

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 15 OF 2019

**IN THE MATTER OF VIOLATION OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF ARTICLE 2, 4, 10, 19, 20, 21, 22, 23, 24, 25, 27,
28, 29, 31, 32, 33, 47, 51, 156, 258, 259 AND 260**

AND

**IN THE MATTER OF CRIMINAL PROCEEDINGS IN THE CHIEF
MAGISTRATE'S COURT CRIMINAL CASE NO. 1980 OF 2019**

AND

**IN THE MATTER OF PERSON DEPRIVED OF LIBERTY ACT NO. 23 OF
2014**

AND

IN THE MATTER OF PRISONS ACT, CAP 90

AND

IN THE MATTER OF PUBLIC HEALTH ACT

BETWEEN

S C.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

COMMISSIONER GENERAL,

KENYA PRISON SERVICE3RD RESPONDENT

MOI TEACHING AND REFERRAL HOSPITAL.....4TH RESPONDENT

AND

AMKA AFRICA JUSTICE INITIATIVE1ST INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION2ND INTERESTED PARTY

Coram: Before Justice R. Nyakundi
M/s Ojiambo & Co Advocates
M/s OGSLAW Advocates LLP
M/s Acorn Law Advocates LLP
Mark Mugun for the ODPP
M/s Winnie Cheruiyot for the Attorney General
Mr. Kirima Advocate for the 4th Respondent
Mr. Ian Nyboma Advocate for the 1st Interested Party

JUDGMENT

1. By way of an Amended Petition dated 29/07/2019 filed through M/s Ojiambo & Co, the Advocates for the Petitioner, the Petitioner seeks the following orders;

- 1) *An order that the Petitioner be and is hereby recognized as a transgender person for purposes of proceedings in criminal case No. 1980 of 2019 and consequential orders.*
- 2) *A declaration that the Petitioner right to privacy, dignity and equal protection of the law has been violated by the 1st and 3rd Respondent by way of intrusive body searches at Eldoret women prison.*
- 3) *A declaration that the Petitioner right to privacy, dignity and equal protection of the law was violated by the 4th Respondent by way the intrusive body searches, physical and medical examination, and taking of her blood samples without consent conducted by the doctors of the 4th Respondent.*
- 4) *A declaration that the Petitioners right to privacy of her medical records was violated by the 1st and the 4th Respondents by releasing the same to the media without consent or lawful court order.*
- 5) *The portioners right to freedom and security of person, which includes the right not to be subjected to any form pf violence, torture or cruel, inhumane or degrading treatment, were violated by the officers of the 1st Respondent.*
- 6) *A declaration that the Petitioners right to privacy and equal protection of the law is at risk of violation if the Petitioner as a transgender was*

to be imprisoned upon the conclusion of Criminal case No.1980 of 2019, in so far as the Prisons Act cap 90 does provide for where transgender should be remanded.

- 7) An order that if necessary, the 3rd Respondent to provide the Petitioner with facility and conditions appropriate to her transgender status and which will not occasion violation of her rights and fundamental freedoms.*
- 8) An order that the 2nd and 3rd Respondents to take appropriate steps to initiate legislative reforms to the prisons Act Cap 90 to provide for appropriate conditions for detention for transgender persons.*
- 9) Any other Order that the Honourable court finds appropriate in the circumstances.*
- 10) Reasonable damages against the 1st, 2nd and 4th Respondents for violations*
- 11) Costs.*

- 2.** The Petition is premised on the facts contained therein, the grounds on the face of it and the contents of the Affidavit sworn in Support of the Petition.
- 3.** In the affidavit, the Petitioner, deposed that she was born in Moiben in Uasin Gishu on 28/12/1990 as a last born in a family of 5 children, two sisters and two brothers, that her mother died when she was two years old. She was raised by her elder sisters and maternal uncles, that she was born and assigned the male sex and named Hillary Kiprotich. However, when she became aware of herself at around the age of 5 years, she understood herself as being a girl and that as a child, she dressed as a boy when attending school, but she would dress as a girl when at home. further, that at school, she played with the girls and more often she went to the girl's toilets.
- 4.** She further deposed that before her family accepted her as a girl, they thought that she was mentally challenged and would say that she is "makararan met" which is Kalenjin for "mentally abnormal", that her father accepted her as a girl and would even call her "cheptanyu" which is Kalenjin for "my daughter" and that her female gender was natural to her and she

did not understand why some of her extended family members found her strange though they eventually accepted her and her gender identity.

5. The Petitioner further deposed that she completed her primary school education in 2006 and she was invited to enrol at Kemelit Secondary School, however her father could not raise the necessary school fees and she was enrolled at the Flags Polytechnic in Uasin Gishu where she trained as a tailor but later dropped out because of lack of tuition fee. In 2008, she started working as a house-girl in Eldama Ravine and in 2009, she got a better offer in Mombasa where she worked as such for a period of 1.5 years. As she did not have a national identity card, she returned home to apply for the same in the name she was given at birth as Hillary Kiprotich. Shortly after she got her national identity card, she got a job as a house girl in a place known as Kimumu in Uasin Gishu until a lady friend of her employer, who knew her from home, told her employer that she was a male not a female. Her employer called a police officer and she was arrested and taken to Eldoret Central Police Station where she was informed she was being charged for being a female impersonator. She was placed in the Males' police cells where she was sexually assaulted by two male individuals in the cells and was released a week after her arrest following complaints from her family members and assurance from her employer that she had not wronged her.
6. The Petitioner deposed that on returning home, she could not find her national identity card, which prompted her to apply for a replacement. At the time, she had taken up the female gender and lived as female, as she perceived herself. She stated that that she was denied an opportunity to apply for a replacement national identity card at the District Registrar of person's office in Uasin Gishu because she did not have a photocopy of her previous card and was told that she could not be Hillary Kiprotich since she was a woman. She gave them gave them her national identity card number but the officials at the registrar's office insisted that she needed to get a new identity card with a male name and female sex marker. She did as advise and also got her birth certificate and passport in the said name

of SHIEYS CHEPKOSGEI with the female sex marker and started training as an athlete, and since then, she has been competing in both national and international athletics championship as a woman athlete.

7. She maintained that she has always from her childhood to adulthood, lived and presented herself as a woman, and at no time since she became aware of herself has she ever presented herself as a man. Thus, her gender identity and presentation as a woman has always been incongruent with the sex assigned to her at birth as male and she has lived with this reality. She urged that this conviction, belief and acceptance of herself as a woman cannot be taken away.
8. She further deposed that because of the incongruence between her gender identity and the sex assigned at birth, she has on many occasions been misunderstood by the members of society and authority, as a result of which she has suffered physical assault, mental torture, discrimination and violation of her privacy, dignity and harassment by members of public and state officers and due the said misunderstanding, she has lived in a lonely in which every day is a struggle for survival.
9. The Petitioner further deposed that on the morning of 14/06/2019, she was arrested at the Moi Teaching and Referral Hospital and charged with the offence of personation contrary to section 382 of the Penal Code. Further, that upon arrest she was detained at the Moi Teaching and Referral Hospital Police Post (commonly referred to as Chandaria) in a room used by both men and women officers and later, she was transferred to Eldoret Central Police Station and detained in a section for women. On 17/6/2019, she was taken to the Eldoret Chief Magistrate's Court and was formally charged, and thereafter remanded at Eldoret Women Prison. According to the Petitioner, her detention at the women section of Eldoret Central Police Station and subsequently at Eldoret Women Prison was purely based on gender identity and presentation as a woman and not based on the sex assigned at birth. Additionally, that while at Eldoret Women Prison on the morning of 18/6/2019, she disclosed to the officers that she was a transgender person, which prompted them to conduct an intrusive body

search of her genitals and upon finding that she had a penis, the agents of the 3rd Respondent recommended that she be remanded at the men's prison. On 18/6/2019 she was returned to the Magistrate's Law Court so that she could be detained at the men prison, but instead the 1st Respondent requested that she be taken back to Eldoret Central Police Station, pending further investigations on her gender.

10. The Petitioner contends that on the same day, she was taken to CID office at the Eldoret Central Police Station, where she was forced to strip off all my clothes for physical body inspection before male officers, that they looked at her and laughed saying that *"Kumbe you have been pretending and lying to us you are a woman"* and then she was taken to the males' holding facilities at the Eldoret Police Station and it was very traumatising and humiliating experience, shortly thereafter, Mr. Omondi, a criminal investigating officer and a male colleague of his escorted her to her house where they ransacked her house in search of performance enhancing drugs used by athletes and they would make fun of my female clothes while throwing my panties and bras on the floor and that Mr. Omondi and his male colleague slapped her severally to coerce her to produce her birth certificates and national identity cards.

11. The Petitioner maintained that while at the Eldoret Central Police Station, the male inmates identified her as a woman and wondered why she was placed in their cell, that some suspected she was an informant "planted" in the cell but after some police officers informed them about her assigned sex they started abusing and slapping her, that some tried to strip her but she screamed and they backed off and a police officer kept her alone in isolation in a small corridor but she would be abused and touched inappropriately by other inmates using the corridor.

12. On 24/06/2019, the Petitioner deposed, she was informed investigating officer that she was to be taken to Moi Teaching and Referral Hospital for investigations about her gender to be conducted, that at the Moi Teaching and Referral Hospital she was placed in a room where a male and a female individual entered and ordered her to strip, the investigating officer, Mr.

Omondi was also present, that she refused to strip but she was threatened by the male individual with physical violence and imprisonment for refusing to strip, that these three individuals were making fun of her while touching and pulling her private parts, that these three also demanded for her blood samples which she refused but they threatened to take it using force and informed her that she would be liable for any injuries she sustained in the course of the exercise, that they informed her that the court had issued orders for the "two doctors" to do whatever they wanted with her and she demanded to see the court orders and they laughed and asked if she knew how to read the English language.

- 13.** The Petitioner maintained that all the examinations, procedures and tests were conducted on her body against her consent and despite her protests and in total violation of by privacy and dignity. She was further subjected to intrusive physical body examination without her consent by both male and female doctors in the presence of Mr. Omondi and she protested against these tests and informed the hospital that she was not ready for such tests and examination, but the hospital insisted that it was executing a court order and forcefully subjected her to the tests.
- 14.** The Petitioner deposed that the Court only directed that her gender be established, however, the doctors at the hospital were clear that they were incapable of determining her gender. Nevertheless, they went ahead to subject her to tests which they knew very well that could not determine her gender and that in any event, the said tests were incomplete and therefore inconclusive, which is clear indication that they were actuated by malice or ulterior motive as opposed to the direction from the Court. According to the Petitioner, MTRH acted in bad faith as the offence she accused of was committed at the said hospital and its members of staff are part of the state witnesses in her criminal case.
- 15.** The Petitioner further deposed that the criminal charges against her in Criminal Case No. 1980/2019 attract a punishment by way of a fine or imprisonment for a term not exceeding two years. The Petitioner is apprehensive that should the court find her guilty of the offense and decide

to imprison her, she will be highly exposed to risks of harassment, physical and mental violence, abuse, discrimination, violation of her privacy and dignity due to lack protection and adequate facilities at the prisons for transgender persons.

- 16.** The Petitioner maintained that it is in the interest of justice and fairness that the Honourable Courts makes a determination of this Petition before the sentencing in the said Criminal Case No. 1980/2019, that the delay in the trial process, if the orders of stay are granted, is nothing compared to the irreparable harm that she will suffer since one can never be adequately compensated for the prejudice, infamy, and agony that comes with such violations of rights and fundamental freedoms, not even with an appeal process and that unless this Court intervenes, the risk that her rights could be violated is real and imminent, that in the very least, my rights as a person who is detained, held in custody or imprisoned under the law and fair trial are under threat in epic proportions; enough to render them limited against the constitutional imperative under Article 24 of the Constitution.
- 17.** In conclusion, the Petitioner urged that in the circumstances and in the interest of justice and preservation of her fundamental rights herein, the orders sought ought to be granted as there is no prejudice to be suffered by the Respondents.
- 18.** The 1st Respondent opposed the Amended Petition through a Replying Affidavit sworn by No. 9228 Police Constable Victor Omondi, on 20/11/2020, the investigating officer in Eldoret CMCR NO.1980 of 2019.
- 19.** He deposed that the petition is frivolous, vexatious, bad in law and otherwise an abuse of Court process, that the Petitioner was arrested on 14/06/2019 and arraigned before Court vide Eldoret CMCR 1980 of 2019 on 17/06/2019 and at the time of his arrest and arraignment, the Petitioner never complained to the OCS Eldoret Police Station or the trial Court that he had issues of a transgender nature, that upon being arraigned, the Petitioner was remanded at Eldoret GK Women Prison as a female and while in remand, he at no point informed the officer in charge

of Eldoret GK Women Prison that he was transgender, that it was in fact the women remandees at the Prison who discovered that the Petitioner was a male person pretending to be a woman, that the discovery led the 3rd Respondent through the 1st Respondent to seek directions from the trial Court on establishing the Petitioner's true status and appropriate custodial orders and that 18/06/2019, the court ordered that the Petitioner's gender and identity be determined and that they thus resented the Petitioner to the 4th Respondent who examined him and prepared the report confirming that he is a male. He maintained that the report is clear that only his sex could be determined and not his gender and that one's gender cannot be established without determining their sex.

20. He denied having subjected the Petitioner to any of the humiliating harassment that he alleges and that the Petitioner should be put to strict proof. He contended that it is therefore untrue that he reported about his alleged gender status, that his sex is indeterminate and that he has suffered under any of the Respondent's hands, that they did not ransack the Petitioner's house and they followed all protocol in respecting his fundamental rights including when the investigating his true identity. He deposed that the Petitioner was initially searched by women officers when it was officers when he was confirmed to be a man. It is noteworthy that he has as all searches have been lawful despite the confusion that the Petitioner has intentionally created in the name of his Constitutional rights and that the Petitioner did not make any mention of being a transgender until the filing of this Petition before this Honourable Court.

21. He contended that the term "transgender" does not exist in law and has no legal recognition under the Laws of Kenya and that even if it did, the Petitioner has made mere allegations about his condition without an iota of medical/scientific evidence, psychiatric or otherwise, to substantiate his averments. He maintained that the Petitioner has not faced any discrimination under Article 27(4) of the Constitution as the said sub-article lists sex as a ground, not gender and neither did the 1st or 4th Respondent release his medical information to the media. It is his conduct

that has resulted in his medical information to be made public through court proceedings.

- 22.** He asserted that the investigations into the Petitioner's identity have led to the exposure of the falsehoods about his identity and subsequent charges of Obtaining Registration by False Pretences Contrary to section 320 of the Penal code in CMCR No. 480 of 2020, that the investigations have revealed that he is a male and that his real name is Hillary Kiprotich - holder of Kenya National ID Card number 26964066 which information was obtained from the Registrar of Persons, the Petitioner illegally used the identity cards of one Beatrice Cherotich Tonui and John Kipkemboi Too as his parents; as well as the particulars of one Sarah Imbogo and Beatrice Jeruto Koiser as recommenders in order to illegally obtain an identity card and passport bearing the name "Shieys Chepkosgel" and that these unsuspecting Kenyans have since disowned having any relation to the Petitioner and that the Registrar of Persons and Director of Immigrations have respectively confirmed that the alleged parents and recommenders were misrepresented in the registration the name of Shieys Chepkosgei.
- 23.** He further deposed that while carrying on the said name of Shieys Chepkosgei, the Petitioner has unfairly competed in local and international female track competitions resulting in him being internationally blacklisted and that subsequently the Petitioner pretended to be a female nurse employed by the 4th Respondent through a forged Staff identification Card which has no employment number or job group but bears ID No. 226964066 which he confirmed was registered in his real name - Hillary Kiprotich.
- 24.** He maintained that instead of following the due process required for change of a person's name, the Petitioner acted criminally until this point when he seeks redress under the guise of constitutional rights, which is an abuse of court process and that the unfavourable social, cultural, economic, administrative and legal structures of our society are being used as an excuse for his fraudulent conduct and sheer lack of effort to follow the legal processes in place to pursue his identity rights.

