REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E045 OF 2022

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....1ST PETITIONER
CHARITY MUTURI.....2ND PETITIONER
THE KENYA PSYCHIATRIC ASSOCIATION.....3RD PETITIONER

=VERSUS=

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS..... 1ST INTERESTED PARTY
THE CABINET SECRETARY FOR HEALTH.....2ND INTERESTED PARTY
NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES.....3RD INTERESTED PARTY
COALITION ACTION FOR PREVENTIVE MENTAL HEALTH KENYA..... 4TH INTERESTED PARTY

WITH

THE LAW SOCIETY OF KENYA.....AMICUS CURIAE

JUDGMENT

Introduction

1) The initial Petition dated 3rd February, 2022 was amended on the 22nd February, 2022. This petition assails Section 226 of the Penal Code, CAP 63 Laws of Kenya which criminalises attempted suicide

provides punishment of two years imprisonment, a fine or both upon conviction pursuant to Section 36 of the Penal Code.

2) The Petitioners fault the Kenyan government for failing in its constitutional mandate to uphold the Constitutional principles and values which include the protection of the rights of its citizens and ensure their freedom from discrimination and the protection of persons with disabilities.

3) The Petitioners contend that the main driving factors for attempted suicide in Kenya and globally are various undiagnosed and untreated mental health conditions as well as mental disabilities which result in suicidal thoughts that may lead to attempted suicide by persons affected. They thus contend that criminalisation of attempted suicide amounts to punishment of persons with mental disabilities contrary to the provisions of Section 2 of the Persons with Disabilities Act and Articles 27 and 260 of the Constitution. Further that this criminalisation amounts to punishment of persons with mental health issues and is contrary to the constitutional requirements on the right of persons to the highest attainable standard of healthcare under Article 43 of the Constitution and Section 4 of the Health Act, 2017.

4) The Petitioners allege that Section 226 of the Penal Code violates the following rights under the Constitution:

a) *The right to the highest attainable standard of health, which includes mental health, under Article 43 of the Constitution;*

b) *The right to equality before the law and non-discrimination on the basis of health status and disability under Article 27 of the Constitution;*

c) *The right to human dignity protected in Article 28 of the Constitution.*

d) *The rights of persons with disabilities as protected in Article 54 of the Constitution.*

e) *The protection of the Best Interest of the Child as well as the rights of the child recognized in Article 55 of the Constitution.*

5) They thus seek the following reliefs:

a) A declaration that Section 226 of the Penal Code Cap 63 of the Laws of Kenya is inconsistent with Articles 2, 27, 28, 29, 43(1)(a), 53(1)(c), 53(2), 54(1)(a) of the Constitution of Kenya.

b) A declaration that Section 226 of the Penal Code Cap63 of the Laws of Kenya is wholly unconstitutional therefore null and void and accordingly stands struck from the Statute forthwith.

c) A declaration that Section 226 of the Penal Code is anachronistic and repugnant to justice.

d) A declaration that the Office of the 1st and 2nd Interested Parties avails free or subsidized counselling and psychological support services for persons who attempt to commit suicide.

e) That this Honourable Court orders the Respondent and the 2nd and 1st Interested Parties to review any convicted cases and ongoing prosecutions on the premise of Section 226 of the Penal Code and file a Progress Report in Court within Six (6) Months.

f) That this Honourable Court Orders that each party bears its own costs on the ground that this Petition is in the public interest.

g) Any other relief that this Honourable Court may deem just and expedient to grant in order to meet the ends of justice.

Petitioners' Case

6) The Petition is supported by the affidavits of ***Dr. Bernard Mogesa***, ***Charity Muturi***, and ***Dr. Boniface Chitayi*** on behalf of the **1st**, **2nd** and **3rd** Petitioners respectively.

1st Petitioner

7) Dr. Bernard Mogesa deponed his affidavit on the 31st of January, 2024. He swore that the 1st Petitioner is the constitutional commission tasked with the protection of human rights and fundamental freedoms as created by Article 59 of the Constitution and established through the Kenya National Commission on Human Rights Act, 2011. That it is also the designated agency in Kenya for monitoring the rights of persons with disabilities, including persons with mental disabilities under Article 33 (2) of the UN Convention on

the Rights of Persons with Disabilities. He deponed further that the Constitution sought to protect and promote human rights and fundamental freedoms including the right to the highest attainable standard of health and access to healthcare services as envisaged under Article 43. That the Constitution underscores the principle of equality, non-discrimination under Article, 27, the right to inherent human dignity at Article 28, protection of the rights of persons with disabilities at Article 54 and protection of the rights of children under Article 53.

8) That the above constitutional rights continue to be threatened and/or are being violated by the retention and application of Section 226 of the Penal Code, CAP 63. That this is despite Kenya ratifying the United Nations Convention on the Rights of Persons with Disabilities on 19th May, 2008 which places an obligation on Kenya to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities as envisaged under Article 4(1)(b) of the Convention. That Kenya has also ratified the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights.

9) He further states that the World Health Organisation ranked Kenya as the sixth African country with the highest levels of depression with at least 1.9 million diagnosed Kenyans suffering from depression hence the continued criminalisation of attempted suicide increases the

stigma and trauma which ends up denying these vulnerable persons the healthcare as well as needed psychological, family and community support. He concludes by deponing that the existence of Section 226 of the Penal Code as read with Section 36 of the same Act is in direct contravention of the basic human rights and fundamental freedoms to wit, the right to the highest attainable standard of health and access to healthcare services under Article 43, as well as the rights envisaged under Articles 27, 53 and 54 of the Constitution.

2nd Petitioner

10) Charity Muturi deponed her affidavit on the 31st of January, 2022. She stated that she is the founder of Tunawiri, CBO concerned with advocacy and policy in mental health. She depones that she has grappled with suicidal thoughts from as young as 14 years and continued to experience high bouts of high energy followed by bouts of depression for over twenty years until she was diagnosed with bipolar disorder in 2015. That she commenced treatment which consisted of a daily medication to manage the mental health condition but the suicidal ideation did not stop and in 2018, she informed her doctor of the same and he promised not to report her to the police. That two hospital admissions, psychological counselling sessions and electro convulsive therapy at Mathari National Hospital transformed and assisted her in coping with her mental health condition.

