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Introduction

1. ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people.
2. This report emphasizes the urgent need for Kenya to intensify its efforts to enhance access to maternal healthcare and fulfill its duty to protect every human being's inherent right to life.

(a) Right to Life and Right to Health

Background

3. In January 2020, during the third Universal Periodic Review cycle, Kenya accepted two recommendations addressing the need to improve maternal healthcare in the country.¹ Regrettably, maternal mortality rates in Kenya have shown little significant improvement, not only during the reporting period but also over the past 15 years.² While steps are being taken at the local and national levels, the state of maternal health remains dire.³
4. Mothers and healthcare workers face daily challenges stemming from the deteriorating condition of healthcare facilities, causing significant barriers to the provision of adequate pregnancy care.⁴ Obstetric hemorrhage and hypertensive disorders of pregnancy are reported as the leading causes of maternal near-miss events (54% and 26%, respectively) and maternal deaths (56% and 21%, respectively).⁵
5. Kenya has recently faced renewed pressure to liberalize its abortion laws, purportedly to improve maternal health outcomes. However, this connection is not supported by evidence and could exacerbate both maternal and child mortality and morbidity. The Kenyan Confidential Enquiry into Maternal Health revealed that only 1.7% of maternal deaths were due to induced abortions.⁶ Furthermore, an increasing number of studies highlight the severe short- and long-term health risks that abortion poses to mothers, with data showing it to be deadlier than childbirth.⁷
6. Research indicates that countries with life-affirming legislation *and* quality healthcare experience minimal mortality, whereas countries where abortion is largely accessible and with weaker healthcare infrastructure continue to report numerous deaths from abortion.⁸ These findings indicate that abortion-related deaths are closely linked to the

¹ Report of the Working Group on the Universal Periodic Review, Kenya, Addendum A/HRC/44/9/Add.1 (July 2020) <<https://documents.un.org/doc/undoc/gen/g20/163/87/pdf/g2016387.pdf>>.

² Guttmacher Institute 'Factsheet: Severe Maternal Outcomes and Obstetric Care in Kenya' (October 2020) <<https://www.guttmacher.org/fact-sheet/severe-maternal-outcomes-and-obstetric-care-kenya>>.

³ Think Global Health 'Kenya and Maternal Health: Delivering Results' (August 2022) <<https://www.thinkglobalhealth.org/article/kenya-and-maternal-health-delivering-results>>.

⁴ Ibid.

⁵ Supra note 2.

⁶ Ministry of Health Kenya 'Saving Mothers Lives: Confidential Enquiry into Maternal Deaths in Kenya' (2017).

⁷ See footnotes 17-21.

⁸ Poland and Malta, countries with the strictest regulation of abortion, have the lowest maternal mortality rates in the world, compared to India and South Africa, for example, where abortion is legal and widely practiced yet has poor healthcare infrastructure.

quality of overall healthcare infrastructure and emergency obstetric care, rather than the legalization of elective abortion.

Legal Framework

7. The Constitution of Kenya guarantees the right to life in Article 26, according to which every person has the right to life and states, in this regard, that life begins at conception.⁹ Consequently, it emphasizes that ‘abortion is not permitted unless, in the opinion of a trained professional, there is need for emergency treatment, or the life of the mother is in danger, or if permitted by any other written law’.¹⁰
8. The Constitution of Kenya also recognizes ‘the right to the highest attainable standard of health, which includes the right to health care services’.¹¹
9. In accordance with the Constitution's protection of life from conception, Kenyan law prohibits the procurement of abortion,¹² while protecting the life of the mother. According to the Penal Code, a ‘person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case’.¹³

Maternal Healthcare

10. Research shows that without routine care—including regular antenatal visits with health personnel for counseling, ultrasounds, and blood tests—women are more likely to die from complications during pregnancy and childbirth. When pregnant women seek care, it is critical that they receive treatment from a trained clinician, such as a nurse, midwife, or doctor, and have timely access to a delivery facility equipped with adequate supplies, drugs, and functioning equipment to properly care for patients.¹⁴
11. The provision of essential interventions for certain obstetric conditions in Kenya remains significantly low. For example, only 77% of women with severe preeclampsia or eclampsia received magnesium sulfate, 67% of women with antepartum hemorrhage requiring blood received it, and just 44% of women with a ruptured uterus underwent surgery within three hours of hospital admission.¹⁵
12. The challenges faced by mothers and healthcare workers in Kenya are compounded by the lack of basic resources, such as electricity, which prevents providers from maintaining electronic patient records and hinders their ability to deliver adequate care. These challenges result in the lack of limited access to healthcare, especially for

⁹ The Constitution of Kenya (August 2010, revised in 2022), art. 26
<<https://kenyalaw.org/ki/index.php?id=398>>.

