

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO E045 OF 2022

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21,22,23, 27,28,29,43(1)(a), 53(1)(c),
53(1)(d), 53 (1) (f) 53(2),54(1)(a), 59, 159 (2) (e), 165(3) (b), 248, 258(1), 258(2), AND
259(1)(b) OF THE CONSTITUTION OF KENYA, 2010**

-AND-

IN THE MATTER OF THE PERSONS WITH DISABILITIES ACT, KENYA, 2003

-AND-

IN THE MATTER OF THE HEALTH ACT, 2017

-AND-

**IN THE MATTER OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF
PERSONS WITH DISABILITIES, 2006**

-AND-

**IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S
RIGHTS (BANJUL CHARTER), 1986**

-AND-

**IN THE MATTER OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS (1976)**

-AND-

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

-AND-

**IN THE MATTER OF THE CONSTITUTIONALITY OF SECTION 226 THE PENAL
CODE, CHAPTER 63 OF THE LAWS OF KENYA**

-AND-

ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

**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**

AFFIDAVIT IN SUPPORT OF THE PETITION

I, **MATHEW MUTISO**, an adult Kenyan citizen of sound mind and disposition residing and working for gain in Nairobi within the Republic of Kenya and of P.O. Box 50322-00100 Nairobi, do swear and state as follows:

1. **THAT** I am the Executive Director to the 4th Interested Party herein hence competent and clothed with the requisite authority to swear this affidavit.
2. **THAT** I am well versed with the facts relating to the Petition and have read and understood the contents of the Petition.
3. **THAT** the 4th Interested Party is the Coalition Action for Preventive Mental Health Kenya, a mental health ecosystem accelerator Organization made up of a wide variety of community groups and non-governmental organizations who are keen to see more investment and opportunities for community-based initiatives.
4. **THAT** the 4th Interested Party was established in September 2020 and registered in June 2021 as a company limited by guarantee for the purpose of achieving key objectives in strategic litigation, advocacy, capacity building, research, sub granting collaboration and partnership (*Annexed to this Affidavit and marked 'MM-1' is a copy of the 4th Interested Party's Certificate of Registration.*)
5. **THAT** I am aware that attempted suicide as laid out by Section 226 of the Penal Code is a misdemeanour punishable by Two (2) Year's imprisonment or a fine or both, pursuant to the provisions of Section 36 of the Penal Code.
6. **THAT** globally, according to data by the World Health Organization, about Seven Hundred and Three Thousand (703,000) people take their own life every year. (*Annexed to this Affidavit and Marked "MM-2" is the Suicide Fact Sheet by the World Health Organization dated 17th June 2021.*)
7. **THAT** I am well aware that these numbers are not reflective of the actual situation owing to the stigma, trauma and fear inspired by the criminalization of attempted suicide therefore not every suicide related death is reported as such and only a fraction of deaths by suicide are reported.

8. **THAT** I fully support the contents of the Petition as filed and in particular the claim that the existence of Section 226 of the Penal Code as read with Section 36, is in direct contravention of the basic human rights and fundamental freedoms enshrined in the Constitution of Kenya to wit, the right to the highest attainable standard of health and access to healthcare services under Article 43; the right to equality before the law and non-discrimination under Article 27; the inherent right to human dignity and to have that dignity respected and protected; the rights of persons with disabilities to be treated with dignity and to access facilities under Article 54; and the rights of children under Article 53.
9. **THAT** the laws contributing to criminalization of suicide are predominantly colonial and inherited from the British. This same laws also sought to deter persons from committing suicide to avoid punishment after being found guilty of another offence. That in 1961 that the British implemented the Suicide Act. The Act decriminalized suicide in England and Wales, so that anyone who failed in their attempt to commit suicide would no longer face prosecution. While we still uphold these laws in Kenya. (*Annexed to this Affidavit and Marked "MM-3" is the Memorandum by South Africa Litigation Centre dated 15th December 2021 highlighting the history of the offence of attempted suicide*).
10. **THAT** persons who have attempted suicide before require follow up care and when necessary, require psychological, family and community support as opposed to criminalisation and punishment.
11. **THAT** the continued criminalization of attempted suicide exacerbates the stigma and trauma thereby denying these vulnerable persons the healthcare, psychological, family and community support they so desperately need.
12. **THAT** on November 2020, the 4th interested party petitioned the government through the Treasury Department to allocate funds towards community based mental health at the National and County Levels, creation of a mental health fund