11) She explains that the main reason for founding Tunawiri CBO was to help members with suicidal ideation and crisis in common where they do not make reports to the Police but support each other by peer based psychological resilience building, economic support for medication and survival needs and referrals to professionals.

12) She explained further that death by suicide is shunned by the community at large, with religious leaders declining to perform burial rites for such individuals. That through her interactions with police officers, probation and prison officials, they have expressed their challenges in dealing with suicide cases and have a growing concern on the rising cases of suicide in the country necessitating a need to create policies and structures to avoid preventable deaths and effectively support persons struggling with suicidal tendencies and other mental health conditions. That the continued criminalisation of attempted suicide escalates stigma which in turn disincentives persons with mental health disorders and struggling with suicidal ideation and thoughts from seeking help they so desperately need. She concluded by deponing that through familial and systemic support; many deaths by suicide are preventable as persons with mental health conditions are able to access and receive the mental health they need.

3rd Petitioner

13) Dr. Boniface Chitayi deponed his affidavit on the 1st of February, 2022. He states that he has practised medicine for a cumulative eleven years, having practised as consultant psychiatrist for three years. He described the 3rd Petitioner as a professional association registered with the Registrar of Societies in 1986 as a non-political, non-religious and non-profit making organization and a member of the World Psychiatric Association. He stated that he is aware that suicidal behaviour ranges from thoughts of death, to suicidal attempts, and all the way to completed suicide and that according to the World Health Organisation, about Seven Hundred Thousand (700,000) persons die every year from suicide and further, that suicide is the second leading cause of death among persons aged 15-29 years and among the top ten leading causes of death among all age groups.

14) That in August 2021 reports from police records showed that Four Hundred and Eighty-Three (483) Kenyans had died by suicide in the preceding Three months. He deponed further that aware that scientific studies indicate that suicidal behaviour is caused by mental illnesses such as ***depression***, ***substance use***, and ***psychosis*** constitute the most relevant risk factors, but also *anxiety*, *personality*, *eating* and *trauma*-related disorder. ***That the risk factors leading to suicide mirror risk factors for mental health conditions and they include***: *biological*; *psychological*; *social (proximal to the individual)*; *Cultural*; *political* and *economic* are distal; mental health

disorders such as *mood disorders*, *substance abuse*, *personality disorders*, *history of suicide attempts*, *physical illness*, *pain*, and *socioeconomic issues* (e.g. Area poverty levels and unemployment) *family problems such as child maltreatment* or *history of suicide*; *relationship problems such as bullying*, *intimate partner problems*, and *social isolation*; and societal problems such as *easy access to lethal means* and *stigma associated with mental illness* and *help seeking*.

15) He concluded by deponing that the *decriminalization of attempted suicide will result in increased access to mental health care*, *reduced stigma and discrimination, reduced fear of seeking help*; *strengthened social support systems*, *reduced deaths by suicide*, *provide a supportive environment for more research into suicide*, and *provide an environment for the enactment and implementation of a suicide prevention* strategy based on current scientific evidence.

The Respondent

16) The Respondent opposed the Petition in its grounds of opposition filed on the 10th of June, 2022:

> *a. The Petitioners herein has not demonstrated before the Honourable Court how the Respondent has violated the Constitution or any rights alleged therein;*
>
> *b. It* ***is improper for the Honourable Court to make general declarations regarding the exercise of constitutional and statutory power without***

reference to specific actions done or not done *by the Respondent herein;*

c. *The Respondent is not the body charged with the constitutional power to legislate;*

d. *The Respondent is not clothed with the mandate to prosecute or supervise the 1st Interested Party in its prosecution, and therefore prayer (e) in the Petition would be in violation of Articles 156 and 157 of the Constitution;*

e. *That in the Report by the Taskforce on Mental health in Kenya which the Petitioners are relying upon, the responsibility to decriminalize attempted suicide, does not lie with the Respondent as the same requires a legislative process;*

f. *That judicial intervention should be limited to acts that are manifestly in breach of the law or where the Court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve the interest of justice. The Respondent has neither failed to legislate, nor charged or prosecuted persons accused of attempted suicide;*

g. *That the Respondent has not at any time violated the rights of the petitioners or the class represented by the Petitioners.*

INTERESTED PARTIES

2nd Interested Party

17) Dr. Patrick Amoth deponed the **2nd Interested Party's** affidavit. He confirmed that he is the Chief Technical advisor to the government of

Kenya and the Ministry of Health on all health matters. He deponed that the Ministry of Health appreciates that suicide is a complex, yet preventable public health problem resulting from the interaction of psychological, social, biological and environmental factors. That it is a point of concern to the Ministry that suicide is among the leading causes of death among young people in many countries, Kenya included, yet suicidal attempts are punishable by law. That following the recommendation by former President Uhuru Kenyatta in his Madaraka day speech, the cabinet resolved to form a Taskforce on Mental Health in Kenya which taskforce was commissioned on the 11th of December, 2019 and in its 2020 report, it was noted that for every adult who died by suicide more than 20 have been attempted suicide while a 2018 Kenya National Bureau of Statistics Report confirms that 421 Kenyans die by suicide every year.

18) That the taskforce noted that there needs to be an amendment and/or repeal specific legal provisions that offend the Constitution like Section 226 of the Penal Code. He deponed that there were discussions between the Ministry of Health officials and the Parliamentary Committee for Health where submissions were given for the repeal of Section 226 of the Penal Code including one which states:

> ***"any person who attempts to kill himself is guilty of a misdemeanour"***

19) That this proposal was however rejected by the Committee. He deponed further that the Ministry of Health developed a Suicide Prevention Strategy 2021-2026 which has an overall goal of 10% reduction of suicide mortality by the year 2026. That the Ministry acknowledges and appreciates the growing epidemic of suicide and attempted suicide and it has made considerable efforts towards decriminalisation of suicide. That ultimately the decriminalisation of suicide can be done by the legislative arm of the government as the duty to legislate can only be carried out by parliament.

4th Interested Party

20) The **4th Interested Party** also filed an affidavit in support of the Petition. It was deponed by one Matthew Mutiso on the 28th of March, 2022. He described the 4th Interested Party as a mental health ecosystem accelerator organisation made up of a variety of community groups and non-governmental organisations who are keen to see more investment and opportunities for community-based initiatives. On the issues raised in the Petition, he deponed that attempted suicide as laid out by Section 226 if the Penal Code is a misdemeanour punishable by a two-year prison sentence, a fine or both pursuant to the provisions of Section 36 of the Penal Code.

