 and 44 of the Act make it mandatory for any person suffering from any venereal disease to consult a medical practitioner and be treated until completely cured. It criminalizes non-compliance with the provisions. Sections 27 and 28 touch on TB treatment, care and prevention, which is an

issue that greatly, affects people living with HIV (PLHIV). It gives the public health officer the authority to remove and request for the isolation of persons who have been exposed to infection or may be in the incubation stage of an infectious disease. The two sections have in the past been used to unconstitutionally incarcerate tuberculosis (TB) patients for “failure to adhere” to TB treatment.

County Laws

Prior to the enactment of the Constitution of Kenya, 2010, there were various By-laws enacted by the Municipal Councils which regulated prostitution and related activities in Kenya. Under the 2010 Constitution, County Governments have the powers to regulate various activities within the County as per the Fourth Schedule to the Constitution. Section 21 of the County Governments Act as read with Article 185 of the Constitution gives the County Governments through the County Assemblies powers to legislate on various issues. In that context, the Nairobi County Government current County By-laws – under the offences relating to ‘General Nuisance’ it is provided that:

Loitering, importuning or attempting to procure a female/male for prostitution purpose is an offense.

The foregoing was equally recognized in the defunct Municipal bylaws which had outlawed loitering for immoral purpose, importuning for prostitution and indecent exposure. It has been noted that these provisions have continued to form the basis of arrest of sex workers by County officials.¹²

How different counties govern activities associated with sex work may result in further criminal sanctions against sex workers in Kenya. These provisions have continued to form the basis of arrest of sex workers by county officials. Alarming, there has been increased debate on attempts by several County Assemblies to undertake further legislation prohibiting sex work and related activities.

4 ANALYSIS OF KENYAN CASE LAW ON SEX WORK RELATED ISSUES

Over the years, the Kenyan courts have confronted various issues pertaining to sex workers. The first reported case documented pre-dates the Constitution of Kenya, 2010 in the case of *Lucy Nyambura & Another vs Town Clerk, Municipal Council of Mombasa & 2 others*¹³, wherein the Petitioners had been arrested and detained in police custody on 13th August, 2008 and arraigned in court in Mombasa Municipal Court Criminal Reg. No. 3560 of

¹² Kenya Sex Workers Alliance, ‘Underage and Legally Under Protected: A Study on the Impact of Criminalization of Prostitution on Violence Prevention and Response for Sexually Exploited Adolescents who Sell Sex in Kenya’ 2018

¹³ Mombasa High Court Petition No 286 of 2009 [2011] eKLR

2008 over the offence of ‘loitering in a public place for immoral purpose contrary to section 258 (m) of the Mombasa Municipal Bye-laws.’ The Petitioners denied the charges and were granted bail.

The genesis of the Petitioners’ case at the High Court was that they had been arrested without warrants; the police had no reason or basis to arrest them, they were not preparing to commit, nor were they in the process of committing any cognizable offence, the arresting officers were all male, and no female officer were availed to conduct the search upon them. These they contended contravened their right to dignity. Accordingly, they informed the Court that the police officer who had arrested them, testified in Court on the 6th of October, 2008 and informed the court that the petitioners were in possession of condoms that they thought there was an offence being committed.

The petitioners relied on various reports including a Report prepared in the year 2008 titled *Documenting Human Rights Violations of Sex Workers in Kenya* in support of their case. It was the petitioner’s case therefore that their right to protection under the law had been violated as enshrined in the Repealed Constitution of Kenya, 1969 as read with various regional and international law instruments. It was also the petitioners’ case that the bye-laws under which they were being charged was unconstitutional and asked the Court to declare the same unconstitutional. The petitioner also contended that the Attorney General had failed in his duty to advise the Municipal Council of Mombasa, through the Minister for Local Authorities, that the said bye-law was unconstitutional. In response to the Petition, the then Town Clerk, swore a replying affidavit wherein he denied the existence of any offence in the Municipal Council’s Bye-laws described as “*loitering in a public place for immoral purposes*”; he said the petitioners had been charged under the General Nuisance Bye-law (Bye-law 258 [m] and [n]) which provided:

“Any person who shall in any street or public place [m] loiter or importune for the purposes of prostitution [n] procure or attempt to procure a female or male for the purpose of prostitution or homosexuality shall be guilty of an offence.”

He denied the claim made for the petitioners, “*that the arresting officer proceeded to arrest the petitioners only on the basis of their being in possession of condoms*”; and he averred that he believed “*the [subject] Bye-law in respect of public nuisance does not impair the petitioners’ constitutional freedom and rights of treatment with dignity, [or] the right to choose the type of contraceptive*” and expressed his belief, that the benefits of the subject Bye-law “*by far outweighs the alleged narrow interest of the petitioners*”. Accordingly, it was the Council’s argument that what he perceived a justification for the Bye-law “*aimed at prohibiting prostitution.*”

He further deposed that the subject Bye-law was not discriminatory, since it applied to “any person” found committing the act of loitering with the sole intention of committing prostitution.

The principle underlying the Bye-law was clear, as counsel submitted:

“... public decency is a matter of public interest and thus any law intended to protect and promote [it] must be encouraged. It is not and can never be the intention of society to promote acts of indecency and acts that would [ex] facie encourage moral decadence and corruption of public morals. Prostitution is one of such [examples of] conduct that any civilized society would not countenance.”

The court was therefore called upon to determine the constitutionality or otherwise of the provisions of the Mombasa Bylaws on prostitution and to determine whether the arrest, charging and prosecution of the petitioners was legal and constitutional. The court while dismissing the Petition underscored the shortcomings of the Petitioners’ case in terms of evidence and underlying legal principles such as the justiciability of the claim under the old Constitution in light of the enactment of the Constitution of Kenya, 2010 the Court was of the view that the Petitioners had not adduced evidence in support of their claim and the mere reliance on a documented Report on human rights violations of sex workers was not sufficient to justify their claim. The Court held that:

The advocate for the petitioners argued this case essentially on the basis of generality premised, in the first place, on the primacy of the Constitution as a basis of fundamental rights. This approach overlooked the evidentiary aspect of this case; and on this account the petitioners’ plea cannot succeed. The far-reaching effects of judicial orders dictate that these orders are to rest on a solid foundation of law and/or evidence, neither of which has been shown in the petitioners’ case. The petitioners have not addressed the question of proportionality between their claims to certain rights, and the claims of the public interest; and they have adduced no evidence demonstrating any violation of their guaranteed rights, apart from raising analogies based on an unrelated study entitled ***Documenting Human Rights Violations of Sex Workers in Kenya*** (2008).

