

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: GATEMBU, JA. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E030 OF 2022

BETWEEN

**THE HON. ATTORNEY GENERAL.....1ST APPELLANT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND APPELLANT
THE INSPECTOR-GENERAL OF POLICE.....3RD APPELLANT
THE SENIOR PRINCIPAL MAGISTRATE KILIFI.....4TH APPELLANT**

AND

**PAK.....1ST RESPONDENT
SALIM MOHAMED.....2ND RESPONDENT**

AND

**KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV & AIDS (KELIN).....1ST APPLICANT/INTENDED AMICUS CURIAE
WOMEN'S LINK WORLDWIDE.....2ND APPLICANT/INTENDED AMICUS CURIAE
FEDERATION OF WOMEN
LAWYERS (FIDA) – KENYA3RD APPLICANT/INTENDED AMICUS CURIAE**

*(Being an appeal from the Judgment and Decree of the High Court of
Kenya at Malindi (Nyakundi, J.) dated 25th March, 2022*

in

HC. Petition No. E009 of 2020)

RULING

1. In their application dated 31st May 2024, the applicants, Kenya Legal and Ethical Issues Network on HIV and AIDS ((KELIN), Women's Link Worldwide (WLW) and Federation of Women Lawyers (FIDA) Kenya, seek orders for leave: to be joined and participate in this appeal as joint Amici Curiae; to file submissions by way of a joint amici brief; and to submit any information and/or evidence it may deem fit to allow the

just disposition of the matter. Similar orders are sought by Law Society of Kenya (LSK) in its application dated 30th June 2024.

2. Both applications were canvassed before me on 25th July 2024 when the parties were represented by learned counsel. In the application dated 31st May 2024 **Miss. Nyokabi Njogu** appeared for the applicants KELIN, WLW and FIDA while **Ms. Nerima Were**, appeared with **Miss. Kwega** for LSK the applicant in the application dated 30th June 2024. **Mr. Martin Onyango, Miss. Rosemary Kirui, Mr. Timothy Thondu,** and **Mr. Derrick Kimani** appeared for PAK, the 1st respondent in the main appeal; **Mr. Mwangi Kamanu** appeared for the Director of Public Prosecutions, 2nd appellant and held brief for **Miss. Lutta** for the 1st, 3rd and 4th appellants, who are the respondents in the application.
3. The applicants assert, and counsel Ms. Njogu and Miss. Were for the applicants submitted, that the applicants have extensive experience and expertise in health-related rights and have participated in and filed amicus briefs in local and international courts; that this appeal raises issues on the accessibility and availability of reproductive health and rights services to women and girls in Kenya and based on their immense experience would assist the Court in determining the issues in this appeal and in arriving at a just and fair determination. Mr. Onyango supported the applications pointing out that the appeal does indeed raise matters of great public interest.

4. In opposition, counsel submitted that the applications are an afterthought and do not meet the criteria set by the Supreme Court in the case of **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others [2015] eKLR**; that the applicants are evidently biased and partial to the respondents; and that the submissions they intend to advance will be of no assistance to the Court.
5. I have considered both applications; the affidavits sworn by Allan Maleche, Agnes Rogo, Anne Ileri and Florence Muturi in support of the applications; the grounds of opposition filed by the Attorney General on behalf of the 1st, 3rd and 4th respondents; and the rival written submissions which were orally highlighted before me during the hearing.
6. The principles guiding the Court in applications of this nature were stated by the Supreme Court of Kenya in the case of **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others** (above). The guidelines include the principles that the relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law; An amicus brief should be limited to legal arguments; An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law; The Court will regulate the extent of amicus participation in proceedings; The applicant ought to

show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available; and The applicant ought to show expertise in the field relevant to the matter in dispute.

7. Other guidelines provided by the Supreme Court are that whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor; A party seeking to appear in any proceedings as amicus curiae should prepare an amicus brief which should accompany the motion seeking leave to be enjoined in the proceedings as amicus and the Court reserves the right to summarily examine amicus motions, accompanied by amicus briefs, on paper without any oral hearing.
8. With those principles in mind, this appeal (in respect of which the applicants seek to be permitted as Amici Curiae) arises from the judgment delivered on 24th March 2022 by which the High Court at Malindi (**Nyakundi, J.**) held that in Kenya, the right to abortion is a fundamental right. Based on the appellants' memorandum of appeal, that judgment is challenged on, among other grounds, that the trial Judge erred in holding that the right to abortion is a fundamental right, but it cannot be said to be absolute in light of Article 26(4) of the Constitution. The trial Judge is also faulted for failing to follow precedent, namely, the decision in **Federation of Women Lawyers (FIDA-Kenya) & 3 Others vs. Attorney General & 2 Others; East Africa Center for Law & Justice & 6 Others (interested party) & Women's Link**

Worldwide & 2 Others (Amicus Curiae) [2019] eKLR where it was held that in Kenya, abortion is illegal.

9. As stated by the Supreme Court in **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others** (above):

“The Constitution of Kenya, 2010, by express terms, requires Courts to “develop the law to the extent that it does not give effect to a right or fundamental freedom” (Art. 20(3)(a)). This is the very foundation for well -informed inputs before the Court, which inherently, justifies the admission of amici curiae. We have a duty to ensure that our decisions enhance the right of access to justice, as well as open up positive lines of development in jurisprudence, to serve the judicial system within the terms of the Constitution.”

10. In my view, through the affidavits and the materials exhibited thereto, the applicants have demonstrated that they have extensive experience and expertise in health-related rights issues and should be able to assist the Court in reaching a fair and just outcome on a matter that is evidently of public interest. It has not been demonstrated that either party to the appeal will suffer any prejudice on account of their admission as amici or that the applicants lack neutrality.
11. In the result, I allow the applications dated 31st May 2024 and 30th June 2024 to the extent, and extent only, that the applicants are at liberty to file submissions by way of amici brief confined only to the issues in the appeal. The bench that will hear the appeal shall determine whether, and the extent to which, the amici may address the Court. For the avoidance of doubt the prayer for the amici curiae “to submit any information and/or evidence it may deem fit” is declined.

12. There will be no order as to costs.

Dated and delivered at Nairobi this 24th day of January 2025.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

DEPUTY REGISTRAR