21) That he supports the contents of the petition as filed, in particular that that the above sections of the Penal Code are in direct contravention of the basic human and fundamental rights and freedoms enshrined in the Constitution to wit the rights envisaged under Articles 43, 27, 53 and 54 thereof. That British implemented the Suicide Act in 1961 which decriminalised suicide in England and Wales so that anyone who failed in their attempt to commit suicide would no longer face prosecution. He deponed further that a prevention strategy should be adopted instead of incarceration because retributive justice seeks to punish rather than restore the individuals who suffer from mental health. That although suicide is not curable, suicidal ideation is preventable through awareness and health promotion services. He concluded by deponing that Kenya should employ an approach that seeks to solve social problems in particular psychosocial challenges like attempted suicide, including diversion systems that will promote rehabilitation rather than punishment as a better option for suicidal attempts and to establish trauma informed courts for mental health cases and drug related cases.

5th Interested Party

22) The **5th Interested Party** opposed the Petition through the grounds of opposition filed on the 10th day of October, 2022 enumerated as follows:

a. *It is a general presumption that Acts of Parliament are constitutional and the burden to prove otherwise lies on the one who alleges unconstitutionality;*

b. *The Constitution of Kenya under Article 26 provides for the right to life. While the constitution covers the right to life or liberty, it does not include the 'right to die'. As premised under the Constitution of Kenya and the international human rights law, as a matter of custom and best practice, it is an obligation of State Parties as duty-bearers to establish measures that ensure the protection of the right to life.*

c. *The Kenyan Parliament and Government have, as a matter of general policy, decided to put great weight on combating self-destructive practice of suicide as well as protecting life. This is a judgement which it's for the two arms to make and their right to make it militates against intrusive review by this Honourable Court. Accordingly, this Honourable Court ought to decline to interfere with policy decisions which are solely within the realm of the other arms of Government.*

d. *Therefore, the rationale behind the impugned Section is evidently premised on the duty imposed on Kenya to ensure it plays its part in protection of life as obligated under Article 26 of the Constitution.*

e. *Accordingly, granting the Orders sought in the Petition may cause an unprecedented hiatus on the enforcement of a law in dealing with persons driven to suicide by ulterior motives. For example, terrorists who consume cyanide pills to wipe out evidence.*

f. *Further, if the orders are granted, the citizens' right to be protected under the terms of Sections 226 of the Penal*

Code will be irreparably compromised because there will be no law to deter people from engaging in suicidal acts;

g. *That under Article 25 of the Constitution of Kenya, 2010 the right to privacy cited by the Petitioner is not recognized as an unlimited right, and is subject to reasonable restrictions as provided for under Article 24, in the public interest on grounds of national security, to preserve public order, to protect public health, to maintain moral standards, to secure due recognition and respect for the rights and freedoms of others or to meet the just requirements of the general welfare of a democratic society.*

h. *Moreover, a number of countries have retained attempted suicide as a criminal offense. In the African region, Kenya, Malawi, Nigeria, Rwanda, Tanzania, Ghana and Uganda are among the countries that currently criminalize nonfatal suicidal behavior;*

i. *The main reason for criminalization of suicide in these countries is that the punishment given acts as a deterrence of more people attempting to commit suicide, nevertheless, not ignoring the rising need to address mental health issues;*

j. *The main reason for criminalization of suicide in these countries is that the punishment given acts as a deterrence of more people attempting to commit suicide, nevertheless, not ignoring the rising need to address mental health issues;*

k. *The petitioner ought to have petitioned Parliament under* ***Article 119 of the Constitution*** *to amend the impugned provision instead of instituting this suit;*

l. Further, the Petitioner has not identified with a certain degree of precision on how the impugned provision infringes on the right his rights.

23) The 5th Interested party urged this Court to find that the Petition lacks merits, it is frivolous, generally argumentative and an outright abuse of the court process and ought to be dismissed with costs.

24) The **6th Interested Party** on its part filed a replying affidavit in response to the Petition. The affidavit was sworn by Jeremiah Nyegenye who deponed that under Articles 1, 94, 95, 96 and 109 of the Constitution places the legislative authority is at the national level, vested in and exercised by Parliament as such Section 226 of the Penal Code was enacted in accordance with the National Assembly. That the Penal Code was revised in 2009 when Parliament was still a unicameral house and all laws enacted by Parliament are presumed to be constitutional and the burden falls on the person who alleges otherwise to rebut his presumption.

25) While quoting the cases of **LAW SOCIETY OF KENYA VS. ATTORNEY GENERAL & ANOTHER (2019) EKLR** and **KATIBA INSTITUTE & ANOTHER VS. ATTORNEY GENERAL & ANOTHER (2017) EKLR** he deponed that granting the order sought by the Petitioners would go against the presumption of constitutional validity but also outdo the legislative will of the people through Parliament. He urged this Court to look at the purpose and effect of the impugned statute and if the same does not infringe on a right

guaranteed by the Constitution, it should not be declared unconstitutional. That the purpose of the section is to protect the sanctity of life and not to antagonize the rights of individuals suffering from mental health conditions and none of the Petitioners have tendered any evidence to prove that criminalization of attempted suicide goes contrary to constitutional requirements on the right to the highest attainable standard of healthcare or is discriminative against persons with mental health conditions. That the statements in the Petition are merely generalised statements without proof.

26) He dissuaded this Court from granting the orders sought in the Petition on the grounds that the Petitioners had not availed any evidence to demonstrate that any rights have been infringed by the impugned provision. That the Petitioners should have petitioned Parliament to have the said section amended and or repealed as enshrined under Article 119 of the Constitution. He urged this Court to find the Petition baseless, devoid of merit and an outright abuse of the court process and should be dismissed with costs.