There is no basis for declaring that Mombasa Municipal Council Bye-law 258 (m) and (n) actually and potentially violates the rights and dignity of women, and there is no basis for declaring the same to be unconstitutional.

Analysis

The above case highlighted a fundamental issue on the constitutionality or otherwise of the Bylaws and the arrest and charging of the Petitioners under the same. The Petitioners in

the said case did not adduce any such evidence demonstrating an infringement of their rights as they merely sought to rely on a Report documenting past violation of rights of sex workers. Accordingly, the Petitioners had not pleaded with precision by giving the specifics as to the mode and manner in which their rights had been violated or how and in what manner the County Bylaws infringed on the various constitutional rights.

The court did therefore not hesitate in dismissing the petition. The Judgment however highlights on the need of precise pleading and adducing supporting evidence to be relied upon by the court in reaching a verdict in favour of a litigant who pleads violation of their fundamental rights and freedoms.

In the case of ***Teresia Kwamboka & 27 others vs Officer Commanding Police Station, (OCS) Kisii Police Station & 5 others***¹⁴, the Court was confronted with a case in which the 1st to 26th Petitioners were residents of Kisii town and described themselves as ‘sex workers’ filed a constitutional petition against the Officer Commanding Kisii Police Station (O.C.S), The Officer Commanding Police Station (O.C.P.D) Kisii Central, the Inspector General of Police, the Director of Public Prosecution; the Chief Magistrate’s Court, Kisii and the Attorney General in which they sought various declaratory orders including a declaration that their arrest and body search by male police officers, detention for a period of 91 hours and a forceful medical examination carried out on them on the 20th November, 2015 constituted a violation of their constitutional rights. They also sought to have the medical examination report evidence arising from the forceful medical examination undertaken declared unconstitutional and to be expunged from the trial court record and subsequently a declaration of violation of their rights under Articles 28 and 29 (f) of the Constitution; and an order quashing and prohibiting their prosecution and any such other forceful medical examination being undertaken on them as had been directed by the trial court.

Accompanying the Petition was a Notice of Motion Application seeking interim conservatory orders staying the criminal proceedings and the undertaking of any such medical examination on them pending the hearing and determination of the Petition.

Whereas the court Ruling does not present a summary of the respondents’ response to the case, the court identified the issue for determination to be whether the petitioners had satisfied the court for a grant of conservatory orders against the respondents. Thus, whether the application was proper before the court and if so, whether the applicants/petitioners had demonstrated that their case against the respondents was eminently arguable for exercise of the court’s discretion in their favour. While declining the Application for interim orders, the High Court held thus:

¹⁴ Kisii High Court Petition No 54 of 2015, [2016] eKLR

The significant point coming from the holding is that the interest being protected is the interest of the public as distinct from the interest of an individual or individuals. In this case as may be deciphered from the petitioners' supporting affidavit, the interest sought to be protected is that of a group of individuals carrying themselves out as "sex - workers", a term which is neither defined in our statutes nor bears any legal significance.

In this country unlike few others mostly in the Western World, such a venture is illegal or unlawful to the extent of constituting criminal offences under the penal code and often leads to offences under the Public Health Act. The legality or otherwise of the arrest, the medical examination and the arraignment of the petitioners are factors which may be addressed in the pending trial at the Magistrate's Court and of course at the hearing of the petition.

[14] If the respondents are found to have acted unlawfully or contrary to constitutional principles and values and in violation of the petitioners' rights and fundamental freedoms while enforcing the law, then there is available remedy under Article 23 of the Constitution including a declaration of rights and an order for compensation "inter-alia". In the upshot, conservatory orders are not for granting where the effect is to stay the due discharge of clear statutory and constitutional functions bestowed upon the respondents.

Analysis

The case as presented was not sufficient to warrant the High Court's intervention at that stage of the proceedings for the reasons that the Trial Court was vested with jurisdiction in the first instance to determine the question of admissibility or otherwise of illegally obtained evidence. Accordingly, the petitioners had sought for damages and compensation as a remedy in the final petition and so the court was reluctant to halt the trial process as the same, if found to be unconstitutional after the hearing of the main petition, could be rectified by an award of damages to the petitioners.

The holding of the court signifies the principle of exhaustion doctrine whereby a party must first exhaust the available alternative remedy before rushing to the High Court's intervention.

In the case of ***International HIV/AIDS Alliance vs MM***¹⁵, the High Court was faced with an appeal from the HIV/Aids Tribunal wherein, the Respondent, was at all material times the employee of a Clinic, where she worked as a community mobilizer between December 2009 and April 2011. The Clinic was a project funded by International HIV/AIDS

¹⁵ High Court Civil Appeal No 365 of 2017, [2019] eKLR

Alliance, the appellant, a national membership network of over 1000 organizations comprising of Non-Governmental Organizations, Community Based Organisations and Faith Based Organizations, Private Sector Research and Learning Institutions responding to HIV/AIDS and TB in Kenya. The case before the Tribunal was that MM's photograph had been posted on the Appellant's website with explanatory notes to the effect that MM was an HIV positive sex worker waiting to be attended to. MM was aggrieved by the foregoing and lodged a complaint at the Tribunal seeking compensation for emotional and psychological distress.

The Tribunal allowed the complaint and granted MM an award of Kenya Shillings One Million Five Hundred as damages. The Respondent was aggrieved by the said decision and filed the appeal at the High Court challenging the said decision. The appellant argued that the respondent gave a written consent with no restrictions to the appellant to use her photograph as earlier alluded. The appellant further pointed out that the parties did not agree on the wordings to be utilized in the caption to the said photograph, therefore the same was left to the appellant and its agents who employed creative liberty taking into account the HIV status of the respondent, the environment and background of the image as well as the intended result of the use of the photograph in line with the article. The appellant further argued that the respondent had knowledge of the appellant's work in the HIV/AIDS field and her giving consent could be viewed in the context that the appellant would use her image to advance the said work.

