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## Understanding Access to Safe Abortion for Women and Girls in Kenya

**Keywords:** abortion, reproductive health care, Constitution of Kenya

**Summary.** Access to safe abortion in Kenya is impeded by the presence of contradictory laws governing abortion, which has resulted in varied interpretations on the legality of abortion among key stakeholders. The objective of this paper is to discuss the abortion legal landscape in Kenya, the existing legal narratives about abortion and the factors affecting access to safe abortion in Kenya.

### Dostęp kobiet i dziewcząt do bezpiecznej aborcji w Kenii

**Słowa kluczowe:** aborcja, opieka zdrowotna w zakresie zdrowia reprodukcyjnego, Konstytucja Kenii

**Streszczenie:** Dostęp do bezpiecznej aborcji w Kenii jest utrudniony przez sprzeczne przepisy regulujące aborcję, co doprowadziło do rozbieżnych interpretacji legalności aborcji wśród kluczowych interesariuszy. Celem niniejszego artykułu jest omówienie sytuacji prawnej aborcji w Kenii, istniejących narracji prawnych na temat aborcji oraz czynników wpływających na dostęp do bezpiecznej aborcji w Kenii.

### 1. Introduction

In 2022, the Supreme Court of the United States overturned the landmark ruling on abortion *Roe v Wade*<sup>1</sup> in *Dobbs v Jackson Women's Health Organization*<sup>2</sup>. The Supreme Court cited the *Roe* decision for lack of a constitutional basis since there is no express reference to a right to abortion<sup>3</sup>. A similar situation exists in Kenya as there are varied interpretations of Article 26(4) on abortion owing to the lack of clarity in Kenyan laws<sup>4</sup>. Courts, Non-Governmental Organizations (NGOs) in

<sup>1</sup> *Roe v Wade* 410 US 113, 163–64 (1973).

<sup>2</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (more) 142 S. Ct. 2228, 213 L. Ed. 2d 545, 2022 WL 2276808; 2022 U.S. LEXIS 3057.

<sup>3</sup> *Ibidem*.

<sup>4</sup> J. Wambui, *The pot bearer understands its weight: An analysis of pro-abortion discourses in Kenya*, "Pathways to African Feminism and Development-Journal of African Women Studies Center" volume 1, issue 4, 2016.

Kenya have generally inclined towards a right to abortion by interlinking it with the right to privacy, dignity, security and health. These stakeholders claim that the continued existence and application of the Kenyan Penal Code on abortion which leads to prosecution of women and health care professionals is a violation of these rights. Consequently, calling for the harmonization of the Penal Code to be consistent with article 26(4) of the Constitution to ensure access to safe abortion.

Access to abortion services in Kenya has been faced with successes and failures with the latter being greater. The Government of Kenya has generally adopted an almost across the board understanding that abortion is a deviation from legal principles but also public views. This has resulted in a situation where despite the existence of constitutionally founded abortion grounds, there has been a blanket restriction on access to safe abortion. These restrictions have both been active in terms of prosecution and conviction of health care professionals and women accused of procuring. The restrictions have also been passive in regard to reluctance by the government under the Ministry of Health to provide and endorse relevant policy documents that guide access to safe abortion.

Through the use of case law and directives, this paper sheds light on the prosecutive attitude the Kenyan government agencies hold against people who procure or seek to advance a course for access to safe abortion. It also discusses the narratives in the legal discourse by looking at abortion as a constitutional question, gender equality, and public perception on the abortion question. The paper concludes by analysing the government's duty to protect, respect, and fulfil access to safe abortion.

### 1.1. History of Access to Safe Abortion in Kenya

Historically, access to abortion services was subject to political and religious discussions<sup>5</sup> with restrictions being both legal and logistical<sup>6</sup>. This resulted in a situation where no consensus was reached on whether safe abortion is legal or not. Despite this lack of consensus, Charles Ngwena argues that from a human rights perspective, legislators or the judiciary should not cite this as precedent to deny access to safe abortion<sup>7</sup>. The Independence Constitution did not address nor recognize the right to abortion or abortion in general<sup>8</sup>. This meant that regulation of abortion

<sup>5</sup> R.N. Oronje, *The Kenyan national response to internationally agreed sexual and reproductive health and rights goals: a case study of three policies* "Reproductive Health Matters" 2013, volume 21, issue 42, para. 151-160.

<sup>6</sup> J. Baker & S. Khasiani, *Induced abortion in Kenya: Case histories*, "Studies in Family Planning" 1992, volume 23, issue 1, p. 34.

<sup>7</sup> C. Ngwena, *A handbook for judges, human rights and African abortion laws*, "Ipas Africa Alliance" 2014, p. 12.

<sup>8</sup> Konrad Adenauer Foundation, *History of constitutional making in Kenya*, "Media Development Association and Konrad Adenauer" 2012.

services was largely delegated to legislation such as the Penal Code, which criminalized the administration, supply, or procurement of substances that sought to procure miscarriage in a woman<sup>9</sup>. However, the Penal Code did not expressly provide for instances where abortion can be permitted resulting in a blanket criminalization<sup>10</sup>.

Section 204 of the Penal Code seemed to have made reference to an instance where abortion could be allowed. This includes where the life or state of a mother is at risk as long as the health professional exercises reasonable care<sup>11</sup>. It is important to note that this instance was only applicable if the abortion was an aftermath of a good faith surgical operation to preserve the mother's life, such that it was a collateral procedure. The case of *Mehar Singh Bansel v R* held that abortion arising from another procedure such as intentional medical abortion would not be safeguarded by Section 204 of the Penal Code<sup>12</sup>. The case of *Rex v Bourne*, prosecuted under the same provision, upheld the position that access to abortion is only limited when a physician performs a surgical operation in good faith to preserve the mother's life<sup>13</sup>.