SUBMISSIONS

27) The Petition was canvassed by way of written submissions. The 1st Petitioner's submissions are dated 4th October 2022 and submitted on the following issues for determination:

a. *Whether Section 226 of the Penal Code is inconsistent with the Constitution an ought to be declared unconstitutional;*

b. *Whether this Honourable Court has jurisdiction to declare Section 226 of the Penal Code unconstitutional and in so finding order it struck out from the statute;*

c. *Whether the Attorney General's constitutional role is crucial to the decriminalization of suicide;*

d. *Whether this Honourable Court may declare Section 226 unconstitutional in the absence of a legislative process in parliament;*

e. *Whether the Court may grant any other appropriate remedies.*

28) On the first issue, they submitted that there is a mental health crisis in Kenya which has given rise to the cases of suicide and attempted suicide and it has been established that there are various causative factors which predispose children and adults to suicidal behaviour. They placed reliance on the case of **NUBIAN RIGHTS FORUM & 2 OTHERS VS. ATTORNEY GENERAL & 6 OTHERS (2020) EKLR** and submitted that the current laws and regulations on mental health in Kenya ought to ensure adherence to the constitution and they ought to be passed and enforced in accordance with the Constitution in order to ensure the promotion of the values enshrined therein, key of which is the protection of Human Rights.

29) They also relied on the cases of **FRANCIS KARIOKO MURUATETU & ANOTHER VS. REPUBLIC (2017) EKLR** and **MUMO MATEMU VS. TRUSTED SOCIETY OF THE HUMAN RIGHTS ALLIANCE AND 5 OTHERS (2013) EKLR** and submitted that Article 159(2) of the Constitution instructs this Court to exercise judicial authority in a manner that protects and promotes the purpose and principles of the Constitution. The Petitioner submitted that the mental capacity and state of the persons charged under Section 226 of the Penal Code must be taken into consideration at the time of commission of the offence and relied on the South African case of **S VS. CARPENTER 1987 1, SA 940 A** and the Indian cases of **STATE VS. SANJAY KUMAR BHATIA 1986 (10) DRJ 31** and **P. RATHINAM VS. UNION OF INDIA (1994 AIR 1844, 1994 SCC (3)394)** where the court held that the criminal penalties for suicide violate the constitutional right to life by amounting to a whole double punishment.

30) That Article 2(5) and 2(6) of the Constitution allow for domestication and application of international legal norms which include general rules of international law and any treaty or convention ratified by Kenya, which in effect meant that international law and treaties on mental health have legal impact within our jurisdiction. They submitted further that Kenya is a member of both the United Nations and the African Union and has in effect ratified many human rights conventions and as such is bound by these instruments to ensure the

protection, promotion and adherence to the protection of human rights and rights of persons with disabilities.

31) The Petitioner urged this Court to find that the existence of Section 226 of the Penal Code violates constitutional and international law as it criminalizes a symptom of mental health disorders and illnesses which is a direct violation of human rights. They urged this Court to declare the section unconstitutional and order that it be struck out of the Penal Code.

32) On its second issue, the Petitioner submitted that the principal role of the Attorney General is to uphold and promote the rule of law, protection of the public interest, human rights and democracy as provided under Article 156 of the Constitution and further Section 5 of the Office of the Attorney General Act 2012. That in the present petition, the Attorney General has a role to not only represent the government in these proceedings but also to promote and protect human rights, advise the government and draft legislative proposals for the government and its agencies regarding the decriminalisation of suicide. They relied on the case of **KENYA AIRPORTS AUTHORITY VS. MITU-BELL WELFARE SOCIERTY & 2 OTHERS (2016) EKLR** where the Court of Appeal discussed the liability apportioned to the Attorney General. They submitted that the prayers sought in this Petition are therefore enforceable against the

Attorney General given his role as the chief legal advisor of the government.

33) While submitting on his third issue, the Petitioner relied on the locus classicus case of **THE OWNERS OF MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL KENYA LIMITED (1989) KLR 1** and the provisions of Article 165 (3) which outline the jurisdiction of this Court. He submitted that it is within the mandate and jurisdiction to declare provisions of the law inconsistent with the Constitution. They placed reliance on the case of **COALITION FOR REFORMS AND DEMOCRACY (CORD) & 2 OTHERS VS. REPUBLIC OF KENYA & 10 OTHERS (2015) EKLR** and refuted the Respondent's grounds in opposing the Petition, particularly the fact that this Court has no jurisdiction to declare Section 226 unconstitutional.

34) On the fourth issue, the Petitioner submitted that this Court has a sui generis role in protecting and defending the Constitution by ensuring that acts, omission or law that violate the Constitution are invalidated and as such the continued existence of Section 226 of the Penal Code is an omission which violates the Constitution. They submitted that the principle of separation of powers does not lock out the necessary checks and balances by the Courts. That the government in its report by the Taskforce on Mental Health acknowledged the need to repeal Section 226 of the Penal Code and emphasized the need to move fast to decriminalise suicide attempts in order to reduce the stigma and

discrimination and encourage help seeking among people that are feeling suicidal. He submitted that this Court is vested with powers to intrude on the domains of other arms of government where constitutional compliance is lacking, as the final custodian of the Constitution.

35) On the final issue, the Petitioner submitted that there shall be need for this Court to grant structural interdicts owing to the numerous number of individual who have been convicted and sentenced under Section 226 of the Penal Code, declare that there is need to establish a register of the said persons and to make provisions to rectify the constitutional violations encountered by the said persons. They submitted further that decriminalising suicide alone is not enough but there is a need for a comprehensive health program to reduce its incidents. That the Government should also take an active step in spreading anti-suicide awareness.

36) The Petitioner concluded by submitting that this Court is vested with the authority to remedy violations of rights and has a duty to provide such remedies and redress violations. That in addition to the prayers in the Petition, this Court directs that the persons who attempt to die by suicide be directed to access appropriate, affordable and accessible mental health care services which include counselling, rehabilitation, therapy and aftercare support in tandem with the Mental Health (Amendment) Act, 2022.

37) The 2nd and 3rd Petitioner's submissions are both dated 4th October 2022 both being in support of the Petition. The Petitioners also filed supplementary submissions on the 22nd September, 2023. These submissions have been considered in this decision.

38) The 4th Interested Party's submissions are dated 25th August, 2023. They submitted that while Kenya has committed to eradicating all forms of discrimination and punishment of persons with disabilities, it has retained Section 226 of the Penal Code which criminalises attempted suicide which is a tragic manifestation of mental illness. That the criminalisation of attempted suicide limits the fundamental rights and freedoms of those whose mental illnesses have cause them to harm themselves. They rebutted the Respondent's argument that the law is constitutional because it forms part of the State's duty to protect life and that although this is correct, there is nothing to suggest that Section 226 meets the objective. That no evidence has been adduced to demonstrate why the limitation of that right is justified. The Interested Party expounded that studies have been conducted to prove that criminalising attempted suicide has no effect on reducing the number of suicide attempts.