The appellant urged the court to find that there was direct consent in the circumstances of the case in terms of the uncontroverted written consent presented to court and implied consent by the inaction of the respondent to place any restrictions on the said consent. To the contrary, the respondent counter-argued that her photographs were taken at Mater Hospital, Nairobi which the appellant's photographer mis-described. The respondent further pointed out that the Clinic is a specialized treatment centre exclusively treating sex workers for HIV and other transmitted diseases. It was also argued by the respondent that the appellant failed to summon its photographer to tender evidence to controvert the respondent's assertion. The respondent further argued that the derogatory effect of the picture at the time was that the respondent worked as a counsellor, teaching women and girls engaged in sex work to quit the trade and engage in safer methods of income earning and as a result the respondent's reputation was defamed by innuendo.

The Court while dismissing the appeal and upholding the Tribunal Judgment held as follows;

Having re-evaluated the evidence in its totality and upon considering the rival submissions, I am convinced that the respondent's photograph was inappropriately used contrary to the law and not in line with the respondent's consent. I am also

convinced that the respondent's photograph as used, portrayed the respondent as a 'prostitut'e. It is apparent that the respondent did not consent to have her image/photograph used to portray her as a prostitute. With respect, I find no fault in the decision of the Tribunal. The appeal as against liability therefore has no merit.

I agree with the submissions of the respondent that she suffered damage and harm. The Tribunal was therefore right to award her damages for emotional and psychological distress.

Analysis

The court in the above case appreciated and upheld the fundamental rights to privacy and dignity among others of the respondent. The case at hand was supported by the necessary evidence and the court appreciated the need for rewarding the respondent for the unjust treatment by the appellant and hence the court did not see any need of interfering with the holding by the Tribunal and hence dismissed the appeal.

In the case of *Republic vs Barbara Njambi*¹⁶, the Applicant had sought for bond and bail pending her trial at the court wherein she had been charged with murder. The State did not oppose the said Application but left it for the court's determination. In this case the Court was presented with a probation officers Report which highlighted the nature of work of the Applicant as a sex worker. The Report partly stated thus:

The applicant is a 31year old hailing from Thika whose father is a casual labourer.. The applicant is reported to have dropped out of school and got married to one Waweru and engaged in commercial sex work until her arrest. It is reported that the victims oppose her grant of bond and that the appellant had no relative willing to secure bond terms for her. The community at High Class Brothel indicated her as brutal when under the influence of alcohol and that her fellow sex workers described her as cunning and is of a don't care attitude. It was reported that the nature of commercial sex work exposes the workers to long distance travel and the probation officer left it to court to decide.

While dismissing the Application for bail, the Court concluded thus;

In the instant case I have considered the following factors: -

- (a)** The need to give the applicant the full benefit of her constitutional rights and freedoms.

¹⁶ Machakos High Court Criminal Case No. 1 of 2019 [2019] eKLR

- (b) The apprehension that the applicant keeps company of persons who have a “don’t care” attitude.
- (c) The apprehension that there is a risk of the Applicant absconding because of the nature of the job she is involved in.
- (d) The seriousness of the charges against the Applicant.
- (e) The indication that the Applicant is brutal when under influence of alcohol.
- (f) The status of the case that the offence was as per the charge sheet allegedly committed on 24th December, 2018, that is not more than a year old.
- (g) The Constitutional requirement that the Applicant must be presumed to be innocent until she is proved guilty or until she pleads guilty.
- (h) The caution that bail should not be refused as a form of punishment to the Applicant.
- (i) The absence of sureties or persons within the jurisdiction of this Court who are ready to undertake that the Applicant shall comply with the conditions of her bail.
- (j) The fact that the Applicant has no known spouse and has two children that need to be catered for despite the fact that she leads an unsettled existence with no fixed place of abode within the jurisdiction of this court and no established connection with her parents.
- (k) Absence of any information from the Respondent that there are other charges pending against the Applicant.

Analysis

In declining to grant bail, the Court thus considered the nature of the Applicant’s work among other factors and hence the same informed the Court’s decision in declining to grant bail.

4.1 LESSONS LEARNT FROM THE ABOVE KENYAN JURISPRUDENCE

As evidenced from the above cited Kenyan cases, it is apparent that the Courts appear to have a bias against sex workers which in fact is further fortified by the legal environment that criminalizes sex work related activities and the non-recognition of the same as genuine work or source of employment. However, the lack of properly prepared and presented cases hasn’t gone unnoticed by the courts. The quality of the cases to be presented will be critical to ensure the litigant/clients are taken seriously. Additionally, the courts may be more inclined to entertain less controversial issues and incremental litigation will provide a good strategy to build on successes while working towards more divisive issues.

5 REVIEW OF CASES IN OTHER JURISDICTIONS INVOLVING SEX WORK

It has been reported that all countries of Asia and the Pacific criminalize sex work or certain activities associated with sex work, except New Zealand and New South Wales (Australia). In some countries, a punitive approach to sex work is entrenched by national constitutions (Bangladesh, Cambodia and Pakistan).¹⁷ Some countries have put in place systems to regulate certain segments of the sex industry, which are allowed to operate in specific areas subject to monitoring or compliance with official requirements e.g. the licensing system in Taiwan, the affidavit system in Bangladesh, the Lokalisasi system in Indonesia, registration with police in Singapore, and licensing or registration systems in States and territories of Australia. In jurisdictions such as Guam, the Philippines and Thailand, sex work is criminalized but the government recognizes the reality that sex is sold in certain premises in particular areas. In these countries, the law requires businesses such as entertainment venues or massage parlors to be registered or licensed and to comply with conditions such as the requirement that employees test regularly for STIs.¹⁸

In Africa, the issue of sex workers has been handled differently through various legislation and judicial pronouncement. Other than the Kenyan context, the international community through the various courts and Tribunals have equally addressed their minds on the various issues affecting sex workers. For example:

In Malawi, in the case of *The Republic vs Pempho Banda and 18 Others*¹⁹, the High Court reviewed and set aside a conviction of 19 women who had been convicted for the offence of living on the earnings of prostitution contrary to **Section 146** of the **Penal Code of Malawi**. The Section is similar to the Kenyan Penal Code on living off the earnings of prostitution.

The convicts filed a review with the court citing the court's inherent jurisdiction. Firstly, they argued that the Magistrate had no jurisdiction over the offence of living on the earnings of prostitution under section 146 of the Penal Code.