- 25.** He further maintained that he has never slapped the Petitioner and neither did any of my fellow officers as they only followed what the court ordered us to do following the uncertain nature with which he presented himself, that they did not ransack his house as he alleges and they put the Petitioner to strict proof thereof and that despite the Petitioner's resistance, they haven't done anything outside of lawful Court Orders that has infringed on his right to privacy, dignity, freedom or security.
- 26.** He contended that this entire petition and the prayers sought are completely misplaced as they are grounded on an alleged gender identity that has absolutely no basis in the laws governing Kenya, that had parliament intended it, it would have legislated beyond the currently recognized sexes/genders that are male and female and that this Honourable Court is the wrong forum for his prayers, since the legislature is responsible for creating statutes which would provide for the rights the Petitioner seeks. He asserted that the Court's mandate is to purposefully interpret the Constitution and the statutes thereunder and cannot assume the role of the legislature as the Petitioner prays and that the Petitioner in any case has not described the kind of custodial facilities he wishes to be provided for him, neither has he made it clear the kind of personnel he wishes to search him.
- 27.** In the end, he urged that that this petition ought to be dismissed for the above reasons and more so because he has come before this court with unclean hands, that the events leading to this case only paints a picture of a petition that is predicated on falsehood and a mere afterthought of a person who has managed to evade the law until now and that the Petitioner has not demonstrated the alleged infringement of his constitutional rights, particularly because this petition arose from clear and unambiguous lower court orders.
- 28.** The 2nd and 3rd Respondents filed a general response in which they basically denied each and every allegation in the Petitioner's petition save for reiterating the averments by the 1st Respondent's with regard to the Petitioner's identity.

29. The 4th Respondent opposed the Amended Petition through a Replying Affidavit sworn by Dr. Saratiel Nyabera, on 5/12/2019, the Ag. Director, Clinical Services at the 4th Respondent.

30. The 1st Interested Party on 9/12/2019 filed Grounds in Support of the Petition premised as follows;

- 1) *That Article 21 of the Constitution mandates the State and every State organ including this Honourable Court to observe, respect, protect, and fulfil the rights and fundamental freedoms in the Bill of Rights, including the needs of vulnerable groups and members of minority or marginalised communities such as the Petitioner.*
- 2) *That Article 260 of the Constitution defines marginalised group to mean "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)."*
- 3) *That contrary to Article 27 of the Constitution which prohibits discrimination and guarantee all persons equality before the law and the right to equal protection and equal benefit of the law transgender persons (person whose gender identity and expression is not of the sex assigned to them at birth due to a medical condition known as Gender Incongruence, previously known as Gender Identity Disorder) continue to suffer both de facto and de jure discrimination due to lack of recognition of their legal status within the State's binary system, more so those in lawful custody.*
- 4) *That the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.*
- 5) *That due to the said lack of legal recognition, transgender persons generally struggle to enjoy inherent dignity and the right to have that dignity respected and protected as guaranteed by Article 28 of the Constitution. Research studies show that transgenders in lawful custody experience higher levels of violations especially when they are*

placed in a prison facility that does not match their gender identity, and are searched by guards who do not match their self-identified gender.

- 6) That incarceration of a transgender woman, such as the Petitioner, in a male facility will subject her to harassment, humiliation, degradation, and abuse contrary to Article 29 of the Constitution that provides every person with the right to freedom and security of the person, which includes the right not to be subjected to torture in any manner, whether physical or psychological or treated in a cruel, inhuman or degrading manner.*
- 7) That if the Petitioner was to be imprisoned upon the conclusion of Criminal case No 1980 of 2019, incarceration without due regard to her transgender identity will offend Section 5 of the Persons Deprived Of Liberty Act, which provides that a person deprived of liberty shall at all times be treated in humane manner and with respect for their inherent human dignity.*
- 8) That the orders of the trial court of 18th June, 2019 in the Criminal case No 1980 of 2019 that the Petitioner, be subjected to, 'further investigations in terms of gender, birth certificates and identity cards 'are inadequate to establish true gender of the Petitioner as gender is determined not only by biology, but also by psychological and social factors.*
- 9) That Courts of comparative jurisdiction have held that it would be wrong to identify and define a person's gender simply on the basis of the chromosomes, genitals, and gonads with which they are born! it is the mind as well as the body that determines the sex of an individual, and where a person's gender identification differs from his or her biological sex, the psychological should in all cases prevail.*
- 10) That accordingly, the results of the said investigations and tests as ordered by the trial Court are incompetent for purposes of determining whether the Petitioner should be placed in a male or female facility. As such, there is a risk of violation of the Petitioner as a transgender if she was to be imprisoned on the basis of the said tests*

results upon the conclusion of Criminal case No 1980 of 2019, in so far as the Prisons Act Cap 90 does not provide for where transgender persons should be remanded.

- 11) That the Petitioner's right and values of Privacy, self-identity, autonomy, and personal integrity were violated by the intrusive body searches, physical and medical examinations, and taking of her blood samples without her consent.*
- 12) That the Petition raises issues of great public interest touching on the rights of transgender persons, a section of minority members of our society and it is imperative that this Honourable Court instructs the 2nd and 3rd Respondents to fulfil their Constitutional obligation to undertake appropriate policy and legislative reforms to the Prisons Act Cap 90 to provide for appropriate conditions of detention for transgender persons.*
- 13) Article 20 of the Constitution obligates this Honourable Court to adopt the interpretation that most favours the enforcement of a right or fundamental freedom and to develop the law to the extent that it does not give effect to a right or fundamental freedom.*
- 14) That by virtue of Article 2 (5) of the Constitution, this Honourable Court should adopt the position of the regional and international conventions ratified by Kenya and jurisprudence on protection of rights of transgender persons, particularly with regard to physical and medical searches, remand and detention conditions.*
- 15) That this Petition is not just about legal standards. It is about a vulnerable transgender woman, and this Honourable Court has the legal power to change the Petitioner's and other transgender individuals lives for better or worse.*

31. The 2nd Interested Party on their part relied on the expert report of Dr. Nkanyiso Madlala filed through her Affidavit sworn on 20/05/2024 and the expert report of Angeline Obutu, a counsellor filed through her Affidavit sworn on 20/05/2024.

32. The Petition was canvassed both orally and vide written submissions. All parties filed their respective submissions.

The Petitioner's Submissions

33. The Petitioner's Counsel began by urging the Court to disregard the contents of the Replying Affidavits sworn by Victor Omondi and Dr. Saratiel Nyabera on grounds that the Petitioner was denied a chance to cross examine the said deponents who were not called as witnesses by the respective Respondents. Counsel cited the Supreme Court in **Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR)** in that regard. Counsel also relied on the case **of AKN V JMN [2016] eKLR**.

34. The Petitioner's Counsel raised the following issues for determination:

- a) Whether the Petitioner is a transgender person*
- b) Whether the 1st, 2nd, 3rd, 4th and Respondents violated the fundamental rights and freedoms of the Petitioner.*
- c) What remedies are available to the Petitioner.*

35. On whether the Petitioner is a transgender person, Counsel submitted that as demonstrated in her Affidavit at paragraphs 4, 5,6,7,8,9,20,25,26 and 27 the Petitioner is a transgender person and in particular at paragraphs 25,26 and 27. Counsel urged that the Petitioner's life, as depicted in her Affidavit in the foregoing paragraphs is one of a person who internally felt, dressed, walked, and lived like the woman she strongly believes she is.

36. Counsel observed that further, in a bid to understand the condition afflicting the Petitioner, this Honourable Court on its own motion requested for expert opinion on the matter, and three expert reports were filed to help the Honourable Court understand the aetiology, treatment and management of the condition known as gender identity disorder and that the Petitioner filed the Expert Report dated 30/4/2024 by Dr. Simon Pickstone-Taylor MBChB (UCT), a Child and Adolescent Psychiatrist specializing in the transgender condition, that a second expert report is

attached to an affidavit sworn by Dr. Nkanyiso Madlala, a qualified Clinical Psychologists specializing in Sexuality and Gender Diversity and that the third report was contained in the Affidavit sworn by Angeline Obutu, a qualified Counsellor.

37. Counsel further submitted that all the three experts appeared before the Court, presented their reports and were examined on the same, that Dr. Simon Pickstone-Taylor extensively elaborated on the aetiology of Transgender people. That at page 3 of his report he describes a transgender person as whose gender identity is the opposite of their birth assigned or biological gender. At page 4 of his report, he concludes that based on various research findings, *'it is understandable that a gender identity is not a choice, but at least in part neurologically determined in our brains. Transgender people do not choose to be that way and cannot change their gender identity through any form of therapy, it appears to result from how their brains are formed.'* Counsel urged that in **Republic v Kenya National Examination Council & Another Ex Parte Audrey Mbugua Ithibu [2014] eKLR**, the Court described the Petitioner in that case, a transgender person, as *'a person with the body of a man and the mind of a woman. For him, the pull of his feminine mind-set is overwhelming.* According to Counsel, the Petitioner's experience is similar to that of Audrey Mbugua Ithibu in the above case. Similarly, Counsel submitted that the Petitioner herein is a person with the body of a man and the mind of a woman and that for him, the pull of his feminine mind-set is overwhelming.

38. Counsel maintained that for transgender persons, the internal perception of gender varies from their physical anatomy/features of sex and that the resultant condition is commonly called 'Gender Identity Disorder/Dysphoria', a natural phenomenon that occurs in a minority of human beings. Counsel urged that the Petitioner herein falls within that minority group of human beings who have the biological misfortune of bearing the physical body of one gender, and the mind of the opposite gender and that simply put, the Petitioner is a transgender person.

- 39.** On the question whether the Petitioner is a transgender or not, Counsel contended that only the Petitioner and the Interested Parties provided the information to the Court through her own affidavit, oral testimony and supporting expert witnesses. Counsel contended that none of the Respondents called any witnesses to refute the information provided by the Petitioner, that the 2nd and 3rd Respondents filed a joint witness statement and called Rael Cherop as their witness and on the issue of transgenderism, she said that upon the arrest of the Petitioner, they conducted a strip down search and ascertained that she had the physical features of a man and that it was clear that the 2nd and 3rd Respondent's evidence did not go beyond physical body search.
- 40.** In regard to whether the Petitioner's right to privacy, dignity, freedom and security of person and equal protection of the law was violated by the 1st and 3rd Respondents, Counsel submitted that the Petitioner has alleged that her right to privacy, dignity, freedom and security of person and equal protection of the law was violated by the 1st, 2nd, 3rd and 4th Respondents by way of intrusive body searches at Eldoret Central Police Station, Eldoret Women Prison unlawful medical examinations at the Moi Teaching and Referral Hospital.
- 41.** In regard to violations of Constitutional rights by the 1st, 2nd and 3rd Respondents, Counsel submitted that the facts on this issue are that the Petitioner was arrested on 14.6.2019 at the Moi Teaching and Referral Hospital and transferred to Eldoret Central Police Station and detained in a section for women. She remained there until 17/6/2019 when she was presented in Court and charged with the offence of impersonation in Criminal Case No:1980 of 2019 and thereafter, she was transferred to Eldoret Women Prison.
- 42.** Counsel contended that at the Eldoret Women Prison, the Petitioner was stripped down and a physical body search conducted. Counsel added that the Petitioner states at paragraphs 12 of the Petition and paragraphs 36 of the Further Supporting Affidavit that she was subjected to intrusive body searches involving touching her genitals and breasts and at the hearing,

she testified that, *'The officers screamed, drawing the attention of their colleagues. They then conducted intrusive and inappropriate bodily searches in a bid to establish my gender. The searches involved stripping and spreading of legs to ascertain whether my genitalia is male or female...I was asked to bend and expose my anus.'*

43. Counsel further submitted that the 2nd and 3rd Respondent witness in her witness statement stated that Petitioner was stripped down and subjected to physical body search, and discovered that the Petitioner had penis and no breasts. She also stated that after the search, they also called the medical officer from prison dispensary to confirm the sexual orientation of the Petitioner. Counsel observed that the 1st Respondent's witness, Police Constable Victor Omondi, the investigating officer stated in his affidavit stated that 'it is *in fact the women remandees at the Prison who discovered that the Petitioner was male person pretending to be a woman*'. Counsel urged that there is sharp contradiction between the statements of the witnesses of the 1st, 2nd and 3rd Respondents as to how the search was done. Counsel contended that the deponent Victor Omondi was not called to be cross examined on the truth or otherwise of the contents on his affidavit, and therefore we urge the Honourable Court to disregard the affidavit. Counsel reiterated that what is not in dispute is that the Petitioner was subjected to strip down body searches, whether by the prison officers or remandees, as admitted by the witnesses of the 1st, 2nd and 3rd Respondents.

44. Counsel cited that **Rules 35 and 36 of the Prison Rules** provide guidance on the manner of searches. Counsel added that **Section 10 of the Persons Deprived of Liberty Act** provided that, a person deprived of liberty *shall not be subjected to an unreasonable body search*, and in any event such body searches can only be carried out only by a person of the same sex. Further, Counsel pointed out that Section 10(5) provides that such a search should *be conducted with decency and in a manner that affords the person being searched the privacy and dignity consistent with the purpose of the search*.

- 45.** Counsel urged that there is no provision for 'stripping down' a prisoner in conducting a search. Counsel submitted that stripping down a person and exposing his genitalia, anus and breasts for public view is inhumane, strips the dignity of a person and infringes on his privacy, particularly where the law has not expressly provided for such a method. Counsel maintained that any action that limits any rights under the Constitution or has the potential to subject a person to limitation of human rights and dignity, must be specifically prescribed. Counsel added that an action that exposes a person's private parts to public view without their consent deprives them of dignity, and abuse of their right to privacy, cruel, inhuman or degrading treatment. Counsel maintained that such an action must receive the sanction of the law, or otherwise it amounts to unlawful limitation of rights and fundamental freedoms in the Bill of Rights. Counsel urged that in the case of **ANN v Attorney General (Petition 240 of 2012) [2013] KEHC 6004 (KLR)**, Hon. Justice Ngugi Mumbi addressed the violations of the right to dignity by body searches.
- 46.** Counsel submitted that the Bill of Rights set out in the Constitutions provides for various rights, including the human dignity (Article 28), freedom and security of the person, and the right not to be subjected to torture in any manner, whether physical or psychological or treated in a cruel, inhuman or degrading manner (Article 29) and right to privacy, which includes the right not to have their person searched (Article 31).
- 47.** Counsel added that Article 51 provides that a person who is detained or held in custody retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained or held in custody. Further Section 5 of the Persons Deprived of Liberty Act provides that a person deprived of liberty shall at all times be treated in humane manner and with respect for their inherent dignity. Counsel submitted that the right to dignity, privacy and freedom and security of person, including the right not to be treated in a cruel, inhuman or degrading manner are not incompatible with lawful detention or custody.

Counsel urged that the Bill of Rights was not put in the Constitution for cosmetic appearance, citing the *case of MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR)*.