39) The 4th Interested Party also relied on the cases of **SANJAY KUMAR BHATIA (supra)** and that of **P. RATHINAM (supra)** and submitted that in determining whether a statute is constitutional or not, the Courts must determine the object and purpose of the

impugned section as it is important to discern the intention expressed in the Act itself. That the Constitution should be given a purposive, liberal interpretation and that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but sustaining the other. That Article 27 of the Constitution provides that every person is equal before the law and has the right to equal protection and benefit of the law and shall not be discriminated on any ground including health status or disability. That the Mental Health Act categorises people who attempt suicide as people who suffer from mental illness and such persons require protection from the law. They relied on the case of **COUNCIL OF COUNTY GOVERNORS VS. ATTORNEY GENERAL & ANOTHER (2017) EKLR** and submitted that there is an uncertainty in the law on how to treat people who have attempted suicide because whereas Section 226 of the Penal Code treats them as criminals who deserve punishment, the Mental Health (Amendment) Act treats them as persons with mental illness who should be treated equally like their counterparts that have been diagnosed with mental illness.

40) The Interested Party concluded by relying on the case of **WAKESHO VS. REPUBLIC (2021) KECA 223 KLR** and submitted that the same treatment should be accorded to individuals who attempt suicide and urged this Court to hold that Section 226 of the Penal Code violates Section 27 of the Constitution.

41) The 5th Interested Party's submissions are dated 10th July, 2023. It submitted that the impugned provision does not in any way violate the provisions of the Constitution as alleged by the Petitioners. They faulted the Petitioners for failing to specifically outline with the required degree of precision on how the impugned provisions violate the various Article of the Constitution cited in the Petition. That the petition does not plead with precision constitutional violations or breaches against the impugned section to sustain a constitutional petition.

42) The Interested Party continued to submit further that Article 119(1) of the Constitution provides that any person has a right to petition Parliament to consider any matter within its authority, including enacting amending or repealing any legislation. That parliament has the unfettered constitutional mandate to legislate and the Petitioners ought to have approached parliament before filing the present petition. That they have failed to demonstrate that they petitioned Parliament to amend or repeal the impugned section therefore failing to exhaust all the remedies available to them before filing the petition. The Interested Party urged this Court to find no ground to hold section 226 of the Penal Code is constitutionally invalid as none of the Petitioners have tendered any evidence to prove that criminalisation of attempted suicide goes contrary to constitutional requirements as alleged,.

43) The Amicus Curiae's submissions are dated 26th June, 2023. The Society submitted in arguments for the decriminalisation of attempted suicide and why the same requires a multidisciplinary approach for effective deterrence. It submitted that health is a human right as enshrined in the Constitution and International Human Rights instruments and it is therefore a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights as well as enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. That it is the State's responsibility to enable and provide every person with the highest attainable health standard including the right to healthcare services, to reduce and deter incidences of attempted suicide. That there is also a need for a comprehensive health program by the government rather than criminalisation which is regarded as a violation of the victim's right to health, dignity and liberty amongst others.

44) The Law Society of Kenya submitted further that criminalization of attempted suicide implies that people who suffer the severe pain inflicted by mental illnesses suffer the additional trauma and stigma of being viewed as criminals. That decriminalization of attempted suicide will aid in destigmatizing suicide and facilitate easy identification and treatment. It concluded by submitting that Section 226 of the Penal Code is a revictimization of already vulnerable

victims while placing those already socially and economically vulnerable at an even greater disadvantage. That Section 226 deters those who harbour suicidal thoughts from seeking help and this hinders early intervention for suicide prevention.

ANALYSIS AND DETERMINATION

45) The amended Petition and the responses thereto call for one major issue for determination:

a. Whether this court has jurisdiction to determine this petition based on:

I. doctrine of exhaustion of remedies

II. doctrine of separation of powers

b. Whether Section 226 as read with Section 36 of the Penal Code is inconsistent with the Constitution.

c. Whether the petitioners are entitled to reliefs sought

Whether this court has jurisdiction to determine this petition based on two grounds:

46) The Respondents and the 5th and 6th Interested Parties raised jurisdictional bar principally on two main grounds. First, that under Article 119(1) of the Constitution any person has a right to petition Parliament to consider any matter within its authority, including enacting amending or repealing any legislation. That the Petitioners

ought to have approached Parliament before filing the present petition. That they did not petition Parliament to amend or repeal the impugned section thereby infringing the doctrine of exhaustion of remedies before filing the petition.

47) The second ground of attack was raised by the Respondent in its grounds of opposition. It contended that Parliament and Kenyan Government decided to put weight to deal cumulative general self-destructive behaviour as a policy matter which militates against the intrusive review by the Courts.

48) The Petitioner refuted the contention that the Court lacks jurisdiction and urged this Court to find that it is within its mandate and jurisdiction to declare provisions of the law that are inconsistent with the Constitution unconstitutional should thus not shy away from determining the constitutionality of Section 226 of the Penal Code.

49) This Court will therefore determine the issue of jurisdiction first. The Supreme Court in **R VS. KARISA CHENGO [2017] EKLR,** defined jurisdiction as:

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be***

either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

50) The Supreme Court in the case of **IN THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION (APPLICANT) (CONSTITUTIONAL APPLICATION 2 OF 2011) [2011] KESC 1 (KLR) (20 DECEMBER 2011) (RULING)** relied on the locus classicus case of **OWNERS OF MOTOR VESSEL 'LILLIAN S" VS. CALTEX OIL (KENYA)LTD (1989) KLR 1** while holding that:

"29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

30. The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."

51) The Article 165(1) of the Constitution establishes the High Court of Kenya while Article 165(3) prescribes the jurisdiction bestowed on the Court. It provides thus:

"(3) Subject to clause (5), the High Court shall have—

a) unlimited original jurisdiction in criminal and civil matters;

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

c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

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; and

iv. a question relating to conflict of laws under Article 191; and

e) any other jurisdiction, original or appellate, conferred on it by legislation."