They further stated that according to section 14(4)(b) of the Criminal Procedure and Evidence Code provides that the court of the fourth Grade may pass a sentence of

¹⁷ In some Asian Countries, a punitive approach to sex work is entrenched by national constitutions. The Constitution of Cambodia prohibits prostitution as exploitation, and the Constitution of Pakistan and Bangladesh require the State to prevent or not promote prostitution. In Pakistan and Viet Nam, prostitution is referred to in law as 'social evil'. John Godwin, *Sex Work and the Law in Asia and the Pacific: Law, HIV & Human Rights in the Context of Sex Work*, (2012, United Nations Development Programme) pgs. 1, 21.

¹⁸ Some registration systems for sex workers, such as the affidavit system in Bangladesh, provide some security benefits and protection from police harassment for those who register, but without any access to health benefits. *ibid*, pg 38.

¹⁹ Malawi High Court Review Case No 58 of 2016 (Being Criminal Case No 142 of 2016)

imprisonment for a term not exceeding twelve (12) months or a fine not exceeding MK100,000 or both. Accordingly, the offence of living on the earnings of prostitution in section 146 of the Penal Code is a misdemeanor and in terms of section 34 of the Penal Code has a maximum sentence of twenty-four (24) months. Thus since the maximum sentence for the offence of living on the earnings of prostitution is 24 months thereby exceeding the jurisdiction of the said lower court.

The second ground for review was that the particulars of the charge were bad for misjoinder. It was their argument that including all the 19 convicts in the same count created the impression that the accused persons jointly committed the alleged offences. However, the caution statements were very clear in that the convicts were all acting independently of one another hence they could not be included in the same count as if they were committing the offence together. The convicts also argued that the charge was wrong in law as living on the earnings of prostitution does not target the sex worker herself. They did concede that section 146 may capture every woman who lives on the earnings of prostitution. This means it can capture any female relation of the prostitute including the children of the prostitute or parent if they depend on the earnings of the prostitution.

Therefore, it was unreasonable to charge sex workers with the same offence which was intended to protect them from exploitation. This would not solve the mischief which the section was intended to deal with.

While setting aside the conviction, the Learned Judge lamented over the misuse of the provision and the discrimination on women as a result of the enforcement of the provision by the authorities in Malawi and the Judge further alluded to the provision being overboard and ambiguous. The Learned Judge noted that;

All the above being said, having noted the history and noting the selective use of prosecution in terms of prostitution, in that, the courts constantly only deal with the women not the other players, it remains for me to determine that the offence of living on the earnings of prostitution in Malawi was not aimed at prostitutes or sex workers, but rather at those who exploited them.

It is my considered view that the section does raise two (2) distinct offences with one targeting the prostitute herself and the other targeting the persons having control over the prostitute. In law, the State has every right noting that there has been an offence committed to try anyone of the said offence as long as their evidence meets the required standard of proof. This however does not take away

from the fact that history of the provision nor that was its initial intention to only target the persons exercising control.²⁰

I would observe however that although the first part of section seems to cover the prostitute herself, it is couched in a fashion that is overboard and it can catch within its web many innocent women including the dependants of the prostitute..²¹

Analysis

The above case shows that laws that were put in place during colonial times end up doing more harm than good and do not cure the mischief they were intended to cure. The result is that the provisions in law that are ambiguous and or equivocal can be amended and are subject to constitutional challenge.

In the case of *Dorothy Chioma Njemanze and Others vs The Federal Republic of Nigeria*²², the Plaintiffs filed the suit against the Republic of Nigeria claiming violations of their various fundamental rights and freedoms by the police and various state agents acting on behalf of the Republic of Nigeria. They complained against their arrest, detention, harassment, abduction and various forms of physical assaults. It was their case that they were on several occasions abducted and assaulted sexually, physically and verbally. Further, that they were threatened and unlawfully detained by state agents in Abuja working for the Abuja Environmental Protection Board (AEPB), the Nigerian Police and the Nigerian Military at different times.

They also contended that the said officials never introduced themselves to them neither did they inform them of the reason for the arrest or charge them to any court in Nigeria. In defence, the State denied the allegation and raised various issues among their arguments being that the Plaintiffs belonged to the cadre of prostitutes popularly called 'Big Aunty' who gathered and coordinated other young girls involved in the business of commercial sex work and with their weight of connection always cajoled other young girls in need of help into prostitution for their own benefit. In response to the Plaintiffs' statement of facts, the Defendant stated that no person(s) were arrested and/or detained by the Nigerian Police, Nigerian Military or men of the AEPB as alleged by the Plaintiffs. That if at all the alleged three girls were arrested by the Nigerian Police and men of the AEPB, neither the 1st, nor 2nd to the 4th Plaintiffs were, among them; the Plaintiffs therefore lacked the legal capacity to bring a complaint on their behalf. The Defendant stated that the 1st Plaintiff did at no time have the alleged experience with the Nigerian Police, Nigerian Army or the men

²⁰ Para 4.29

²¹ Para 4.30

²² Community Court of Justice of the Economic Community of West African States (ECOWAS) Suit No. ECW/CCJ/APP/17/14

of the AEPB. That the 1st Plaintiff was hiding under the canopy of human right activism to campaign for the legalization of prostitution in public places in the Federal Capital Territory. That the 1st plaintiff was actively involved in the coordination and conduct of the trade or business of professional commercial sex workers (prostitution).

The Defendant argued that the Government of the Federal Republic of Nigeria, the FCT administration and indeed the international bodies in Africa are against commercial sex workers popularly called “ashawo” in Nigeria, as same constitutes nuisance and a violation of the moral values of our African society. Accordingly, that the person described as a Man O’ War by the Plaintiffs was not an agent of the Defendant. It was also the Defendant’s argument that the Plaintiffs dressed naked or half naked by the road side soliciting for men both interested and uninterested members of the public including innocent infants. Accordingly, that only an insane or an idle person can be in the street at 12 mid-night in the name of collecting signatures. The Defendant stated further that the activities of the plaintiff (prostitutes) were injurious to the moral life of the FCT and a crime under the Nigerian law, particularly the Penal code, applicable to the FCT. The ECOWAS Court while holding in favour of the Plaintiffs noted that the Plaintiffs had proven their assertions on the illegal arrest and the Defendant had failed to rebut the assertions.