The World Health Organization (WHO) has described abortion as a procedure meant to terminate a pregnancy that is performed by unqualified individuals and/or performed in a facility that fails to meet minimum medical standards<sup>14</sup>. The International Conference on Population and Development defines reproductive health to mean a state of complete wellbeing related to the reproductive system, its processes and functions and the ability to freely choose to reproduce or not<sup>15</sup>.

The restrictions on the access to abortion through law significantly contributed to unsafe abortions in Kenya in the 1980s and 1990s<sup>16</sup>. This led to high maternal mortality rates and other health complications<sup>17</sup>. In 2004, the National Guidelines on Medical Management of Sexual Violence and the Medical Practitioners and Dentists Board Code of Professional Conduct and Discipline provided that access

<sup>9</sup> Kenyan Penal Code, Chapter XV.

<sup>10</sup> *Ibidem*.

<sup>11</sup> Kenyan Penal Code, Section 204.

<sup>12</sup> *Mehar Singh Bansel v. R*, Court of Appeal at Nairobi, Criminal Appeal No. 115 of 1959. Available at <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/mehar-singh-bansel-v-r>. [Accessed on: 15.03.2024].

<sup>13</sup> *Rex v. Bourne*, Central Criminal Court, 3 All E. R. 615 (1938). <https://www.womenslinkworldwide.org/en/files/2769/gjo-reinounido-1939-en-pdf.pdf>. [Accessed on: 15.03.2024].

<sup>14</sup> World Health Organization, *Unsafe abortion: global and regional estimates of incidence of unsafe abortion and associated mortality in 2000*, 4th ed, 2004.

<sup>15</sup> International Conference on Population and Development, 1994.

<sup>16</sup> Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law*, 2010; International Planned Parenthood Federation, *Death and denial: Unsafe abortion and poverty* "IPPF" 2006.

<sup>17</sup> Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (2010).

to abortion for pregnant rape victims was limited to medical doctors and gynecologists<sup>18</sup>. It also required that prior to abortion a psychiatric evaluation had to be conducted on the woman. These greatly limited access to safe abortion services especially for women and girls in low-income backgrounds since medical doctors and gynecologists were scarce in the country. The health facilities in these areas were largely manned by nurses and clinical officers<sup>19</sup>.

In 2011, the Committee on Elimination of Discrimination Against Women (CEDAW) found that the situation in Kenya on unsafe abortions led to a high maternal mortality rate. CEDAW found that the presence of stringent abortion laws drove women and girls to seek clandestine and unsafe abortions. The Committee also recommended that the Kenyan government should ensure not only access to safe abortion according to the law, but also treatment from complications arising from unsafe abortion<sup>20</sup>.

Faith-based sectors have played a significant role in the (in)access to abortion services and reproductive health care in Kenya. For instance, the Committee of Experts reported that the life clause (Article 26) was drafted a number of times as a result of constant opposition by the clergy<sup>21</sup>. That the inclusion of the abortion provisions in the Kenyan Constitution was equally borne out of a back and forth between the Committee of Experts and faith-based sectors<sup>22</sup>. In 1995, this sector protested against sexual and reproductive health education to adolescents<sup>23</sup>. The original Article 26 was to be expressed in neutral words that “Every person has the right to life”. This was agreed by clergy men present at the consultative meeting. However, the clergy retracted their agreement pressuring the Parliamentary Select Committee to expand Article 26 to categorically state that “life begins at conception and ends at natural death”. This was then amended to “life begins at conception” and the words “abortion is not permitted...” were added<sup>24</sup>. The Final

<sup>18</sup> Center for Reproductive Rights, *A decade of existence: Revealing progress, reversal and betrayal of a national compromise*, Track Report, June 2020 Available at: [https://reproductiverights.org/sites/default/files/documents/A-Decade-of-Existence-Kenya\\_0.pdf](https://reproductiverights.org/sites/default/files/documents/A-Decade-of-Existence-Kenya_0.pdf). [Accessed on: 12.05.2024]; Center for Reproductive Rights, *In Harm's Way*, *op. cit.*, p. 32.

<sup>19</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 5.

<sup>20</sup> CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women- Kenya*, 2 February 2011. <https://www.google.com/url?sa=t&rcrct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjiuMjyWBAXUyVPEDHW5wC80QFnoECA4QAQ&curl=https%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2Fcedaw%2Fdocs%2F-co%2FCEDAW-C-KEN-CO-7.pdf&usg=AOvVaw1oHuV731H2qE68k18yy1hU&copi=89978449> [Accessed on: 03.06.2024].

<sup>21</sup> Final Report of the committee of experts on constitutional review, 2010, 21.

<sup>22</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 7.

<sup>23</sup> R.N. Oronje, *The Kenyan national response to internationally agreed sexual and reproductive health rights and goals: A case study of three policies*, “Reproductive Health Matters” volume 21, issue 42, pp. 151-160.

<sup>24</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 7.

Report of the Constitutional Review Committee noted with concern that there was a lot of misinformation on abortion as provided by the Constitution. Particularly, that the Constitution permitted abortion on demand<sup>25</sup>.

Kenya has remained adamant in ensuring consistency in its abortion laws both nationally and regionally. In 2010, Kenya while ratifying the Maputo Protocol entered a reservation on Article 10(3) and 14(2) of the Protocol as those provisions were inconsistent with the reproductive health laws in the country<sup>26</sup>.

## 1.2. Legal Framework on Access to Abortion in Kenya

Access to abortion in Kenya is regulated by the 2010 Constitution, Penal Code and other Ministry of Health directives. Generally, Article 26 is the foundation of access to abortion in Kenya. It provides for the right to life with the fourth sub-article highlighting abortion as a limitation on the right to life.