- 48.** Counsel observed that the Bill of Rights occupies the heart and the soul of the Constitution. Article 19 states that the Bill of Rights is an integral part of the Kenya's democratic state and is the framework for social justice and that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Counsel urged that the Constitution will be rendered impotent if we continue stripping down our fellow human being and displaying their genitals to the public in the name of searches as it was done to the Petitioner herein. Counsel added that it is the most degrading and humiliating thing to ask a grown-up person to stand naked before a group of fellow men or women. Further, Counsel pointed out that such an action amounts to cruelty and psychological torture. Consequently, Counsel added that the Petitioner was subjected to cruel treatment and psychological torture and that it was for such ills that the Bill of Rights was incorporated in our Constitution to cure and remedy.
- 49.** Counsel urged that the Constitution enjoins the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Counsel submitted that the 1st, 2nd and 3rd Respondents failed in this fundamental duty set out in Article 21 when they subjected the Petitioner to strip down searches in public.
- 50.** Counsel further submitted that the 2nd and 3rd Respondents had no justifiable reasons to subject the Petitioner to the most intrusive, degrading, humiliating and inhuman body searches. Counsel highlighted that Rule: 36. (1) of the Prisons Rules provides that. "The searching of a prisoner shall be conducted in as seemly a manner as is consistent with the necessity for discovering concealed articles. Counsel urged that it is clear that the

purpose of conducting body searches is for discovering concealed articles. Counsel maintained that assertion by the 1st, 2nd and 3rd Respondents that they conducted the body searches to establish the genitals and other sex organs of the Petitioner is completely outside the purpose for which the law permits searches in prison. Counsel cited the case of **R.M v ATTORNEY GENERAL & 4 others[2010]eKLR** and he urged the Court to adopt the position taken in the said authority and find that the actions by the 1st, 2nd and 3rd Respondents to subject the Petitioner to strip down body searches by persons of opposite sex was a violation of the Petitioner's rights to human dignity, privacy, freedom and security of person which includes the right not to be subjected to torture in any manner, whether physical or psychological; or treated in a cruel, inhuman or degrading manner.

51. Counsel submitted that the Prisons Act, and the rules made thereunder does not limit the above-mentioned rights and fundamental freedoms. Counsel observed that Article 24 provides a right or fundamental freedom in the Bill of Rights shall not be limited except by law.
52. Counsel further submitted that as noted above, the purpose of searches is to discover concealed articles or objects. Counsel added that there are other less intrusive methods available to achieve the same purposes such as the use of modern technology as used at airports and other high security sensitive areas. Counsel reiterated that strip down body searches are archaic, cruel, degrading, inhuman and therefore have no place in an open and democratic society based on human dignity and social justice.
53. Counsel urged that in any event, and despite the provisions of Article 24, freedom from torture and cruel, inhuman or degrading treatment cannot be limited under any circumstances and that any law or act that purports to limit these rights would be inconsistent with Article 25 of the Constitution, and hence void to the extent of inconsistency, and any other act or omission in contravention of Article 25 of the Constitution is invalid. Counsel observed that to the extent that intrusive strip down body searches are cruel, inhuman, degrading and tend to subject a person to

psychological torture, the same should be found to be inconsistent with Article 25 of the Constitution, and hence invalid.

- 54.** Counsel submitted that on 18/6/2019, the Petitioner was taken back to Court with the request from the 3rd Respondent that she be taken to the male prison, but instead the 1st Respondent requested that she should be taken to the Eldoret Central Police Station, and be detained in the male section and she was later transferred to the female section of the same Police Station. Counsel observed that these facts have not been specifically denied. Counsel urged that transferring the Petitioner from the female prison, to the male section of the Police station and back to the female section amounted to psychological torture. Counsel pointed out that the Petitioner testified that she became a subject of curiosity and ridicule from both the fellow remandees and police officers.
- 55.** Counsel further submitted that on 18 6 2019, the Court ordered that the Petitioner be taken to the 4th Respondent's Institution for investigation to find out the gender of the Petitioner, that pursuant to this Court order, the Petitioner was taken to the 4th Respondent's institution and subjected to the most humiliating, intrusive and unlawful medical examination and tests, involving pulling and measuring of his penis, radiological examination and blood testing, while the Court ordered for the establishment of the Respondents gender, the medical officers at the 4th Respondent's institution embarked on unlawful and unauthorized process of establishing the sex of the Petitioner and that these facts are not denied by the 4th Respondent. Counsel added that no witness was called to challenge these facts and that in fact a Dr. Saratiel Nyabera filed a Replying Affidavit purportedly on behalf of the 4th Respondent in which he alleges at paragraphs 5 that, the hospital dutifully performed a sex/gender *verification tests on the accused person as per the court order while following the medically accepted procedures of determining a person's sex. The test included physical examination of the accuse person, drawing of blood for hormonal profile, and a radiological exam to ascertain his pelvic internal organs.*

- 56.** Counsel contended that indeed what the officers of the 4th Respondent were testing was sex, and not gender and that from the testimonies of the experts who were invited to shed light in this matter, it was clear that sex and gender are two different things, that Doctors who are trained and qualified will definitely know the difference and that the 4th Respondent has no shortage of such doctors. Counsel added that it was clear that at the hearing and from the testimony of the experts that while sex is subject to biological/physiological evaluation and tests, gender is a subject of psychiatric study and evaluation. Counsel maintained that this is the standard practice in the medical world. During the hearing, the advocate for the 4th Respondent proposed to call two psychiatric doctors working with the 4th Respondent, including the well-known Dr. Lukoye Atwoli as expert witnesses, but for some unknown reasons, they were not called. Counsel further submitted that the clinical officers who examined the Petitioner at the institution were also not called and that the 4th Respondent did not present any witness to support its assertions or challenge the assertions by the Petitioner or rebut the testimonies of its witnesses or support its assertions.
- 57.** Counsel reiterated that the tests carried out by the 4th Respondent to establish the sex of the Petitioner were unlawful to the extent that they were not sanctioned by the Court order. Counsel urged that the Court order was very specific and limited to establishing the gender of the Petitioner. There was not court order sanctioning the 4th Respondent to establish sex of the Petitioner. Counsel maintained that the medical tests carried on the Petitioner were intrusive and a violation of the right to privacy, freedom and security of person.
- 58.** Regarding the remedies available, Counsel submitted that Article 23 of the Constitution empowers this honourable Court to uphold and enforce the Bill of Rights, and the Court is empowered to grant appropriate relief including; declaration of rights under prayers (a), (b), (c), (d), (f) of the Petition, orders of Structural interdict under prayer (h), (i) of the Petition. Counsel relied on the case of **Baby 'A' (Suing through the Mother E A) &**

another v Attorney General & 6 others [2014] eKLR, in which the Court ordered the 1st Respondent therein to *‘file a report to this Court within 90 days on the status of a statute regulating the place of intersexual as a sexual category and guidelines and regulations for corrective surgery for intersex persons* and he added compensation, observing that under prayer (k) of the Petition, the Petitioner has sought reasonable damages. Counsel submitted that in the RM Case above, the Court awarded Ksh.500,000/= to the Petitioner for violations of his right to dignity by body searches, in ANN case above, the Court awarded Kshs.200,000/= and in that MWK_case above, the Court awarded Ksh.4,000,000/= for violation of the rights to dignity, privacy, freedom and security of the person by intrusive body searches. Counsel observed that above cases were determined not less than 8 years ago and that considering the gravity and the nature of the rights violated, the duration of time and inflationary factors, we propose that Ksh.10,000,000/-will be an appropriate remedy for damages.

The 1st Respondent’s Submissions

59. Counsel for the 1st Respondent, **Mr. Mugun** outlined the following issues for determination:

- a) *Whether the doctrine of judicial exhaustion is applicable*
- b) *Whether the Petition has been overtaken by events*
- c) *Whether the Petition was crafted with specificity.*
- d) *Whether there is any infringement of the Petitioner’s rights.*

60. Regarding the doctrine of judicial exhaustion, Counsel relied on the definition of the doctrine of exhaustion found in the **Black’s Law Dictionary (10th Edition)**. Counsel submitted that the doctrine of exhaustion serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party avails himself of the remedies within the mechanisms of out-of-court dispute resolution. Counsel added that this encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in **R u I.E.B.C Ex Parte National Super**

Alliance (NASA) Kenya and 6 Others [2017] eKLR. Counsel also cited the case of **Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR.**

- 61.** Counsel urged that the doctrine of judicial exhaustion is not absolute and there are exceptions to that rule. He cited Mrima J in **Jeremiah Memba Ocharo v Evangeline Njoka & 3 Others [2022] eKLR** where the judge formulated a criterion for consideration on exception. He also cited the findings of Mativo J (as he then was) in **Krystalline Salt Ltd v Kenya Revenue Commission [2019] eKLR** as similarly illustrative as to when a court may depart from this doctrine.
- 62.** Counsel further submitted that the Petitioner did not table any documentation before this Honourable Court to show that the Registrar of persons has refused to register him as a transgender. Counsel pointed out that as a matter of fact, the Registrar is not a party to this case and that so, whom would the order be enforced. Counsel urged that the Registrar's discretion has not been invoked. Counsel maintained that the internal statute-recommended remedies have never been invoked, the internal statute-recommended remedies have not been exhausted and that the sufficiency otherwise, of the Registration of Persons Act has never been interrogated. According to Counsel, it might very well be that the Registrar may, without further legal recourse, register him as a woman and that what was the rush to the High Court for if not to furtively defeat justice. Counsel urged that the Petitioner jumped the gun and that this was a false start. Counsel observed that when an athlete jumps the gun and attempts to gain an unfair advantage over his/her competitors, the referee makes haste in blowing the whistle then shows him the proverbial red-card to disqualify him from further offending the long-standing rules of the race and doing so will also serve as an incentive for people to comply with the rules. Counsel urged the Court not to hesitate to do so.
- 63.** Regarding the petition being overtaken by events, Counsel submitted that "equity does not require an idle gesture." Counsel submitted court never ever issues orders in vain and never ever issues an order which is incapable

of being fulfilled. Counsel cited prayer one in the petition and submitted that in cross-examination by counsel for the 1st Respondent, the Petitioner admitted that Eldoret CMCR 1980/2019, sired this petition, he admitted that it had long been heard and determined and that the outcome was an acquittal. Counsel further submitted that he admitted that he faced two other criminal cases related to his criminal activities at MTRH; the first of which related to obtaining registration by false pretences, was similarly heard and determined with an outcome of him being convicted and sentenced to a 3 years' suspended sentence and the other one relating to anti-doping and passing himself off as a female athlete was still pending in court.

64. Counsel urged that the sub-stratum of the case has long collapsed and disintegrated and that should the Court be minded to order that he is recognised as a transgender person as he specifically prayed for, that order will be otiose considering that the criminal cases that sired this petition has long been heard and determined and that this Honourable Court would be asked to lock the gate after the horse has already bolted. Counsel observed that it would be an exercise which our Swahili people say, “*ni kazi ya kupuliza gunia.*” Blow as you may, but that sack will never fill up! Counsel urged that Court orders, are not issued in vain, granting that prayer would be doing precisely that.

65. In regard to specificity in drafting, Counsel began by citing the case of **Anarita Karimi Njeru v The Republic [1976-1980] KLR 1272** where the Court held that where a Petitioner alleges a contravention or threat of contravention of a constitutional right, he must set out with specificity, the rights infringed and the particulars of the infringement or threat of infringement. Counsel also cited case of **Mumo Matemu v Trust Society of Human Rights Alliance & 5 Others [2013] eKLR** and the case of **Trusted Society of Human Rights Alliance v Attorney General & Others [2012] eKLR.**

66. Counsel maintained that the law that a Petitioner claiming violation of his constitutional rights must state with specificity: what right was violated, by

whom was the right violated, how it was violated; and avail proof of the violation thereof.

67. Counsel submitted that from a perusal of the petition, one will note that the Petitioner span a tale of how a litany of his constitutional rights were violated. Counsel observed that he does not bother to specify how the 1st Respondent violated any of those rights, he instead picked up cudgels with the fact that after the medical tests revealed he was a biologically and physiologically male, therefore a man pretending to be a woman or concealing his manhood, the ODPP requested that he is confined in a male detention facility. Counsel further observed that the Petitioner himself readily admitted that had he gained admission to the female remand facility and it became known that he was endowed with male genitalia, it is very likely that he would have been molested. Counsel contended that how now can making applications in court be an infringement of someone's fundamental right, how is it that protecting a man from potential sexual molestation in female detention centre be a violation of his fundamental human rights. Counsel maintained that unless he himself bore sinister/lascivious motives, they struggle to see how applying to have him protected from an imminent sexual molestation so grossly violated his human rights.

68. On whether there was infringement of the Petitioner's rights, Counsel submitted that it is always important to remember that the Petitioner was sent to MTRH (the 4th Respondent herein) for a gender assessment. Counsel added that this was done pursuant to a court order issued by the trial court. It is imperative to also note that the "offending" court order was not appealed against, something that even the Petitioner himself agreed and he was satisfied with that order. Counsel contended that there is a presumption that court orders are legal, lawful and binding upon the party against whom they are issued. Counsel submitted that obedience of court orders is not optional and had the hospital not complied with that court order, they would have automatically been in contempt of the court and

they would have attracted the ire of the trial court and would have most likely suffered undesirable penal consequences for the contempt.

69. Counsel further submitted that there is also a presumption that a person acting in good faith in satisfaction of a court order, is immune from acts done bona fide in compliance with that court order. Counsel questioned how was the hospital staff supposed to assess his gender. Counsel maintained that neither the Petitioner nor the Interested Party's expert gave an internationally acceptable practice for doing this. Counsel added that because it is impossible to open up his brain and tabulate his thought process, they cannot tell whether he truly believes that he is female, or whether he is pretending to be a woman so that he gains an unfair advantage in women's athletics competitions, or he harbours sinister/ lascivious motives in insisting he wants to be remanded in a female detention centre. Counsel urged that what they do know, is that he has failed, refused and or neglected to take hormonal therapy to suppress his male attributes. Counsel observed that he has similarly failed, refused and or neglected to undergo surgical procedures to correct the mismatched genitalia. Counsel contended that after all the professional experts testified on oath that transgender women do any or both of these to start and complete their transformation from male to female. Therefore, Counsel submitted that Shieys is not a woman, he is a man, feigning to be a woman to win women's races and beat the criminal justice system. Counsel urged the Court to declare him so.

The 2nd and 3rd Respondents' submissions

70. Counsel for the 2nd and 3rd Respondents raised the following issues for determination:

- a) Whether the searches, arrest and detention of the Petitioner was unconstitutional;*
- b) Whether the 4th Respondent violated the Petitioner's rights;*
- c) Whether an order can issue to compel 2nd and 3rd Respondents to initiate legislative reforms to provide for prison facilities for transgender; and*

d) Whether the Petitioner is entitled to damages

- 71.** In regard to whether the searches, arrest and detention of the Petitioner was unconstitutional, Counsel submitted that the Petitioner claims that intrusive searches were done in both the police station and the women's prisons, he claims that upon his arrest, he was placed in women's cells and was later remanded at the Eldoret women's prison where he was discovered to be male, he was referred back to court which ordered that a medical report be filed to ascertain the Petitioners' gender for proper custodial orders, at Eldoret women prison he claims to have been subjected to intrusive and inappropriate bodily searches and was later detained in the male cells, he also states the police conducted illegal searches in her house and he claims that the bodily searches have occasioned him mental torture, agony and pain.
- 72.** Counsel submitted that the 1st to 3rd Respondents have refuted those allegations through affidavit sworn by Constable Omondi and Response to petition dated 10/05/2021. Counsel further submitted that in the affidavit of Constable Omondi, the 1st, 2nd and 3rd Respondents state that upon arrest of the Petitioner, he never disclosed that he was as claimed a transgender, he was detained in female cells and that neither he nor his colleagues ransacked the Petitioner's house.
- 73.** During viva voce hearing, Counsel submitted that the Petitioner on cross examination confirmed that the female wardens were shocked to see his penis and that he was well aware that the law requires that a search must be done on a person to ensure that he is not carrying any contraband and that he also stated that had it not been discovered that he was a man during search he may have been molested by fellow remandees at the cells.
- 74.** Counsel submitted that no constitutional rights of the Petitioner were violated during the search and detention and that the actions taken were in line with existing legal mandates governing the processing and classification of detainees, designed to safeguard the Petitioner, other detainees, and institutional security.

- 75.** Counsel maintained that searches in prisons are conducted in accordance with established legal provisions, ensuring both institutional security and the dignity of detainees. Counsel submitted that Section 11 of the Prisons Act allows Prison Officers to search anything including persons and vehicles getting into the prison, that Section 11(5) Provides that any search by a woman shall be made by another woman with due regard to decency. Counsel further submitted that Rule 35 of the Prisons Rules states that all prisoners be searched upon admission and at subsequent intervals as necessary to prevent contraband, weapons, or harmful substances and Rule 36 requires that such searches be carried out in a "seemly manner" consistent with the necessity of discovering concealed articles and that the searches must be done by prison wardens of the same gender. Counsel submitted that the purpose of these searches is not to degrade individuals but to maintain institutional safety and security, ensuring that prison facilities remain free from illegal or dangerous items. Counsel cited Section 10 of the Persons Deprived of Liberty Act Cap 90A.
- 76.** Counsel urged that body cavity that's is referred is inclusive of the mouth, the vagina and the anus which are the only body cavities that a human is born naturally with. Counsel also urged that Article 24 of the Constitution allows for certain limitations on rights when they are reasonable, justifiable, and necessary in a democratic society, particularly when security and public safety are at stake. The Petitioner in this case as a person deprived of liberty had various of his rights limited by law.
- 77.** Counsel further submitted that there is no dispute that the Petitioner was arrested, presented to a police station and later women's prison and that search was conducted in women's prisons which sent the women wardens reeling in shock. Counsel pointed out that what is in dispute is whether such searches and detention were in violation of Articles 29 and 31 of the Constitution and Sections 5, 10 and 12 of the Persons Deprived of Liberty Act. Counsel maintained that it is the onus of the Petitioner to demonstrate that the searches conducted were in violation of the said articles and provisions. The Petitioner admitted on cross examination that he or she did

not disclose to the women prison wardens that he or she has a penis and he was born a man. According to Counsel, had he disclosed he would not have been searched by the female wardens and that as soon as it was discovered that he was in the wrong place he was placed in solitary confinement to protect his dignity.

78. Counsel contended that the Petitioner was not subjected to any malice, discrimination, or undue humiliation, as the search was conducted in accordance with established prison procedures designed to confirm identity and ensure security. Counsel submitted that the 3rd Respondent acted within their legal mandate and exercised discretion to classify the Petitioner in a manner that safeguarded both her well-being and that of other detainees. Counsel observed that in **Republic v. Kenya National Examination Council & Another ex parte Audrey Mbugua Ithibu [2014] eKLR**, the court recognized the complexities surrounding gender identity but underscored the necessity of maintaining procedural integrity in public institutions. Counsel therefore submitted that the search was neither unlawful nor excessive but was instead a proportionate and legally justified measure in accordance with the Prisons Act, the Persons Deprived of Liberty Act, and constitutional standards for institutional security.

79. Counsel maintained that the arrest, search and detention of the Petitioner were done in compliance of the law and in protection of his rights and that it is the onus of the Petitioner to provide proof on how the said rights were violated but the fact that he surprised female wardens with male genitalia is not proof. Counsel added that he did not disclose his gender when he was searched or even protest.

80. On whether the 4th Respondent violated the Petitioner's rights. Counsel submitted that in respect of the medical examination, the Petitioner presented a unique situation to the court where he claimed he was a woman and as soon as he was taken to the women's prison it was discovered that he had male genitalia. Counsel urged that under such circumstances the court had no option but decide where he would be detained, which would be informed by a medical report and that he had an option of adhering to

the bail terms granted to avoid medical intervention in order to decide on his custodial terms. Upon failure to pay the bail, Counsel submitted that the court had no option to find ways to have him appear in court until the end of his trial. Counsel urged that the Petitioner himself has quoted Section 11 of the Health Act and added that in the circumstances the medical report was necessary to issue necessary custodial orders. Counsel added that the report was put in the court file and that's the only record that was shared of the Petitioners' medical report and that there is no evidence presented that the 4th Respondent shared the medical report to any other party.

81. Counsel contended that the Petitioner did not present any evidence that the said examination that was conducted by the medical officers at the 4th Respondent's facility was in violation of his rights and that in the replying affidavit of Dr. Saratiel Nyabera, she stated that he conducted examinations following medical procedures of determination of a person's sex and she further stated that a phenomenon of transgender person is not medically possible to ascertain. Counsel urged that Petitioners have not presented any evidence demonstrating that the said test was beyond what was prescribed or even called any medical evidence on how transgender phenomenon can be medically ascertained.

82. Counsel further submitted that there are witnesses that were called at the behest of the court to attend court and explain the phenomenon of transgender. Counsel observed that transgender phenomenon is a novel issue in this country that even the court itself needed to understand it. Counsel submitted that 1st and 2nd interested parties generously provided witnesses, experts from South Africa' to purportedly assist the court with the needed expert evidence. Counsel urged that the evidence presented by the doctors was biased and was only meant to build on the Petitioners' case. Counsel added that the interested parties have filed responses in this court in respect to the matter at hand and have made their stand very clear that they support the Petitioner's case.

- 83.** According to Counsel, under these circumstances, the court ought to have appointed the expert witness itself. Counsel observed that this is an issue that when determined will cut across all disciplines and almost every aspect of life of the people of Kenya, that it will cut every aspect of life where Kenyans are separated by their gender just to mention education system where girls and boys are separated in dormitories in boarding schools and it is a major paradigm shift that cannot be left to expert evidence informed by witnesses provided by the interested parties and that experts from a foreign country whose credentials, expertise and knowledge cannot be ascertained.
- 84.** Counsel observed that expert opinion in general circumstances especially under the Evidence Act is evidence provided by independent witnesses, that an opinion as to handwriting for example will be provided by a handwriting expert from the Directorate of Criminal Investigations and that the said expert is in many occasions is not an adversary or has any in subject matter in litigation. Counsel cited Rule 20(4) of the Mutunga Rules, with respect to calling witnesses. Counsel submitted that the rules do not limit the court on which witness to be called, the court at this instance was free to call for evidence of any witness whom the court believed would have assisted it towards the ends of justice, of course including the interested parties witnesses. Counsel submitted that for caution and to avoid the court being swayed towards a parties position in the name of expert witness the court should have procured a witness by itself.
- 85.** Regarding Dr. Nkanyiso Madlala expert report, Counsel submitted that this is an expert that came to court having read the Amended petition and contents thereof explained by counsel for the 2nd interested party, came to this court to assist the court shade more light to issues raised in the petition proceeded to pass judgement against the 4th Respondent without hearing it or reading its responses to the petition. Counsel urged that the words of Dr. Madlala, are deep such that we needn't look further, this is a biased expert witness whose evidence can only be relied on to advance the Petitioner case but not to provide to the court an expert opinion. Counsel

submitted that the court did not require expert opinion on the omissions or commissions of the 4th Respondent. According to Counsel, the witness has failed in his purpose of providing expert witness and should be disqualified as such.

- 86.** Counsel submitted the evidence of Dr. Madlala if it is to be regarded, in respect to ascertainment of transgender, he stated upon cross examination by counsel for the 1st interested party that the same is a psychological issue and diagnosis is done by a psychiatrist and psychologist. Counsel maintained that the role of expert was limited to the reasons why the court requested for his attendance, to explain the phenomenon of transgender and not to advance his belief that is based on Petitioner assertion that the 4th Respondent were unethical.
- 87.** Counsel further submitted that is the role of Kenya Medical Practitioners and Dentist Council as stated under Section 4(j) of the Medical Practitioners and Dentists Act to conduct disciplinary proceedings against Doctors. Section 20 of the said Act provides disciplinary procedure and stated under subsection (1) as follows: "Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.
- 88.** Counsel urged that the Petitioner believing that the 4th Respondent had breached his rights by conducting medical examination with were not authorized and purportedly releasing his information ought to have launched a complaint before the Kenya Medical and Dentists Council which is properly suite to determine these issues. Counsel submitted that the Court is not properly equipped to deal with complex issues of medical practitioners'. Counsel observed that the doctrine of Constitutional avoidance provides that the Constitution should only be invoked as the last resort and when there are other remedies a Petitioner should pursue those other remedies and there is no reason why the Petitioner did not launch his complaint before the council. In the circumstance, Counsel submitted that

the court should dismissed allegations of malpractice against the 4th Respondent couched in this Constitutional petition.

- 89.** In a nutshell, Counsel submitted that the 4th Respondent conducted itself with professionalism using the resources and skills available to it at that very time provided the court with the information it required and filed a report with respect to the sex of the Petitioner. In respect to gender, Counsel submitted that the 4th Respondent in its report clearly indicated that it is in no position to ascertain it and that it is impossible to ascertain. Counsel submitted that the Prison Act provides for men and women prisons only. Counsel urged that, that information was useful to the court for issuance of custodial orders. Counsel thus submitted that the case against the 4th Respondent ought to be dismissed.
- 90.** On whether the court can compel the 2nd and 3rd Respondents to initiate legislative reforms for transgender prison facilities, Counsel submitted that the evidence provided by the experts with respect to transgender persons and their existence in this case, although we still hold the view that they were not proper witness for lack of independence. Counsel highlighted the fact that they are alive to the fact that in this country the courts have granted orders to transgender individuals like in the case of **Republic V Kenya National Examination Council & another Ex Parte Audrey Mbugua Ithibu(2014)eKLR**, the high Court granted orders to have the applicant who was claiming that he is transgender to have his name changed in the KNEC certificates 'and the gender mark removed and that the said decision was upheld in the case of **Kenya National Examination Council v Republic & 2 others (2019) eKLR**
- 91.** Further, Counsel submitted that in similar circumstances the **Supreme Court in the case of NGOs Coordination Board V EG & others; Katiba Institute (Amicus Curiae) (Petition 16of 2019(2023) KESC 17 (KLR) (CONSTITUTIONAL and Human Rights)** the Supreme Court allowed the registration of Gay and lesbian NGO and stated that they were persons who are entitled to the rights to associate as granted by the constitution.

- 92.** Counsel added that the Petitioner has a recourse to address these issues under Article 119(1) of the Constitution grants other avenue. Counsel contended that the Petitioner, has never petitioned to parliament to initiate such legislative reforms neither has he ever made any proposals to the 3rd Respondents. Counsel added that in the evidence of the prison warden, she indicated clearly that she has never in her career experienced such a scenario or transgender phenomenon. Counsel submitted that the transgender phenomenon is a novel issue, and is admittedly under research. Counsel urged that it is upon the Petitioner to raise such issues before parliament so that legislative process may be initiated.
- 93.** Counsel called upon the Court to respect the doctrine of separation of powers. Parliament is endowed with law making authority under Article 94 of the Constitution. Counsel submitted that Constitution proceeds to provide the process which can be followed for enactment of legislation and in Article 118 provides for public participation in legislation making procedure. Counsel added that Parliament derives its legislative authority from the diverse people of Kenya and that the processes to be followed in legislative reforms by a representative body like parliament is expected at the end that a piece of legislation represents the voices of the people of Kenya. Counsel urged that this honourable court is not equipped with such mandate and even when it is dragged to a legislation it is not in a position to speak for the people of Kenya.
- 94.** Counsel pointed out that transgender issues are issues that will cut across every discipline, it will cut across every situation that presents a position in which males and females have been separated: in public toilets, boarding learning institutions where there are separate male and female hostels or dormitories, in sports, of course prisons, in recruitment of the army, police and prison officers where the process of recruiting men is distinguished from the process of recruiting women; and any other disciplines or areas where male and female are separated. According to Counsel, it might disturb the affirmative action clauses of the Constitution treating women as marginalized group and insisting on one third representation of women

in leadership. Counsel urged that the issue of transgender needs to be looked at wholesomely and that the court has no capacity of looking at it wholesomely. It needs to be debated by the representatives elected by the people of Kenya do debate bills.

95. Counsel cited Article 10 of the Constitution of Kenya and submitted that in order for a decision on whether or not there shall be separate prison for transgender people to meet the principals of governance enunciated above, the said process and ultimate decision must be made by the institution that is Constitutionally mandated to do so. Counsel submitted that this honourable court cannot guarantee democracy and participating of the people and inclusiveness. Counsel observed that transgender issues have sparked debate worldwide ranging from morality, safety, equity, religion etc. In sports, Counsel submitted that the court should take judicial notice, that there has arisen several issues as whether transgender women should compete with women. Counsel maintained that the right to public participation cannot be gainsaid, it is important for the people of Kenya to be afforded a chance to participate in decisions that will affect their daily lives and that, that right will be taken away if the court is to compel the legislation on creation of prison for transgender persons.

96. Counsel urged that the doctrine of separation of powers is entrenched in our constitution which establishes three arms of Government and allocate roles upon each arm. Counsel urged that the court can only intervene when there is illegality or irrationality. In this case, Counsel contended that parliament has not been given a chance at all. Counsel relied on the case of **Ripples International v Attorney General & another; FIDA (Interested Party) (Constitutional Petition E017 of 2021) [2022] KEHC 13210 (KLR) (29 September 2022) (Judgment)**. Counsel cited the Court of Appeal stated thus in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)**.

97. Counsel submitted that, that having been said, the Court while interpreting the Constitution may compel parliament to enact legislation in cases where the Constitution has expressed as such in in cases where

failure to legislate can cause gross violation of the Constitution. Counsel relied on the holding in case of **Okoiti v National Assembly & another (Petition E224 of 2021) [2022] KEHC 16361 (KLR) (Civ) (16 December 2022)**.

98. According to Counsel, the questions to be answered at this juncture my lord is whether the 2nd and 3rd Respondents have violated the Constitution to an extent that there is need for the court to compel them to issue legislative reforms to the Prisons Act. Counsel submitted that the Petitioners' case is not a measuring bar to enable the court determine that there is need for a wholistic approach that will involve people of Kenya and a process that will start not with a predetermined end.
99. Counsel further submitted that the Petitioner as has been demonstrated in the record of conviction that he has the habit of misrepresenting himself, he has misrepresented himself as a female athlete and subsequently a female nurse a fact which has not been denied, he has used fake papers to obtain a birth certificate in a female name, an undisputed fact and that upon arrest he did not disclose he was a woman both in the police cells and in prison. In fact, Counsel urged that his withholding of information caused him to be put in the women's cells. in the women's prisons, he withheld information until when it was realized during search and upon realization he was placed under different cell. Counsel maintained that the moment he was discovered he was a man; his rights were protected right from the beginning to the end and he was presented in court and released thereafter. According to Counsel, there has been no breach of the Petitioner's rights. Counsel contended that why then would the court interfere, and compel legislative process. According to Counsel, a need has not been established, a prisoner may be treated specially as case may arise from time to time the was the Petitioner was treated in the women's prison. Counsel acknowledged the sentiments of the Court of Appeal in the case of **Kenya National Examinations Council v Republic & 2 others [2019] KECA 493 (KLR)**. Counsel submitted that it should be noted that in this particular case the court ordered that the gender mark in the Respondents certificate

be removed. Counsel urged that such that an order that would have been available for the Petitioner is to have him imprisoned in situations that will not occasion breach of his rights to dignity and not to direct parties to initiate legislative process and that it should be dealt with on a case by case basis like it was dealt with in these circumstances. Further, Counsel urged that it is settled principle that constitutional law remedies are remedies of last resort. Counsel maintained that where there is another avenue of ventilating issues or seeking remedies that other avenue must first be exhausted. Counsel urged that the Petitioner ought to have first petitioned parliament for the amendment of the Prisons Act to provide transgender facilities and as stated above this is not the right forum to deal with such an issue. Counsel thus submitted that the court should not issue any order to direct initiation of legislative process.