The Court stated thus:

For the avoidance of doubt in cases in which an Applicant alleges arrest and detention, it is usually difficult for them to have access to the detailed record of the arrest, a fact usually within the knowledge and possession of the arresting officials. How does he prove the facts of arrest other than through an assertion of that fact. Mere denial of lack of arrest on the part of a Defendant cannot suffice. The Court usually presumes the fact of arrest and its unlawfulness and the Defendant have to rebut it by producing credible evidence of absence of arrest and detention of the Applicant. A general denial by the Defendant as in this case is not sufficient....²³

The Court further found in favour of the Plaintiffs on the issues of verbal abuses. The Court observed as follows:

The use of the word prostitute or “Ashawo” on the Plaintiffs is humiliating, derogatory and degrading to their persons. The Defendant having failed to provide any reasonable justification for its allegation and use of such degrading²⁴ words on the Plaintiffs is therefore in violation of Plaintiffs rights as provided under Article 5 of the African Charter on Human and Peoples’ Rights. From the totality of evidence offered, it seems that the whole hug of the operation was targeted against women.

²³ Pg 32

²⁴ Pg 37

This systematic sting operation directed against only the female gender furnishes evidence of discrimination.²⁵

There is an obligation placed on State Parties to Convention on Elimination of All Forms of Discrimination against Women (CEDAW) to adopt laws, administrative and Policy measures to prevent gender based discrimination. Prostitution is claimed to be a crime in the laws of the Defendant. However, it takes two persons to engage in such criminal activity. There is no law that suggest that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes. If it were so, it ought to apply to all persons irrespective of sex.²⁶

Analysis

The above decision demonstrates the willingness by regional and international Courts to address challenges faced by various populations such as sex workers whereby their respective States have failed to take any such necessary action to protect and secure their fundamental rights and freedoms. In the above case, it was evident that the State of Nigeria had failed to undertake various actions despite the Plaintiffs raising their complaints with the various authorities. The foregoing necessitated the filing of the said suit to the regional court against the Nigerian Government. As evident from the above case, it is to be noted that the challenges the said sex workers were facing are similar to those faced by Kenyan workers such as constant harassment, abuse and threats by law enforcement agencies and authorities. The success in the above case was attributed mainly by the availability of evidence in support of the allegations made in the said suit.

In the **South African Case of S vs Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)**²⁷ the Court was confronted with a case challenging various South African legislation on sex work and prostitution. The High Court had found in favour of the Appellants and held that the criminalization of prostitution constituted an infringement of the Appellants rights. The Appellants, a brothel-owner, a brothel employee and a sex worker were convicted by a Magistrate's Court for contravening the South African Sexual Offences Act, 1957. The High Court partially allowed their appeal by quashing their conviction and declaring section of the Sexual Offences Act that had criminalized prostitution unconstitutional but dismissed the appeal on the aspect of sections of the Act which criminalized keeping or managing a brothel.

The Appellants thus lodged an appeal against the High Court decision to the South African Constitutional Court seeking to annul the decision on the keeping or managing a brothel. In

²⁵ Pg 38

²⁶ Pg 38

²⁷ (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002)

this case on 20th August 1996 a police officer entered a brothel owned by the first appellant in Pretoria, paid R250 to the second appellant, a salaried employee, and received a pelvic massage from the third appellant, a prostitute or sex worker. The three appellants admitted in the Magistrate's Court that they had contravened the Sexual Offences Act 23 of 1957, which criminalizes providing sex for reward and brothel-keeping, but claimed that the relevant provisions of the Act were unconstitutional and should be declared invalid. Since the Magistrate's Court has no power to declare statutes unconstitutional, they did not resist conviction in that court. After being found guilty and sentenced by the magistrate, they appealed to the Pretoria High Court to have the provisions set aside.

The court was therefore called upon to determine the constitutionality or otherwise of the provision of Section 20 (1) (Aa) of the said Act. While dismissing the appeal, the Constitutional Court rendered itself as follows:

The legislature has the responsibility to combat social ills and where appropriate to use criminal sanctions. In doing so, it must act consistently with the Constitution. Once the legislature has done so, courts must give effect to that legislative choice and may not enter into the debate as to whether the choice made is better or worse than others not chosen. It was accepted that the options available to the legislature in combatting the social ills associated with commercialised sex include criminalisation, regulation and abstention.²⁸

The means employed by the state to address these problems are to criminalise commercial sex and brothel keeping. It is not for this Court to pass judgement on the effectiveness or otherwise of the choice made by the legislature. Indeed, we are not entitled to set aside legislation simply because we may consider it to be ineffective or because there may be other and better ways of dealing with the problem. It follows therefore that prostitution and brothel keeping are not protected by section 26. For these reasons I agree that the challenge based on section 26 must likewise fail.²⁹

On the arguments that criminalization and prohibition of prostitution infringed on the right to privacy, the Court rendered the following opinion thus:

What lies at the heart of the prostitutes' complaint is that they are prohibited from selling their sexual services. After all, they are in this industry solely for money. The prohibition is directed solely at the sale of sexual activity. Otherwise the prostitutes are entitled to engage in sex, to use their bodies in any manner whatsoever and to engage in any trade as long as this does not involve the sale of sex and breaking a

²⁸ ibid Paragraph 25

²⁹ ibid Paragraph 26

law validly made. What is limited is the commercial interests of the prostitute. But that limitation is not absolute. They may pursue their commercial interests but not in a manner that involves the sale of sex. Having regard to the legitimate state interest in proscribing prostitution and brothel keeping, viewed against the scope of the limitation on the right of the prostitute and brothel keeper to earn a living, I conclude that if there be a limitation of the right to privacy, the limitation is justified. It follows that the challenge based on the right to privacy must also be dismissed.³⁰

On the role of the Court and in addressing the issues raised, the Court affirmed its mandate in light of the doctrine of separation of powers and the mandate of the legislature. The Court thus stated:

Much of the argument in this case, and of the evidence placed before this Court, was directed to the question whether the interests of society would be better served by legalising prostitution than by prohibiting it. In a democracy those are decisions that must be taken by the legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.³¹

Analysis

The above decision exemplifies the difficulty in challenging such provisions of statutes touching on the criminalization of sex work and related activities. In the instant case, the court appreciated that the role of legislating and making laws is a preserve of the legislator and that it would not be in the interest of justice for the court to examine the effect of legislation and to substitute the choice of the legislator by its own decision. The above case was based purely on an interpretation of the Constitution and the impugned statute and striking a balance between the individual interests vis-à-vis that of the greater members of the public. By reasoning, it may be argued that the court upheld the principle that public interest outweighs private interest and that is why the court drew the conclusion that the whereas prostitution is committed in private, the law should equally be as concerned with crimes that are committed in private as it is with crimes that are committed in public.