The interpretation of legal provisions on abortion are significant given the fact there are different consequences if an abortion is *illegal* according to the law and when it is *restricted*<sup>27</sup>. A report by Centre for Reproductive Rights found that the varied interpretations of abortion laws in Kenya have an effect on the willingness of health professionals to carry out safe abortions<sup>28</sup>. Additionally, varied interpretations of the law run the risk of prosecuting and convicting safe abortions<sup>29</sup>. This discussion is further highlighted with the frequent mentions of abortion as a right by some Kenyan abortion jurisprudence. This part addresses the legal framework of access to abortion in Kenya.

### Constitution of Kenya

Access to abortion in Kenya finds support in Article 26 under the ambit of the right to life<sup>30</sup>. The High Court has interpreted this to mean that as a general rule abortion is not lawful in Kenya and stands illegal as envisioned in the Penal Code<sup>31</sup>. However, Article 26(4) contains a proviso which acts as an exception to the general rule<sup>32</sup>. That abortion is only permitted on three grounds. First, when in the

<sup>25</sup> G. Maingi, *The Kenyan constitutional reform process: A case study on women's rights*, "Feminist Africa" volume 15, 2011, p. 78. [https://feministafrica.net/wp-content/uploads/2019/10/fa\\_15\\_case\\_study\\_grace\\_maingi.pdf](https://feministafrica.net/wp-content/uploads/2019/10/fa_15_case_study_grace_maingi.pdf) [Accessed on: 12.05.20204].

<sup>26</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 01 July 2023. <https://www.refworld.org/legal/agreements/au/2003/en/18176> [Accessed on: 04.06.2024].

<sup>27</sup> Handbook, *op. cit.*, 13.

<sup>28</sup> Center for Reproductive Rights, A decade of existence, *op. cit.*, p. 6.

<sup>29</sup> *Ibidem*.

<sup>30</sup> Constitution of Kenya, Article 26 (4).

<sup>31</sup> FIDA-Kenya & 3 others v AG & 2 others, 304.

<sup>32</sup> FIDA-Kenya & 3 others v AG & 2 others, 305.

opinion of a trained health professional there is a need for emergency treatment. Second, when the life and health of the mother is at risk and third, for any other ground provided under written law<sup>33</sup>. Access to abortion as reproductive health care is also safeguarded in Article 43(1) under the right to the highest attainable standard of health<sup>34</sup>.

Access to information on abortion related services is a constitutional right under Article 35 of the Constitution. It guarantees every citizen with the right to information held by the state<sup>35</sup> or any other person, which is required in the exercise of a right or freedom<sup>36</sup>. In the *Network for Adolescents and Youth of Africa & another v Attorney General and 4 others*, the petitioner lodged a petition against the Kenya Medical Practitioner's Board and the Kenya Film Classification Board for banning Marie Stopes International Kenya from offering abortion services and advertising such services respectively<sup>37</sup>. Although the case is yet to be concluded, the ban from advertising abortion services has been criticized as a violation of the right to access information<sup>38</sup>.

Despite the Constitution making allowance for abortion on permitted grounds, unsafe abortions have been on the rise in Kenya. A 2013 report by the Ministry of Health highlighted unsafe abortions as a leading contributor of maternal mortality rates in Kenya<sup>39</sup>. The Ministry of Health attributed at least 35% of maternal mortality rates to unsafe abortion<sup>40</sup>. The report found that the continued absence of technical and policy mechanisms, stigmatization of abortion services impede access to safe abortion in Kenya. It also found that women and girls in low-income and informal settlements suffer the brunt of unsafe abortion services<sup>41</sup>.

<sup>33</sup> Constitution of Kenya, Article 26(4).

<sup>34</sup> Constitution of Kenya, Article 43(1)(a).

<sup>35</sup> Constitution of Kenya, Article 35(1a).

<sup>36</sup> Constitution of Kenya, Article 35(1b).

<sup>37</sup> Network for Adolescents and Youth of Africa & another v Attorney General and 4 others 2019 (eKLR); D. Kathia, *Challenge the institutional stigma against abortion to uphold women's rights*, "Network for Adolescents and Youth of Africa" 22 June 2023. <https://nayakenya.org/2023/06/22/challenge-the-insituational-stigma-against-abortion-to-uphold-womens-rights/> [Accessed on: 10.05.2024].

<sup>38</sup> Kenya Legal and Ethical Issues Network (KELIN), High Court directs hearing on Marie Stopes in Kenya abortion services ban challenge, KELIN Strategic litigation, 20 February 2024. Available at: <https://www.kelinkenya.org/high-court-directs-hearing-on-marie-stopes-kenya-abortion-services-ban-challenge/> [Accessed on: 14.05.2024].

<sup>39</sup> Africa Population and Health Research Center, Ministry of Health, Kenya, PSAS, Guttmacher Institute, *Incidence and Complications of Unsafe Abortion in Kenya: Key findings of a national study*, Nairobi-Kenya, 2013. <https://www.guttmacher.org/sites/default/files/pdfs/pubs/abortion-in-Kenya.pdf> [Accessed on: 12.05.2024].

<sup>40</sup> Center for Reproductive Rights, In Harm's Way: The Impact of Kenya's Restrictive Abortion Law, 2010 citing Ministry of Health's Kenya National Post Abortion Care Curriculum: Trainer's Manual 2003.

<sup>41</sup> Center for Reproductive Rights, A decade of existence, *op. cit.*, p. 10.

### Penal Code

The criminal justice system in Kenya has been criticized for stifling access to abortion in Kenya given its inconsistent with the Constitution<sup>42</sup>. The Penal Code criminalizes abortion as an offence against morality and as an offence connected with murder. It criminalizes procuring of an abortion<sup>43</sup>, self-induced abortion<sup>44</sup> and the supply of drugs to procure an abortion<sup>45</sup>. The Penal Code criminalizes the killing of an unborn child<sup>46</sup>.