100. On whether the Petitioner is entitled to damages for alleged violations, Counsel submitted that the Petitioner is not entitled to damages, that the circumstances upon which the Petitioner was arrested, detained and searches that were conducted on him were normal and necessary. Counsel added that they were within the circumstances which is allowed by statute and the Constitution. Counsel maintained that it is only upon proof of violation of rights that the court can award damages, in these circumstances the evidence on record do not establish that there has been a violation of rights to that extent. Counsel submitted that burden of proof must be discharged as captured by Section 107 of the Evidence Act, Cap. 80. Counsel relied on the holding in the case of **GSN v Nairobi Hospital & 2 others [2020] eKLR**. Counsel urged that in view of the foregoing, Petitioner did not proof violation of rights and thus it follows that damages cannot be issued.

The 4th Respondent's Submissions

101. Counsel for the 4th Respondent submitted that the Petitioner filed an amended petition dated 29/07/2019, seeking two orders against the 4th Respondent, that is, a declaration that the 4th Respondent violated the

Petitioners right to privacy, dignity and equal protection of the law by way of intrusive body searches, physical and medical examinations and taking blood samples without consent conducted by the doctors of the 4th Respondent and also sought that its right to privacy of its medical records was violated by the 4th Respondent to the media without consent or lawful court order. Counsel urged that that none of the two has been prosecuted leave alone proven against it. It is settled law that Constitutional petitions should not be filed as a first resort when statutory provisions offer remedies for the grievances. Counsel submitted that there exists alternative remedies (medical negligence and libel/defamation) of filing a suit in the ordinary civil court and therefore the complaints against the 4th Respondent do not call for this honourable Court's Constitutional interpretation mandate under the Bill of Rights.

102. Counsel observed that 4th Respondent is a body corporate capable of suing and being sued and it is a legal person as clearly demonstrated by the fact that it is not represented by the Honourable Attorney General of the Republic of Kenya and does not confer any rights. For this preposition urged the Court to be guided by the case of **Ntongai v Kaberia & 3 others (Constitutional Petition 3 of 2019) [2023] KEHC 508 (KLR) (2 February 2023) (Judgement)** and the case of the **County Government of Meru (the 4th Respondent [2023] KEHC 508 (KLR)). In view of the aforementioned cases,** Counsel urged the Court to find and hold that no case has been made against the 4th Respondent.

103. Counsel further submitted that medical malpractice claims occurs when a healthcare professional, such as a doctor, clinical officer, physiotherapist or a hospital deviates from accepted standard of care, resulting in harm or death to a patient. Medical malpractice claims enable patients to seek compensation for damages caused by such substandard treatment. Counsel maintained that medical malpractice cases in Kenya are primarily brought under the tort of negligence. Similarly, Counsel observed that there are laws that govern medical consent and libel or defamation under which the Petitioner herein could have sought the damages sought in this petition.

However, Counsel urged that there is no evidence that the Petitioner filed a Complaint with the Kenya Medical Practitioners and Dentist Council (KMPDC) or filed a civil claim for damages now sought in this Petition and that the orders sought against the 4th Respondent are not available to the Petitioner under this petition since the Bill of Rights and the Constitutional Interpretative mandate of this Court should not be invoked where other remedies lie.

The 1st Interested Party's Submissions

- 104.** Counsel for the 1st Interested party began highlighting the applicable rules of interpretation citing Article 10, Article 19, Article 20(4), Article 21(1) and Article 259(1) of the Constitution of Kenya, 2010.
- 105.** In regard to violation of the Petitioner's Constitutional rights, Counsel submitted that at the women's prison, the Petitioner was stripped in the presence of other inmates and prison wardens of both sexes. She was again stripped at the Police Forensic Room in the presence of several police officers of different sexes among whom the Petitioner remembered Mr. Omondi and Ms. Veronica and that during both strip-downs, the Petitioner was paraded, viewed, and ridiculed by the people present. At the Petitioner's house, police officers went through her underwear, which they displayed to one another speculating the size and length of her genitalia while making derogatory remarks. When the Petitioner complained, the police officer identified as Mr. Omondi slapped her into submission. Mr. Omondi said he was punishing the Petitioner for making the officers' work difficult. The Petitioner was also examined at the 4th Respondent hospital where details of her genitalia were displayed to onlooking nurses and doctors who made humiliating comments.
- 106.** Counsel urged that the actions above violated the Petitioner's right to privacy, equal protection of the law, freedom and security of a person, human dignity, protection from discrimination, and protection from torture, cruelty, and inhumane treatment.

- 107.** In regard to violation of human dignity, Counsel submitted that the strip-downs and demeaning comments degraded the Petitioner in the eyes of those present, contrary to Article 28 of the Constitution which guarantees human dignity. He cited the Court of Appeal in **KNEC v. Republic** on the significance of human dignity.
- 108.** Counsel observed that Kenya ratified the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. It is operationalized by the *Prevention of Torture Act Cap. 88* which in section 2 defines 'cruel, inhuman and degrading treatment or punishment' as *a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a public officer or a person acting on behalf of a public officer against a person under their custody, causing suffering, gross humiliation or degradation to the person*". Counsel cited the Supreme Court in **Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019(Consolidated))[2023/KESC 3(KLR)(27 January 2023)(Judgment)**.
- 109.** Counsel contended that the prison wardens had no business stripping the Petitioner in the presence of other inmates. He urged that worse, the prison wardens present were of mixed sex contrary to Section 11 of the Prisons Act which seeks to protect the privacy and decency of inmates. Mr. Omondi and Ms. Veronica (police officers) cannot and did not justify why they stripped the Petitioner at an office meant for forensic activities, and in the presence of officers of mixed sex, nor can the medical practitioners at the 4th Respondent hospital.
- 110.** In regard to absence of laws and policies, Counsel submitted that the Respondents attempted to justify their unlawful conduct by stating that the law is silent on how the Respondents should treat a transgender inmate. The Respondents failed to enact rules recognizing transgender and intersex inmates as required under Section 74(1)(a) & (2) of the Prisons Act. This inaction should not be blamed on the Petitioner.
- 111.** Counsel urged that the absence of a policy does not justify the violations above. Counsel added that this Petition has been brought under Article 23 of the Constitution, and he also urged the Court to consider and allow the

prayers sought by the Petitioner. He observed that in KNEC v Republic above, the 1st Petitioner (Audrey Mbugua Ithibu) was the transgender Applicant and that the Court stated in paras. 56 & 57 that, "56...It cannot be the case that until there is a policy and legislative framework in place, persons like Audrey are without recourse to secure their dignity guaranteed under the Constitution. 57.In effect, lack of policy or legislative framework cannot be a bar for the court to enforce constitutional rights." Counsel submitted that therefore, nothing in the circumstances of the present case prevents this Court from granting required remedies. He added that the Supreme Court of India in the *NALSA* case para.116; "There may not be any statutory regime recognizing the third gender for TGs (Transgenders). However, we find enough justification to recognize this right of theirs in the natural law sphere. Further, such a justification can be traced to various provisions contained in part III of the constitution relating to "Fundamental Rights".

112. Regarding discrimination, Counsel observed that as presently couched, the Prisons Act Cap 90 does not contain provisions safeguarding the optimal conditions for a transgender inmate. The actions of the Respondents side-lined the Petitioner from enjoying protections reserved for other prisoners. The witness for the 3rd Respondent confirmed to the Court that transgender persons are not factored in the day-to-day routines at the prison or remand. This and other acts by the Respondents amount to a violation of **Article 27 of the Constitution.**

113. Additionally, Counsel submitted that the Indian Supreme Court in **the NALSA Case above** para **123** held that a decision recognising transgender as a third gender advances the rule of law, appreciates the realities of transgender persons, is progressive, and promotes the welfare of minority groups and equality for all.

114. Counsel urged that the Petitioner was treated unlike other inmates. The patterns of discrimination are embedded in the Prisons Act which does not seem to contemplate transgender and intersex inmates. Resultantly, Counsel submitted that the Petitioner was predisposed to discrimination.

Consequently, urged that the actions of the Respondents were discriminatory and that the actions of some police officers like the Police constable Omondi were vindictive and targeting. Counsel maintained that law or no law, the treatment of the Petitioner by the Respondents reeks of discrimination and is contrary to the Constitutional edicts known to all police officers, prison wardens, and medical practitioners.

The 2nd Interested Party' Submissions

115. Counsel for the 2nd Interested Party outlined the following issue as the issues for determination;

a) *Who is a transgender person?*

b) *Whether the Petitioner and transgender persons require special protection in detention.*

116. In regard to who is a transgender person, Counsel submitted that it is essential to define the following terms as against the expert evidence on record; that biological sex as simply put by Dr. Simone Pickstone-Taylor's (hereinafter 'Dr. Simone's report) this is the body on the outside. The Yogyakarta Principles define sex as each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty. In this case, the Petitioner's sex is male.

117. Gender expression, Counsel submitted that this is a person's expression of gender such as; the clothes they wear and who they chose to play with as a child. In the Petitioner's affidavit she indicates that, "*I dressed as a boy when attending school but could dress as a girl when at home*". She further states that, "*I played with girls, and more often I went to girls' toilets*". The Petitioner is categorical that, "*I have always lived and presented myself as a woman*". It is thus clear that at childhood she expressed herself as a girl and now as a woman.

118. Gender identity, Counsel submitted that as per Dr Simone's report this is a person's experience of what their gender is, regardless of the body that they have. As per Dr. Madlala's report, it determines their sense of identity,

singularity and belonging. The Yogyakarta Principles define gender identity as each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. In her affidavit the Petitioner recalls that, *"I was born and assigned the male sex and named Hillary Kiprotich, however when I came to know myself at around the age of 5 years, I knew myself as a girl"*. She further depones that, *"My female gender was natural to me."*

119. In regard to gender dysphoria, Counsel submitted that as per Dr. Madlala, this is the psychological distress that results from the incongruence between one's sex assigned at birth and their gender identity.

120. Counsel urged that as per Dr. Simone, the gender identity of most people is in line with their body (sex). Transgender persons are a part of the minority whose gender identity is the opposite of the sex that they were assigned at birth. In this case, the Petitioner is a transgender woman which means that she was assigned male at birth (born with male genitalia) but identifies as a woman. Counsel further urged that the transgender condition is not merely a choice but as a result of the brain formation and that Dr Simone explained this in detail during his testimony and in the report, which is referenced in the Petitioner's submissions.

121. Counsel further submitted that in the famous UK case of **Bellinger v Bellinger (Appeals Court, 2001)**, three eminent professors were invited to report on the cause of gender dysphoria, which reports were analysed in depth by the Court, that the evidence of Professor Gooren, Professor of Endocrinology at the Free University Hospital, Amsterdam, was provided in a report on transsexualism, dated 20/6/1999 and he was clear that transsexualism was a medical condition.

122. Counsel observed that Professor Gooren stated that the differentiation of sex and gender continues after birth;

"27. Traditionally it is assumed that sexual differentiation, the process of becoming man or woman is completed with the formation of the external genitalia, the criterion used to assign a new born child to the male or female sex. From the beginning of this century, it became clear in laboratory animals

that this is not the endpoint of the sexual differentiation process but that the brain undergoes a sexual differentiation process into male and female, largely predicting/correlating with future sexual and non-sexual behaviour.”

123. Counsel further observed that Professor Gooren then explained the process of differentiation, ending with the brain cells;

"27. The process of sexual differentiation takes place in distinct steps, first the chromosomal configuration is established, next gonadal differentiation, next differentiation of the internal and external genitalia, and finally the differentiation of the brain into male or female. Normally all steps in the process of sexual differentiation are concordant (in men: an XY chromosomal pattern, testis, male internal and external genitalia and a male brain differentiation being the substrate of male-type behaviour, in women an XX chromosomal pattern, ovary, female internal and external genitalia and a female brain differentiation being the substrate of female type behaviour).

124. Counsel added that citing contemporaries, Prof. Gooren held that sexual differentiation applies to all mammals including human beings, and that experiments have shown that some specimen departs from the expected patterns, to lead to transgenderism:

27....Sexual and non-sexual brain differentiation is now accepted as part of the process of becoming male or female of the mammalian species to which humans belong...On the basis of the findings of these experiments it has been hypothesized that in human subjects with gender identity problems the sexual differentiation of their brains has not followed the pattern predicted by their earlier steps in the sexual differentiation process (such as chromosomes, gonadal, genitalia) but has followed a pattern typical of the opposite sex in the final stage of that differentiation process; as indicated above, a situation that can be induced in laboratory animals by experimental manipulation."

125. Counsel submitted that Prof. Gooren, concluded that the unconventional patterns lead to behaviours that are irreversible, and which ought to be managed rather than denied;

"28. In conclusion: there is now reason to believe that transsexualism is a disorder of sexual differentiation, the process of becoming man or woman as we conventionally understand it. Like other subjects afflicted with errors in this process, these subjects need to be medically rehabilitated so that they can live acceptable lives as men or women. This decision is not essentially different from the one made in inter-sexed children where assignment takes place to the sex in which they in all likelihood will function best. In them the decision most of the times takes place shortly after birth...Similarly, it is the case in transsexualism since there is credence that the sexual differentiation of the brain in humans occurs (also) after birth. As such it is unavoidable that in subjects with errors of the sexual differentiation of the brain, sex reassignment takes place after birth, sometimes much later in their lives since it requires a large amount of life experience to discover the predicament of being born in the wrong sex, in other words having sexual and non-sexual brain patterns that are in contradiction with the after-sex characteristics."

126. Counsel further observed that because the process is continuous, Prof. Gooren submitted to the Court that the sex/gender of a person cannot be settled at birth with finality, and may morph, as shown in this Petition:

"30. The process of becoming man or woman is not complete with the formation of the external genitalia, the common criterion to label someone male or female and extremely expeditious in that regard. But the brain is also sex-dimorphic and is an organ that becomes sex-dimorphic in the course of normal female/male development."

127. In view of the above explanations and the Petitioner's submissions, Counsel urged that the Petitioner is a transgender person. She is afflicted with gender dysphoria such that although she was assigned male at birth, her brain development and experience of gender is that of a woman.

128. On whether the Petitioner is deserving of special protection, Counsel submitted that as stated by Dr. Madlala during his testimony, the transgender condition cannot be cured and it can only be managed and that such management lies in their gender identity being recognized and accepted as per Dr. Simone:- *"It is very important to most transgender people*

that people around them recognize and accept them for the gender identity they are, rather than their birth assigned sex. A good mental health outcome is dependent on their gender identity being recognized and accepted."