In the Nigerian Case of Constance ***Nkwocha and Others vs Hon. Minister of the Federal Capital Territory and Others***³², the Petitioners' complaint was that the respondents had broken into their premises in the name of enforcing Abuja law banning prostitution in Nigeria. It was their complaint that the Respondents arbitrarily arrested them late at night,

³⁰ ibid Paragraph 29

³¹ ibid Paragraph 30

³² High Court of Nigeria, Abuja, Case No. FHC/ABJ/CS/483/2017

conducted indecent searches on them, detained them and took their monies in the process of enforcing the illegal arrest. These they asserted was contrary to their various fundamental rights and freedoms as enshrined in the Constitution of Nigeria and various other laws including the African Charter on Human and Peoples Rights. They further asserted that the illegal search of the houses was contrary to the law on protection of the right to family and private life and as such they sought for compensation and prohibitory injunctive orders against the Respondents for the said violations.

In response to the application, the respondents contended that that the 1st applicant was selling beer at the beer parlour in Mabuchi but failed to link an action of the called joint task force to the breach of her fundamental right that is not enough to only make averments on oath without providing material particular to substantiate her allegation. They contended that the applicant had not satisfied the evidential threshold and that the issues raised in the suit could not be sustained under Fundamental Human Rights action. Accordingly, that the allegations made were matters to be considered under damages under Chapter IV of the Constitution of the Federal Republic of Nigeria. While holding that there had been violations of the Petitioners' rights, the Court stated as follows:

The actions of the Respondents amounts to an infringement of the Applicants rights to privacy enshrined in Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended). It is trite that where the words in a statute are clear and unambiguous, they should be given their ordinary meaning, the Court of Appeal reiterated this principle in COMMISSIONER FOR LOCAL GOVERNMENT AND CHIEFTANCY & ANOR v. ONAKADE (2016) LPELR 41133 (CA) PP.21 PARAS A-B

The law has laid down process and procedure for effecting arrest, law enforcement agents and agencies should ensure at all times to follow the laid down guide by the law.

Consequently, I find and hold that the breaking in and the arrest of the Applicants by the Respondents is an infringement of the Applicants' rights to privacy as guaranteed by the Constitution.

Consequently, I hereby award compensation to each of the Applicants in the sum of N100,000 (One Hundred Thousand Naira) Only against the Respondents and the cost of this suit.

Analysis

The above judgment underscored the importance of human rights litigation as it affirmed the question of recognition and upholding of fundamental rights and freedoms of individuals especially sex workers. The decision further demonstrates the courts

willingness to address human rights violations perpetuated by state agencies and officials. By applying and upholding the constitutional provisions on the right to privacy of the applicants, the court illustrated the sanctity of the individuals' right to privacy and the need to respect and uphold the same even when state agencies are enforcing the laws. Whereas the court awarded the applicants damages in terms of monetary compensation, it further upheld and recognized the importance of their various fundamental rights and freedoms.

In the Canadian case of *Canada (Attorney General) vs Terri Jean Bedford and Others*³³, Terry Jean Bedford, a 52-year-old woman had for a long time worked as a prostitute in various Canadian cities. She asserted that she had worked in various cities including Calgary, Vancouver, Windsor and Toronto and that she had worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. In this case, the Canadian court appreciated that in Canada, prostitution is not illegal and that no law prohibited a person from either selling or buying sex. The Court however noted that the Canadian Parliament had nonetheless enacted laws that indirectly restricted the practice of prostitution by criminalizing various related activities. The Petitioners therefore filed the suit challenging some of the provisions on the grounds that they were unconstitutional. The said three provisions of the Criminal Code, R.S.C. 1985, c. C-46, were:

1. Section 210, which prohibits the operation of common bawdyhouses. This prevents prostitutes from offering their services out of fixed indoor locations such as brothels, or even their own homes;
2. Section 212(1)(j), which prohibits living on the avails of prostitution. This prevents anyone, including but not limited to pimps, from profiting
3. Section 213(1)(c), which prohibits communicating for the purpose of prostitution in public. This prevents prostitutes from offering their services in public, and particularly on the streets.

In the court below, the application judge held that these provisions are unconstitutional and must be struck down because they do not accord with the principles of fundamental justice enshrined in s. 7 of the Canadian Charter of Rights and Freedoms. She reasoned that the challenged laws exacerbate the harm that prostitutes already face by preventing them from taking steps that could enhance their safety. Those steps include: working indoors, alone or with other prostitutes (prohibited by s. 210); paying security staff (prohibited by s. 212(1)(j)); and screening customers encountered on the street to assess the risk of violence (prohibited by s. 213(1)(c)). The respondents argued that these provisions deprive them of the right to life, liberty and security of the person protected by s. 7 of the Charter, that the deprivation does not accord with the principles of fundamental justice,

³³ Court of Appeal for Ontario Case No. 2012 ONCA 186 C52799 and C52814

and that the provisions cannot be justified. They also argued that the communicating provision violates the guarantee of freedom of expression in s. 2(b) of the Charter and cannot be justified under s. 1.

The application judge dealt with two preliminary matters before turning to the merits of the constitutional challenge. **First**, she held that all the respondents had private interest standing to challenge the three provisions of the Criminal Code. In so holding, the application judge rejected the Attorney General of Canada's attempt to distinguish between Ms. Lebovitch, who currently works as a prostitute, and Ms. Bedford and Ms. Scott, both of whom worked as prostitutes in the past and wish to return to this type of work in the future. **Second**, the application judge acknowledged, that the Prostitution Reference was 'prima facie binding' on the court in respect to the bawdy-house and communicating provisions.

Nevertheless, she concluded, at para. 75, that she was not foreclosed from hearing the application because the issues raised in the case were different from those raised in the prostitution reference. Those argued in the Prostitution Reference. The Court partly upheld the lower court decision and held that;

As we will explain, we agree with the application judge that the prohibition on common bawdy-houses for the purpose of prostitution is unconstitutional and must be struck down. However, we suspend the declaration of invalidity for 12 months to give Parliament an opportunity to redraft a Charter-compliant provision.