52) The Petitioners want the Court to determine if Section 226 of the Penal Code meets Constitutional threshold which would be an issue falling under Article **165 (d) (i) of the Constitution**.

53) On the issue that the legislation against attempted suicide is a policy decision made by Parliament and Government and therefore the Courts should not be invited to interfere by way of review; I would agree to the extent that Courts must be slow to interfere on policy matters falling within other branches of Government but that is only if the said policies are consistent with Constitutional principles and values. For instance, a policy decision that goes against Article 10 by Parliament or the Government for being discriminatory in its application or in violation of human rights cannot escape scrutiny by

the Court. This is because application of Article 10 applies across the board. It provides:

> *10. National values and principles of governance;*
>
> *(1) The National values and principles of governance in this Article bind all State Organs, State Officers, public officers and all persons whenever any of them-*
>
> *a) applies or interprets this Constitution*
>
> *b**) enacts, applies or interprets any law**;*
>
> *c) **makes or implements public policy decisions***
>
> *(2) The national values and principles of governance include:*
>
> ***a) ……***
>
> *b) **human dignity**, equity, social justice, inclusiveness, equality, **human rights**, **non-discrimination**, and protection of the marginalised.*

54) Further, under Article 2 (4) any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in the contravention of the Constitution is invalid. By the same breath, Article 3 obligates every person to respect, uphold and defend the Constitution.

55) The South African Constitutional Court in **Minister of Health and Others vs. Treatment Action Campaign and Others (2002) 5 LRC 216**, underscored the Court's role in safeguarding the Constitution as follows:

> ***"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."***

56) The argument therefore that this Court must not interfere with a policy matter is cannot apply in a blanket manner. The Court has a constitutional obligation to scrutinize the policy or the law in question for conformity with the Constitution. That contention therefore holds no water.

57) The next issue as canvassed by the 5th and 6th Interested Party was that the Petitioner failed to exhaust the available local remedies before approaching the Court. That the Petitioners ought to have first approached Parliament under Article 119 (1) which gives every person a right to Petition Parliament to consider any matter under its authority including to enact, amend or repeal legislation.

58) On this issue of lack of exhaustion of remedies, I do not think the 5th and 6th Interested Parties are forthright considering the totality of the evidence on record. Dr Patrick Amoth who swore the affidavit on behalf of the Cabinet Secretary for Health (2nd Interested Party) revealed that the Ministry of Health Commissioned a Task Force on Mental Health on 11th December, 2019 which culminated in a report in the year 2020. Among the highlights of the recommendations was repeal of Section 226 of the Penal Code. The Ministry engaged the Parliamentary Committee on Health on that issue. The Parliamentary Committee rejected the proposal. That avowal was not denied by the Respondent or the 5th and 6th Interested Parties.

59) The fact therefore is that the 5th and 6th Interested Parties were approached but rejected the said proposal to consider making changes on Section 226 of the Penal Code albeit from a different party which does not mean it would have different had it been the petitioners who had done it.

60) Further, it is also my considered view Article 119 (1) of the Constitution does not preclude the jurisdiction of this Court to determine the constitutionality of impugned legislation. I am reinforced in this resolve by the case of **Council of Governors & 3 others v Senate & 53 others [2015] KEHC 6965 (KLR)** where the court held thus:

"It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of Article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of Article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:

> ***"Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation.***
>
> ***2. Parliament shall make provision for the procedure for the exercise of this right."***

The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under Articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under Article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including "the question whether any law is inconsistent with or in contravention of" the Constitution, or under Article 165(3)(d)(iii), to determine 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"?

In our view, the answer must be in the negative. Doubtless, Article 119(i) will serve a useful purpose in

allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that Article 119 is not intended to cover situations such as is presently before this Court. The question of the constitutionality of the impugned CGAA was raised with Parliament prior to its enactment. As deposed by Mr. Charles Nyachae, the Chairman of CIC, in his affidavit sworn on 19th September 2014, the issue had been brought to the attention of Parliament through CIC's Advisory Opinion in the month of August 2014, prior to the enactment of the CGAA. Parliament, nonetheless, appears to have disregarded the concerns raised regarding its conformity with the Constitution and proceeded to enact the legislation.

It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and Articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.

This Court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or An Act of Parliament, that procedure should be strictly followed. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Similarly, Article 258(1) thereof donates the power to every person to institute court proceedings claiming that the Constitution has been

contravened, or is threatened with contravention. If this Court were to shirk its constitutional duty under Article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under Article 119(1) is without merit."

61) In view of the above, it is my finding that the Respondent, 5th and 6th Interested Party objection to the jurisdiction of this Court to determine this matter fails.

Whether Section 226 as read with Section 36 of the Penal Code is inconsistent with the Constitution

62) The Petitioners contend that Section 226 as read with Section 36 of the Penal Code is inconsistent with the provisions of Articles 27, 28, 29, 43(1), 53 and 54 of the Constitution. It is necessary to set out the impugned provision for purposes of this discourse.

Section 226 of the **Penal Code** on the other hand provides thus:

Any person who attempts to kill himself is guilty of a misdemeanour

Section 34 of the **Penal Code**:

When in this Code no punishment is specially provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

63) This contention calls for the close examination of these statutory provisions as against the Constitution to determine if the statutory provision is invalid. This will thus call for Constitutional Interpretation. Article 259 provides a guide on how the Constitution is to be interpreted as follows:

> ***259 Construing this Constitution***
>
> ***(1) This Constitution shall be interpreted in a manner that-***
>
> ***a) <u>Promotes its purposes, values and principles</u>***
>
> ***b) <u>advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights.</u>***
>
> ***c) permits the development of the law; and***
>
> ***d) contributes to good governance***
>
> ***2) If there is a conflict between different language versions of this Constitution, the English version language prevails***
>
> ***3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things…….***

64) Jurisprudentially, Courts have developed and applied various principles that serve as guide in Constitutional interpretation. In **<u>Ferdinand Ndung'u Waititu vs Independent Electoral &</u>**

Boundaries Commission (IEBC) & 8 others [2014] eKLR, the Court stated:

> ***"I accept the proposition that the appellant has put forward, that the Constitution must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at Article 259 (1) of the Constitution which is framed as follows:***
>
> ***Article 259. (1) This Constitution shall be interpreted in a manner that—***
>
> ***i. promotes its purposes, values and principles;***
>
> ***ii. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***iii. permits the development of the law; and***
>
> ***iv. contributes to good governance.***
>
> ***These principles have been reiterated time and again by our courts. In Njoya & 6 others - vs- Attorney General & 3 others No 2 [2008] 2 KLR (EP), this Court held that:***
>
> ***The Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it."***

67. Similarly, the Supreme Court **in the Matter of the Interim Independent Electoral [2011] KESC 1 (KLR)** professed thus:

"(86)" .....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.