### Health Act

The Health Act of 2017 came in to give effect to provide regulation of healthcare services which includes abortion services<sup>47</sup>. The Act defines abortion to mean the termination of a pregnancy before the fetus is viable<sup>48</sup>. The Act makes implicit reference to one of the permissible grounds of abortion which includes when the pregnancy worsens a condition such that the former poses a risk to the life and health of the mother<sup>49</sup>.

The first ground contains two significant terms that are pivotal in analysing access to abortion in Kenya. These are ‘trained health professionals’ and ‘emergency treatment’. The Health Act defines a healthcare professional as someone with formal training at the proficiency level of a medical doctor, nurse or clinical officer and who is licensed by the relevant regulatory board<sup>50</sup>.

The inclusion of other healthcare professionals aside from medical doctors is an important highlight as the High Court of Kenya pointed out in *FIDA-Kenya & 3 others v Attorney General & 2 others*. These professionals were included in appreciation of the scarcity of medical doctors, especially in rural and informal settlements in the country<sup>51</sup>.

The Act stipulates that the procedure should be conducted in an enabling environment which is a legally recognized facility. The facility must have the requisite infrastructure, commodities and minimum human resources<sup>52</sup>. The Act also defines health as the state of complete mental, physical and social well-being. This is in line with the World Health Organization (WHO) definition of health

<sup>42</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 6.

<sup>43</sup> Kenyan Penal Code, Section 158.

<sup>44</sup> Kenyan Penal Code, Section 159.

<sup>45</sup> Kenyan Penal Code, Section 160.

<sup>46</sup> Kenyan Penal Code, Section 228.

<sup>47</sup> Health Act, No. 241, Long title; Section 3(b).

<sup>48</sup> Health Act, No. 241, Section 2.

<sup>49</sup> Health Act, No. 241, Section 6(2).

<sup>50</sup> Health Act, No. 241, Section 6(2).

<sup>51</sup> *FIDA-Kenya & 3 others v Attorney General & 2 others*, 358 [2022] eKLR.

<sup>52</sup> Health Act, No. 241, Section 6(3).

which includes mental health and not merely the absence of disease<sup>53</sup>. Section 2 of the Act defines emergency treatment as necessary treatment to prevent death or worsening of a condition<sup>54</sup>.

### Standards and Guidelines

Access to abortion is guided by a number of policies, standards and guidelines developed by the Ministry of Health. The Standards and Guidelines on Reducing Mortality and Morbidity from Unsafe Abortion in Kenya (“2012 Standards and Guidelines”) provides guidance to healthcare professionals on providing abortion care<sup>55</sup>. In 2013, these Guidelines were suspended by the Ministry of Health, although the High Court in 2019 held that the suspension of the Guidelines is a violation of the rights of women and girls<sup>56</sup>. The application of the Guidelines is in question given the fact that it has been reported that the Government of Kenya is yet to issue a statement to reinstate the Guidelines and the intention might be lacking given an ongoing appeal of the 2019 High Court decision<sup>57</sup>.

The Guidelines expound further on how to provide abortion services when the health of the mother is at risk. The physical health of the mother is taken into consideration whether actual or reasonably foreseeable. It provides that the healthcare professionals should be informed by the history of the patient, physical examinations and/or laboratory tests<sup>58</sup>.

Following the suspension of the Guidelines, the Ministry of Health issued a directive suspending the training under National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies (“Training Curriculum”)<sup>59</sup>. The Training Curriculum also prohibited the use of an abortion drug known as Medabon. The memo dated 24<sup>th</sup> February 2014 suspending the Training

<sup>53</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*. Geneva: World Health Organization; 2012. [http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf) [Accessed on: 13.05.2024].

<sup>54</sup> FIDA-Kenya & 3 others v Attorney General & 2 others, 356 [2022] eKLR; Health Act, Section 2.

<sup>55</sup> Standards and Guidelines on Reducing Mortality and Morbidity from Unsafe Abortion in Kenya. <https://www.safeabortionwomensright.org/wp-content/uploads/2018/02/Standards-Guidelines-for-the-Reduction-of-Morbidity-and-Mortality-from-Unsafe-Abortion.pdf> [Accessed on: 13.05.2024].

<sup>56</sup> Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR.

<sup>57</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 9.

<sup>58</sup> Standard and Guidelines, *op. cit.*, p. 10.

<sup>59</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 9; L. Bassett, J. Naughton, *Africa: Instruments of Oppression*, “Pulitzer Center on Crisis Reporting” 2015. <https://pulitzercenter.org/reporting/africainstruments-oppression> [Accessed on: 11.05.2024].

Curriculum stated that the 2010 Constitution prohibits abortion on demand and thus there is no need to train health care professionals on safe abortion<sup>60</sup>. This situation leaves a gap in access to abortion services in Kenya. Despite the existence of Article 26(4) permitting abortion in certain circumstances, a lack of transparent tools and procedures for implementation of lawful abortion renders access to abortion a moot issue.

### 1.3. Case Law

#### 1.3.1. FIDA-Kenya & 3 Others v AG & 2 Others (2019)

The case involved an unsafe abortion performed on “JMM” by unskilled personnel. As a result, JMM suffered chronic kidney disease and died. Her mother lodged a claim against the Ministry of Health for suspension of the 2012 Standards and Guidelines and the Training Curriculum. The petitioners’ claim was that as a result of the suspension of the policy and guidelines, women and girls such as JMM were left exposed to unsafe abortions.

The Court recognized that the withdrawal and suspension was an unlawful limitation to the right under Article 26(4)<sup>61</sup>. The Court held that the withdrawal and suspension was a violation of the right to the highest attainable standard of health, right to be free from discrimination, right to benefit from scientific progress<sup>62</sup>. The Court also held that the withdrawal left a gap which continues to deny survivors of sexual violence safe quality treatment<sup>63</sup>.