accessible by Community Based Organizations to support grassroots interventions and training of community health volunteers on basic psychosocial first Aid: *(Annexed to this Affidavit and Marked "MM-4" is a copy of the Petition to the Treasury dated 25th November 2020).*

13. **THAT** the role of Community-based mental health services is emphasized in the World Health Organization's Mental Health Action Plan, the World Bank's Disease Control Priorities, and the Action Plan of the World Psychiatric Association. *(Annexed to this Affidavit and Marked "MM-5" is a copy of the Comprehensive Mental Health Action Plan 2013-2030, by the World Health Organization.)*
14. **THAT** one of the four major objectives of the World Health Organization's Mental Health Action Plan is the provision of comprehensive, integrated mental health and social care services in community-based settings.
15. **THAT** In light of this, the Action Plan proposes that member states systematically shift the focus away from long stay mental hospitals and shift the focus to non-specialized health settings such as using a network of community based mental health services, among others. It is envisioned that by 2030, 80% of countries will have doubled their number of community-based mental health facilities. *(Reference is made to Page 267 of the Comprehensive Mental Health Action Plan marked as Exhibit "MM-6").*
16. **THAT** the in 2018, the World Bank's Disease Control Priorities in its publication, stated that Community health platforms are the partnerships formed to assess and ensure public health. They provide the context in which outside interventions should be implemented and sustained, and they offer a way to develop and maintain community-centred solutions. It makes a case for the strengthening of community-based public health interventions to ensure their sustainability.

(Annexed to this Affidavit and Marked "MM-7" is Chapter 14 titled "Community Platforms for Public Health Interventions by Melissa Sherry, Abdul Ghaffar and David Bishal", extracted from the World Bank's Publication, "Disease Control Priorities; Improving Health and Reducing Poverty").

17. **THAT** the World Bank's Disease Control Priorities Report on Improving Health and Reducing Poverty Reports holds the view that overall, improving the health of the world's most vulnerable people remains one of the best investments the global community can continue to make toward realizing a better, safer world.
18. **THAT** the World Psychiatric Association Action Plan 2020-2023 recognizes the public mental health approach and further recognizes that the advancement of mental health and the provision of appropriate and acceptable mental health care services cannot be truly achieved without a multi stakeholder and multi sectoral approach and aims to highlight the specific role of psychiatrists in working with other professionals in health, legal and social aspects of care; and ensure positive engagement with member societies and WPA components, mental health professionals and general health care workers . *(Annexed and Marked "MM-8" is the World Psychiatric Association Action Plan 2020-2023)*
19. **THAT** I am aware that according to the WHO report on Preventing suicide a national suicide prevention strategy should make prevention a multisectoral priority that involves not only the health sector but also education, employment, social welfare, the judiciary and others. The strategy should be tailored to our country's cultural and social context, establishing best practices and evidence-based interventions in a comprehensive approach.
20. **THAT** I am aware that incarceration of a person attempting suicide is a form of retributive justice which seeks to punish rather than restore an individual who

more often suffer from a mental health challenge that compromises their ability to make “rational” decisions; or they are under the influence of alcohol or drugs that limit their ability to make correct choices or have undergone various traumatic experiences that compel them to end the pain and suffering. (*Annexed and Marked “MM-9” is the International Association of Suicide Prevention - Attached Publication titled “Policy position on the decriminalization of attempted suicide”*)