¹⁰ Ibid.

¹¹ Ibid, art. 43(1)(a).

¹² Penal Code of Kenya (2010, revised in 2012), Sections 220 and 228 and Sections 158-160
<https://kenyalaw.org/ki/fileadmin/pdfdownloads/Acts/PenalCode_Cap63.pdf>.

¹³ Ibid, Section 240.

¹⁴ Supra note 3.

¹⁵ Supra note 2.

persons in non-urban areas, where health facilities are often unable to meet the needs of pregnant women.¹⁶

13. The promotion of abortion liberalization as a solution to the maternal health crisis in Kenya is seriously misguided. Studies have documented that abortion leads to an increased risk of hemorrhage¹⁷, infection,¹⁸ preterm birth, and low birth weight in future pregnancies¹⁹, among others. Record-linkage studies across multiple countries have also confirmed an increased mortality rate after abortion, with high-quality data also showing that the mortality rate after abortion is three times higher than after childbirth.^{20,21} Expanding access to abortion would therefore only lead to more women suffering from related complications. Moreover, abortion can never be safe because it takes the life of an unborn child and inflicts harm the mother through the loss of her child.
14. Kenya must focus on helping women get through pregnancy and childbirth safely, rather than facilitating the termination of their pregnancies. Given the maternal health crisis in Kenya, resources must focus on improving conditions for pregnant women, women undergoing childbirth, and postpartum women.

The High Court Judgement in Malindi

15. In a contested decision now under appeal, the High Court at Malindi erroneously claimed in March 2022 that abortion is a fundamental right recognized under international human rights law and directed the legislature of Kenya to fast track legislation that provide for access to abortion.²² The appellants pointed out that '[T]he Learned Judge erred in both law and fact by wrongly applying international law', as elaborated in the section below.²³

¹⁶ Supra note 3.

¹⁷ See for example: Niinimäki M, Pouta A, Bloigu A, Gissler M, Hemminki E, Suhonen S, Heikinheimo O. Immediate complications after medical compared with surgical termination of pregnancy. *Obstet Gynecol.* 2009 Oct;114(4):795-804.

¹⁸ See for example: Royal College of Obstetricians and Gynaecologists 'The Care of Women Requesting Induced Abortion: Evidence-based Clinical Guideline Number 7' (November 2011) <[3270 RCOG Abortion guideline.qxd](#)>.

¹⁹ PS Shah, J Zao 'Induced termination of pregnancy and low birthweight and preterm birth: a systematic review and meta-analysis' *An International Journal of Obstetrics and Gynaecology*, Volume 116, Issue 11 p. 1425-1442 (September 2009) <<https://obgyn.onlinelibrary.wiley.com/doi/10.1111/j.1471-0528.2009.02278.x>>.

²⁰ E Karalis 'Decreasing mortality during pregnancy and for a year after while mortality after termination of pregnancy remains high: population-based register study of pregnancy-associated deaths in Finland 2001-2012' *An International Journal of Obstetrics and Gynaecology*, Volume 124, Issue 7 p. 1115-1121 (December 2016) <<https://obgyn.onlinelibrary.wiley.com/doi/abs/10.1111/1471-0528.14484>>.

²¹ Reardon, DC and Thorp, JM (2017). 'Pregnancy associated death in record linkage studies relative to delivery, termination of pregnancy, and natural losses: a systematic review with a narrative synthesis and meta-analysis' *SAGE Open Medicine*, 5: 2050312117740490.

²² *PAK and Salim Mohammed v. Attorney General et al.*, Kenyan High Court at Malindi (March 2022) <<https://reproductiverights.org/wp-content/uploads/2022/03/CONTITUTIONAL-PETITION-E009-OF-2020-JUDGMENT-MALINDI-FINAL.pdf>>.