129. Counsel further submitted that in his testimony, Dr. Madlala categorized such recognition and acceptance as legal, social and medical; that legal recognition entails acceptance by the legal system for instance the provision of appropriate conditions for detention of transgender persons in the Prison Act; social recognition and acceptance entails allowing transgender persons to live and present themselves as per their gender identity, his is in essence allowing them to dress in line with the gender they identify with, change their name and pronouns and use toilets of their preference and medical recognition includes the support to take cross hormones and have surgeries to align their body with their gender identity; 'To align the body with the mind?

130. Counsel contended that failing to afford transgender persons this recognition and acceptance cause more harm, as per Dr. Simone, research has shown that if nothing is done to support transgender adults high levels of anxiety, depression and other psychopathology develop from their distress at having the wrong biological body and as per Dr. Madlala, misgendering a transgender person may not seem like a big deal to other people but it wreaks havoc on the psyche of the transgender person and can lead to a feeling of invisibility, decreased self-worth and self-esteem which in turn leads to depression and even suicide.

131. Counsel maintained that acts of the Respondents which outrightly rejected and made a mockery of the Petitioner's gender identity have caused irreparable harm and in the Counsellor's report and testimony was clear on the psychological harm caused by the Respondents 'actions; "*My client has phobia for imprisonment due to the gross violation of her right to privacy. She claims that this imagination makes her experience suicidal tendencies. My client has been experiencing insomnia, loss of appetite and appears to be frail.... She has been experiencing abdominal pain and suspects ulcers."*

132. Counsel submitted that Petitioner's demeanour when she testified about the Respondents 'action is evident of how traumatic the experience was for her. She visibly cried bitterly as she recalled these events and had to take breaks to compose herself and over 5 years after the violations, the Petitioner is still visibly shaken by her experience.

133. Counsel added that in dissenting opinion of Lord Thorpe in *Bellinger*, the three professors did not only bring medical evidence to court but also feelings of empathy and compassion and that indeed, cases of this nature are not without compassionate feelings towards the afflicted. Professor Gooren wrote;

"116v. One of the serious obstacles to understanding gender dysphoria is that it is an unimaginable problem to those who do not have it. This distinguishes it from other forms of human suffering for which it is much easier to generate empathy and sympathy

134. Counsel submitted that this Court is not only a court of law, but a court with a conscience. It is a court with a heart and a soul. It's a court of feelings, sympathy, and compassion and that may the same be extended to the Petitioner. Counsel observed that this Court to declare violations of constitutional rights, it must take and consider the position of the victims of those violations.

135. Counsel cited Thorpe LJ. in ***Bellinger v Bellinger***, finally opined that transgenders ought to be supported by creating an environment that allows them to enjoy the benefits of society that are available to the general population.

"160. That citation formulates and clarifies the essential issue for the decision in this appeal. The range of rights claimed by transsexuals falls across the divisions of our justice systems. The present claim lies most evidently in the territory of the family justice system. That system must always be sufficient flexible to accommodate social change. It must also be humane and shift to recognise the right to human dignity and freedom of choice in the individual's private life. One of the objectives of statute law form in this field must be to ensure that the law reacts to and reflects social

change. That must also be an objective of the judges in this field in the construction of existing statutory provisions.”

136. Counsel pointed out that although **Bellinger v Bellinger** was dismissed, they find fortress in the reasoning in the dissenting Judgment by Thorpe LJ and the expert submissions by Professors Green and Gooren. Counsel submitted that the findings of the Judge and expert analysis of the professors in Bellinger are well supported by the affidavit evidence filed in the present Petition. Counsel urged the Honourable Court to accept the persuasive Dissenting Opinion.

137. Counsel observed that even though the Court in Bellinger dismissed the case, it acknowledged the gaps in policy and predicaments facing transgender persons and that in so doing, the Majority Court strongly cautioned the UK Government in its closing remark as follows:-*"We would add, however, with the strictures of the European Court on Human Rights well in mind, that there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration. The recommendation of the Inter-Departmental Working Party for public consultation merits action by the Government Departments involved in these issues. The problems will not go away and may well come again before the European Court sooner rather than later."*

138. Counsel added that the prediction of the Court that the problem could come again before the European Court sooner rather than later did not take long to materialize. Counsel submitted that the European Court on Human Rights was called upon to deliver the landmark Judgment in the famous case of **Christine Goodwin v. The United Kingdom, ECHR**s whose outcome changed the legal landscape in favour of transgender persons in the UK, leading to the passage of the Gender Recognition Act of the UK.

139. Counsel cited the **Goodwin case**, the Applicant who was a transgender person had sought to challenge the refusal to amend their birth certificate as a violation of her rights under the European **the Bellinger** Case. The Court found that the UK Government had indeed violated the rights

Government quickly put in place measures leading to the enactment of the Gender Recognition Act.

140. Counsel contended that social, legal and medical recognition during incarceration is fundamental towards the realization of the rights of incarcerated transgender persons such as the Petitioner. Counsel urged that the general application of detention laws and procedures especially on searches and sex aggregated accommodation is harmful; the Petitioner and transgender persons require special protection.

141. Counsel urged the Court to be guided by the decision of the Equality Court of South Africa in Case **No.EC10/2026 Jade September v Mr. Subramoney N.O. & 3 other**, where the Court was called upon to determine whether an incarcerated transgender woman should be allowed to express her gender identity while in prison.

Analysis and Determination

142. As this court plugs in to delve deeper into the jurisprudential questions to unravel the intricate issues raised by the Petitioner, one cannot forget to make a commentary about law and morality which exert significant influence on the society capable of shaping or destabilising its functions. Sometimes it is often perceived that morality and law are closely connected but they also diverge considerably. Law is a broad rule of conduct applicable to all activities in the administration of justice while morality is deeply ingrained in human behaviour for ages. It compels individuals to act in accordance with moral principles regardless of the moral support. Sometimes morals are taken as benchmarks of the law. Though law and morals maybe in pursuit of similar ends, there is always tension.

143. Having been in this space, litigation addressing the constitutional rights of the transgender community has exploded in the last decade, if the jurisprudence developed in **EG v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR** is anything to go by as a trigger to fundamentally reshape the constitutional landscape with respect to the equality and liberty rights of transgender litigants. The court in EG (supra)

dealt in detail on the provisions of Art. 36 of the Constitution on the rights of association. Hence recognizing the transgender community as constitutionally protected subjects entitled to meaningful rights. This petition is part of that revolution in transgender constitutional rights which are important in their own rights though it is being litigated when there is a wave of anti-transgender legislation sweeping across the continent and even in our own country we are yet to legislate on the rights affecting what is so commonly referred to as the ‘third gender’.

144. First and foremost, it is significant to remind ourselves that this court is vested with jurisdiction to entertain the Petitioner as filed the Petitioner as against the Respondent under Article 165 (3)(b) & (d) which states as follows;

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

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

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

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

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.”

145. Upon consideration of the Petition and the orders sought therein, the responses, and the testimonies of the parties, the following issues arise for determination;

a) Whether the Petition meets the threshold for a Constitutional Petition

b) Whether the Petitioner is recognised as a transgender person for purposes of proceedings in Criminal Case No. 1980 of 2019

- c) *Whether the Petitioners' constitutional rights were violated by the Respondents*
- d) *Whether Petitioners' Rights as a transgender person are at risk of violation if she is to be imprisoned upon the conclusion of Criminal Case No. 1980 of 2019 in so far as Cap 90 is concerned.*
- e) *Whether an order that the Petitioner should be detained in a separate facility with conditions appropriate to her transgender status*
- f) *Whether the court should order the 2nd Respondent to initiate legislative reforms to the Prisons Act to provide for appropriate conditions for transgender persons*

146. The question of justiciability and standing forms part of the threshold issue in a Constitutional Petition. The Court then has to undertake an inquiry as to whether there is another reasonable and effective manner in which the prayers in the Petition can be litigated and the nature of the relief sought by the Petitioner and the extent to which it is of general and prospective importance to the Petitioner and the larger public interest.

147. For the first time in Kenya in particular the Constitutional Courts across the country must decide cases on the basis of the values and principles of governance as expressly stated in Article 10 of the Constitution. The Petitioner is asking the Constitution to answer to the issues, grievances, violations which have been occasioned to her in the course of the state officers making certain decisions which then limited those protected and guaranteed fundamental rights and freedoms. Sometimes the Constitution 2010 which is in a class of its own may have not been internalised and understood by the common citizenry of this Republic. It is one of the transformative Constitutions in the United Nations Family. I therefore cannot agree more with the statement of Mohammed A. J in the comparative dictum in **S vs Acheshon 1991 2 (SA) 805 (NM)** when he submitted that;

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a ‘mirror reflecting the national soul,’

the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”

148. Clearly, the Kenyan people struggled, negotiated and finally in 2010, a new Constitution was born to entrench the Bill of Rights as one of the cornerstone of governance and sustenance of the rule of law. In Article 20, the Republic with all its arms of government is reminded on the application of the Bill of Rights in the following language: -

20. Application of Bill of Rights

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

147. I am inspired by the profound words by the court in **Unity Dow Vs Attorney General of Botswana (1992) LRC** thus; *“the Constitution is the Supreme Law of the land and is meant to serve not only this generation but yet unborn. It cannot allow to be a lifeless museum piece. On the other hand, Courts must breathe life into it as occasion may arise to assure the healthy growth of the state through it. We must not shy away from the basic fact that while particular construction of a Constitutional provision may be able to meet the*

designs of the society of a certain age ... it is the primary duty of Judges to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider society governed by acceptable concepts of human dignity.”

Looking back, this indeed maybe a living testimony as to why Kenyans fought for this Constitution for decades so as to give themselves a supreme law of the Republic which binds all persons and all state organs of both levels of government.

149. For this court to acquit itself of the task ahead on the remedies sought by the Petitioner, it has got to bear in mind the reflections of the apex court decision on the tools of interpretation of the Constitution. In the case of **Re Interim Independent Election Commission [2011] eKLR** it was held thus; *“The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.”*

150. The constitution also sets out a theory of interpretation in Article 259 which states as follows;

259. Construing this Constitution

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

151. On this same subject of interpretation of the Constitution, the Court **In the matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR** dealt with a holistic tool of interpretation observed that; *“But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”*

152. I am of the considered view given this background of the dictum from the Supreme Court, any interpretation of the Constitution which withholds the rights guaranteed in the Bill of Rights commonly referred to as Chapter 4 of the Constitution will not be giving an interpretation and construction of the Supreme Law of the land the benefit of the rights as envisioned by the drafters and adoption of it by the Kenyan people. The approach more favourable is that of a broad interpretation over a narrow interpretation likely to limit the fundamental Rights and Freedoms.

Therefore, the first question to answer is whether the Petition meets the threshold for a constitutional petition

153. The requirements for a Constitutional Petition to even be considered were set out by the court in **Anarita Karimi Njeru v Republic 1979 eKLR** where the court held that-

“ We would however, again stress that if a person in seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

That based on this holding for petition to meet the constitutional threshold to be entertained by the Constitutional Court it must meet with a reasonable degree of precision the three-tier test, that is stating that which one complains of, the provision said to be infringed, the manner in which they are alleged to be infringed.

That although the petitioner has enumerated Articles 28, 31 and 40 of the Constitution as the articles that have been infringed, no particulars are pleaded with reasonable clarity on how they have been violated and the extent of the violation. That the petitioner has not demonstrated how the respondent who is not the State has failed to support or infringed such right under Article 40(5) of the Constitution of Kenya when the said right is the responsibility of the State.

154. Additionally, in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** the Court of Appeal held that-

“.... However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. The respondent has cited the case of Thorp v Holdsworth [1876] 3 Ch D.637 at 639 and submits that the petitioner has not pleaded with reasonable precision the provisions of the Constitution which he alleges were violated and has not set out the particulars of how the violation were done.” (see also the jurisprudential dimension in the following authorities Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority and Another (2016) eKLR & National Assembly v James Njenga Karume [1992] eKLR).”

155. In this Petition, besides the threshold issue as it relates to the facts and the provisions of the Articles of the Constitution one has also to say something on the broad approach of standing concerns; whether someone who approaches a court is the appropriate person to present the matter to the court for adjudication. Under the common law, South African courts take a restrictive approach to standing. A person who approaches a court for a relief is required to have an interest in the subject matter of the litigation, in the sense of being personally adversely affected by the alleged

wrong. The Petitioner must therefore prove that his/her own rights under Chapter 4 on the Bill of Rights of the Constitution have been infringed or violated calling upon the Constitutional Court to exercise jurisdiction to give a remedy or remedies under Article 23 of the same Supreme Law. What is not required of the Petitioner is to invoke the Constitution on abstract or hypothetical issues which can be litigated in other fora i.e. criminal or civil forums. There is therefore in our Constitution Article 22 which provides as follows;

“22. Enforcement of Bill of Rights (1) Every person has the right to institute court proceeding claiming that a right or fundamental freedom in the Bill of Right has been denied, violated or infringed, or is threatened. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*
- (d) an association acting in the interest of one or more of its members.*

(3) The Chief Justice shall make rules providing for the court criteria that proceedings referred to in this Article, which shall satisfy the criteria that-

- (a) the rights of standing provided for in clause (2) are fully facilitated;(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;*
- (c) no fee may be charged for commencing the proceedings;(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and*
- (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.*

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”

156. For the purpose of the Bill of Rights, it is clear that the Constitution as entrenched a far more general approach to the requirement of standing and the threshold issues on whether the pleadings in the Petition meets the criterion of the Constitutional Petition. The ability of categories of persons or group of persons who are recognized to fit the category of standing in litigating under the Constitution are as specified in Article 22 here in cited above. To invoke Article 22 the Petitioner need only to make an allegation. It is not necessary to persuade the court that a fundamental right is violated or infringed. There is therefore a level of flexibility on the doctrine of justiciability to pave way for the Constitutional Court to determine the issues on the merit. The sufficient interest is for the kind of relief being sought in the Petition by the Petitioner.

157. I have considered the pleadings and it is evident that the crux of the orders sought in the petition are from the sequence of events beginning with the Petitioners’ arrest on 14/06/2019 at Moi Teaching and Referral Hospital for the offence of personation. On 16/06/2019 the petitioner was transferred to the male section at Eldoret Police Station and was then charged with the offence and later taken to Eldoret Women’s’ Prison. He/she alleged that he was subjected to intrusive body searches and that when she was produced on court on 18/06/2019 a letter was presented to the effect that she was male, resulting in her detention at the male prison. Additionally, the court directed that she be subjected to tests to determine her gender. Specifically, the violations are alleged to have arisen from the strip searches at the prison contrary to section 10 of the persons deprived of Liberty Act, Health Act, Prison Act and subsequently Articles 19, 20, 21, 23, 24, 27, 28, 29 and 31 of the Constitution.

158. In light of the facts presented before the court and pleaded, it is my considered view that the Petition meets the threshold required for a

Constitutional petition and it states the instances within which the violations arose to a degree of specificity.

159. The standard and burden of proof for constitutional petitions generally follows the Principles applicable under Section 107(1), 108 and 109 of the Evidence Act. I can safely state that the Petitioner or petitioners is required to prove his/her/their petition by a preponderance of the evidence. This means the Petitioner must show that the facts he/she/they are alleging are more likely to be true than false. Therefore, it is not a standard prescribe in criminal cases of beyond reasonable doubt. This standard and burden of proof rests with the Petitioner or Petitioners to raise a prima facie case that a fundamental right as pleaded in the Petition has or have been contravened. Whereas on the other hand the burden of justifying the derogation of right falls on the Respondent or Respondents.