21. **THAT** I am aware that the World Health Organisation (WHO) has recommended the best matrix mix of mental health service delivery that provides a pyramid comparison of the frequency of use and need against the cost of the service. It recommends that countries limit mental hospitals owing to their high costs, poor clinical outcomes and several human rights violations and instead strengthen and build formal community mental health services, and informal community mental health services. (*Annexed and Marked “MM-10” is the WHO Publication titled “The Optimal Mix of Services for Mental Health”*)
22. **THAT** I am aware that the Mental Health Taskforce Report of 2020 stated that Kenya had a mental health budget allocation of less than 0.1% directed towards treatment of mental disorders and there was no allocation on Prevention and Promotion of mental health services in the budget. (*Annexed and Marked “MM-11” is the Taskforce on Mental Health Report, 2020*).
23. **THAT** in alignment with the Convention on the Rights of Persons with Disabilities (CRPD) in 2019, Kenya adopted and started implementing the Quality Rights Mental Health Initiative, a very low hanging fruit towards transforming mental health and human rights at the lowest edge of communities. The initiative adopts a more human rights-based approach and recovery oriented and which one of its key objectives is to reform national policies and legislation in line with the CRPD

and other international human rights standards. (*Annexed to this Affidavit and Marked "MM-12" is the WHO Quality Rights Flyer*).

24. **THAT** non specialised delivery of mental health services at community level on a peer-based approach yields more positive results to tackle mental health stressors therefore there is a need to have more community-based interventions. (*Annexed to this Affidavit and Marked "MM-13" is the Publication titled "The Role of Communities in Mental Health Care in Low- and Middle-Income Countries: A Meta-Review of Components and Competencies, published in the International Journal of Environmental Research and Public Health*).
25. **THAT** I am aware that in 2019 the United Nations General assembly made a declaration towards the achievement of Universal Health Care for all, and Mental Health must be an integral part thereof. Given that roughly Seven Hundred and Three Thousand (703,000) suicide cases are reported annually, scaling up community-based interventions is a key strategic pillar towards reducing these figures. (*Annexed to this Report and Marked "MM-14" is the WHO Special Initiative for Mental Health (2019-2023): Universal Health Coverage for Mental Health*).
26. **THAT** suicide is not curable but suicidal ideation is preventable through awareness and health promotion services. That according to the Taskforce Report on Mental Health, 2020, mental unwellness determinants are social, economic and environmental in nature.
27. **THAT** decriminalization of attempted suicide will reduce stigma and increase understanding of mental health disorders, as opposed to the current misinformation evidenced in the recent Mental Health (Amendment) Bill 2020, Section 2, which defines "persons with mental illness" to mean a person found to be so suffering under this Act and includes a person suffering from maternal

mental illness and a person diagnosed with mental impairment due to alcohol or substance abuse, evidencing a narrow biomedical approach and perspective towards mental health which is not trauma informed. This only serves to compound stigma and negativity towards addiction and does not take into consideration that alcohol or substance use can lead to suicidal ideation as coping mechanism for other distresses and mental unwellness. *(Annexed to this Affidavit and Marked "MM-15" is a Copy of the Mental Health (Amendment) Bill, 2020)*

28. **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. Establish trauma informed courts for mental health cases and drugs related cases a concept on Therapeutic Jurisprudence *(Annexed to this Affidavit and Marked "MM-16" is a Copy of the Fordham Urban law journal publication titled "Therapeutic jurisprudence and problem-solving courts")*

29. **THAT** I swear this Affidavit in support of the Petition filed herewith together with the reliefs sought therein.

30. **THAT** what is deponed to herein is true to the best of my knowledge save for what is based on information and belief the sources and grounds whereof have been stated.

SWORN at NAIROBI)
this 28th day of March, 2022)
by the said, Mr. Mathew Mutiso)



BEFORE ME:)

DEPONENT

LISA W. WANJOHI
ADVOCATE &
COMMISSIONER FOR OATHS
P. O. Box 49721 - 00100,
NAIROBI

COMMISSIONER FOR OATHS)

DRAWN BY

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NAIROBI

TO BE SERVED UPON:

1. THE HONOURABLE ATTORNEY GENERAL
2. THE DIRECTOR OF PUBLIC PROSECUTION
3. THE CABINET SECRETARY, HEALTH
4. NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES