The Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others (2016), Petition No. 266 of 2015
(High Court of Kenya   Constitutional and Human Rights Division)   [Decision online.]

Court Holding

In June 2019, the High Court of Kenya, Constitutional and Human Rights Division, ruled that women and girls have a right to access lawful abortion in cases of pregnancy resulting from rape and defilement as provided for by the Kenya Constitution 2010.
The Court also ruled that the Ministry of Health's 2014 withdrawal of the 'Standards and Guidelines' and 'Training Curriculum for healthcare professionals on abortion', was arbitrary and unlawful. It also awarded compensation to the personal representative of the estate of JMM, for material and emotional harm suffered as a result of the actions of the respondents.

Summary of Facts

The ruling followed a petition at a High Court in Kenya, about a girl named JMM (not her real name), who was defiled and impregnated by an older man at age 14, suffered an unsafe incomplete abortion, and died of chronic kidney damage four years later.

At the center of the petition was the withdrawal of 'the "Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya" (Guidelines) and the "National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies" (Curriculum) These two documents had been developed through the involvement of health stakeholders in 2012.

The petitioners challenged the constitutionality of the actions of the Director of Medical Services (DMS), who, on 3 December 2013, had withdrawn the Guidelines, and on 24 February 2014 had withdrawn the Curriculum through a Memo directed to "All Health Workers – Public/ Private/ FBO [Faith Based Organizations]" and entitled "Training on Safe Abortions and Use of Medabon (Mifepristone + Misoprostol) for Abortions." In the Memo, the DMS had directed all addressees not to participate in any training on safe abortion and/or use of Medabon. It stated that anybody attending the trainings or using the drug Medabon would be subjected to legal and professional proceedings. The DMS went on to claim in the said Memo that "the 2010 Constitution of Kenya clearly provides that abortion on demand is illegal and as such there was no need to train health care workers on safe abortion or importation of medicines for medical abortion." (para 35)

The petitioners, who included JMM's mother, presented JMM as one of many young women who have died in the process of getting rid of unwanted pregnancies, a situation that had been worsened by the withdrawal of the 2012 Standards and Guidelines, and the Training Curriculum on abortion.

JMM had been forced into sexual intercourse by an older man and became aware of the pregnancy after two months. She met a supposed "doctor" in the back room of a pharmacy. Initially, the doctor injected her in the thigh and promised that the foetus would come out by next day. When this failed to occur, she again visited the medical quack, who inserted a metal tool into her vagina and again promised the foetus would emerge. It once again failed and her condition deteriorated to vomiting and bleeding heavily. JMM had not discussed her condition with her parents for fear of their reactions, but news of her illness was relayed to JMM's mother through her elder sister's mother-in-law. At her mother's request, JMM was taken to the nearest dispensary (in Ibeno), which could not complete the abortion nor provide

post-abortion care due to a lack of equipment and skilled staff at the facility. She was transferred by ambulance to Kisii Teaching and Referral Hospital, a level 5 hospital, approximately 15.6 km away. There, for the first time, doctors removed the foetus and revealed to the family that JMM had procured an unsafe abortion. JMM's kidneys were failing, so they referred her to Tenwek Mission Hospital, 50 kilometres away. JMM's family could not afford the ambulance fee, so they brought her there by taxi. After seven days, the Tenwek hospital transferred her by ambulance to Kenyatta National Hospital, which had dialysis facilities

At the Kenyatta National Hospital, JMM was diagnosed with having had a septic abortion and hemorraghic shock, and having developed chronic kidney disease. She received surgery and treatments including dialysis for two months, but the hospital bill was far beyond her family's ability to pay, so JMM was detained for failing to pay a treatment fee. Due to the poor conditions in the detention room, JMM got sick and had to be treated again for four days; she was only discharged two weeks later after the fee was waived. She was advised to undergo routine dialysis monthly at Kenyatta National Hospital's renal unit at the cost of Kshs 50,000, which her family could not afford either.

By the time that the petition was heard, JMM had died of kidney failure at age 18, so she was represented in the case by her mother and guardian, known as "PKM" .

Issues

1) Whether Article 26(4) of the Constitution of Kenya permits abortion in certain circumstances;
2) Who is a 'trained health professional' for the purposes of Article 26(4)?
3) What do the constitutional rights to health, and reproductive health entail?
4) Whether pregnancy resulting from sexual violence falls under the permissible circumstances for abortion under Article 26(4);
5) Whether the DMS's impugned letter and memo meet the test for limitation of rights set out in Article 24;
6) Whether the decision of the DMS violated the petitioners' rights and the rights of other women of reproductive age guaranteed in Articles 26, 27, 29, 33, 35, 43 and 46 of the Kenyan Constitution.
   Whether the decision of the DMS violated the rights of health workers guaranteed in Articles 32, 33, 34, 35 and 37;
7) Whether the decision to withdraw the 2012 Standards and Guidelines and Training Curriculum and to issue the Memo violated Articles 10 and 47 of the Constitution and was ultra vires – beyond the powers of the DMS;
8) Whether the circumstances of JMM qualified her for post-abortion care under Article 43 of the Constitution;
9) Whether PKM, as the personal representative of the estate of JMM, is entitled to comprehensive reparation including indemnification for material and emotional harm suffered as a result of the actions of the respondents.

Court's Analysis

The Court acknowledged the fact that arguments from both parties had invited it to consider an interpretation of the meaning and implication of article 26(4) of the Constitution, hence its decision to interpret article 26, which provides that:

1) Every person has the right to life.
2) The life of a person begins at conception.
3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.
4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

The first question in the petition concerned whether article 26(4) of the Constitution permits abortion on certain grounds. In order to effectively provide an interpretation of the article, the Court found it necessary to define a number of terms:

Foremost was the Court's clarification of the meaning of '***emergency treatment***'; the Court relied on Section 2 of the Health Act 2017, which defines 'emergency treatment' as 'the necessary immediate health care that must be administered to prevent death or worsening of a medical situation.'

Secondly, the Court was called upon to define the meaning of the term '***health***' in article 26(4). The petitioners argued that this term should be read to include both physical and mental health, whereas, the respondents claimed that the interpretation should cover only physical health. The Court once again quoted the Health Act 2017 which replicates the World Health Organization definition:

> "health" refers to a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity;

The Court noted that a similar definition of health was outlined in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("The Maputo Protocol").[1] With these definitions in mind, the Court clarified that the Constitution permits abortion in situations where a pregnancy, in the opinion of a trained health professional, endangers the life or **mental, psychological** or **physical** health of the mother. An expansive definition of health is all-inclusive and critical, enabling young girls and women to access abortion services not only when they are physically unhealthy but also mentally or psychologically affected.

A third exception to the prohibition of abortion under the Constitution is: where abortion is permitted by ***'any other written law'***. On this particular issue, the Court ruled that the 2009 Guidelines that were issued by the Minister in charge of health, in accordance with the Sexual Offences Act of 2006, is indeed one of the existing laws that permits abortion after rape. The 2009 Guidelines provide that 'victims of sexual violence who became pregnant as a result should be informed that termination of pregnancy may be allowed after rape, and should they opt for termination, should be treated with compassion, and referred appropriately'.

Furthermore, Kenya has ratified the Maputo Protocol (2005) which permits abortion. According to Kenya Constitution 2010,[2] all ratified treaties are part of her domestic laws; however, Kenya had made a reservation to Article 14(2)(c), which provides 'the right to safe abortion in cases of sexual assault, rape, incest and when the pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.' After canvassing

[1] JMM decision, Para 336, citing Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa OAU Doc CAB/LEG/66.6 (2003) entered into force 25 November 2005.
[2] Constitution of Kenya 2010, Art 2(6)

the issue of the reservation, the Court's verdict was that the reservation of 2005 was now in conflict with the Constitution of 2010, which provides for abortion on some of those grounds; therefore, the reservation cannot stand. The judges further noted that the words of the Article mirror in some respects the words used in the Constitution.

Furthermore, according the African Commission of Human and Peoples' Rights, General Comment No. 2 on the Maputo Protocol:

> women have rights to terminate pregnancies contracted following sexual assault, rape and incest. Forcing a woman to keep a pregnancy resulting from these cases constitutes additional trauma which affects her physical and mental health.... Apart from the potential physical injuries in the short and long term, the unavailability or refusal of access to safe abortion services is often the cause of mental suffering, which can be exacerbated by the disability or precarious socioeconomic status of the woman.

Similarly, Kenya is also a signatory to the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Committee that oversees compliance with the Convention requires States to, among other things, enact and enforce laws and policies that protect women and girls from violence and abuse and provide for appropriate physical and mental health services.

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The Court also quoted the case of *C. K. (suing through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 Others,* which finds

> . . . that the petitioners in this petition have suffered horrible, unspeakable and immeasurable harm due to acts of defilement committed against them. They each suffered physical harm in the form of internal and external wounds from the perpetrators assaults and some suffered consequences of unwanted pregnancies vested [sic] on children not physically mature enough to bear children. The petitioners have suffered psychological harm from assaults made worse by the threat, fear and reality of contracting HIV/AIDS and other sexually transmitted diseases or infections.

The second issue related to clarification of who is deemed a ***'trained health professional'*** whose '***opinion***' would authorize '***emergency treatment***' for the purposes of Article 26(4). The petitioners and the respondents could not agree on who should make the call for an abortion. According to the petitioners, a *'trained health professional'* includes nurses, midwives and clinical officers as defined in the Health Act, 2017. The respondents argued that the term means, or should be taken to mean, medical doctors only. It was therefore, necessary for the Court to give an interpretation of who is authorised by law to offer abortion services. The Court's clarification referred to section 6(2) of the Health Act,[3] which says that the term ***a trained health professional***

> shall refer to a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid license from the recognized regulatory authorities to carry out that procedure.

In order to give an understanding of how the term "trained health professional" was adopted, the Judges revisited the process of constitution-making, highlighting the spirit

[3] Health Act, Act No. 21 of 2017, section 6(2). Online here.

behind including cadres other than doctors. As the Committee of Experts (CoE) on Constitutional Review that drafted the 2010 Constitution had indicated in their Final Report:

> The requirement that abortion could be performed by medical practitioners alone also raised concerns. It would mean that women in poor rural communities without such services would be unable to procure abortions with potentially serious or fatal repercussions for some poor women. There was also need to ensure that the language used by the Parliamentary Select Committee did not outlaw methods of fertility control, such as emergency contraception. The CoE accordingly amended the draft to include language that would enable appropriate medical intervention to be available when necessary. (cited in para 358)

The third issue related to what the rights to health and reproductive health entail. The definition of health has already been outlined above. In terms of the right to reproductive health in particular, Article 43(1) of the Constitution provides that:

> Every person has the right—(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

The Court acknowledged the inter-linkage and inter-dependence of rights, adding that the right to health is an underlying determinant of the enjoyment of other rights. The Court quoted the communication *Purohit & Moore v The Gambia,*[4] in which the African Commission states that:

> Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.

The Court cited another High Court decision of the Constitutional and Human Rights Division in the case of *Mathew Okwanda v. Minister of Health and Medical Services.*[5] That decision had cited General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR), wherein the Committee recognises that the right to health is closely related to economic rights and is dependent on the realization of the other rights, including the rights to food, housing, water, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information and other freedoms.

The Court also quoted the case of *P.A.O & 2 Others v Attorney General*[6] that adopted the definition of ***health*** as provided in the same General Comment No. 14 on the Right to Health in which the CESCR notes that:

> Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.

In addition, Article 43(1) of the Constitution of Kenya includes the right to 'reproductive health care' for girls and women. Similarly, the Court noted that CESCR's General Comment No. 14 provides at paragraph 14:

> "The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a)) may be understood as requiring

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[4] *Purohit & Moore v The Gambia (Communication 241//*2001) [2003] ACHPR 49; (29 May 2003), para 80

[5] Mathew Okwanda v. Minister of Health and Medical Services & 3 others [2013] eKLR.

[6] P.A.O & 2 Others v Attorney General [2012] eKLR

> measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care[,] emergency obstetric services and access to information, as well as to resources necessary to act on that information.

Finally, the Court referred to the International Conference on Population and Development Program of Action 1994(ICPD)[7], which defined the right to health as:

> a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.

Regarding the fourth issue, on whether pregnancy resulting from sexual violence falls under the permissible circumstances for abortion under Article 26(4); the Court ruled that abortion is permissible 'if a pregnancy results from rape or defilement, and in the opinion of a trained health professional, endangers the physical, mental and social well-being of a mother . . . (that is the health of the woman or girl).' Most significant was the Judges' acknowledgement that 'there can be no dispute that sexual violence exacts a major and unacceptable toll on the mental health of women and girls. Whether the violence occurs in the home or in situations of conflict, women suffer unspeakable torment as a result of such violence.'

The fifth issue related to whether the DMS's impugned letter and Memo meet the test for limitation of rights set out in Article 24 of the Constitution. In arriving at its ruling, the Court examined Article 24(1), which permits limitation of rights only to the extent that it is reasonable and justifiable in a democratic society. Similarly, the Court relied on international human rights bodies' guidance on restricting rights, the 'three-part test'.
The first test is that restrictions must be **prescribed by law**; this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[8] Second, restrictions must pursue a **legitimate aim**, exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others, protection of national security, public order, public health or morals. Thirdly, restrictions must be **necessary and proportionate** to secure the legitimate aim: Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression/information and the protected interest.

The Court's verdict on this issue was that 'the DMS's letter and Memo did not meet the test for limitation of rights set out in Article 24, and their withdrawal amounted to a limitation of the said right.' Therefore, the decision to withdraw the 2012 Standards and Guidelines and Training Curriculum was indeed a violation of Articles 10 and 47 of the Constitution and the Fair Administrative Action Act. (para 401)

The sixth issue involved ascertaining whether the decision of the DMS violated the petitioners' rights and the rights of other women of reproductive age guaranteed in Articles 26, 27, 29, 33, 35, 43 and 46 of the Constitution. It was the Court's finding that by withdrawing the 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya, 'the DMS in effect disabled the efficacy of Article 26(4)' of the

[7] International Conference on Population and Development Program of Action 1994, Para 7.2
[8] Human Rights Committee, *Leonardus J.M. de Groot v. The Netherlands, No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995).*

Constitution of Kenya. The Court went on to say that the action constituted a limitation of the rights under Article 26(4), and derogated from the core or essential content of the right'. It was also the view of the Court that the action was unjustifiable and violated the rights of women and adolescent girls of reproductive age.(para 402)

Similarly, on the seventh issue, regarding whether the decision to withdraw the 2012 Standards and Guidelines and Training Curriculum for Medabon and to issue the Memo violated Articles 10 and 47 of the Constitution and was *ultra vires* --beyond the powers-- of the DMS, the Court found that the DMS had no such power, since those powers are bestowed upon the Kenya Medical Practitioners and Dentists Board (KMPDB).(paras 392, 401)

The Court also found that 'by withdrawing the 2012 Standards and Guidelines and the Training Curriculum, the DMS in effect disabled the efficacy of Article 26(4) of the Constitution and rendered it a dead letter.'(para 402). The action of the DMS was unjustifiable, prejudicial to the petitioners, and violated the rights of the petitioners and other women and adolescent girls of reproductive age, whose interest they represent to the highest attainable standard of health guaranteed under Article 43(1)(a).

The Court faulted the DMS for creating an environment in which survivors of sexual violence cannot access safe quality services despite the clear constitutional provisions. According to the Court, this action amounted to a violation of women's and adolescent girls' right to non-discrimination as well as their right to information, consumer rights, and their right to benefit from scientific progress. (para 402)

On the eighth issue, whether the circumstances of JMM qualified her for post-abortion care under Article 43, the Court ruled that under a holistic reading of Article 43 of the Constitution together with the Health Act 2017, JMM was entitled to emergency treatment including post-abortion care. It was the Judges' view that, 'all persons who are in need of treatment are entitled to health care and it matters not the circumstances under which they find themselves in those situations.'(para 403)

Finally, the Court considered whether PKM, as the personal representative of the estate of JMM, was entitled to comprehensive reparation. The Court declared that PKM, as the personal representative of the estate of JMM, was entitled to comprehensive reparation including indemnification for material and emotional harm suffered because of the actions and omissions of the respondents. However, it was the opinion of the Court that 'no monetary sum can really erase the scarring of the soul and the suffering and deprivation of dignity and death that some of these violations of rights entail. When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened.'(para 409)

Conclusion

The Court ruled that Article 26(4) of the Constitution of Kenya permits abortion in certain circumstances,that is if a trained health professional deems that there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. The Court further ruled that rape and defilement are among the legal grounds for termination of pregnancy in Kenya, permissible under Article 26(4).
The Court clarified (in para. 399) that "any condition that in the opinion of a trained health professional, necessitates emergency treatment, or endangers the life or health of the mother,

warrants an abortion." According to the Court, "It is not the cause of the danger that determines whether an abortion is necessary but the effect of the danger." Therefore, if the rape or defilement endangers her "health," including her "physical, mental and social well-being . . . abortion is permissible."

Significance:
This decision is significant in a number of ways:
(1) It effectively clarifies the situations in which a woman could access abortion in the hands of trained health professionals. It affirmed that the Kenya Constitution permits abortion in situations where a pregnancy, 'in the opinion of a trained health professional, endangers the life or mental or psychological or physical health of the mother'. (para 397) By recognizing that the need for the health professional to consult with the pregnant woman to determine whether an abortion is necessary, the Court affirmed the sexual and reproductive autonomy of the woman. This is consistent with the observations of the CEDAW Committee[9] and the African Commission on Human and Peoples' Rights,[10] that restrictive abortion laws undermine the right to reproductive autonomy of women.