160. So, what is the function of this Court? It is as derived from the comparative jurisprudence in the US Supreme Court case of **US v Butler. 297 US I (1936)** as cited with approval by this Court in **Centre for Public interest law (CEPIL) Others v The Attorney General (2021) UGCC 44** (unreported). It was held:

“There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not to the constitutional mandate, the judicial branch of the government has only one duty: to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce it's considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy.”

Whether the Petitioner is recognised as a transgender person for purposes of proceedings in Criminal Case No. 1980 of 2019

- 161.** The Criminal Case No. 1980 of 2019 was determined on 5th February 2020 and the Petitioner was acquitted. Therefore, this issue is overtaken by events.
- 162.** However, the court cannot turn a blind eye to the emerging issues in the ever-evolving world that we live in. This is not the first case where a person with Gender identity disorder has come before the court seeking constitutional protections. Under Article 27 of the Constitution ‘every person’ is considered equal before the law and therefore is deserving of protection and dignified treatment, regardless of sexual orientation or gender identity.
- 163.** It is apparent that the issue of gender identity is still a grey area in our laws and therefore, the same requires a progressive interpretation of our statutes and in the long run, statute specific to the issues of gender identity.

Whether the Petitioners’ Rights were violated by the Respondents

- 164.** In addressing this question, one has to revert back to the key provision of the Amended Petition as pleaded by the Petitioner to lay ground with regard to the wider margin of the issues that will inform the determination to this Petition.
- 165.** Under Article 19(2), the purposes of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
- 166.** Under Article 19(3), the rights and fundamental freedoms in the Bill of Rights; belong to each individual and are 31. Article 19 provides that the Bill of Rights is an integral part of Kenya's democratic state and is the frame work for social, economic and cultural policies not granted by the State, do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by the law, and are only subject only to the limitations contemplated in the Constitution.

167. Article 20 provides that the Bill of Rights applies to all law and binds all state organs and all persons, and in applying a provision of the Bill of Rights, the Court is enjoined to;

a) develop the law to the extent that it does not give effect to a right or fundamental freedom.

b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

168. Under Article 21, it is the duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights, and all State organs and public officers have a duty to address the needs of vulnerable groups within the society.

169. Article 27, provides every person is equal before the law and has the right to equal protection and equal benefit of the law sets out this right as including the full and equal enjoyment of all rights and fundamental freedoms. Subsection 4 provides as follows;

“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.”

170. Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected. Human dignity is an inherent basic right to which all these human beings.... are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on other hand it confers a duty on every human being to respect this right. (see **Purohit & Another v The Gambia (2003) AHRLR 96**).

171. Human dignity is inherent and cannot be ceded, lost or given away. It can, however, be disrespected or denied in the way in which individuals or classes of persons are treated in society. This can result in people or whole communities feeling as though they have no dignity, or that their dignity is not worthy of protection by the law. Nowhere else is it more apparent than in the bureaucratic processes and narrow conceptualisation of gender in

terms of Kenyan law pertaining to gender recognition. Trans and gender diverse persons have inherent human dignity. However, the effects of the law are such that it inheres a very real feeling of having no dignity for both the individual and communities. The government of Kenya therefore carries a responsibility to promote human dignity by enacting laws that not only allow for the recognition of trans and gender diverse persons but that allow for this recognition aligned with affirmation on the basis of self-actualisation.

172. Further in **X2 v State (NCT of Delhi 2023) 9scc 433** the court held that;

“The right to dignity encapsulates the right of every individual to be treated as a self-governing entity having intrinsic value. It means that every human being possesses dignity merely by being a human, and can make self-defining and self-determining choices. Further, this Court held that the right to dignity is intertwined with the right to privacy. This means that a person can exercise his right to privacy in order to protect his right to dignity and vice-versa.”

173. Article 29 provides that every person has the right to freedom and security of the person, which includes the right not to be subjected to torture in any manner, whether physical or psychological or treated in a cruel, inhuman or degrading manner.

174. Article 31 provides that every person has the right to privacy, which includes a right not to have information relating to their family or private affairs unnecessarily required or revealed.

175. Besides the Constitutional framework the right to privacy which all citizens of Kenya portend from, the provisions from the international and regional instruments which bears obligations are as entrenched in **Article 2, 5 and 5 of the Constitution**. Those treaty provisions are reproduced below;

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the charter of the United Nations.

Article 17: (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

Article 22, ACHPR 1. All people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

176. The Petitioner seeks declaratory orders with regards to the violation of her rights to privacy, dignity and equal protection under the law. **Article 27 of the Constitution** provides as follows;

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) 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.

5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

177. Attention is drawn to the provisions of Article 27(4) of the Constitution which prescribes protection against discrimination on the basis of sex. To establish whether the petitioner underwent any discrimination, contrary to the law, we must first establish what the position is under the Kenyan Law with regards to the definition of gender and sex.

178. The legal framework touching on this petition will be incomplete without a mention of international law expressly provided for under Article 2(5 & 6) of the Constitution. The illustrative provisions some which were enacted before our Constitution 2010 provide a mirror to the generation of this Republic who might be harbouring in their minds that transgender, intersex and LGBTQI are new phenomenon in our society with the advent of the new Constitution. That is indeed is far from the truth as demonstrated by the following provisions under the international law framework which are relevant legal tools in entrenching the jurisprudential discourse on the rights of these unique class of citizens amidst us. The theologians might even be more puzzled for they trace their existence of man and woman to the Garden of Eden. In the Biblical Philosophy in the

eyes of God and man in creation, there are only a few traces of such homosexuality perhaps in Genesis 19 when some men of Sodom surrounded Lot's house, demanding that Lot send the men out so they can have sexual relations with them. So what do the global instruments state on this matter of great public importance more specifically the continent of Africa? In this aspect, I will just mention just but a few: -

International & Regional Instruments

- a. Universal Declaration of Human Rights (UDHR)-** While not explicitly mentioning gender identity, its core principles of equality and non-discrimination apply to all individuals, including transgender people.
- b. International Covenant on Civil and Political Rights (ICCPR)-** Articles 2 and 26 address non-discrimination, which includes grounds of sex and other status, and have been interpreted to include gender identity.
- c. International Covenant on Economic, Social and Cultural Rights (ICESCR)-** Similar to the ICCPR, Article 2 ensures non-discrimination in the enjoyment of economic, social, and cultural rights.
- d. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)-** While focused on women, CEDAW's principles of non-discrimination and equality apply to transgender individuals, particularly transgender women.
- e. Yogyakarta Principles and Yogyakarta Principles Plus 10-** These principles, developed by legal experts, provide a detailed interpretation of international human rights law as it applies to sexual orientation and gender identity, offering guidance on various rights, including gender recognition and protection from violence.
- f. European Convention on Human Rights (ECHR)-** Article 14 prohibits discrimination, and interpretations of this article have been extended to include discrimination based on gender identity.
- g. European Union (EU) Treaties-** The Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of

the European Union prohibit discrimination based on sex and other grounds, which can be applied to gender identity.

h. African Union (AU)- The African Charter on Human and Peoples' Rights, along with regional human rights mechanisms, can be interpreted to protect transgender individuals from discrimination.

179. Given the fact that Kenya has taken special recognition of incorporating international law in its constitution together with our supremacy of the Constitution having a whole Chapter 4 on the Bill of Rights, the state has a responsibility to implement both the constitutional imperatives and international law human rights standards to ensure that transgender individuals, the intersex, the LGBTQI can enjoy their rights. My reading of this petition speaks clearly that the Petitioner faced discrimination partly at the National Police Station and also at the prisons facility on that aspect of gender identity. Having heard the material evidence, one will be faulted to blame the police for the ill-treatment or mental cruelty which may have been occasioned in that interaction with the petitioner, but in our repository of laws there is no law that specifically addresses the rights of transgender persons after the legal gender recognition. The question I ask myself is, is it ever legal for one to pass judgement discriminating against lesbian, gay, bi-sexual, transgender or intersex persons? The answer to me is that given in our Constitutional framework in Articles 25 (a) on the right and fundamental freedom from torture and cruel, inhumane or degrading treatment or punishment, 27 (1 & 4), 28 & 31 of the Constitution.

180. In transgender cases like in the instant factual situation of the petitioner, there was a struggle for the state organs and our offices to come to terms with the definitional dimension of the issues raised at the time of gender identity. As I have stated elsewhere, gender identity refers to each person's deeply felt internal and individual experiences which may or may not correspond with the sex assigned at birth including a personal sense of one's body and other expressions of gender including the dress code, speech and mannerism.

- a. According to the definition of Commission for Human Rights, *“transgender persons include persons who have a gender identity which is different from the gender assigned to them at birth and those people who wish to portray their gender identity in a different way for the gender assigned at birth. It includes those people who feel they have to prefer to or chose to, whether by clothing, accessories, mannerisms, speech patterns, cosmetics or body modifications, present themselves differently from the expectation of the gender role assigned to them at birth. This includes among many others, persons who do not identify with the labels male and female, trans sexual, transvestites and cross-dressers.”* **See (Discrimination on grounds of sexual orientation and gender identity in Europe, Commissioner for Human Rights, Council of Europe Publishing, 2011, p. 132)**

181. This is what the Constitution demands of the state in Article 27(5)- A person shall not discriminate directly or indirectly against a person in any grounds specified above and for our case, it is on grounds of sex, gender, birth, conscience, belief etc. The drafters of the Constitution did not stop there and one has to read in and read out the text in subsection 6 of the Article which states; *To give full effect to the realisation of the rights guaranteed under this Article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”*

182. The issue which fuelled the petitioner’s litigation finds its roots to when she approached the National Registration Bureau to obtain or secure an identity card. The struggle was that she had been assigned at birth a different sex configuration but a new gender identity seemed to conflict with that legal recognition at birth. One must agree that there are complicated legal and procedural requirements when the issue of gender identity sets in and it’s in conflict with the sex identity assigned at birth. For the Registrar at the National Registration Bureau and thereafter the experience of the Petitioner with the National Police Service facilities and

our correctional facilities, the borderline between the two are often blurred. Without a legal and regulatory framework, one wonders on how the state officers at the National Registration Bureau, police stations and prison facilities are to ensure that the right to human dignity and privacy life of transgender persons. One must appreciate that it is not a common occurrence but it is with us now and the state governed by the Constitution 2010 must take appropriate measures to guarantee of full fundamental freedoms of persons who find themselves on gender re-assignment in the areas of their lives. They are entitled as a constitutional imperative drawn from the foundation of the Bill of Rights to enjoy the human rights naturally accorded to the other class of persons who are not classified as intersex, LGBTQI or transgender. In the case at bar, it was all about the change of names and gender in the documents of identification issued by the National Registration Bureau. Even though with a margin of appreciation, the state officers in the mentioned organs of the Constitution made some attempts to keep to the needs of the petitioner but unfortunately, they fell short of the glory of the Constitution as specified in Article 27 on Equality and Freedom from Discrimination, Right to Human Dignity in Article 28, Freedom and security of the person in Article 29. The experience of the petitioner shared with the court essentially amounted to some grievance severe in nature, cruelty inhumane and degrading treatment.

183. In so far as the interpretation and construction to real life, the idea of equality is obviously a difficult and deeply controversial aspirational social idea. What are we asking the state organs and state officers to do? At its basic model, applying the test of a reasonable man in the streets of both rural and urban areas, people who are similarly situated in relevant features or characteristics or ways should be treated alike. The complexity of it is the issue of what counts as relevant or similar when it comes to determining the similarity of people's situations and circumstances. We might be grappling with this question particularly in the instant petition which is on transgender rights. I agree that these are

difficult issues for the state. But so long as our governance is rooted in the supremacy of the constitution, it commits us to the goal of achieving equality. It tells us in Article 10 and 27 that the type of society we covenanted to create from 2010 onwards is one based on equality, dignity and freedom. These comprises guarantees that laws legislated by parliament drawn from the provisions of the Constitution will protect and benefit citizens equally and those who find themselves domiciled in our premises. As a result of the lacuna in the enabling statutes or policy on transgender rights, there is need for special measures to be taken to ensure the advancement of their rights. This legal framework in the context of principles and purposes of the Constitution will distil the distinctions between formal and substantive equality. This is an achievable goal, it has been done before and most recently the President signed into Law the Persons with Disabilities Act 2025.

184. As I ponder on the contexts and textual provisions of Article 27 on equality clause, I am persuaded to apply the criteria on the stages of enquiry by the constitutional court of South Africa in **Harksen Vs Lane No 1998 (1) SA 300 (CC)**. This enquiry as tabulated by the court is of fundamental importance in establishing a violation of the equality clause.

- a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation. Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
- b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*
 - i. Firstly, does the differentiation amount to ‘discrimination’. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the*

fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

ii. *If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.*

c) *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.*

185. Basically, this means that there is a preliminary enquiry as to whether the impugned provision or conduct differentiates between people or categories of people. This enquiry though on the face of it can be taken as a threshold test on equality clause under Article 27 when a State/Public Officer or organs of the Constitution, public bodies is confronted with situations and circumstances in the same latitude like the Petitioner, but to me the spectrum of it is wide and complex to say the very least. It is trite that the provisions under the equality clause more under Article 27(4) does not prevent the state from making classifications on the application of the clause that is from treating some people differently to others. Although this might not be the best example, but I have in mind the Inua Jamii Program which constitutes cash transfers to vulnerable citizens and the recently signed Persons with Disabilities Act 2025 covering person with disability in Kenya. The position in law is that it is not envisaged in the Constitution that the principle of equality requires everyone to be treated the same. There will be legitimate considerations for the equality clause not to be taken to mean uniformity in regulating the affairs of the citizens of this country without

classification of differentiation of some sort. The country has made tremendous progress since the promulgation of the Constitution 2010 in restructuring institutions and transforming our society under the ethos of the constitution but we cannot ignore systematic inequalities and unfair discrimination which remain rooted in our political, social and cultural sphere. Given that legal mirror, sometimes I pause the question whether it is time as we progress to redress issues of equality and non-discrimination in our sector wide governance structures to think of a legislation in the name and style ‘promotion of equality and prevention of unfair discrimination’. It is a national debate whose time is now.

186. The case before this court is of a citizen whose transgender identity is innate for her sex identity is some kind of birth right. While the recognition of gender assignment of a female is the one retained for recognition outside the internal reproductive organs, in other jurisdictions, more complex transsexual issues involving male and female gender undergoing medical therapy and surgeries to complete the requirement for legal recognition of gender reassignment is a major conversation. What is the legal discourse in all this? Individuals including minorities undertaking certain steps in safeguarding their personal dignity, autonomy and privacy including the case at bar of a transgender, to me have a right to define their own identity as part of their personal freedom to gain full personhood implicit in our constitution. What is the Petitioner asking the state to do to have his physical, mental and moral integrity respected in consonant with the Constitution? This dense and complex question goes right to the heart of the Bill of Rights in our Chapter 4 of the Constitution. In the words of the Constitution, the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. **See**

Article 19 of the Constitution of Kenya. This is the answer to the question by the petitioner.

187. In giving clarity to the distinguishing features of this complex class of litigation, certain key definitional dimensions will continue to occupy the mind of this court as a continuum to the Kenyan populace to plug in to this discourse on the Bill of Rights litigation.

188. The **Black's Law Dictionary, 8th Edition** at page 1406 defines sex as follows;

“The sum of peculiarities of structure and function that distinguish a male from a female organism.”

189. However, the same dictionary does not define gender. In the **Concise Oxford Dictionary**, at page 592, 12th Edition, Gender is defined as;

“The state of being male or female (chiefly in cultural or social contexts.”