[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to 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.

[88] These constitutional imperatives must be implemented in interpreting the provisions of Article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power,

the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

[89] It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation."

68. In examining the constitutionality or lack thereof of a Statute, Courts are also to bear in mind the general presumption that deems every Act of Parliament to be constitutional unless otherwise established. This principle was articulated by the Court of Appeal of Tanzania in **Ndyanabo vs. Attorney General [2001] EA 495** which adopted with approval the English case of **Pearlberg vs. Varty [1972] 1 WLR 534** where it was observed thus:

"Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

69. Likewise, the Supreme Court of India in **Hamdard Dawakhana vs. Union of India Air (1960) AIR 554, 1960 SCR (2)671** held as follows:

"In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

70. Another fundamental guiding principle is that the Court has to consider both the purpose and effect of the impugned provision. This principle was elaborated in the case of **R vs Big M Drug Mart Ltd 1985 CR 295** which was cited with approval in **Geoffrey Andare v Attorney General & 2 others [2016] eKLR** as follows:

"Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

71. This principle was also applied by the Constitutional Court of Uganda in **Olum and another vs Attorney General [2002] 2 EA**, where it was noted that:

"To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or

section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional…"

72. The burden of proving the unconstitutionality of a statute rests on the person who alleges so. This was the holding in the persuasive authority of **U.S. vs Butler 297 U.S. 1 (1936)** where the Court held as follows:

"When an Act of Congress is appropriately challenged in the courts as not conforming 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."

73. Furthermore, in **Council of County Governors v Attorney General & another [2017] eKLR** the Court highlighted another critical principle in the interpretation of Statute by stating as follows:

"A law which violates the constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as

well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus, any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution."

74) The Petitioners' case is that Section 226 revictimizes victims of mental illness which is manifested through attempted suicide. They state that this section goes against the provisions of non-discrimination on the basis of health and disability as provided under Article 27, the right to human dignity as provided under Article 28, the right of persons with disabilities under Article 54, and the protection of the best interest of the child as well as the rights of the child as provided under Article 55 of the Constitution. Besides, it impedes the right to the highest attainable standard of health as provided under Article 43 as the stigmatization associated with crime hinders the victims from seeking help hence is an obstacle to the right to equality before the law.

75) The Petitioners contend that individuals who attempt suicide are in fact persons with disabilities arising from mental health issues.

76) The 4th Interested Party supports the Petition and states that continued criminalization of attempted suicide is predominantly colonial as it was inherited from the Britain with a view to deter persons from committing suicide to avoid punishment after being found guilty of other offences. That the individual who have attempted suicide before require follow up care and whenever necessary psychological, family and community support instead of criminalisation and punishment.

77) The 2nd Interested Party on its part recognises that there is indeed a mental health crisis in Kenya. The interested Party documents the attempts by the Ministry of Health to reduce the suicide incidents in the country including but not limited to a failed attempt to repeal and or amend Section 226 of the Penal Code. The Interested Party contends that the role of amending or repealing the section should be left to the National Assembly and not the Court.

78) The Respondent, the 5th and 6th Interested Parties also support this position and state that the Petitioners should have invoked their right under Article 119 (1) of the Constitution to petition Parliament to amend/repeal the impugned section of the Penal Code.

79) There have been various attempts to amend the Penal Code since 2021 which the most recent being in 2023 where the Penal Code (Amendment) Bill 2023 at Section 36 purported to repeal Section 226

of the Penal Code. This proposal according to the 2nd Interested Party has failed severally. The Respondent and the 5th and 6th Interested Parties argue that the impugned section is crucial to prevent self-harm especially by criminals.

80) The Mental Health (Amendment) Act No. 27 of 2022 at Section 2 defines a person with mental illness as:

> ***"person with mental illness" means a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes—***
>
> ***(a) a person diagnosed with alcohol or substance use disorder; and***
>
> ***(b) a person with suicidal ideation or behaviour;***

81) This legal position validates the Petitioners and 4th Interested Party's contention that persons subject to Section 226 of the Penal Code are in fact persons suffering from mental illness.

82) Section 226 of the Penal Code exists notwithstanding the above definition of mental illness which includes suicide ideation thereby making it a health issue**.** Further the Kenya Mental Health Policy **2015 – 2030** recognises persons with mental illnesses as persons living with disabilities.

83) **Article 27(4) of the Constitution** provides that the state shall not discriminate directly or indirectly against any person on any ground,

including race, sex, pregnancy, marital status, **health status,** ethnic or social origin, colour, age, **disability,** religion, conscience, belief, culture, dress, language or birth.

84) The 2nd Interested Party, the Ministry of Health which is in charge of overseeing matters health in the Country filed a replying affidavit in which it deponed that through a Presidential directive, a Taskforce on Mental Health in Kenya was constituted on 11th December, 2019. The Taskforce Report on Mental Health and Wellbeing (2020) recommended among other recommendations, the decriminalisation of suicide. The recommendation read:

> ***Decriminalise suicide***
>
> *This will help to reduce stigma and discrimination and in turn encourage early identification, management and follow-up of people at risk of suicide. There should be restriction to the means used for example access to firearms. The Taskforce recommends educating the media on responsible reporting of suicide; implementing programmes among young people to build life skills that enable them to cope with the stresses of life.*

85) The Ministry of Health also developed a Suicide Prevention Strategy 2021-2026 whose major goal was a 10% reduction in suicide mortality by the year 2026. At page 15, the Strategy acknowledges that:

> ***"Mental illnesses are often associated with suicidal behavior and the prevalence of common mental illnesses in Kenya which include depression and anxiety***

disorders is about 10.3%. Additionally, 42% of those attending general medical facilities in Kenya have symptoms of severe depression. Suicidal thoughts associated with depression lifetime prevalence is estimated at 7.9%…."