²³ Appeal from the Judgment and Decree of the High Court of Kenya at Malindi (Honourable Mr. Justice R. Nyakundi dated 24th March 2022 in High Court Constitutional Petition No. E009 of 2020)(5 September 2022).

16. No draft law legalizing elective abortion has successfully been introduced in the parliament, and the Kenyan Health Ministry's reproductive health policy 2022-2032 ultimately made no provisions in this regard. However, pressure from activist organizations as well as foreign governments, continues to mount.

Right to Life under International Law

17. The claim of a so-called 'human right to abortion' conflicts with key provisions of international human rights treaties, especially the right to life. Building on the Universal Declaration of Human Rights' recognition that '[E]veryone has the right to life', Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) states that 'Every human being has the inherent right to life'.²⁴

18. The ICCPR's prohibition of the death penalty for pregnant women implicitly recognizes the child as worthy of legal protection.²⁵ The clause contained in Article 6(5) must be understood as recognizing the unborn child's distinct identity from the mother and thus his or her right to life.

19. The travaux préparatoires of the ICCPR explicitly states that 'the principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child'.²⁶ Similarly, other early UN texts note that the intention of the paragraph 'was inspired by humanitarian considerations and by consideration for the interests of the unborn child'.²⁷

20. The protection of unborn life is also found through an ordinary reading of the preamble of the CRC. The preamble states that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*' [emphasis added].²⁸ According to Article 31(1) of the Vienna Convention on the Law of Treaties, '[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.²⁹ Article 31(2) goes on to emphasize that '[T]he context for the purpose of the interpretation of a treaty shall comprise...[the text's] preamble'.³⁰

21. Article 1 of the CRC defines a child as 'every human being below the age of eighteen years'. This provides an upper limit as to who is a child but does not provide a lower limit on when the status of 'child' attaches.³¹ Moreover, Article 6 of the CRC holds that 'States Parties recognize that every child has the inherent right to life. States Parties

²⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICCPR), art. 6.

²⁵ Ibid.

²⁶ Report of the Third Committee to the 12th Session of the General Assembly, A/3764 § 18. (5 December 1957).

²⁷ Report of the Secretary-General to the 10th Session of the General Assembly, A/2929, Chapter VI, §10 (1 July 1955).

²⁸ Convention on the Rights of the Child (CRC), opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3, Preamble.

²⁹ Vienna Convention on the Law of Treaties (1969), art. 31(1).

³⁰ Ibid, art. 31(2).

³¹ Ibid at art. 1.

shall ensure to the maximum extent possible the survival and development of the child'.³² Viewed in the context of the preamble, both Articles 1 and 6 of the CRC indicate recognition and protection of unborn life.

22. The 1994 Programme of Action of the International Conference on Population and Development, which outlines inter alia the commitments of UN Member States in the area of reproductive health, emphasizes the need to 'reduce the recourse to abortion' and that the 'prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion'. Moreover, it highlights that 'any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process', in essence, that abortion regulation is a matter of national sovereignty and that judicial activism, should not substitute for the democratic process carried out by elected legislators.³³

(b) Recommendations

23. In light of the aforementioned, ADF International suggests the following recommendation be made to Kenya:
- a. Resist pressures to further liberalize abortion, and instead implement existing laws aimed at protecting the equal right to life of every human being;
 - b. Take all necessary measures to reduce recourse to abortion, with a view to eliminating the need for abortion, in accordance with its commitments under the Programme of Action of the International Conference on Population and Development and the Beijing Declaration and Platform for Action;
 - c. Implement the commitment made in the Geneva Consensus Declaration to improve and secure access to health and development gains for women;
 - d. Continue to improve health care infrastructure, access to emergency obstetric care, midwife training, and resources devoted to maternal health, with a focus on safely getting mothers and babies, especially from poor and rural backgrounds, through pregnancy and childbirth;
 - e. Accelerate progress towards preventing adolescent girls' pregnancy, including through strengthened partnerships with parents, educators, and religious and community leaders;

³² Ibid at art. 6.

³³ 1994 Programme of Action of the International Conference on Population and Development, para 8.25.