#### 1.3.2. PAK & Another v AG & 3 Others (2022)

The interpretation of the access to abortion in Kenya in *PAK & another v AG & 3 others* was viewed in light of the right to life, right to health and the right to dignity. The Court recognized the right to terminate pregnancy as a fundamental right that should be looked at through the ethos, culture and context of Kenyan society.

The Court in analysing the right to life within the lens of the case relied on *S v Makwanyane (1995)* which cemented the place of the right to life as antecedent to all other rights<sup>64</sup>. Although the latter seemed to place the protection of unborn life above the right to abortion, Justice Nyakundi connected the right to life with the right to dignity. That the right to life goes beyond mere existence and includes the right to be treated with dignity<sup>65</sup>.

<sup>60</sup> FIDA – Kenya & 3 others v Attorney General & 2 others, para. 34-36.

<sup>61</sup> FIDA – Kenya & 3 others v Attorney General & 2 others, para. 141.

<sup>62</sup> FIDA – Kenya & 3 others v Attorney General & 2 others, para. 402, 415.

<sup>63</sup> FIDA – Kenya & 3 others v Attorney General & 2 others, para. 402.

<sup>64</sup> (3) SA (391) (CC)).

<sup>65</sup> PAK & another v AG & 3 others, para. 51.

Justice Nyakundi pointed out that when formal channels for abortion are lacking, it leaves women to the dangers of unsafe abortion<sup>66</sup>. That a denial of access to safe abortion exposes women and girls to risk to their lives and health. The Court held that the right to abortion is interrelated with the right to privacy and any woman should be allowed to exercise this right as instructed by Article 26(4) of the Constitution.

#### 1.4. Narratives in the Legal Discourse

The legal narratives around access to safe abortion in Kenya include abortion as a constitutional question under Article 26(4). Abortion has also been supported by viewing it as a derivative of other constitutional rights such as the right to the highest attainable standards of health and right to privacy. Constitutional values such as non-discrimination, equality, are also discussed below as existing narratives in the legal discourse. Access to safe abortion can be effectively achieved through providing information on the scope and nature of safe abortion in Kenya including health facilities that are approved to offer safe abortion services.

##### 1.4.1. Access to Safe Abortion under Article 26(4)

Abortion is largely viewed as a constitutional question as it involves a balance of fundamental constitutional values. These values include that of equality, privacy, protection of life and dignity. Abortion in Kenya is explicitly provided for under Article 26(4) of the Constitution as a limitation of the right to life. The Kenyan Constitution recognizes that life begins at conception but equally permits abortion if in the opinion of a trained health professional there is need for emergency treatment, life and health of the mother is at risk and on any other ground permitted by written law<sup>67</sup>. It is important to note that abortion under the Kenya constitution is not provided as a right but rather a limitation to a right. This is a fundamental highlight given the interpretation of Article 26(4) by Kenyan courts. In *PAK & another v Attorney General & 3 others*, the Court interpreted abortion as a fundamental but not absolute right<sup>68</sup>. This leads to the question whether access to abortion in Kenya is a right on its own or the normative content of the right to life? This is significant in analysing the varied interpretations of access to abortion in Kenya. Although proponents of abortion in Kenya rely on Article 26(4) of the constitution to support the existence of a right to abortion, the same article only provides for

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<sup>66</sup> *PAK & another v AG & 3 others*, para. 52.

<sup>67</sup> Constitution of Kenya, Article 26.

<sup>68</sup> *PAK & another v Attorney General & 3 others* (2022) eKLR, para. 164.

abortion as a normative content of the right to life. Despite this, courts continue to affirm the existence of a right to abortion.

#### 1.4.1.1. Using Procedure to Strategically Pursue Access to Abortion

Joanna Erdman argues that the use of procedural turn by courts could be fundamental in ensuring that women and girls access safe abortions as per their countries' legal systems<sup>69</sup>. Procedural turn includes efforts by courts to pursue access to safe abortion by focusing on the procedural limitations to criminalization of abortion rather than substantive<sup>70</sup>. Alternatively, Joanna Erdman argues that access to safe abortion can be pursued by relying on the procedural aspect of abortion laws rather than the substance<sup>71</sup>. She explains that access to safe abortion might be greatly improved by focusing not on “what” abortion laws are but “how” they work as a litigating strategy.

In *Tysiac v Poland*<sup>72</sup>, the European Court of Human Rights found that the state of Poland had violated Tysiac's right to private life as a matter of the procedure put in place to implement Polish abortion laws. Tysiac sought to have access to lawful abortion for a severe medical eye condition. She sought opinion from medical personnel, which they all agreed that carrying the pregnancy to term had severe risks to the life and health of the mother<sup>73</sup>. Upon requesting termination of the pregnancy from a state hospital, she was denied the service for the reason that her medical conditions did not warrant therapeutic termination. Consequently, she carried the pregnancy to term and her medical condition deteriorated, leading to disability<sup>74</sup>. She lodged a criminal complaint which was improperly conducted. She petitioned the European Court of Human Rights arguing that the manner in which investigations were conducted violated the right to respect her private life under Article 8 of the European Convention of Human Rights<sup>75</sup>. The European Court found a violation of Article 8 given the improper nature of investigations. The European Court called upon the Polish government to enact legislation that gives real possibilities to access lawful abortion<sup>76</sup>.

<sup>69</sup> J. Erdman, *Procedural turn in transnational abortion law*, “Cambridge University Press – American Society of International Law” 2010, volume 104.

<sup>70</sup> J. Boxer, *Two years on from a “landmark” abortion decision in Kenya*, “Bill of Health” 2024.

<sup>71</sup> J. Erdman, *Procedural turn in transnational abortion law*, Cambridge University Press, American Society of International Law, 2010, volume 104.

<sup>72</sup> The case of *Tysiac v Poland (Tysiac v Poland)*, European Court of Human Rights, Application No. 5410/03, Judgement, 20 March 2007.