(2) The ruling is important because it clarified that existing restrictive penal laws on abortion are impliedly repealed by the Constitution of 2010 and other laws like the Sexual Offences Act of 2006. The Court's ruling that whereas abortion is generally prohibited, it is permissible in the circumstances prescribed under article 26(4) of the Constitution, and further as provided under section 35(3) of the Sexual Offences Act. Furthermore, the Court went on to rule that, 'the 2009 Guidelines issued by the Minister in charge of Health in accordance with the Sexual Offences Act had provided that victims of sexual violence who become pregnant as a result of rape and defilement should access abortion services.(para 371)

(3) The High Court decision is of utmost importance to survivors of sexual violence, who by the decision can access abortion. The Court's acknowledgement that sexual violence has a profound effect on the health, both physical and mental, of the survivors of such violence is important. It was critical for the Court to acknowledge that 'sexual violence exacts a major and unacceptable toll on the mental health of women and girls, and that, whether the violence occurs in the home or in situations of conflict, women suffer unspeakable torment as a result of such violence.' Although, the Sexual Offences Act 2006 has been in existence, the ruling made clarifications and definition of key terms such as "health" "trained health professional and 'emergency treatment'.

Furthermore, the decision affirmed the importance of article 14(2)(c) of the Maputo Protocol that Kenya ratified in 2010. However, while ratifying the Protocol, Kenya entered a reservation on article 14(2)(c), which contains provisions calling on African states to ensure women can access abortion services in cases of incest, sexual assault and rape; and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.[11] The existence of the reservation was used by respondent in this case and has also been used by State and health officials to limit access to abortion services. Therefore, the fact that the Court condemned the reservation of the Kenyan government is in itself a positive development to remind states of their obligations under international law to promote and protect women's sexual health. With this pronouncement, the government of

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[9] See for instance CEDAW, General Recommendation 24 on Women and Health.
[10] See General Comment 2 by the African Commission on Human and Peoples' Rights
[11] Maputo Protocol (n1 above)
[11] Maputo Protocol, art 14(2)(c) 'protect the reproductive rights

Kenya has a duty and responsibility to lift the existing reservation to ensure compliance with its own Constitution.

While making their decision, the Judges underscored the importance of considering the social context under which unsafe abortion occurs, emphasizing that, abortion is not merely a foreign agenda as painted by its opponents. It is worth noting that the Court took into consideration reports and research conducted on the incidence of abortion in Kenya before arriving at its decision.[12] A study that was conducted by the Ministry of Health and other stakeholders in 2012 revealed that the government incurred a high cost in treating complications from unsafe abortions.[13] The study found that unsafe abortion remained one of the leading causes of maternal mortality and morbidity in the country.[14]

According to a second study considered by the Court, the restrictive abortion laws not only overburden women, but are also attributed to the high maternal death toll, making it difficult for quality care provision at healthcare facilities in the country. One particularly important highlight from the report is the demonstration of the consequences of the restrictive laws on healthcare providers, which inhibit their ability 'to effectively and ethically comply with the dictates of their profession: to save the lives and protect the health of their patients'.[15]

Last but not least, the judgment is of particular importance to women in poor rural communities and informal settlements, simply because it gave a clear interpretation of who is a trained medical practitioner authorised by law to offer abortion services. The expanded definition has the effect of ensuring that abortion is available to women in informal settlements and rural areas where doctors might not be available. It addresses the issue of intersectional inequality and discrimination where poor rural women have failed to access same services as their counterparts from wealthier urban backgrounds. Inclusion of midwives is an important criterion for availing the services to women at the village level, while nurses and clinical officers can be accessible at local dispensaries.

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https://www.law.utoronto.ca/sites/default/files/documents/reprohealth/kenya_2019_jmm_abortion_training_rape.pdf

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[12] Kenyan Ministry of Health and African Population and Health Research Center, 'Incidence and Complications of Unsafe Abortion in Kenya' (2013); see also Center for Reproductive Rights report titled 'In Harm's Way: The Impact of Kenya's Restrictive Abortion Law (2010)'
[13] https://aphrc.org (accessed on 10 June 2020)
[14] African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute. (2013). Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study, Nairobi, Kenya
[15] Centre for Reproductive Rights, '*In harms's way: The impact of Kenya's restrictive abortion law*' (2010).