We also hold that the prohibition on living on the avails of prostitution infringes s. 7 of the Charter to the extent that it criminalizes non-exploitative commercial relationships between prostitutes and other people. However, we do not strike down that prohibition, but rather read in words of limitation so that the prohibition applies only to those who live on the avails of prostitution in circumstances of exploitation. This cures the constitutional defect and aligns the text of the provision with the vital legislative objective that animates it.

One important point before we begin. Prostitution is a controversial topic, one that provokes heated and heartfelt debate about morality, equality, personal autonomy and public safety. It is not the role of the court to engage in that debate. Our role is to decide whether or not the challenged laws accord with the Constitution, which is the supreme law of the land. While we have concluded that some aspects of the current legislative scheme governing prostitution are unconstitutional, it remains open to Parliament to respond with new legislation that complies with the requirements of the Charter.

Analysis

This decision appreciated the role of the court in striking down unconstitutional legislation but giving the legislator the time to rectify such unconstitutional legislation without leaving a vacuum in the law. The suit although presented by individuals in their private capacity, highlighted on public interest issues and challenges sex workers in Canada faced. The judgement brought a clarity on the law by upholding and recognizing the fundamental rights and freedoms of sex workers. The reasoning in the said case may be used as a persuasive authority in litigating over sex workers' rights in Kenya.

6 TRENDS, STRENGTHS, WEAKNESSES AND OPPORTUNITIES

Whereas the international community through the international and regional courts offer incisive jurisprudence on litigation of issues affecting sex workers, the laws in the various countries are different and the enforcement mechanisms are different as well.

- ✚ In some instances, the wordings used in statutes are the same and as such, the similarity in wording in the legislation offers an opportunity to challenge convictions of sex workers in Kenya for living off the earnings of sex work.
- ✚ The challenges presented in the Kenyan context include prohibitive bail terms which discourage sex workers from pursuing trial of cases.
- ✚ Additionally, when arrested, the charges preferred are usually on the basis of County Bylaws as opposed to the Penal Code. This appears to be a strategy to coerce sex workers into admitting guilt where the possibility of more favourable fines is likely and has been the trend locally.
- ✚ As evident from the various cases, the sex workers' fundamental rights and freedoms have been litigated upon in totality and jointly as the ambit of the various rights and fundamental freedoms protected are intrinsic and inter-linked and inter-dependent.
- ✚ The ambit of each of the protected rights is to be determined in part by the underlying significance and values of the Bill of Rights as a whole and that the rights intersect and overlap one another.

The reasoning and analyses given by the various courts shall provide good and persuasive authorities that may be used in litigating various issues pertaining to sex workers in Kenya. For instance, the right to life, is linked to the right to health; the right to human dignity; the right and freedom against inhuman. Cruel, degrading treatment among others and as such, any litigation to be undertaken would involve litigating the various rights and fundamental freedoms jointly.

7 THE WAY FORWARD IN ADVANCING THE FUNDAMENTAL RIGHTS AND FREEDOMS FOR SEX WORKERS

The foregoing cases and practices highlight on the roles the Court have played in advancing the recognition of the various fundamental rights and freedoms of sex workers. The Courts have in various instances shied away from declaring provisions on criminalization of sex work unconstitutional and have cited the doctrine of separation of powers and the role of the legislature in enacting laws.

Within the Kenyan Context, a similar challenge had been brought in regard to the provisions of the Penal Code outlawing same sex marriage and the challenge on ambiguity of the provisions in regard to **Sections 162 and 165** of the **Penal Code** of Kenya on sexual conduct between individuals of the same gender in the case of *EG & 7 others vs Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*³⁴ The Petitioner in this case stated that he brought the Petition to end what he considers unjust and unconstitutional state of affairs whereby LGBTIQ Kenyans were exposed to the risk of criminal prosecution and imprisonment because of the climate of social opprobrium towards them perpetuated by the criminalization of their sexual orientation and identity. Consequently, he urged the court to strike down the impugned provisions for being unconstitutional. In the alternative, he urged the court to interpret the said provisions in a manner that excludes them from the ambit of the private consensual sexual conduct between adult persons of same sex. The Petition was founded on Articles **2, 19, 20, 21, 24, 25, 31, 43 and 259** of the Constitution. In the petitioner's view, to the extent that the impugned provisions declared the conduct as unnatural or grossly indecent and criminalize it, the provisions degraded the inherent dignity of the affected individuals by outlawing their most private and intimate means of self-expression. He further claimed that sexual intimacy between consenting adults was a fundamental part of the experience of humanity, and an essential element of how individuals express love and closeness to one another; and, establish and nurture relationships. He argued that to criminalize one's conduct of engaging in sexual intimacy in private with another consenting adult, and in a manner which causes no harm to any third party or to the parties so engaging, amounted to a fundamental interference in the person's experience of being human and their personal dignity and privacy and amounts to degrading treatment.

While opposing the petition, the Attorney General stated that the preamble to the Constitution acknowledges the supremacy of the almighty God who is the objective moral law giver and that this informed the decision to retain the impugned provisions. He contended that the Petitioners had failed to lay clear grounds for the court to find the impugned sections unconstitutional. He maintained that the Constitution recognizes

³⁴ Nairobi High Court Petition No 150 of 2016 consolidated with Petition No. 234 of 2016

marriage as a union of two consenting adults, male and female, and, that the legislative function of the State is exercised by Parliament, hence, the court cannot compel the government to legalize homosexuality by amending the impugned provisions. The Kenyan Court composed of a bench of three Judges gave a lengthy opinion on the issue including the historical context of the enactment of the statute and the Constitution of Kenya, 2010 while emphasizing on the constitutional value and principles. The court partially held that:

We are aware that all laws in existence as at 27th August 2010 must be construed with alterations, adaptations, qualifications and exceptions necessary so as to conform with the Constitution. Nonetheless, as observed above, the issue before us was alive during the constitution making process, and, therefore, if Kenyans desired to recognize and protect the right to same sex relationships, nothing prevented them from expressly doing so without offending the spirit of Article 45.