<sup>73</sup> *Tysiac v Poland, op. cit.*, para. 9-15.

<sup>74</sup> *Tysiac v Poland, op. cit.*, para. 17.

<sup>75</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950, Article 8.

<sup>76</sup> *Tysiac v Poland, op. cit.*, para. 116.

In Kenya, the court in *PAK and Salim Mohammed v Attorney General et al.* held that there was a ‘lacuna’ in the statutory framework on abortion. Since the Penal Code does not provide for exceptions as reflected in Article 26(4). The court directed that the legislature should pass a law that implements Article 26(4).

#### 1.4.1.2. Access to Abortion as a Derivative of Other Rights

Access to abortion under Article 26 is provided as the normative content of the right to life. Article 43(1) can also be read to include access to abortion as reproductive health care and part of the normative content of the right to health. Globally, constitutions have framed access to abortion in different ways. Anna Śledzińska-Simon argues that the reluctance of an explicit recognition on the right to abortion in constitutions result in judges affirming the right to abortion<sup>77</sup>. This has been seen in Kenya as well with the jurisprudence on abortion recognizing a right to abortion which is not explicitly provided in the Kenyan constitution<sup>78</sup>. This was affirmed in *Roe v Wade*<sup>79</sup> which was later overturned in *Dobbs v Jackson Women’s Health Organization*. The Supreme Court of the United States concluded that the constitution of the United States does not confer the right to abortion and relegated the authority back to the people of the United States<sup>80</sup>.

In *Dobbs*, the Supreme Court faulted the decision of *Planned Parenthood of Southeastern Pa v Casey*<sup>81</sup> for relying on *Roe v Wade* without considering whether the constitution of the United States confers a right to abortion. It also faulted the court in *Casey* for providing abortion “homes” in other rights. Similarly, *PAK & another v Attorney General & 3 others* (2022), reads the right to abortion in the right to life, dignity and health. The implication of this approach is that it makes the pursuit of ensuring access to safe abortion in Kenya stand on shaky legal ground which may lead to a dramatic overturn as seen in *Dobbs* back in 2022. The right to privacy within the context of health care includes the right to make choices about a person’s health freely without coercion or embarrassment<sup>82</sup>.

<sup>77</sup> A. Śledzińska-Simon, *Constitutional framings of the right to abortion: A global view*, “Oxford University Press” 2023, volume 21, issue 2, pp. 399-406, 402.

<sup>78</sup> *PAK & another v Attorney General & 3 others* (2022) eKLR, para 164.

<sup>79</sup> 410 U.S 113 (1973).

<sup>80</sup> 19-1392, 597 U.S. 215 (2022).

<sup>81</sup> 505 U. S. 833.

<sup>82</sup> J. Dhillon, *Protecting women’s access to safe abortion care*, A Guide to Understanding the Human Rights to Privacy and Confidentiality: Helping Advocates Navigate ‘Duty to Report’ Requirements, 2014, p. 1.

#### 1.4.1.3. Gender Equality and Access to Abortion

The UN Working Group against discrimination of women in law and practice reported that inhibitions on reproductive autonomy of women is an infringement on their right to equality and privacy<sup>83</sup>. It described equality within the context of reproductive health to mean access without discrimination to reproductive services<sup>84</sup>. Equality in access to health services also needs to be responsive to the different biological needs of women and men. This includes access to safe termination of pregnancy which has been recognized by the CEDAW committee as an equality right for women<sup>85</sup>.

In the regional legal system, the Maputo Protocol serves as a regional framework on elimination of discrimination and achievement of gender equality in the continent. This is to ensure that women and girls are able to fully participate in all spheres of life. The Protocol was adopted during the 2<sup>nd</sup> Ordinary Session of the Assembly of the African Union, ratified by AU member states and entered into force on 25 November 2005. Kenya as an AU member state signed and ratified the Protocol with reservations on Article 10 (3), 14(2). This was on the basis that these provisions were inconsistent with the reproductive health laws of the country.

The African Commission, which is the monitoring body of the Protocol, found that Kenya's reservation was invalid and the effect of the reservation would make Kenya avoid its obligations. Following this, Kenya National Human Rights Commission advised the Kenyan government to withdraw its reservation on Article 14(2) arguing that the reservation leaves Kenya in a state of contradiction<sup>86</sup>.

#### 1.4.1.4. Factors Affecting Access to Safe Abortion Services

Access to safe abortion services in the country has been affected by a number of factors, including availability of healthcare facilities that meet minimum medical standards. The Committee on Economic, Social and Cultural Rights has set out the elements of sexual and reproductive health, including abortion. These include

<sup>83</sup> ICCPR, Article 3,17.

<sup>84</sup> F. Raday, UN Working Group against discrimination in law and practice, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends*, October 2017, p. 1. <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf> [Accessed on:12.05.2024].

<sup>85</sup> Statement by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), *Safeguarding girls' lives, health and future through minimizing unwanted pregnancies and guaranteeing access to safe abortion*, 11 October 2023. <https://www.ohchr.org/sites/default/files/documents/hrbodies/cedaw/statements/CEDAW-Statement-International-Day-Girl-Child%202023.pdf> [Accessed on: 12.05.2024].

<sup>86</sup> Kenya National Commission on Human Rights Advisory on The Removal of Kenya's Reservation on Article 14 (2) (C) of The Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa.

the availability, accessibility, affordability, acceptability and quality<sup>87</sup>. Availability of trained and informed health care professionals is a significant factor affecting access to safe abortion in Kenya. Additionally, the lack of access to information on abortion and the legal provisions regulating abortion is a fundamental factor that has negatively affected access to safe abortion.