190. The dictionary goes on to clarify that sex tends to refer to physical differences while gender refers to social or cultural ones. In a nutshell, sex is determined by physical features to wit; genitalia whereas gender is a social construct.

191. In my interpretation and appreciation of the provisions of Article 27(4) of the Constitution, one of the key battlegrounds is that of “**sex**” and for the benefit of the Kenyans, there is no “**gender**” but analogously as a ground it is defined in other regulatory framework in Kenya. In my view, the spirit of Article 27(4) as originally drafted, sex goes with the definition of “**man**” or “**woman**” as a biological identity. In light of these, marriage in Kenya involves to a “**man**” and a “**woman**” with biological sex assigned at birth. That is why the marriage of same sex couples is not recognised in our Marriage Act 2014. However, in the instant petition, the Petitioner has an assigned identity of sex at birth and has sought protection of gender reassignment for the purpose of living or becoming a female. That is how in terms of National Registration Bureau, she applied for a full gender recognition certification to be issued to her as female. That was the battle ground as to why she was being prosecuted for a criminal offence before the Chief Magistrates at Eldoret.

192. However, the **National Gender and Equality Commission Act** defines gender as;

“gender” means the social definition of women and men among different communities and cultures, classes, ages and during different periods in history;

193. A person is defined as transgender precisely because of the perception that his or her behaviour transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behaviour. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioural norms (see *Transgender Employees and Title VII*, 95 Cal. L. Rev 561, 563 (2007))

194. Going back to Article 27, the same refers to sex but does not make any provisions on gender. This does not legitimise discrimination based on any other grounds other than those in Article 27(4) as Article 27(1) provides that generally, all persons are equal before the law.

195. Whereas the petitioner claims to be a transgender person, as at now, Kenyan Law does not recognise the same as a separate gender across the board. The petitioners’ contention is that the intrusive searches conducted by the 1st and 4th respondents’ officers were a violation of her constitutional rights.

196. Prison searches are governed by the Prison Rules. Rule 35 and 36 provide as follows;

35. Every prisoner shall be searched when taken into custody by a prison officer, on admission into prison and at such subsequent times as the officer in charge directs, and all unauthorized articles shall be taken from him.

36 (1) The searching of a prisoner shall be conducted in as seemly a manner as is consistent with the necessity for discovering concealed articles.

(2) A prisoner shall be searched only by officers of the same sex as the prisoner.

Additionally, Rule 32 provides

(1) Prisoners shall sleep in communal wards or in separate cells, as the officer in charge directs in the case of each prisoner.

(a) Male and female prisoners shall be kept absolutely separate from each other and shall be confined in different buildings.

(b) The wards, cells and yards where women prisoners are confined shall be secured by locks different from those securing the wards, cells and yards allotted to male prisoners.

(c) Women prisoners shall in all cases be attended by women officers.

(d) A male prisoner shall not enter a prison or part of a prison appropriated to women prisoners, except on duty, accompanied by a woman prison officer.

197. The running thread is that the classification of prisoners is based on sex and not on gender and therefore, the respondents, in executing their mandate, were merely acting within the confines of the law in this regard. Further, the Petitioner failed to inform them that she was transgender and it is only at receiving this information that they conducted what would be termed an ‘intrusive’ body search which was the only way they could conclusively establish the sex of the petitioner. It is at this point, in my observation, that the Petitioner began to undergo humiliation and was subjected to treatment bordering on inhumane. Perhaps this was brought about by the fact that this was the first interaction of the police and prisons officer with such a scenario and therefore, their actions were borne out of, ignorance, lack of knowledge or exposure to emerging issues.

198. In the modern day and age, a strip search is quite degrading considering that there exist various technologies that can be used to search if a person in custody is hiding any weapons or contraband in bodily cavities. Contrary to the assertions of the respondents, a strip search, despite being anchored in law, is degrading and in my books, an affront to the petitioners’ right to dignity.

199. I have also considered the manner in which the petitioner was handled by the officers both at the police station and the prisons' department from the contents of her affidavit and her testimony in court. It is apparent that their conduct was unprofessional and bordered on discrimination and undue humiliation. The manner in which she was told to strip and the threats and insults from the officers were completely unnecessary and a violation of the petitioner's rights. Whereas there are requirements that a prisoner be searched by an officer of the same sex, and recognising the impartibility of requiring a transgender officer to be present for such instances, I am convinced that the petitioner could have been handled in a more humane manner but not in contravention of Article 25(a) of the Constitution which provides for freedom from torture and cruel, inhuman or degrading treatment or punishment.

200. I have reviewed the various scenarios which may have presented themselves during the chain of events as between the state officers at the police station and prisons. I am satisfied that the Respondents have not discharged the honours of justification or put up a plausible explanation which fits Article 24 on limitation of Rights and Fundamental Freedoms. In the case of **S Vs Makwanyane 1995 (6) BCLR 665 (CC)**, the Court expressed a similar view that in *recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights.*

201. In considering this petition under the second limb of Article 27 on Non-discrimination, any particular form of it on grounds under subsection 4, all those that are analogous to the list would constitute discrimination against any citizen by as state officer, public officer, public body, individual citizens or institutions.

202. The importance of this terminology on human dignity which then invokes the application of Article 27 of the Constitution is referred by Kantian Philosophical thought in the following passage; *"In the kingdom of ends*

everything has either a price or dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity. What is related to general human inclinations and needs has a market price; that which, even without presupposing a need, conforms with a certain taste, that is, with a delight in the mere purposeless play of our mental powers has a fancy price; but that which constitutes the condition under which something can be an end in itself has not merely a relative value, that is, a price but an inner value, that is dignity. Now, morality is the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a law-giving member in the kingdom of ends. Hence, morality and humanity in so far as it is capable of morality, is that which alone has dignity.”

203. From this perspective of Kant, the citizens of this country particularly those gifted with offices recognized by the Constitution as state officers have a duty, obligation and responsibility and duty bound to treat all persons who come their way seeking a particular service in a humane way. There would be no justification or excuse for the state through its institutions or servants to lend support to any form of in humane behaviour. If anything, there is a constitutional duty to strive and secure the right of human dignity to the fellow citizens.

204. It is instructive to note that the Petitioner in this case was a suspected criminal for an offence of impersonation which triggered a whole conversation on her gender identity and the import of recognition on the part of the actors in the Criminal Justice System. She was actually arrested and prosecuted for this offence. The Constitution 2010 recognizes two components of rights in Article 29, that is the freedom and security of the person, every person has the right to freedom and security which includes the right not to be deprived of freedom arbitrarily or without just cause. The other aspect of this provision is on the aspect of security of the person. What is the legitimate expectation of the National Police Service in discharging their functions under Article 244 of the Constitution? It is to ensure that the substantive and the procedural aspect of Article 29 of the

Constitution are satisfied conjunctively. In the sense that deprivation of the right to liberty cannot be limited arbitrarily if one has to draw from the yardsticks of Article 24 of the Constitution. In the facts of these petition, I am yet to find evidential material that there was a rational connection between the deprivation of liberty of the petitioner and some determinable purpose given the nature of the offence and the provisions of Article 49 (1)(h) of the Constitution and the entire scope of the rights of an arrested person. In my view, the manner of deprivation of freedom and the right to liberty was in violation of Article 29 of the Constitution.

Whether the Petitioners' Right to privacy was violated by the leaking of her medical records by the 1st and 4th Respondents

205. It is trite law that he who alleges must prove. The Petitioner claimed that the Respondents leaked her medical records to the media without her consent. This right to privacy twins with the right to human dignity discussed elsewhere in this judgement. It has a wider amplitude as it will be appreciated shortly from the principles developed in our case law. In the case of **Jessicar Clarise Wanjiru Vs Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR**, the privacy was defined as follows; *"The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."*^[5] *In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy."*

206. The Court also in the case of **Coalition for Reform and Democracy (CORD) & 2 Others Vs Republic of Kenya & 10 Others [2015] eKLR** explained as follows; *"Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is*

demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”.

207. The facts of this petition revolve around the sense of gender and sexual orientation of the petitioner which is so embedded on the individual that the individual carries this aspect of identity wherever she goes. The court is concerned with the sharing of the medical information even when it was unnecessary and it was used to brutalise and harass the petitioner. The seminal case before me runs streams of intrusion of the constitutional right to privacy of the petitioner. Why is this right protected by the Constitution? The right is essentially grounded within the constitutional imperative to facilitate, protect and guarantee one the right to life one’s own life with minimum interference from the state agencies, state officers or individuals. The elements of it is concerned with personal life, family, home life, physical, moral, integrity and it goes on and on to even capture the element of reputation. Therefore, any unauthorised sharing of private information, photographic impressions with third parties prima facie unless qualified as a national security issue or falls within the limitation clause in Article 24 of the Constitution any such disclosure is in violation of the Constitution. It is puzzling that the state officers named in this petition acted negligently without due care and attention while fully aware health rights and information which may even touch on a medical condition of a citizen are classified as confidential and kept within the privacy of the home for personal use. It was not the business of the Respondents, employees, staff, servants to enter into the business of the health rights of the petitioner. This right to privacy shall be enjoyed unless less limited by the same constitution. In our constitutional order, right to privacy and human dignity are like Siamese twins. This unauthorised sharing of medical data is in breach of the enabling statutes and the pillars of the constitution on the right to privacy and dignity of the petitioner.

Whether the court should order that the 2nd and 3rd respondents take appropriate steps to initiate legislative reforms to the Prisons Act to provide for appropriate conditions for transgender persons

208. The 2nd and 3rd respondents are entities created by law and governed by respective statutes. Additionally, legislative reforms to legislation is a function of the legislature. The Role of Parliament is clearly set out in Article 94 of the Constitution which provides;

(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause

(5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

209. Whereas courts have the mandate to interpret the law and where necessary, strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. I am guided by the words of the High Court in the case of **Trusted Society of Human Rights v Attorney-General and others, High Court Petition No 229 of 2012; [2012] eKLR**, at paragraphs 63-64 where it held as follows:

“Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. the Constitution

consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two.”

210. It is my considered view that issuing an order that the 2nd and 3rd respondents initiate legislative reforms to provide for appropriate conditions for detention of transgender persons cannot issue without breach of the doctrine of separation of powers. The reason legislative decisions are left to the legislature is because they are granted this power by the constitution and further, such a decision has ramifications that stretch far beyond the detention of prisoners. It would have the ripple effect of creating provisions for a third gender which requires policy formulation across various departments of government that render services to members of the public. A blanket directive at this juncture would do more harm than good as there would be an administrative crisis to accommodate similar provisions across state departments. Consequently, the same should be left to parliament as it is the body mandated with such responsibility by law.

Whether the Petitioner is entitled to an award for damages

211. It is trite that the award of damages in this petition concerns some constitutional torts particularly those involving violation of the constitutional rights as discussed elsewhere in this judgement by the state officers against the petitioner. This claim on constitutional tort is classified as a civil wrong arising from violations of constitutional rights and for our case, is more pronounced within the provisions of Chapter 4 on the Bill of Rights. Therefore, it should be remembered that constitutional torts are distinct from common law torts like malicious prosecution, negligence, defamation etc. as they involve breaches of fundamental rights guaranteed by the Constitution. It is a means of upholding the rule of law and ensuring accountability for the violation of rights. For our case, it is to compensate the victim for the harm suffered outside the prism of the Constitution.

212. The reference point where a party is seeking damages for a Constitutional Violation Article 23(3) of the Constitution provides the following remedies;

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

213. This is a case of constitutional violation, which does not call for an award of compensatory damages in the traditional sense. Further, the award of damages is a secondary remedy, as was stated by the Constitutional Court of **South Africa in the case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291** as follows:

The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

214. In the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal spoke to the issue of award of damages for infringement of constitutional rights and stated:

The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the

violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

215. The Court of Appeal went on to state:

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration.

216. Having found that the treatment of the Petitioner by the 3rd respondents was in violation of the Petitioners' rights to equality and freedom of discrimination under Article 27, human dignity under article 28 and the rights of a person detain under article 51 of the Constitution, I find that the Petitioner is entitled to damages.

217. It is for these reasons that I conclude that the Petitioner has discharged the standard and burden of proof as stipulated in section 107(1), 108 & 109 of the Evidence Act on a balance of probabilities to find the Respondents

liable jointly and severally for the constitutional violations. Before I pen off, I thank the legal team involved in this discourse and express gratitude for the professionalism, dedication and positive impact they had on the case. I also sincerely appreciate each one of them for their resilience and patience for this is an emerging new jurisprudential question in Kenya.

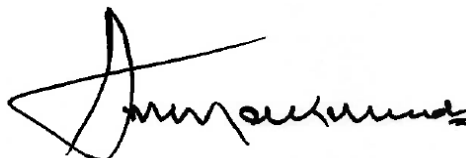
218. As a result, the following declarations be and are hereby made by this Court: -

- a) That the limitations imposed by the Respondents on the rights enshrined in Article 25 (freedom from torture and cruel, inhuman, or degrading treatment or punishment), Article 27 (equality and freedom from discrimination), Article 28 (human dignity), Article 29 (freedom and security of the person), and Article 31 (right to privacy) cannot be considered reasonable and justifiable in an open and democratic society, as provided for in the Constitution. The Constitution and statute law provide mechanisms that are less restrictive for addressing some of the breaches committed by the Respondents against the Petitioner, especially where such violations fall within the category of absolute rights under the Constitution. It must therefore follow that the actions and conduct of the Respondents including institutions, state officers, employees, or servants were unconstitutional to the extent determined by this Court.*
- b) A declaration is hereby made that the petitioner is to be notably recognized as a transgender individual, having affirmed her right to self-identity and gender, in order to guarantee and protect her rights in the context of the "third gender." Consequently, the right of transgender persons to determine their self-identified gender is upheld, and the state is directed to grant legal recognition of such gender identity within the framework of our legal system.*
- c) That it is proposed the State consider undertaking appropriate legislative measures to address the rights and protections of individuals within its borders, in line with Article 27(4) of the Constitution, which prohibits discrimination on any grounds,*

including race, sex, social origin, gender, birth, or other status. In this regard, the enactment of a Transgender Protection Rights Act is recommended as a potential mechanism to ensure equal protection and recognition for transgender persons.

- d) That in the alternative, a declaration be and is hereby made that the Intersex Persons Bill 2024 be complemented to identify the rights of the transgender community in Kenya.*
- e) That in the interim, a declaration be and is hereby made for the 2nd Respondent to explore means and ways of initiating an amendment of Part VI of the Prisons Act with a view to address a threat or infringement or violations under Articles 25, 27, 28, 29 and 31 of the Constitution for the Transgender community.*
- f) That a declaration be and is hereby made that for the constitutional violations committed under Articles 25, 27, 28, 29 and 31 of the Constitution by the 1st, 2nd and 3rd Respondents are liable for damages of Kshs. 600,000/= in favour of the Petitioner whereas the 4th Respondent shoulders liability for damages of kshs. 400,000/= for the breach of right to privacy under Article 31 of the Constitution.*
- g) That a declaration be and is hereby made that there is a compelling sense of urgency for the state in the interim to make provision of the physical and structural facilities at the police stations and the prison facilities for these “third gender” who may be in conflict with the law because of their gender identity with a view to guarantee their constitutional rights as envisioned in this judgment.*
- h) That the costs of this petition be borne by the parties.*

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH AUGUST 2025



.....

R. NYAKUNDI
JUDGE

In the presence of:

Mr. Ojiambo Advocate for the Petitioner

Mr. Ian Nyboma Advocate for the 1st Interested Party

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