Analysis

In the above case, owing to the nature of the dispute and the sensitivity of the subject matter, the petitioners invoked the jurisdiction of the High Court pursuant to **Article 165 (4)** of the **Constitution** for the empanelment of an uneven number of judges to hear and determine the said dispute. The suit brought to the front the un-ending debate of the law and morality and the role of the courts vis-à-vis the legislature in interpreting and applying the law over issues that have for a long time been considered moral questions. Whereas the court did not shy away from determining the issues on the merits, the court examined the historical context and cultural values underpinning and that have been developed over a period within the Kenyan context. The court was thus guided by the constitutional provision recognizing marriage as a union between a man and a woman and thus used it as a basis for rejecting the petitioners' contentions on the recognition of same sex unions, regardless of the fact that such activities entailed conduct mostly confined to individuals' private affairs. The case although not successful, highlighted the plights and the challenges faced by the LGBT community in Kenya and gave the members therein an opportunity of bringing the said issue to light.

8 RECOMMENDATIONS

Given the attitude of the courts, potential for judicial bias and the political environment leading up to the 2022 elections, prioritizing less controversial issues that guarantee quick wins will strategically build on the achievements incrementally towards more controversial issues. PIL will be unsuccessful if rushed without adequate time and sufficient resources to consider the questions properly undertake exhaustive research on the necessary evidence and legal justification necessary to prove each case. Given the poor quality of Kenyan cases on sex work related issues and the lack of local precedents, there is

a real risk that an action could be deemed frivolous and court could award costs against the litigant in the event of failure. Careful selection of litigants/clients who are equally committed to pursuing the public interest from the very beginning may help strengthen the overall case – so the safety of clients and witnesses must be pre-arranged. Having organizations as additional litigants will provide a good back up in case of any eventuality where a client is no longer able and willing to proceed. Engaging well-credentialed experts will be an integral part of the litigation strategy in PIL by sex workers in Kenya to strengthen credibility of evidence that can shed light on difficult sociocultural aspects.

The following are litigious issues that present a higher likelihood of success and greater impact to the community of sex workers in Kenya;

- a) Individual or group cases challenging denial of essential services such as medical services or guaranteed legal rights;
- b) Individual or group cases whereby forced HIV testing and medical examinations have been conducted and/or such directives have been issued and are yet to be undertaken.
- c) Individual or group cases where there have been infringements of the right to privacy and personal dignity specifically in media reporting.
- d) Individual or group cases where there have been infringements of the right to privacy and personal dignity specifically by law enforcement who break into sex workers' homes alleging their use as brothels.
- e) Individual or group cases involving arbitrary detentions and arrests without formal charges or being taken to court within 24 hours Police harassment and arbitrary searches without warrants.
- f) Individual or group cases of violence by authorities or reluctance to investigate and prosecute perpetrators of violence against on sex workers.
- g) Abuse of criminal procedure and excessive use of force by law enforcement.

Strategically pursuing causes that highlight the impact of criminalization will set the foundation for a PIL case to realize decriminalization.

9 POSSIBLE CHALLENGES IN LITIGATION

Litigating on the foregoing issues will offer a viable opportunity for the recognition of sex workers, and their fundamental rights and freedoms and also help in securing the same however, the same may be hampered by various factors for instance:

- a) Evidential Burden – the burden of proof shall at all times rest with the Petitioners to prove all such assertions and allegations in support of their various causes. This is to

be overcome by ensuring that parties have all the relevant and necessary evidence. This may be overcome by for instance;

- 1) Timely collection of medical Records and evidence and preservation of the same for necessary action.
 - 2) Timely obtaining of witness statements and/or testimonies which shall aid in prosecution of the cases.
 - 3) Obtaining formal Complaints made against various persons and authorities; OB Numbers/ Complaint Letters etc. shall assist in discharging the burden of proof and determining what further cause of action to take.
- b) In terms of prosecuting the cases in Court, the criminalization of sex work and related activities in Kenya implies a direct bias by the Courts and authorities on the issues and as such the burden shall be upon us to persuade the Court and change the attitude guided by the law on criminalization of sex work and prostitution. This can be achieved through the publication and publicization of various reports and incidents documenting the hardships and violations against sex workers. The foregoing would highlight the need for the protection and taking action for the protection of sex workers and the courts would be inclined to intervene especially where there are public outcries for intervention.
- c) Whereas **Article 2 (5) and (6) of the Constitution of Kenya** recognizes that general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya forms part of the laws of Kenya, foreign jurisprudence and judicial pronouncements are not binding upon the Courts. In the ***EG and Others vs Attorney General and Others*** case referred to elsewhere herein, the Court cautioned against reliance on foreign jurisprudence. It opined thus:

When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we should exercise caution in referring to foreign jurisprudence and develop our common law in a manner that promotes the values and principles enshrined in our Constitution. This position was appreciated by the courts in this country.

However, the Supreme Court will have to avoid mechanical approaches to precedent. It will not be appropriate to pick a precedent from India, one day, Australia, another day, South Africa another, the US yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country.”

To mitigate the foregoing, we may, depending with the nature of the cases, invoke the provisions of Article 165 (4) of the Constitution on having matters determined by an uneven number of judges so as to have a diverse bench hearing and determining a matter.

- d) PIL tends to be expensive because of the complex legal and policy issues that are involved and often the lengthy period such cases take to conclude. Inadequate resources could cripple efforts.
- e) Reports documenting sex workers abuses and victimization are not-binding on the Court and cannot form a basis for proof of violation or constitute the genesis of a Petition or cause of action. Strong documentation and hard evidence must be obtained. We can however use such reports to inform public debate and inspire media engagement on the key issues affecting sex workers in Kenya.
- f)

10 CONCLUSION

Based on this legal review, the Courts offer a good platform for advancing the fundamental rights and freedoms and various issues affecting sex workers. Both the Kenyan Courts and the International Courts and Tribunals will offer an effective platform if carefully considered. Depending with the circumstances of each case and the available evidence, approaching the East African Court of Justice where the Kenyan Government has completely failed to address the issues will also be an available remedy. On the parties, it is advisable to have individuals, groups and any such registered organizations as litigants as this is a public interest litigation as question of *locus standi* is largely relaxed. Litigation can complement a broader sex workers movement, and foster community mobilization and encourage alliances that then produce action for change. Ultimately, the best approach is to prioritize less controversial issues that guarantee quick wins will strategically build on the achievements incrementally towards a push for decriminalization in Kenya.