The Centre for Reproductive Rights in Kenya has reported that there exist varied interpretations of legality of abortion in Kenya, which has subsequently affected access to safe abortion. The report highlighted the fact that these interpretations were shared among key stakeholders such as health care personnel, police officers and prosecutors. This had the resultant effect of perpetuating a series of uninformed arrests and prosecution, resulting in health care personnel turning away women and girls seeking safe abortion services on the grounds permitted under Article 26(4).

General Comment 22 calls upon state parties, including Kenya, to ensure that health care personnel receive the requisite training to perform the full range of reproductive health services, including safe abortion services<sup>88</sup>. The availability of such health personnel in Kenya has been met with a number of obstacles including government, union restrictions and arrests. Particularly in 2014, the Office of the Director of Medical Services which is under the Ministry of Health in Kenya circulated a memo which made safe abortion training illegal and subject to sanctions<sup>89</sup>. This also included the use of an abortion drug known as Medabon which is largely used for safe termination of pregnancy. The Centre for Reproductive Health also reported that the Director of Medical Services sanctioned the Kenya Obstetrical and Gynecological Society for developing policy and training curriculum on the provision of safe abortion services<sup>90</sup>. The Director of Medical Services had equally called for the withdrawal of the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya<sup>91</sup> and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies. These two guidelines were an imperative part of the training and equipping health care professionals with the skills on offering safe abortion services<sup>92</sup>. It was reported

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<sup>87</sup> ESCR Committee, *General Comment 22 on the right to sexual and reproductive health under Article 12 ICESCR*, 2 May 2016, E/C.12/GC/22, para. 11-21.

<sup>88</sup> ESCR Committee, *General Comment 22*, *op. cit.*, para. 13.

<sup>89</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 9.

<sup>90</sup> *Ibidem*.

<sup>91</sup> Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya. <https://www.safeabortionwomensright.org/wp-content/uploads/2018/02/Standards-Guidelines-for-the-Reduction-of-Morbidity-and-Mortality-from-Unsafe-Abortion.pdf> [Accessed on: 09.05.2024].

<sup>92</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 9.

that the withdrawal of the guidelines left a gap in access to safe abortion, which led to harassment and a regression back to unsafe abortions<sup>93</sup>.

In 2019, a case was brought before the High Court on behalf of JMM, who as a result of the withdrawal of the guidelines, was forced to undergo abortion as a result of defilement. The Court held that the Kenyan government is under a duty to promote, respect, and protect the right to reproductive health. With the withdrawal of the guidelines which formed the bedrock for ensuring safe reproductive health services, the government had violated this right<sup>94</sup>. In this case, the court also pointed out that the guidelines were public policy documents, which meant that they were subject to public participation even in their withdrawal.<sup>95</sup> The Centre for Reproductive Rights reported that some police officers took advantage of the withdrawal of the guidelines to harass and arrest health care professionals.<sup>96</sup>

The withdrawal of the guidelines was cited for spreading false information about the legality of abortion in the country<sup>97</sup>. The ESCR Committee held that accessibility does not only mean physical accessibility of health care facilities, but also information accessibility. The latter is defined as the right to seek, impart and disseminate sexual and reproductive health information<sup>98</sup>. Access to information on abortion services has been recognized as a fundamental aspect of access to abortion by the ESCR Committee<sup>99</sup>. Information accessibility in relation to access to safe abortion came under discussion in 2018 where Marie Stopes International Kenya- a private health care facility that offers abortion services was banned from advertising its services. The ban was executed by the Kenya Film and Classification Board (KFCB) in undertaking its controversial moral mandate<sup>100</sup>. KFCB argued that through the advertisement by Marie Stopes Kenya was seeking to promote the practice of abortion which was against the 'moral values' of the country.

Other institutions followed suit to denounce Marie Stopes International Kenya for providing abortion services and advertising the same. For instance, the Kenya Medical Practitioners and Dentists Union Board sought to deregister Marie Stopes from providing any abortion services, including post-abortion care. Interestingly, this ban was supported by the Chief Executive Officer of the KFCB, Ezekiel Mutua, who claimed that the clinic was promoting moral decay in Kenya at the

<sup>93</sup> Ipas Africa Alliance, *Making Change Happen: A Review of Progressive Abortion Policy Change in Africa*, 2016, p.14. <https://www.ipas.org/wpcontent/uploads/2020/06/POLCAFE16MakingChangeHappenPolicyChangeAfrica.pdf> [Accessed on: 25.06.2024].

<sup>94</sup> FIDA –Kenya v AG, *op. cit.*, para. 334.

<sup>95</sup> FIDA –Kenya v AG, *op. cit.*, para. 382.

<sup>96</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 13.

<sup>97</sup> Center for Reproductive Rights, *A decade of existence*, *op. cit.*, p. 9.

<sup>98</sup> ESCR Committee, *op. cit.*, para 18.

<sup>99</sup> *Ibidem*.

<sup>100</sup> KFCB Guidelines, p. 11.

behest of foreign governments<sup>101</sup>. However, this ban was later lifted by the then Cabinet Secretary for Health, Sicily Kariuki. This move was met by opposition from a section of the public who maintained that the services offered by the clinic were against Kenyan laws on abortion. The former Health Cabinet Secretary provided conditions of operation for the clinic including regular supervision by the KMPDB, ensuring that the services comply with Article 26(4)<sup>102</sup>.

### 1.5. Public Perception on Access to Abortion in Kenya

As seen above, public morality or at least public perception of abortion in Kenya heavily influences the decisions taken by government agencies. There have been a couple of studies attempting to understand how the Kenyan public views abortion.

A community level study conducted in Kisumu and Nairobi counties found that public perception of abortion in Kenya on abortion is heterogeneous depending on gender, education level, occupation and society level<sup>103</sup>. The study was performed among a group of both female and male health care providers including community health volunteers, pharmacists as well as teachers and found that abortion is considered a deviation from societal norms<sup>104</sup>. The societal norms in this case were those related to religious and cultural beliefs. The study also indicated that the community perceives fertility complications among women as a direct consequence of abortion. On the contrary, young unmarried men and women considered abortion as a private affair that is 'no longer a big deal'<sup>105</sup>. An additional study on access to safe abortion services conducted on women and girls in Western Kenya indicated that women's understanding of abortion only involved unsafe, crude and life-threatening methods. It concluded that this understanding impeded access to abortion services by instilling fear on the abortion methods available<sup>106</sup>.

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<sup>101</sup> Kenya bans Marie Stopes from offering abortion services, "British Broadcasting Corporation" 18 November 2018, <https://www.bbc.com/news/world-africa-46254630> [Accessed on: 08.06.2024].

<sup>102</sup> A. Omboki, *Magoha put to task over lifting of ban on Marie Stopes abortion services*, "Nation Media", 24 January 2019. <https://nation.africa/kenya/news/magoha-put-to-task-over-lifting-of-ban-on-marie-stopes-abortion-services-131068> [Accessed on:10.06.2024].

<sup>103</sup> B.A. Ushie, K. Juma, G. Kimemia, R. Ouedraogo, M. Bagha and M. Mutua, *Community perception of abortion, women who abort and abortifacients in Kisumu and Nairobi counties, Kenya*, "National Library of Medicine", 2019, volume 14, issue 12. <https://10.1371/journal.pone.0226120> [Accessed on: 11.20.2024].

<sup>104</sup> *Ibidem*.

<sup>105</sup> *Ibidem*.

<sup>106</sup> H.M, Marlow, S. Wamugi, E. Yegon, T. Fetters, L. Wanaswa and S. Msipa-Ndebele, *Women's perceptions about abortion in their communities: perspectives from western Kenya*, "Reproductive Health Matters", 2014, volume 22, issue 43, pp. 149-158. [https://10.1016/S0968-8080\(14\)43758-3](https://10.1016/S0968-8080(14)43758-3) [Accessed on: 11.05.2024].

Availability and accessibility of medical infrastructure is also a key element of access to safe abortion services. The United Nations has emphasized that the right to abortion related information has to be available, accessible and evidence-based<sup>107</sup>. The latter requires a number of factors to be taken into consideration including clinical findings, maturity level of the audience and rights-based approach should be adopted<sup>108</sup>. That the information is to be made available in a format and language that is appropriate<sup>109</sup>. In the African Context, the African Commission on Human and Peoples' Rights places the burden of ensuring comprehensive reproductive rights education is given to the state<sup>110</sup>.

Availability also includes the presence of trained, experienced and skilled health-care personnel<sup>111</sup>. It has been argued that the general fear and stigma against abortion indirectly affects the availability of resources to be committed to safe abortion services<sup>112</sup>.

It is also imperative that women and girls are made aware of the availability and accessibility of safe abortion services. Failure to which studies indicate that the lack of understanding can be an inhibiting factor to ensuring safe abortion. Information has been found to be a key element in furthering effective education including dissemination of relevant instruments such as officially endorsed documents that set out parameters of safe abortion<sup>113</sup>. With the current status of the standards and guidelines on abortion in Kenya, the general lack of coherence and misinformation or lack thereof threatens to persist.

## 1.6. Concluding Remarks

The continued existence of contradictory laws governing abortion in Kenya has left the country in a situation where access to safe abortion is almost impossible. Due to these contradictions, relevant stakeholders in the abortion discourse such as health care professionals are unable to provide safe services to women and girls

<sup>107</sup> Human Rights Committee, General Comment No. 36 on Article 6 of the ICCPR, on the Right to Life, para. 8, U.N. dOC.CCPR/C/GC/36 (2018).

<sup>108</sup> African Commission, General Comment No 2 on Article 14(1),(a),(b),(c) and (f); Maputo Protocol, Article 14.2, para 51.

<sup>109</sup> *Ibidem*.

<sup>110</sup> African Commission, *op cit*.

<sup>111</sup> ESCR Committee, *op. cit.*, para 12.

<sup>112</sup> I.K. Warriner, I.H. Shah eds., *Preventing unsafe abortion and its consequences: Priorities for research and action*, "Guttmacher Institute" 2006, p.119. <https://www.guttmacher.org/sites/default/files/pdfs/pubs/2006/07/10/PreventingUnsafeAbortion.pdf> [Accessed on: 20.06.2024].

<sup>113</sup> W. Limbialia, F. Obare, e. Ikiugu, V. Akora, J. Njunguru, M.Njuma, K.Reiss and H. Brungi, *Availability, use and quality of care for medical abortion services in private facilities in Kenya*, 2015, Step up report, Population Council and Marie Stopes International. [https://knowledgecommons.popcouncil.org/departments\\_sbsr-rh/257](https://knowledgecommons.popcouncil.org/departments_sbsr-rh/257) [Accessed on: 16.11.2024].

in the country for fear of arrests and prosecution. Despite the constant call for harmonization by the courts, the Kenyan government remains reluctant to provide clarity on the laws. Consequently, women and girls are forced to bear the brunt of unsafe abortions performed by untrained health care professionals and other rogue persons and in facilities that fail to meet minimum health requirements.

Additionally, the government has failed to protect the right to reproductive health care by allowing a situation where other state and non-state institutions frustrate efforts by health care facilities and personnel who offer safe abortion services on legal grounds. For instance, the action of the Kenya Film and Classification Board in banning advertisement for safe abortion services impeded the right to access reproductive health care information. Also, the constant interference of faith-based sectors restricts the achievement of reproductive rights for women and girls in the country. The failure by this sector to acknowledge the reality of unsafe abortions in the country has increased abortion stigma, making it difficult to access safe abortion. Therefore, the Kenyan government should not only respect the right to reproductive health care including safe abortion within the confines of the constitution, but it should also protect from interference with the enjoyment of this right by third parties.

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