86) Universally, there are international conventions and treaties which advocate for non-discrimination and observance of human rights, notably:

a) Universal Declaration of Human Rights;

Article 7 *provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

b) The Convention on the Rights of Persons with Disabilities:

Article 4 (1)(b) *places an obligation on member states to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability by undertaking to:*

To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

c) International Covenant on Economic, Social and Cultural Rights

Article 12 of the Covenant *urges state parties to recognize the right of everyone to the enjoyment of the /highest attainable standard of physical and mental health*

d) African Charter on Human and People's Rights

Article 16 *provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. State Parties are mandated to take the necessary measures to protect the health of their people to ensure the health of their people and to ensure that they receive medical attention when they are sick.*

87) The 5th and 6th Interested Party justified the existence and retention of Section 226 of the Penal Code insisting that it in consonance with protecting the right to life by deterring and preventing self-destructive behaviour. In my view, such an argument flies in the face in view of the very evidence that suicide ideation is mental health issue hence it is not a **'willed act'** by made by human being of sound mind. In fact, the Ministry of Health has classified it as a disability. In any case, I find the following persuasive authorities from Indian jurisdiction germane in laying bare the fallacy of criminalising suicide attempts as advocated by the 5th and 6th Interested Parties.

88) The Bombay High Court in **MARUTI SHRIPATI DUBAL VS. STATE OF MAHARASHTRA ON 25 SEPTEMBER, 1986, 1987(1) BOMCR499, (1986)88BOMLR589** held:

"We are therefore of the view that the provisions of S. 309 being arbitrary are ultra vires Art. 14 of the Constitution.

20. That takes us to the last contention which seeks to assail the very basis of the punishment prescribed by S. 309. The section punishes the attempt to commit suicide with simple imprisonment for a term which may extend to one year or with fine or with both. "We have already enumerated the different sets of circumstances in which a person may attempt to commit suicide. If the purpose of the prescribed punishment is to prevent the prospective suicides by deterrence, it is difficult to understand how the same can be achieved by punishing those who have made the attempts. Those who make the suicide attempt on account of the mental disorders require psychiatric treatment and not confinement in the person cells where their condition is bound to worsen leading to further mental derangement. Those on the other hand who make the suicide attempt on account of acute physical ailments, incurable diseases, torture or decrepit physical state induced by old age or disablement need nursing homes and not prisons to prevent them from making the attempts again. No deterrence is further going to hold back those who want to die for a social or political cause or to leave the world either because of the loss of interest in life or for self-deliverance. Thus in no case the punishment serves the purpose and in some cases it is bound to prove self-defeating and counter-productive. On this account also the provisions of the section are unreasonable and arbitrary."

89) The Supreme Court of India in the case **P. RATHINAM VS. UNION OF INDIA ON 26 APRIL, 1994 1994 AIR 1844, 1994 SCC (3) 394** held that:

"75. Suicide, as has already been noted, is a psychiatric problem and not a manifestation of criminal instinct. We are in agreement with Dr (Mrs) Dastoor that suicide is really a "call for help" to which we shall add that there is no "call for punishment" in it. Mention may also be made about what was observed in "The Attitudes of Society towards Suicide", a xerox copy of which is a part of written submissions filed on behalf of Respondent 2 (State of Orissa) in W.P. No. (Crl.) 419 of 1987. It has been stated in this article at p. 9 that shortly after passing of the Suicide Act, 1961 (in England), the Ministry of Health issued recommendation advising all doctors and authorities that attempted suicide was to be regarded as a "medical and social problem", as to which it was stated that the same was "more in keeping with present-day knowledge and sentiment than the purely moralistic and punitive reaction expressed in the old law".

76. So what is needed to take care of suicide-prone persons are soft words and wise counselling (of a psychiatrist) and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor...

108. The latest American position has been mentioned as below at p. 348 of Columbia Law Review, 1986: "Suicide is not a crime under the statutes of any State in the United States. Nor does any State, by statute, make attempting suicide a crime. In twenty-two States and three United States territories, however, assisting suicide is a crime. If an assistant participates affirmatively in the suicide, for instance by pulling the trigger or

administering a fatal dose of drugs, courts agree that the appropriate charge is murder."

109. On the basis of what has been held and noted above, we state that Section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. ….

110. We, therefore, hold that Section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanization, which is a need of the day, but of globalization also, as by effacing Section 309, we would be attuning this part of our criminal law to the global wavelength…"

90) Further the State of Pennsylvania in the case of **COMMONWEALTH VS. WRIGHT 26 PA COUNTY CT 666 (1902)** while holding that attempted suicide is not a crime, Justice Arnold PJ stated that:

"Calling suicide self-murder is a curt way of justifying and indictment and trial of an unfortunate person who has not the fortitude to bear any more ills of life. His act may be a sin but not a crime. It is the result of a disease. He should be taken to a hospital and not prison."

91) The above persuasive decisions are intrinsically convincing and in tandem with our own Section 2 of the Mental Health Amendment Act and the Ministry of Health Policy that persons who attempt suicide are in fact victims of mental illness and not criminals who possess the requisite *mens rea* to commit this offence. The 5th and 6th Interested Parties have had various to amend or repeal to reflect to the reality but have failed to do so.

92) It is my finding that applying the purpose and effect principle of constitutional interpretation, Section 226 of the Penal Code offends Article 27 of the Constitution by criminalising a mental health issue thereby endorsing discrimination on the basis of health which is unconstitutional. It also indignifies and disgraces victims of suicide ideation in the eyes of the community for actions that are beyond their mental control which is a violation of Article 28. The existence of Section 226 exposes the survivors of suicide and potential victims with suicide ideation to possible reprisals thereby eroding the right to have the highest attainable standard of health envisaged in Article 43 (1) of the Constitution.

Whether the Petitioners are entitled to reliefs sought

93) Having arrived at the above findings, it is my considered view that the following reliefs commend themselves to this Court:

a) A declaration is hereby made that Section 226 of the Penal Code is unconstitutional for violating Articles 27, 28 and 43 of the Constitution.

b) Considering that the Petition was brought in the interest of the public, each Party shall bear respective costs of the Petition.

Dated, signed and delivered electronically at Nairobi this 9th day of January, 2025

.....

L N MUGAMBI

JUDGE